

**EARTH JURISPRUDENCE: PRIVATE PROPERTY
AND EARTH COMMUNITY**

PETER D. BURDON

A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

ADELAIDE LAW SCHOOL
THE UNIVERSITY OF ADELAIDE

MAY 2011

DEDICATED TO MY BEAUTIFUL SOULMATE SHANI AND DANCING
DAUGHTER FREYA.

AND TO THE LIFE AND WORK OF WILLIAM 'THOMAS' BERRY (1914-2009)

TABLE OF CONTENTS

<i>Abstract</i>	v
<i>Acknowledgements</i>	vi
<i>Declaration</i>	vii
<i>Detailed Table of Contents</i>	ix
<i>Chapter One – Introduction</i>	1
<i>Chapter Two – Anthropocentrism and Private Property</i>	43
<i>Chapter Three –Earth Community</i>	89
<i>Chapter Four – A Theory of Earth Jurisprudence</i>	127
<i>Chapter Five – Private Property Revisited</i>	171
<i>Chapter Six – Conclusion</i>	220
<i>Bibliography</i>	232

ABSTRACT

The central argument of this thesis is that the institution of private property reflects an anthropocentric worldview and is contributing to the current environmental crisis. Drawing on the description of law as a mirror of society, it considers how our idea of law and the institution of private property can adapt to reflect the recent scientific description of human beings as interconnected and mutually dependant on nature. It advocates a paradigm shift in law from anthropocentrism to the concept of Earth community.

The thesis first provides an example laws anthropocentrism by exploring the legal-philosophical concept of private property. Private property is advanced over other legal concepts, because it plays a key role in governing human interactions with the environment and because it contains some of law's main messages about nature and our place within it. The thesis analyses three main influences on the development of private property from the humanism of antiquity, the scientific revolution and the influence of liberal political philosophy. It concludes that the dominant rights-based theory of private property is anthropocentric and facilitates environmental harm.

The second component of the thesis explores contemporary scientific evidence supporting the ecocentric concept of Earth community. This concept argues that human beings are deeply connected and dependent on nature. It also describes the Earth as a community of subjects and not a collection of objects. Assuming that the social sphere is an important source for law, this thesis considers how a paradigm shift from anthropocentrism to ecocentrism can influence the development of legal concepts. To catalyse this shift, it considers the 'new story' proposed by cultural historian and theologian Thomas Berry. This story describes contemporary scientific insights such as interconnectedness in a narrative form

Third, the thesis uses the alternative paradigm of Earth community to articulate an emerging legal philosophy called Earth Jurisprudence. It describes Earth Jurisprudence as a theory of natural law and advocates for the recognition of two kinds of law, organised in a hierarchical relationship. At the apex is the Great Law, which represents the principle of Earth community. Beneath the Great Law is Human Law, which represents rules articulated by human authorities, which are consistent with the Great Law and enacted for the common good of the comprehensive Earth Community. In regard to the interrelationship between these two legal categories, two points are crucial. Human Law derives its legal quality from the Great Law and any law in contravention of this standard is considered a corruption of law and not morally binding on a population.

Finally, the thesis constructs an alternative concept of private property based on the philosophy of Earth Jurisprudence. It describes private property as a relationship between members of the Earth community, through tangible or intangible items. To be consistent with the philosophy of Earth Jurisprudence, the concept of private property must recognise human social relationships, include nonreciprocal duties and obligations; and respond to the 'thing' which is the subject matter of a property relationship. A theory of private property that overlooks any of these considerations is defective and deserves to be labelled such.

ACKNOWLEDGEMENTS

It has been a profound honour and privilege to dedicate the last three years to writing a PhD dissertation. I am left with an overwhelming feeling of love and support.

I would first like to express gratitude to my beautiful wife Shani and daughter Freya. Many times in the last three years my writing has kept me away from parties, concerts, trips to the beach and even breakfast! You have both always given me support, understanding and love. For all of this I am more grateful than I can put into words. Thank you both for your love and for giving me hope in people.

Thank you to my parents, Jenny and Terry Burdon for never telling me who to be or what to do, but providing the space and support for me to grow into my own person. Thank you also for teaching me respect, compassion and empathy. Thank you also to my siblings Robert and Katie Burdon and mother in law Pru Davey.

To my supervisors, Paul Babie and Alex Reilly. Thank you both for the *many* hours you have both spent reading, critiquing and supporting my thesis. You have both been wonderful supervisors, role models and friends over my candidature and provided me the foundation for an academic career. Thank you.

