

Wild Law 2007–8

Taking climate change seriously

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1. Introduction*

One of the primary purposes of this Wild Law weekend (September 2007) is to explore the extent to which the ideas outlined in *Wild Law*, and in particular the philosophy of law referred to as 'Earth jurisprudence' is helpful in understanding and responding to the challenge of climate change.

Some (but by no means all) readers of *Wild Law* become impatient with the philosophical musings in the book and have expressed to me their frustration that I have not enumerated precisely what practical steps ought to be taken to give effect to Earth jurisprudence and to design and implement wild laws. My response is usually along the lines that *Wild Law* is about drawing attention to the shortcomings inherent in how most cultures understand the role of law and the environmentally and socially destructive implications of those approaches, and also about beginning the process of creating a vision of what law and governance might be if we approached it from an Earth-centric rather than a purely anthropocentric perspective. In other words, it is explicitly about the philosophical or jurisprudential aspects of law and governance and it should not be evaluated as a programme for legal and institutional reform of a governance system.

Nevertheless, a desire for practical ways to express these ideas is entirely understandable and indeed Earth jurisprudence will not be of much use if it does not provide a basis for practical action. Therefore it seemed to us that a useful way of furthering the debate would be to test the Earth jurisprudence approach against one of the most significant and intractable challenges currently facing our governance systems to see whether or not this approach provides any useful insights and helpful guidance in developing responses to climate change. I do not think it is an exaggeration to say that the reality that we face in the early years of the 21st century is that climate change and associated environmental impacts pose a very significant, and potentially fatal, challenge to civilisation in the form that we know it. Therefore the question of whether or not Earth jurisprudence can be of assistance in guiding our analysis of, and response to, this issue is of far more than academic interest.

While it is unrealistic to expect that we could develop a coherent programme of legal reform over the course of

the next few days, I hope that our discussions will provide greater clarity as to how the ideas in *Wild Law* could be applied to this pressing issue.

I am mindful of the fact that some people in the audience have thought long and hard about these issues while others are relatively new to the Earth jurisprudence approach. Consequently, please do not hesitate to ask for clarification if I skim too lightly over ideas or concepts and bear with me if I belabour aspects of Wild Law and Earth jurisprudence that you are already very familiar with.

2. The context for the discussion

Earth jurisprudence is about recontextualising human governance systems within the wider system of order that regulates the cosmos of which we form part. To some extent, it can be characterised as a 'systems approach' to law and governance in that it seeks to move beyond reductionist, mechanistic approaches to understanding reality, society and law and to incorporate the insights of systems thinking. In particular, Earth jurisprudence embodies the recognition that the behaviour of any one part of a system is largely determined by the functioning of the system as a whole and cannot be fully understood without an understanding of that system. From this perspective, in order to respond appropriately to climate change we must start by understanding the wider system within which this problem arises, accurately diagnose the nature of this particular pathology and on the basis of that diagnosis devise interventions designed to restore the health (ie the integrity and proper functioning) of the system as a whole. This is what is required to 'get real' in dealing with the reality of climate change and to respond appropriately.

3. The nature of the system

Sadly, summing up the nature and functioning of the cosmos in a few paragraphs is rather beyond my abilities! However, like most humans, my limitations have not stopped me speculating on the nature of reality and the universe and sometimes reading the views of others on this mysterious subject. In doing so I have been particularly struck by the understanding that we are part of an evolving universe composed of entities which are simultaneously distinguishable as having their own separate identity, and as forming part of greater wholes. Arthur Koestler coined

* United Kingdom Environmental Law Association (UKELA) Wild Law workshop 'Wild law: a response to climate change' 21–23 September 2007.

the expression 'holon' for an entity that is itself a whole and simultaneously part of some other whole and described the way in which holons are organised and relate to each other as a 'holarchy'.¹ A holarchy is distinct from a hierarchy because instead of a series of levels of different entities arranged in a manner that ensures that upper levels dominate the levels below, in a holarchy, each level both includes the less complex holons of which it is constituted and transcends them in that it displays emergent or novel properties which were not exhibited by any of the holons which compose it.

Seen from this perspective, evolution is a process whereby holons emerge and are progressively organised into larger holons that include more and more levels of holons, thereby manifesting greater degrees of 'wholeness', and hence 'depth'. For example, the evolution of Earth has seen atoms forming themselves into molecules, these in turn becoming organised into simple living cells (which developed the emergent property of being able to replicate themselves), these in turn becoming incorporated within multi-cellular organisms of increasing complexity which in turn developed more and more sophisticated brains which in turn produced new emergent properties such as consciousness.

