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EARTH JURISPRUDENCE

PRIVATE PROPERTY AND THE ENVIRONMENT

Peter D. Burdon

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Dedicated to the life and work
of William 'Thomas' Berry (1914–2009)
and
to my friend and mentor, Ron Engel

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Earth Jurisprudence

This book argues that the institution of private property is anthropocentric and needs to be reconceived. Drawing on international case law, indigenous views of property and the land use practices of agrarian communities, Peter Burdon considers how private property can be reformulated in a way that fosters duties towards nature.

The dominant rights-based interpretation of private property entrenches the idea of human dominion over nature. Accordingly, nature is not attributed any inherent value and becomes merely the matter of a human property relationship. *Earth Jurisprudence: Private Property and the Environment* explores how an alternative conception of property might be instead grounded in the ecocentric concept of an Earth community. Recognising that human beings are deeply interconnected with and dependent on nature, this concept is proposed as a standard and measure for human law. Using the theory of earth jurisprudence as a guide, this book outlines an alternative ecocentric description of private property, as a relationship between and among members of the Earth community.

This book will appeal to those researching in law, justice and ecology, as well as anyone pursuing an interest more particularly in earth jurisprudence.

Peter D. Burdon is a Senior Lecturer at the Adelaide Law School. His professional life seeks to blend theory and praxis. To this end, he has been an active campaigner with Friends of the Earth and also sits on the Ethics Specialist Group of the International Union for the Conservation of Nature.

Series editor's introduction

Taking Earth jurisprudence – an ecocentric theory of law based on the work of Thomas Berry – as its foundation, this book engages in a lively analysis of modes of normative human coordination with and within an all-embracing Earth community made up of a multitude of ecosystems and other-than-merely-human subjectivities and subjects. The book offers a wide-ranging and eclectic engagement with central problems related to humanistic formulations of law and normative relations, subjecting anthropocentrism and – in particular – ‘the anthropocentric notion of private property’ to scrutiny within a broadly natural law conception of Earth jurisprudence.

Appealing to Earth jurisprudence and to a ‘theory of social change’ drawing on vernacular law and the contemporary inadequacies of law as a response to eco-violation, Burdon argues for modes of resistive political subjectivity and a juridical re-invention responsive to a wider, deeper vision of a common good embracing the entire living order. Human law – all human law – argues Burdon, should be situated ‘within the physical context of the Earth’s system’ and ‘directed toward the common good of the entire Earth community and not just human or corporate interests’. In other words, Burdon seeks to argue that ecocentric ethics should be understood to be inherent to law. The implications of this for the centrally important institution of private property – an analysis of which forms a core concern of this book – are not, Burdon argues, that private property is inherently inconsistent with ecocentric ethics or that private property should be discarded as a social institution. What his analysis indicates, he suggests, is that a ‘more nuanced understanding of private property is required’ – one responsive to ‘nature as a subject rather than an object’. While some might wish to take issue with Burdon concerning his characterisation of the liberal tradition – and while others may resist his conclusions – Burdon issues an important and timely challenge to revisit cherished assumptions in the search for a more radical, a more eco-humane, juridical order.

The questions and debates that Burdon invites in this work offer one more strand in the now multiply threaded, critical and insistent conversation taking place the world over in the search for renewing dynamics between law, justice and ecology.

Anna Grear

Foreword

This book pushes the boundaries of jurisprudence, i.e. the school of legal reasoning and investigation into the nature of law. Since Aristotle's *Nicomachean Ethics*, jurisprudential thinking has centered on the idea of justice, but only in the context of human relationships. The modern ecological crisis, however, has challenged this way of thinking. Why should justice be confined to inter-human relationships when humans collectively discriminate against all other species? Must the non-human part of nature stay outside the realm of law as the leading modern theorist of justice, John Rawls, insisted? Or have we reached a stage of maturity that makes it feasible, perhaps necessary to include nature into the realm of law? This is the central idea of Earth jurisprudence.

Peter Burdon is an environmental lawyer and, like all scholars of this field, concerned with protecting the environment from human overuse. However, unlike most of his colleagues Burdon defines the overuse problem not in anthropocentric, but ecocentric terms. He agrees with the common notion of private property as a bundle of rights, but organises this bundle in a different way. Some user rights may stay as they are, while those affecting the environment – land, water, air, animals and plants – need to respect additional boundaries. Translated into law, environmental boundaries mark the new limitations to private property. Hence, overuse does not occur when other people are affected in their entitlement to the environment, but a lot earlier: the environment itself, the integrity and functioning of ecosystems, describes the threshold for overuse.