I have also been fortunate to receive support from many friends over this period. Thank you kindly to Shani Burdon, Sam Alexander and Claire Nettle for generously reading the complete draft of this thesis. Thank you also to Mary Heath for reading and providing critical comments on an earlier draft of chapter four. Finally, thank you to members of the University of Adelaide thesis writing group Adam Webster, Vanessa While, Mark Giancaspro, Beth Norseworthy, Matthew Stubbs and Gabrielle Appelby.

Finally, I would like to acknowledge with gratitude the support I received from the FA Joyner Scholarship in Law. This scholarship made the writing of this thesis possible by providing financial support to my family for almost three years. Thank you also to the University of Adelaide Law School for providing resources and support for my research. I look forward to a long and meaningful academic career at this place of learning.

DECLARATION

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

Some of the arguments in this thesis have been developed through publication during the course of research and writing. Parts of chapter two were first published in:

‘What is Good Land Use? From Rights to Responsibilities’ (2010) 34(3) *University of Melbourne Law Review* (forthcoming)

The concept of Earth Community and Thomas Berry’s thoughts on shifting culture in Chapter Three was first published in:

‘The Jurisprudence of Thomas Berry’ (2011) 11 *Worldviews: Global Religions, Culture, and Ecology* (forthcoming)

‘The Ecozoic Era’ in Peter Burdon (ed), *An Invitation to Wild Law* (Wakefield Press, 2011)

The exploration of Earth Jurisprudence as a legal philosophy in Chapter Four was first published in:

‘Thomas Berry and Natural Law’ (2011) *Barry University: E-Symposium: Continuing the Great Work: A Tribute to Thomas Berry* (forthcoming)

‘The Jurisprudence of Thomas Berry’ (2011) 11 *Worldviews: Global Religions, Culture, and Ecology* 4

‘Wild Law: The Philosophy of Earth Jurisprudence’ (2010) 35(2) *Alternative Law Journal* 62

‘The Great Jurisprudence’ in Peter Burdon (ed), *An Invitation to Wild Law* (Wakefield Press, 2011)

The evolution of private property discussed in Chapter Five was also published in:

‘What is Good Land Use? From Rights to Responsibilities’ (2010) 34(2) *University of Melbourne Law Review* (forthcoming)

‘Native Title and the Clash of Civilization’ (2008) 104 *Chain Reaction Magazine* 34

‘The Rights of Nature: Reconsidered’ (2010) 49 *Australian Humanities Review* 69

‘Rights of Nature: The Theory’ (2011) 1 *IUCN Environmental Law Journal*
<http://www.iucnael.org/en/component/docman/doc_download/660-earth-rights-the-theory.html>

A number of the ideas were explored and discussed at the presentation of unpublished papers at:

‘Rights of Nature: Theory & Practice’ (University of Adelaide, *Staff Seminar*, 19 November 2010)

‘The Rights of Nature in Ecuador’ (Environmental Defenders Office, *Annual General Meeting*, 26 October 2010)

‘Rights of Nature: Developments’ (Flinders University, *Staff Seminar*, Adelaide 6 October 2010)

‘Wild Law in Australia and Environmental Jurisprudence’ (University of Wollongong, *Wild Law and Legal Epistemologies*, Wollongong, 26 July 2010)

Wild Law: An invitation to Environmental Jurisprudence’ (University of New South Wales, *Australasian Philosophy Association*, 8 July 2010)

‘Wild Law and the Authority of Law’ (Flinders University, *Students of Sustainability*, Adelaide, 5 July 2010)

‘Wild Law and Biodiversity’ (Paper presented at *Biodiversity & the Law: Building Blocks for Life*, Adelaide, 3 May 2010)

‘An Introduction to Wild Law’ (Paper presented at Flinders University Staff Seminar, Adelaide, 25 April 2010)

‘What is Good Land Use? From Rights to Obligations’ (Paper presented at *From Plains to Plate, the Future of Food in South Australia*, Adelaide, 12 February 2010)

‘Thomas Berry and a New Jurisprudence’ (Paper presented at *Parliament of World Religions*, Melbourne, 7 December 2009)

‘Rights of Nature and Human Domestication’ (Paper presented at *Wild Law: Australia’s First Conference on Earth Jurisprudence*, Adelaide, 17 October 2009)

‘What is Earth Jurisprudence?’ (Paper presented at *Wild Law: Australia’s First Conference on Earth Jurisprudence*, Adelaide, 16 October 2009)

‘Native Title and the Clash of Civilisations’ (Paper Presented at *Law Without Borders*, University of British Columbia, Vancouver, 2 May 2008)

I give consent to this copy of my thesis, when deposited in the University Library, being made available for loan and photocopying, subject to the provisions of the Copyright Act 1968. I also give permission for the digital version of my thesis to be made available on the web, via the University’s digital research repository, the Library catalogue, the Australasian Digital Theses Program (ADTP) and also through web search engines.

