

# The Land is the Source of the Law

A DIALOGIC ENCOUNTER WITH  
INDIGENOUS JURISPRUDENCE



C. F. Black



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## Foreword

Observers of nature, especially herbalists, biologists and those who take water seriously, would readily accept the proposition that land is life. For the inhabitants of planet earth, the link between land and life is indissoluble. In his argument for the liberation of the 'wretched of the Earth', Franz Fanon argued that, for the colonized, land is life. This political argument is consistent with the biological insight that land is life. In this way, biology and politics converge. The convergence means that to dispossess someone of their land is tantamount to the violation of their inalienable right to life. Thus ethics and morality come into the picture in order to ensure the recognition, respect and protection of the inalienable human right to life. The spheres of ethics and morality do not by themselves constitute positive law. Law, then, is necessary to enforce the recognition, respect and protection of the inalienable human right to life.

To the biological and political perspectives that land is life, C.F. Black now adds another dimension in the vigorous proposition that the land is the source of law. For some, a revered deity is the source of ethics and morality with which positive law must comply. For others, morality and positive law are separate independent spheres. These two contrary perspectives appear to be at odds with the proposition that the land is the source of law. According to one trend in legal philosophy, land is just a thing, available for naming, claiming and owning – individually or collectively. On this reasoning, the land is the object that becomes the subject of law whenever disputes arise concerning its naming, claiming and owning. Thus the land is not the source but the object of law. So it is that Dr Black's

proposition is a contestation, an argument against the legal philosophical perspective that the land is merely a thing that fortuitously becomes the subject of law.

C.F. Black's proposition springs from an experience, an epistemology deeply rooted in the ancient wisdom of her people relevant to her Australia of today. Contemporary Australia is an invention of colonization, a veritable disseizure of a people's land, and therefore an abrogation of their inalienable right to life. By virtue of the questionable 'right of conquest', this invention named 'Australia' acted to silence the voice of the Indigenous peoples, the rightful owners of the country since time immemorial. It is no small matter that in recent times the parliament of Australia took the noble decision to apologize to the Indigenous peoples of the country. Dr Black's proposition is fundamentally a challenge to the legal philosophical perspective that the land is merely a thing. It is also the assertion and affirmation of the right of the Indigenous peoples of Australia to speak in their own terms on all matters, including the meaning of law. She draws from the well of her people's epistemology and wisdom to support the proposition that the land is the source of the law. Consonant with this, she uses homegrown terminology, especially the *talngai* and the *gawarima*. The former means light in the metaphysical sense, providing clarity to the penumbras of everyday experience. The latter is the description of a circular movement in which a story is carried over from one point to the next. The *talngai* and *gawarima* meet at the insight that motion is the principle of be-ing. Light moves one to illuminate the dark corners of experience, but this cannot happen if the light is static in the condition of permanent rest. Through the *gawarima*, the light of the *talngai* is continually enlightening the dark corners of experience. The meeting point between the *talngai* and the *gawarima* means the relationship is an experience and concept that is ontologically coeval with the insight that motion is the principle of be-ing. On this understanding, Dr Black invites three Senior Law Men, bearers of the ancient wisdom, to explain the cosmology, the relationship, and the responsibilities and rights that underlie the proposition that the land is the source of the law. Memory is the cement that puts the past and the present together, and the three Senior Law Men fulfil this function. The reader is invited to enter into this philosophy of law, to feel it in order to begin to understand it. For this to happen in a meaningful way, it is necessary to comprehend the meaning of 'Indigenous' espoused by Dr Black. It means, for her, 'a ritual sacred formula to produce good health in a knowledge system based on being within – *in*, a system of two; *di*, based on being within a productive or creative complementary system of relationships'.

Any Indigenous jurisprudence that was the victim of the Western invasion and conquest in the unjust wars of colonization is in vital need of a dialogical encounter with the West in order to assert and reaffirm the right of the Indigenous peoples to speak for themselves in their own terms. The jurisprudence of these Indigenous peoples, wherever they may be, is brought together, forming one community based on the shared experience of conquest in the unjust wars of colonization. One may ponder on the significance of the *Colonial Laws Validity Act* of the British Crown in order to appreciate this point. The common experience of colonial conquest is the well from which the Indigenous conquered peoples drink without having to renounce or repudiate their specific philosophical-cultural backgrounds. It comes as no surprise, therefore, that Dr Black is deeply immersed in the Australian experience while drinking from the common well of the experience of other Indigenous peoples. She draws a lot more from the American Indian, or Amerindian, experience compared with Africa. Yet she succeeds in making the Indigenous conquered peoples of Africa recognize their image in the mirror that she places in front of them. For example, we are introduced to the *Djang*, the primordial energy in constant need of balance and rebalancing. This concept is more than akin to the 'life force', dynamology or vitality found in the African philosophy of be-ing. It provides the basis for a polylogue among the Indigenous peoples of Australasia, Africa and the Amerindians. Memory and belief in the living dead ('ancestors') are sustained by the perpetual exchange of life forces in the holistic order of things. And so it is that the *Djang* cosmology is the affirmation that life is a complex network of dynamic relationships: a vitality.