It is important to appreciate that, as prominent American thinker Ken Wilber has pointed out,² each holon has two tendencies or drivers. The first is to maintain its own autonomy and identity as a 'part', and the second is to maintain its connection or communion with, and place in, a greater whole. In order to do this, information must flow back and forth between each holon and the holon of which it forms part. If this flow of information is compromised the lower-level holon may cease to respond to the organising authority of the holon of which it forms part and that holon may fail to recognise its dependency on the holons that constitute it. This inevitably leads to a breakdown in the system. Put another way, if a holon is not able to maintain either its autonomous identity, or its place within the whole, the holarchy will begin to disintegrate.

Should a holon be destroyed, because it is an integral part of all higher holons, the higher holons will also be destroyed, while the holons below it will be unaffected. For example, if we regard the human being as a holon, it is easy to see that if humans ceased to exist, the higher holons of which they form part, such as families, nation states, bodies of scientific knowledge etc would cease to exist while other holons such as insects would continue functioning quite happily.

If we translate these concepts into a language more familiar to lawyers, it can be said that in order to maintain its identity, a holon must have certain rights (ie the conditions necessary to maintain its wholeness, autonomy or agency) while to maintain its place within the greater

whole it has certain responsibilities in the sense of conditions which it must meet in order to continue to be part of that whole.³ In exploring these ideas I find it useful to think in terms of communities, since it is clear that a healthy human community requires both that the basic rights of its members (eg to food and shelter) are protected, and that each member of the community acts in a socially responsible manner and contributes in some way to the wellbeing of that community.

In certain circumstances, a holon may 'rebel' against the order imposed by a higher order holon and seek to dominate the holon of which it forms part. For example, a leader in a society may seek to become a dictator or a cell in a body may begin to proliferate excessively and so become cancerous. In other words, one of the holons disrupts the mutually beneficial relationship and either fails to recognise its dependency on the holons of which it is composed or the organising authority of the larger holon of which it is part. This causes the system to deteriorate and break down. In these circumstances, the solution is not to do away with the offending holons (ie cells or leaders) but rather to check and limit the behaviour which is detrimental to the maintenance of the higher level holon and to reintegrate the lower order holon so that it once more functions as an integral part of the whole.

Again, if we use the human as an example of a holon, it is not too difficult to see that we have placed too much emphasis on our rights to autonomy and agency and too little on our responsibilities to the Earth community of which we form part. We have sought to appropriate excessive rights to ourselves without the corresponding responsibilities which must balance those rights if we are to maintain our membership of higher order holons such as the biosphere. From this perspective, it is unsurprising that we see an increase in pathological symptoms both in human communities (eg crime and polarisation of the rich and the poor) and in the biosphere (eg global warming).

To sum up, therefore, in discussing the question of climate change, it is important to appreciate that it is occurring within a greater system of order consisting of holons arranged in holarchies and that if humans and other holons of which humans form part (eg communities, states etc) do not respond to the information from higher holons such as the biosphere and submit to its organising authority, the biosphere will begin to deteriorate and a new holon will emerge that does not include the 'rebel' human holons. Like a host animal infected with pathogens, we must either be killed by Gaia (for example by global warming that raises average temperatures to levels inhospitable to human life), or enter into a new symbiotic relationship with Gaia (perhaps on the basis of a far lower human population). Furthermore, in approaching these issues we should be mindful that since humans are holons with great depth (in the sense that they include many levels of holons) and a high degree of consciousness, we have correspondingly greater responsibilities to maintain the whole.

1 The word 'holon' (from the Greek *holos*, meaning 'whole') was coined by Arthur Koestler in *The Ghost in the Machine* (Penguin/Random House 1967) to refer to something that is simultaneously a whole and a part (p 48).

2 K Wilber *A Brief History of Everything* (2nd edn Gateway Dublin 1996).

3 Wilber (n 2) 303.

4. The nature of climate change

One of the most interesting things about climate change and the reason why it is so difficult for our governance systems to respond to is that it is not an isolated and discrete 'mischief' that can be dealt with by simply prohibiting the harmful activity. Climate change is a symptom of systemic societal problems that cannot be successfully addressed without changing the nature and functioning of our social systems and the cultures that inform them. It is, I think, particularly important to appreciate that climate change is a symptom of more fundamental problems and that any attempt merely to address the symptoms cannot be successful in the long term unless the underlying causes are addressed simultaneously. Merely mopping the brow of the fevered patient is of little value without discovering the cause of the fever and addressing that. An accurate diagnosis is obviously vital since if the fever is caused by an infected wound the appropriate response will be very different from that if the fever were caused by influenza.