The practical implications of this idea are easy to grasp. As humans become mindful of their ecological dependencies, they will organise their laws accordingly. In the future, private property holders – from car drivers to land owners right through to multinational corporate organisations – will have to pay for their use of the environment and will be prevented from environmental overuse. Considering the magnitude of our current crisis, this seems a very good idea. And yet, we are not likely to see such radical legal reform anytime soon. Too much is at stake. After all, in capitalism private property is sacred and

any tempering with the motors of wealth and prosperity are readily dismissed as ideologically driven.

Ideologies (or paradigms) are belief systems that are relatively immune against new ideas, no matter how ethical, realistic and convincing they may be. So is the Earth jurisprudence movement driven by an ideological agenda, as its critics might suggest? I suggest that the position is the very reverse – for nothing could be more ideological than the belief that money generates wealth, that private property is sacred and economic growth indispensable. This is not the same as saying that money, property and growth may be useful within a given purpose. The issue is one of context and right balance. Our world is falling apart precisely because of gross imbalances in the prevailing economic system. The rich get richer at the expense of the poor and altogether we ruin the planet, our common home. The systemic nature of the process of bringing ourselves to the brink of extinction is almost beyond belief. Yet, our political leaders seem not to care: the ‘tino’ (‘there is no alternative’) ideology sits too deeply in their hearts and heads.

This book presses against the closures of contemporary ideology. The book conceives of private property as a relationship between and among members of the Earth community. In the age of the Anthropocene, surely this is a realistic and convincing proposition – at least to those who find the notion of an Earth community appealing. This in turn will depend on narrowness or broadness of the mind: our thinking will either be narrowly contrived to protect the status quo or it may be broader, literally open minded, depending on our horizons of time and space.

So far *homo sapiens* has been remarkably narrow minded. *Homo sapiens* sees ‘himself’ as the centre and crown of the universe. The Earth may appear huge to such a two-legged dwarf, but is merely a speck of dust in the universe and not even in the middle of it, as we should know since Copernicus. The centre of our planetary system, the sun, is only one of further 300 billion other stars in our Milky Way, which itself is just one of an estimated 100 billion galaxies with some 70 sexillion stars (a number with 21 zeros). How special does that make *homo sapiens*?

Ours is a tiny place and the time span we occupy is not that impressive either. If we condense the history of the universe to two calendar years beginning with the Big Bang on 1 January, we can say that *homo sapiens* appeared on 31 December a few minutes before midnight. During the last fraction of a second he does everything to destroy his fellow species and their common habitat, Earth. And how many seconds will we have in the New Year? One? Ten? If we make it to one minute after midnight (26,065 years) *homo sapiens* will have proved to be surprisingly successful, but reaching the end of the first hour of the New Year (1.5 million years) will take a miracle. From all we currently know, primates will not be around come 2 January (37.5 million years). The sun will have lost its life-supporting power around 14 January, and by early March, Earth will look like Mars today, while at the end of July,

Earth is likely to crash into the sun. On this time scale *homo sapiens* is, at best, a dayfly.

This brief story of space and time should teach us humility. How dare we think of ourselves as special – as if evolution has reached its final goal? What could possibly be right with an anthropocentric mindset? The only realistic perspective is to see ourselves as a small part in an evolutionary process of life. Thomas Berry has described this reality as a miracle that humans – and possibly only humans – are able consciously to witness and marvel at. It is this perspective of humility and awe – not the ignorance of *homo* (not so) *sapiens* – that will broaden our mind. And only this will allow us to begin the ‘Great Work’.

Seen from this angle, the notion of Earth community is highly attractive as it locates humanity in space and time realistically. As Albert Schweitzer put it: we humans are life that wants to live, in the midst of life that wants to live. And what could be more important for contemporary jurisprudence than helping to organise legal principles and instruments around this awareness?

This book makes a timely contribution to Earth jurisprudence, but even more so to bringing property rights in line with ecological realities. Will the author succeed? The good news is that transformation always starts with the thoughts and actions of individuals. What may seem as unthinkable will over time become the norm. When Christopher Stone, the early pioneer of the eco-law movement, wrote his famous essay, he pointed out just how changeable legal morality is. Slavery was once seen as perfectly justified. For some time now, any form of gender, racial or religious discrimination has become unlawful and increasingly discrimination against animals is being outlawed.