The polylogue among the Indigenous peoples conquered in the unjust wars of colonization is not restricted to these peoples. As a challenge to the Western legal philosophical perspective, the polylogue is an invitation to the West – and, indeed, to all the peoples of the world. It is to be hoped that this invitation will be honoured, first, in the name of justice for and to all humankind, and, second, for the mutual enrichment of all the cultures of planet earth. Along this path there is a chance that *The Land is the Source of the Law* will make a lasting contribution to the protection and preservation of the only known liveable planet on which we all live.

Mogobe Ramose  
November 2009

# Contents

<i>Foreword</i> by Mogobe Ramose	xi
<b>PART ONE</b>	
<b>The Journey Begins</b>	<b>1</b>
1 My camp	3
2 The camp of the <i>talngai-gawarima</i>	11
<b>PART TWO</b>	
<b>Camps of the Senior Law Men</b>	<b>21</b>
3 Feeling the <i>Djang</i> : The camp of Senior Law Man Neidjie	23
4 The spider or the web? The camp of Senior Law Man Mowaljarlai	43
5 Health and land: The camp of Senior Law Man Wandjuk Marika	63

**PART THREE**

**Travelling the Land 79**

- 6 The journeys: From camps of old men to camps of young women 81
- 7 The camp of 'caring for country': The world of *Plains of Promise* 99
- 8 The camp from Turtle Island: *Thunderheart* 121
- 9 The camp from the sparkling waters of the Pacific: *Whale Rider* 145

**PART FOUR**

**Completing the Circle 163**

- 10 The end of the journey: A camp of contemporary concerns 167
- Notes 185
- Bibliography 195
- Index 203



**PART ONE**  
**The Journey Begins**



## CHAPTER 1

### My camp

‘I want you to remember only this one thing,’ said the Badger. ‘The stories people tell have a way of taking care of them. If stories come to you, care for them. And learn to give them anywhere they are needed . . . Sometimes a person needs a story more than food to stay alive.’

(Borrows 2007: 13)

The Yugumbeh language of my mother’s people<sup>1</sup> is a rich one. It stems from a land that was a virtual paradise, abundant in fish, birds and mammals. This abundance, however, did not lead to the erection of edifices to glorify some distant god or idol; rather, the Kombumerri people developed a rich intellectual and metaphysical world, aware of the galaxies as much as they were of the lifecycle of the smallest insect. Each entity was valued in its own right. My awareness of this heritage began with the repatriation of the remains of my grandmother’s ancestors, a common story among Indigenous peoples of the world. But this story of return is a story of a beginning rather than end: it was the beginning of my learning of the Law, which had been denied to me due to an unacknowledged invasion – an invasion sanitized by such words as *discovery*, *settler society* and *colonization* rather than an acknowledgement that many thousands of men, women and children had died to keep Australia ecologically balanced. I feel a deep sorrow that these fallen warriors/soldiers are still not recognized formally, even by our own people, but rather airbrushed into the background as a Sorry Day,

largely as a consequence of the settler society turning Australia into a First World nation. While the remembrance of this brutality and lack of recognition of those who gave their lives to keep their lands sustainable for future generations is not the purpose of this book, it is hoped that such remembrance will result from the impact of the book on the reader.

Returning to my story, the more I ventured into the remembrance of the world of my ancestors – and especially the revitalization of our Yugumbeh language – the more the stories came to me. And so, as the Badger advised, it was the stories – the vehicle for intellectual and metaphysical knowledge encased in feelings – that would reveal to me the Indigenous jurisprudence: why the Land is the source of the Law.