We are all by now familiar with many of the specific symptoms associated with climate change, including the increased incidence and severity of extreme weather events such as hurricanes, floods and droughts, the melting of the polar ice caps, sea level rise and the spread of invasive species and pathogens. The proximate cause for this, we are told, is an increase in the concentration of CO₂ and other greenhouse gases in the atmosphere. This is in turn caused by a wide variety of human behaviour, principally the excessive burning of fossil fuels and wood and the destruction of forests and other ecosystems that sequester CO₂. Human behaviour of this kind is clearly a bad idea both for humans and for other species. As a policy document on the impacts of climate change on Africa succinctly puts it: 'Climate change is happening and when all the impacts are added up, everyone will lose out sooner or later'.⁴ So why do we persist in acting in this manner?

One of the reasons is that our political, legal, economic and other societal structures legitimate, encourage and facilitate this behaviour. Power companies that burn fossil fuels are subsidised; virtually all aspects of Earth are legally defined as 'natural resources' to be 'exploited' by humans, or more usually, by those strange legal entities called corporations which are legally required to prioritise the pursuit of profit for shareholders above all else. All aspects of nature other than humans are defined as objects incapable of holding rights and consequently legally incompetent to enforce the due performance of the responsibilities which are essential for the maintenance of the community of life on Earth.

However, it is important to appreciate that the external manifestations of inappropriate behaviour and maladapted social structures reflect the inner worldviews, beliefs and

values that are held both by us each as individuals and collectively by our cultures. Ultimately, the drivers of climate change reside in erroneous personal and collective beliefs that, despite all the evidence to the contrary, more material wealth and consumption will lead to greater human happiness and welfare even as it destroys the environment that sustains us.

In other words, I am suggesting that although climate change can, to a large extent, be attributable to the failures of our governance systems, it cannot be successfully addressed merely by addressing the symptoms (eg by technological innovation), or by changing laws, but must also be addressed by changing personal and cultural world views, values and ethics. The Earth jurisprudence approach is therefore inherently concerned with addressing both the inner worlds of the individual and of society and the external manifestations of that world in the behaviour of individuals and the structure and functioning of the governance systems of our societies.

5. Doing something about climate change

If one believes that understanding climate change within the wider context of the functioning of natural systems and the ongoing evolutionary story of our planet provides a valid starting point, and the diagnosis that I have outlined is broadly correct, the next question to answer is: 'How does this diagnosis or perspective help us to begin rectifying the problem?'

5.1 A new vision

One of the difficulties I believe that we face in this regard is that it has been so long since most cultures attempted to regulate themselves with the purpose of fitting in with, and playing a mutually beneficial role within, the larger community of life on Earth, that most of us have only the vaguest notion of what we are aiming at. In other words, it is important for us to begin to develop plausible and realistic visions of what the 'healed state' that we are aiming at might look like. We need actively to envision a range of attractive and desirable futures where human beings live fulfilled lives as responsible members of the Earth community if we are going to be successful in orienting our governance systems towards the attainment of those objectives and to motivate people to strive for those ends. I do not believe that the politics of fear and the rhetoric of deprivation and scarcity will get us where we need to go. While we need to look the challenge of climate change squarely in the eye and not to water down the harsh scientific data with political compromises, the magnitude of the task at hand requires that we inspire and transform people rather than seek to drive them through fear.

5.2 Building new social movements

Once we make the shift to considering ourselves part of the Earth community, the injustices and inadequacies of our existing governance systems becomes increasingly

4 New Economics Foundation and International Institute for Environment and Development, The second report from the Working Group on Climate Change and Development 'Africa – Up in Smoke?' June 2005.

clear. It also becomes apparent that we cannot rely on governments to reform our laws and political systems – we need to begin building social movements capable of driving through the necessary changes and to articulate the principles that we will apply in redesigning them.

Discussing the nature and forms of the social movement that will be required to bring Wild Laws into being is beyond the scope of this talk. However, in the interests of contributing to later debates I will leave you with an interesting point of view advocated by Thomas Linzey, the director of the Community Environmental Legal Defence Fund in Pennsylvania. Many of you may be aware of the CELDF's work in supporting local communities to enact bylaws that provide for rights for nature and strip corporations of civil liberties and rights in certain circumstances. Tom Linzey is fond of making the point that there has never been a proper environmental movement in the United States because social movements fight for rights and drive these into the Constitution. The abolitionists and the suffragettes were not deterred by the fact that the Constitution allowed slavery and did not grant voting rights to women. Furthermore, they did not campaign for a government agency to ameliorate the condition of slaves or of women – the equivalent of the Environment Protection Agency. Instead, they said 'this is fundamentally wrong and we will fight for slavery to be outlawed and for civil rights to be afforded to all citizens'.