Today, it is no longer unthinkable to outlaw any form of discrimination against nature. Sooner or later ecological realities will sink in and teach us an entirely new morality. This book shows the implications of the new morality for a central concept of law. Scholars and students will greatly benefit from it.

Klaus Bosselmann
Professor of Law
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Contents

<i>Acknowledgements</i>	ix
<i>Introduction: Series Editor Anna Grear</i>	xi
<i>Foreword: Professor Klaus Bosselmann</i>	xiii
1 Introduction	1
2 Anthropocentrism and private property	15
3 Earth community: narrative and action	47
4 A theory of Earth jurisprudence	79
5 Private property revisited	101
Epilogue: the great work	135
<i>Bibliography</i>	137
<i>Index</i>	165

Introduction

The present legal system is supporting exploitation rather than protecting the natural world from destruction by the relentless industrial economy. (Berry 2006: 107)

1.1 The inquiry

Thomas Berry was a theologian and cultural historian. His observation that law is central to the present environmental crisis is the motivation behind a growing movement in law called Earth jurisprudence. In this chapter, I introduce the inquiry and outline the fundamental themes on which the book is built. I begin by introducing the environmental crisis and describe the relationship between law, culture and environmental harm. I also introduce the concepts of paradigm and paradigm shift, which are used in this book to analyse how law and legal concepts such as private property can shift from an anthropocentric (human-centred) to an ecocentric (Earth-centred) foundation.

1.1.1 The environmental crisis

Our biosphere is sick and is behaving like an infected organism. As carbon has been collecting in our atmosphere, it has also been accumulating in the ocean and as time has passed, deforestation, soil erosion, vanishing wetlands and a whole host of other problems have continued unabated. We face a convergence of crises, all of which present a significant moral and survival challenge for the human species. In 2001 the United Nations Millennium Assessment undertook a four-year study, involving over 2000 scientists from 95 countries, on the health of the planet. Released in March 2005, the report found that 60 percent of global ecosystem services 'are being degraded or used unsustainably' resulting in 'substantial and largely irreversible loss in the biodiversity of life on Earth.' It further estimated that humans are responsible for the extinction of between 50–55 thousand species each year (Millennium Ecosystem Assessment 2005: 81), a rate unequalled since the last great extinction some

65 million years ago (Berry 2006: 107). These systems and species provide the basis for all life and their devastation undermines the health and future flourishing of all components of the environment.

The scale of the present crisis is so great that in 2000, atmospheric chemist Paul Crutzen argued that the period from the industrial revolution to the present constituted a new geological era. Crutzen (Crutzen and Stoermer 2000: 17) labelled this period the 'anthropocene' to describe the significant impact of human activity on the Earth.¹ The term 'anthropocene' follows the geological tradition that divides the Phanerozoic eon into Paleozoic, Mesozoic and Cenozoic eras. Commenting on this characterisation, David Suzuki (2010: 17) argues that human beings have 'become a force of nature'. Indeed, it was not so long ago that hurricanes, tornadoes, floods and droughts were accepted as natural disasters. 'But now', Suzuki argues (2010: 17), 'we have joined God, powerful enough to influence these events.'

Chapter 2 of this book will demonstrate how the institution of private property has facilitated the emergence of the anthropocene and the current environmental crisis. For now, it is sufficient to note that the crisis is very real and largely anthropogenic. These two points were forcibly advocated before the international community in 1992 when 1700 senior scientists (including 104 Nobel Prize winners, comprising more than half of all laureates alive at the time) signed a document called 'World Scientists Warning to Humanity' (1992). The opening words read:

Human beings and the natural world are on a collision course. Human activities inflict harsh and often irreversible damage on the environment and on critical resources. If not checked, many of our current practices put at risk the future that we wish for human society . . . and may so alter the living world that it will be unable to sustain life in the manner that we know. Fundamental changes are urgent if we are to avoid the collision our present course will bring about.

The authors went on to list the areas of collision from the atmosphere to water resources, oceans, soil, forests, species and population. The document also warns:

No more than one or a few decades remain before the chance to avert the threats we now confront will be lost and the prospects for humanity immeasurably diminished. We the undersigned, senior members of the world's scientific community, hereby warn all humanity of what lies

1. In adopting the term 'anthropocene' I agree with the comments made by Dipesh Chakrabarty that the term should not denote reference to a single subject 'mankind'. As Chakrabarty (2009: 216) argues, talk of mankind can 'simply serve to hide the reality of capitalist production and the logic of imperial domination that it fosters'.

ahead. A great change in our stewardship of the Earth and life on it, is required, if human misery is to be avoided and our global home on this planet is not to be irretrievably mutilated.