Signed

Date

DETAILED TABLE OF CONTENTS

CHAPTER ONE – INTRODUCTION	1
I. THE THESIS	3
II. THE INQUIRY	5
1. The Environmental Crisis	5
2. Environmental Crisis and Ethics	8
3. The Relationship Between Law and Culture	10
4. Law and Anthropocentrism	12
5. Paradigm and Paradigm Shift	15
III. LITERATURE REVIEW	19
1. Earth Jurisprudence	20
2. Environmental Philosophy	24
3. Property Theory	28
4. Legal Theory	35
IV. STRUCTURE: AN OVERVIEW OF THE STUDY	37
1. Chapter Two: Anthropocentrism and the Law	37
2. Chapter Three: Earth Community	39
3. Chapter Four: Earth Jurisprudence	40
4. Chapter Five: Private Property: Revisited	41
CHAPTER TWO – ANTHROPOCENTRISM AND PRIVATE PROPERTY	43
I. INTRODUCTION	45
II. DOMINION	47
1. Philosophical Justification for Dominion	49
2. From Dominion to Dominium	56
III. THE SCIENTIFIC REVOLUTION: SEPARATION AND FRAGMENTATION	60
1. The Scientific Revolution	61
2. Private Property and the Industrial Revolution	65
3. The Separation of People from Place	70
A. Positive Law and Jeremy Bentham	70
B. Hohfeld's Analysis	74
IV. THE LIBERAL THEORY OF PRIVATE PROPERTY	79
V. CONCLUSION	86
CHAPTER THREE – EARTH COMMUNITY	89
I. INTRODUCTION	91
II. PARADIGM SHIFT: EARTH COMMUNITY	94
1. Quantum Physics	96
2. Ecology	101
3. Autopoiesis and Gaia Theory	105
III. CULTURAL AND LEGAL CHANGE	113
1. The New Story	116
IV. CONCLUSION	124

CHAPTER FOUR – A THEORY OF EARTH JURISPRUDENCE	127
I. INTRODUCTION	129
II. WHAT IS EARTH JURISPRUDENCE?	131
III. THE LEGAL CATEGORIES OF EARTH JURISPRUDENCE	137
1. Natural Law and the Great Law	141
A. Aquinas and Natural Law	141
B. The Great Law	144
2. Human Law	151
IV. THE INTERACTION BETWEEN THE GREAT LAW AND HUMAN LAW	155
1. Legal Quality	156
2. Corruption and Civil Disobedience	163
V. CONCLUSION	169
CHAPTER FIVE – PRIVATE PROPERTY REVISITED	171
I. INTRODUCTION	173
II. THE INDETERMINACY OF PRIVATE PROPERTY	175
III. PRIVATE PROPERTY AND HUMAN RELATIONSHIPS	178
IV. PRIVATE PROPERTY AND ETHICS	184
1. Obligation and Responsibility	184
2. Ethics and Earth Community	190
3. Responsibility in Practice	196
V. PROPERTY AND THINGS	202
1. Things in Theory	207
2. Things in Practice	213
VI. CONCLUSION	217
CHAPTER SIX – CONCLUSION	220
I. SUMMARY OF ARGUMENT	222
II. DIRECTIONS FOR FUTURE RESEARCH	226
III. CONCLUDING REMARKS	230
BIBLIOGRAPHY	232
BOOKS AND CHAPTERS IN BOOKS	232
JOURNAL ARTICLES	255
OTHER SOURCES (MEDIA AND INTERNET)	263
CASE LAW	265
LEGISLATION	266

Declaration from 'Wild Law' – Australia's First Conference on Earth Jurisprudence

We the participants of Wild Law, declare that the perceived separation between nature and human beings is a fundamental cause of the current environmental crisis. Our law reflects this in treating nature as property and by restricting rights to human subjects.

We assert that law needs to transition from an exclusive focus on human beings and recognise that we exist as part of a broader earth community. We recognise that the universe is composed of subjects to be communed with, not objects to be used. Each component member of the universe is thus capable of having rights.

We commit to evolving law so that it protects the natural world from destruction and cultivating Wild Laws that are consistent with the philosophy of Earth Jurisprudence.¹

¹ On 16-18 October 2009, 80 people including scientists, students, lawyers, government workers, activists, educators and other concerned individuals from all over Australia and the world gathered in Woodhouse, Piccadilly, South Australia for 'Wild Law', Australia's first conference on Earth Jurisprudence. See further <<http://www.adelaide.foe.org.au/earth-jurisprudence/>>.