Perhaps it is time to reinvigorate community based environmental and animal welfare organisations worldwide by forming coalitions to cooperate on a common agenda of driving rights for natural communities and local human communities into the constitutions of our nations and at the international level.

5.3 Designing Wild Laws to address climate change

Turning now to the question of how to design Wild Laws to address climate change, I wish to touch briefly on four general principles which I think we can use as design principles.

5.3.1 The context of the Earth community

The first principle to appreciate is that, as Thomas Berry has observed: 'the Universe is a communion of subjects not a collection of objects'. This changes everything. It means that other species and aspects of natural systems are subjects that have 'rights' which originate from the fact that they have co-evolved as part of the Earth system (or, if you like, are holons within the holarchy of the biosphere). If we are dealing with other subjects instead of inert 'natural resources' it means that instead of developing laws that define our relationships with the environment in terms of mechanistic specifications (eg emission standards), we need laws that promote good relationships based on the recognition of basic rights, mutual interdependence and respect. We need legal and social systems that can resolve apparent conflicts between the interests of humans and the interests of other members of the Earth community not by reference to rigid rules

and specifications but in manners that seek to foster healthy relationships. In other words we need to resolve our differences like lovers rather than like lawyers. This obviously suggests that traditional adversarial litigation may not be appropriate and we may need to develop new forms of mediation and decision-making to achieve decision-making that is more equitable to all members of the Earth community and to promote restorative justice.

At present there is very little recognition in our governance systems of the need for human beings to respect the rights of members of the Earth community. For example, there is no regime which prohibits any state or human community from damaging the climate system or imposes liability for harm done to the Earth community as a whole, or even to other states such as the lesser developed countries. From an Earth jurisprudence perspective, this is a glaring 'gap' in our legal systems.

5.3.2 The purpose of human governance systems

The second important design principle is that each law must reflect the understanding that we humans are an integral part of the Earth community and, as such, the fundamental purpose of human governance systems must be to ensure that the pursuit of human wellbeing does not undermine the integrity of the Earth community which is the only possible source of our wellbeing. This means that our legal systems must not only protect the rights of humans but must also ensure that we fulfil our responsibilities to that Earth community. Indeed, doing so is an essential precondition for our continued membership of the community.

5.3.3 Align human laws with nature's laws

The third overarching principle is that human governance systems should be designed to be consistent with the principles and functioning of the natural systems of which they form part (what I have referred to in *Wild Law* as the 'Great Jurisprudence'). In discussing principles of ecological design, Nancy Jack Todd and John Todd propose a similar principle when they state:

Design should follow, not oppose, the laws of life.⁵

This general principle has many different facets. For example, we observe that nature has a tendency towards diversity and that greater diversity within a natural community is associated with increased resilience as well as harmony and beauty. This suggests that our legal systems should be designed to embrace diversity and to reflect the particular characteristics of the bioregions to which they apply. In embracing diversity, we need to recognise that in the same way as progressive constitutions now outlaw racism and sexism, we need to develop new legal mechanisms to outlaw the domination and

⁵ N Todd, J Todd *From Eco-Cities to Living Machines. Principles of Ecological Design* (North Atlantic Books Berkeley California 1993).

exploitation of other species. This is a tough ask, but if we are serious about being responsible members of the Earth community, we need to attempt to view things from the perspective of other members of the community as well as our own.

We might also observe that natural processes tend to be cyclical rather than linear. For example, each species, and the waste from each species, provides food for another and because the nutrients can circulate indefinitely, the system is sustainable. On the other hand, human systems tend to be linear. We dig minerals out of the ground and harvest trees, discard most of these materials in the process of manufacturing goods, use the goods briefly and then bury the lot in landfill sites where they cannot be reused. In the process we discharge vast amounts of greenhouse gases into the atmosphere which destabilise the climate. It is clear that for human systems to function as part of a greater whole, we need to eliminate waste, promote cyclical processes and seek to maintain dynamic balances rather than continuing to pursue the absurd ideal of maintaining infinite consumption of 'resources' on a finite planet.

5.3.4 Use methodologies that are consistent with your principles

The fourth principle is to develop and apply new methodologies and ways of working (including new formats to replace the conventional conference format). One cannot achieve fundamentally new results with old methodologies. As has been pointed out, the means are the ends in the making and the means that are employed will have a fundamental impact on the end result. This new methodology must involve a new humility as we seek to listen and hear the voice of the natural world more clearly. It will also involve us seeking to foster our own connection with the natural world and to hear what it needs in order to heal.