The failure of the international community to respond adequately to this and other similar warnings is already devastating communities around the world and has the potential to put the future of most components of the Earth community in great jeopardy.

1.1.2 Environmental crisis and ethics

At the dawn of the twenty-first century there is no greater challenge confronting human beings than the fate of the environment and the community of life it supports. There are many different ways to understand and interpret this crisis. Some of the most visible explanations in environmental-political discourse include industrial capitalism (Foster 2010), consumerism (Alexander 2009), overpopulation (Ehrlich & Ehrlich 1972), patriarchy (Merchant 1980) and anthropocentrism (Ehrenfeld 1978). These approaches are not mutually exclusive and interact in a complex cultural, social, political and economic web. Commenting on this mixture, some theorists have begun to characterise the present environmental crisis as a crisis of culture. Environmental psychologist Ralph Metzner (1999: 99) supports this characterisation: '[t]here is a growing chorus of agreement that the deepest roots of the ecological crisis must lie in the attitudes, values, perceptions and basic worldview that we humans of the global industrial society have come to hold.'

Philosopher John Livingston (1981: 24) expands this analysis, noting that disasters are commonly portrayed as a series of separate issues. He writes: 'Oil spills, endangered species, ozone depletion and so forth are presented as separate incidents and the overwhelming nature of these events means that we seldom look deeper.' 'However' Livingston argues that such 'issues are analogous to the tip of an iceberg, they are simply the visible portion of a much larger entity, most of which lies beneath the surface, beyond our daily inspection.'

In my view, the most sophisticated explanation of the root causes of the environmental crisis was developed by social ecologist, Murray Bookchin. According to Bookchin (1982: 4; Price 2012: 133–160), the domination of nature by human beings stems from and takes the same form as myriad ways in which human beings exploit one another. The key to this analysis is 'hierarchy' – a term that encompasses 'cultural, traditional and psychological systems of obedience and command' (Bookchin 1982: 4–5). Hierarchy includes the domination of the young by the old, of women by men, of one ethnic group by another, of the wealthy over the poor and of human beings over the environment.

Bookchin (1982: 62–88) argues that hierarchy has its ultimate foundation in the ‘raw materials’ of early civilisation. However, he also recognises that its emergence and elaboration has a dual effect that is both material and subjective. On a material level, Bookchin (1982: 89) argues that hierarchy attained sophisticated form in ‘the emergence of the city, the state, authoritarian technics, and a highly organized market economy’. On a subjective level, hierarchy found expression ‘in the emergence of a repressive sensibility and body of values – in various ways of mentalizing the entire realm of experience along the lines of command and obedience’. Bookchin (1982: 89) labelled these subjective elements ‘epistemologies of rule’ to denote the emergence of a body of knowledge that normalises the characteristics of a bifurcated hierarchical society.

What attracts me to Bookchin’s statement on hierarchy is that it allows one to theorise myriad ways in which negative hierarchical relationships contribute to environmental harm in an open and dialectical way. It recognises both structural and biopolitical analysis and invites conversation about anthropocentrism, gender, racism and economics. It also provides a foundation for thinking through how these root causes interact with one another. For example, how environmental harm often works in conjunction with racism and class (Bullard 2000), or how poor women are disproportionately affected by environmental catastrophes such as flooding, draught and forced migration (Sontheimer 1991). Thus, while my investigation focuses primarily on anthropocentrism as the ‘deepest cause of the present devastation’ (Berry 1999: 4) I will also move beyond this instance of hierarchy to consider other (mental and material) explanations for the environmental crisis. Specifically, I consider how anthropocentric hierarchy is supplemented and works in conjunction with economic and gender hierarchy.

1.1.3 The relationship between law, culture and power

The law and legal disciplines are not created in a vacuum. Though they appear ‘natural’ and almost self-evident, the law and legal disciplines always tend, to a greater or narrower extent, to mirror the reality in which they are born and in which they grow. (Zamboni 2008: 63)

Legal systems and philosophies emerge from a social context and tend to be animated by the worldview and moral horizon of the political class of a given society (Pashukanis 1989). The political class has historically been closed on the basis of race and gender (Wallerstein 2011a: 77) and continues to be represented predominately by the wealthy (Burdon 2013a). Law is one of the key mechanisms through which this class analyses itself and projects their image to the world. It also represents the dominant operative theory of society and environment within that society.