6. A few ideas for wild laws

I do not want to pre-empt our discussions this weekend by giving specific prescriptions for the use of law in addressing climate change at this stage. However, I thought it might be useful at this stage to throw out a few ideas for further discussion.

6.1 Less law may be better

First, I suspect that responding effectively to climate change may well require a simplification of the legal system so that it is oriented towards fulfilling human responsibilities to the community of life as a whole and maintaining the quality of those relationships. If these fundamental issues are addressed, symptoms such as climate change will begin to disappear.

We should be wary of knee-jerk responses that simply increase red tape and place too much faith in more detailed rules and standards and more advanced technology. For example, is it really important at this critical stage in our planet's history to devote huge amounts of attention to determining precisely what emission standards should be

imposed on a particular company at a particular site and training an army of inspectors and developing increasingly complex technology to enforce those laws? Perhaps it would be better to refuse to authorise any new projects that emit greenhouse gases in significant quantities and require municipalities to take whatever measures may be necessary (within certain democratic limits) to reduce net emission from their area to zero?

6.2 Enshrining nature's limits in law

Perhaps it is time to take nature's limits and enshrine them in law. We already know that continuing to emit CO₂ and other greenhouse gases into the atmosphere will produce unacceptable climate changes and that we need to reduce the concentration of these gases in the atmosphere.

Perhaps we should consider establishing the principle that the emission of more than a certain amount of greenhouse gases per person is *prima facie* unlawful and place an onus on each person and social unit (eg companies, local authorities, states etc) to justify any excessive emissions. A legal defence would only be available to those who could demonstrate, for example, that they had done everything reasonably possible to contribute to the quality of their relationship with other members of the Earth community and the net impact of their activities was beneficial from the perspective of the Earth community as a whole. Corporations that are unable to conform to the limits within a prescribed transition period should be wound up or their founding documents amended to transform them into public interest organisations dedicated to repairing the damage caused. However drastic this sounds, in my view it is clearly more desirable to close down legal entities that cannot demonstrate that they are playing a beneficial role on Earth than for our species to lose its membership of the Earth community.

These are radical ideas and they may not be the best way of approaching these issues. However, I believe that it is important to face the fact that the magnitude and urgency of the challenge requires far bolder and more imaginative legal and institutional reforms than those currently touted in mainstream political debate. We should not shrink from debating ideas on their merits, however radical they may seem at first.

6.3 Reclaiming local democracy

I also suspect that the application of the design principles discussed above may inevitably lead to a strengthening of the rights of smaller human communities to govern themselves and to prohibit activities that they believe are harmful. In this regard it is important to appreciate that from an Earth jurisprudence perspective, since the universe (and by proxy, Earth) is the fundamental source of human rights, this process should be seen as one of reclaiming those rights from distant political structures rather than petitioning for the devolution of power.

If this process occurs, it will have important ramifications for issues such as bioregional planning, food production, energy and transport.

7. Conclusions

In conclusion, there is no legal silver bullet that will stop global climate change. Even if there were, we would be left with many other pressing and life-threatening environmental issues to address such as the overuse of water, the loss of fertile soils, the poisoning of the biosphere, the collapse of fish stocks, the catastrophic loss of biodiversity and so on. Climate change is but one aspect of a wider process of fundamental change within the Earth community caused and fuelled by human activities based on a faulty understanding of our place in the cosmos and our responsibilities as members of the Earth community. The primary role of what may be termed 'wild lawyers' is to begin the process of reorientating our human governance systems so that their primary purpose is to enable us to remain in communion with the rest of the Earth community, to fulfil our responsibilities in relation to it and to begin to heal the damage that we have done to that community.

In doing so we need to take the following six steps:

1. appreciate the context within which our governance systems exist
2. analyse the real nature of the problem
3. identify the nature of the society we want to create
4. devise an appropriate approach with principles to guide the detailed design of Wild Laws
5. build a constituency that will support the necessary changes, and
6. begin the process of restructuring our governance systems.

Climate change is real and if we do not want our civilisations to collapse we will have to submit to the authority of Earth and do whatever it takes to honour our responsibilities to the other members of the Earth community. This may seem difficult and costly but it is the price of continued membership of that community. In my view it is a fair price to pay for the privilege of living on a planet of breathtaking beauty and magic – and for a sense of belonging, identity, meaning and fulfilment.