The instant we begin to approach law from this perspective, the questions we ask about law and the ideas we have regarding its development shift. This point is explicitly recognised by Kermit Hall (Hall and Karsten 2009: 1) in his description of law as a 'magic mirror'. Hall borrows this phrase from Justice Oliver Wendell Holmes Jr (1981: 17) who noted: 'This abstraction called Law is a magic mirror, [wherein] we see reflected, not only our own lives, but the lives of all men that have been!' For Hall, the description of law as a 'magic mirror' has two aspects. First, law is understood as a 'cultural artefact' and legal historians are encouraged to explore the social choices and moral imperatives that underpin a legal system and its normative concepts (Hall and Karsten 2009: 1). Further, Hall contends that a proper understanding of the relationship between law and society allows one to consider and perhaps even influence the future direction of law.

From this perspective, law mirrors the values, perceptions and goals of the dominant class in society. Further, the future of our legal system depends intimately on how these values perceptions and goals change or adapt to future need – not to mention whose needs they recognise. Reflecting a vast heritage of anthropocentric philosophy and theology, the next section argues that the dominant concept of law in analytic jurisprudence is fundamentally human centred. Following this, I introduce my argument about how our legal system can adapt to reflect ecological goals as reflected in the concept of Earth community.

1.1.4 Law and anthropocentrism

Our law is deeply anthropocentric and directed toward maintaining hierarchical structures for the protection of property and economic growth. To illustrate this point I turn first to legal theory, which as Karl Llewellyn (1962: 372) notes 'is as big as law – and bigger'. Legal theory deeply informs our concept of law and plays a critical role in shaping the contours and provisions of positive law, i.e. legislation and case law.

Despite great variation, legal theory is predominately anthropocentric. This is specifically true for both natural law and legal positivism, which are concerned ultimately with human beings and human good. More specifically, legal theory is concerned with 'relations between individuals, between communities, between states and between elementary groupings themselves' (Graham 2011: 15). Only in rare circumstances does legal theory consider the environment as relevant to human law (Blomley 2001). Indeed, 'the separation and hierarchical ordering of the human and non-human worlds' represents a fundamental presupposition on which the cannon of Western law has been constructed (Graham 2011: 15).

In orthodox legal theory, legal positivism is the dominant school of thought. Positivism describes law as a science and holds that no external element (i.e. morality, the environment or religion) enters into the definition of law. Legal provisions are identified by empirically observable criteria, such as legislation,

common law and custom. Positivism focuses on the identification and definition of law with reference to 'abstract legal categories' and regards those doctrines as 'authoritative rules' applicable to each question and dispute requiring legal adjudication (Graham: 2011: 15). This method explicitly considers the influence of the environment, non-human animals, and place irrelevant. As a result, legal categories and prescriptions can be exported across the globe without reference to the unique landscape or populace on which they will operate.

The human-centred nature of legal positivism is expressed further by the passivity of courts to receive cultural evidence (Brown 1999) and their refusal to allow advocates to seek for protection for the environment in its own right (Taylor 2010: 203). As Graham (2011: 15) argues: 'By imagining and juxtaposing objective and subjective thought, abstract rules and particular contexts and then by privileging objectivity and abstraction, legal positivism epitomises anthropocentric logic.'

In Chapter 2, I describe how private property has been shaped to reflect anthropocentric thinking and the way it not only maintains but also perpetuates a dichotomy between human beings and the environment. Considered through the lens of private property, the environment possesses no inherent value and receives only instrumental value and protection through human property rights. Law and economics scholars are particularly unapologetic on this point. Richard Posner (1986: 32) typifies the instrumentalist view of the environment in his advocacy for privatisation: 'If every valuable (meaning scarce as well as desired) resource were owned by someone (universality), ownership connotes the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and ownership rights were freely transferable or as lawyers say alienable (transferable), value would be maximized.'

Neoliberal commentators have used Posner's justification in their advocacy for the further privatisation of the environment and the enclosure of all common space. And yet, I contend, if human beings are going to survive the ecological crisis (let alone thrive) then we need to shift our law from its current focus on the exclusive rights of private individuals to the needs and interests of the comprehensive Earth community.

1.1.5 Paradigm shift and the concept of earth community

Revolutions are inaugurated by a growing sense . . . that existing institutions have ceased adequately to meet the problems posed by an environment that they have in part created. (Kuhn 1996: 92)

Physicist and philosopher Thomas Kuhn first articulated the concepts of paradigm and paradigm shift. Writing specifically with regard to science, Kuhn (1996: 43) defined a paradigm as: 'A constellation of achievements – concepts,