And so I turn to my clan's Yugumbeh language to assist me to elucidate the knowledge I carry in my genetic memory from those ancestors. I have chosen two words – two of my favourites, in fact – that will shape the jurisprudence in this book: *talngai* and *gawarima*. *Talngai* means light, which is used to enlighten in a metaphysical sense – what goes around the camp as knowledge. *Gawarima* describes a circular movement in which the information/story goes around a camp. In turn, it becomes a knowledge that is of a ritual nature and is therefore meant to heal through *feeling* the knowledge. This *feeling* of knowledge will be articulated through the *talngai-gawarima* jurisprudence actualized in this book.

## The Talngai

### *I am legally patterned?*

By telling a cosmological story from my ancestors' country, I am demonstrating how I am patterned into the web of Law stories that have weaved my ancestors into reality. This is just one of the Law stories that weave me into the web of reality of my grandmother's Kombumerri clan and my grandfather's Munaljarlai clan. It comes from my maternal grandfather's country of the Munaljarlai peoples of South-East Queensland, Australia. I have spent many years thinking about this story and revisiting while travelling around Aboriginal Australia. This account is my own rendering of the story, as each member of the clan will have his or her own account, for each telling passes on different elements that are important to the audience at the time of the telling. This telling emphasizes the breach of law of my own clan towards the hunting dogs belonging to a neighbouring clan, which, in turn, caused an abrupt geological change.

I was told once about these dogs, great hunting dogs they were. Not just ordinary dogs, hang around the camp types. No, these dogs were different – magic dog!

They say they even saw one of those dogs down on the Coast. A big black dog with red eyes. But I don't know for sure. Only old grandfather Bilum Bilum would know that. He was a clever man, knew all those old stories, Law stories – those Law stories that weave us all together.

But those dogs they had magic because they could hunt anything they wanted. They made that hunter happy. They would catch an animal, bird or fish and bring it back to the hunter.

That hunter he was a big strong handsome fella. He came from down south . . . made his way up the coast and up to the mountains and there he stood looking out over what was the beautiful hilly country of the ol' people.

That's before they got silly and got wiped out. And this is how it happened. This is how all that land got flattened out. Yeah, it lost all its lovely hills and pretty trees and so just became hard, baked land. It happened all of a sudden. I've been told this happen in other places. Maybe everyone got silly at the same time, so they all got wiped out.

That big handsome hunter was standing there looking out and watching for honey bees – he loved that sugar bag. That's another story how he found that sugar bag but I am not going to tell you that story. I am going to tell you this one about those dogs.

Those dogs saw a big *guraman*, that's a kangaroo, they chased after the *guraman* and before you knew it they had disappeared from sight, so the hunter didn't take much notice, he was just looking for those bees.

But what about those dogs, yeah, those dogs? They chased that *guraman* so fast that it had to pull up some of its magic and it hopped even faster and saw up ahead a lagoon, that was the Ilbogan lagoon in Bilum Bilum's country. When that kangaroo saw that lagoon, he jumped straight into it and turned himself into a *warrajum*. That's a water spirit, real special one. Makes that water, sweet water, special water.

But those dogs, what about those dogs, yeah those dogs. Well, they got mad at themselves for losing that kangaroo and so they didn't see those lazy young fellas coming along. They were supposed to be hunting but you know young fellas, any chance to sit down and tell stories about girls instead of hunting. And sure

enough they thought . . . hey, let's catch those dogs then we don't have to do all that hard work huntin'. So they set a trap and caught those dogs and took them back to their camp and ate them up. Real good they were. Stupid fellas eating magic dogs!

Well that hunter, he knew his dogs had been eaten, he knew something bad had happen to them. He felt it on his skin, cause it started moving real bad right near his elbow. So he went looking for those dogs and found them. He found all those bones those lazy fellas had left in the campfire. He took those bones and made a special place for them up in the mountains. You can see that special place for miles all around. I like looking up to that place where those two rocks poke up looking like dogs watching me down on the coast. Makes me feel special.

But what about those fellas that killed those dogs? Oh that was bad and that hunter made sure they were dead. Then he did something that killed all the people. He changed that land with his magic – he made it all change, just in one day. With his magic he flattened that place out real flat and made that land real hard and black. That's now Munaljahlai country. That story reminds my Grandad's mob to be careful and follow the Law, otherwise the land might suddenly change overnight. A wipeout can happen any time. It happened before and can happen again. That's why we tell this story. To remind people, stay straight with the Law.

### *I am part of my family's history*

My mother taught me to 'notice' nature. In so doing she taught me the Law of the Land.

My mother, Beryl Yuke, was born of a Kombumerri woman, Edith Graham, and a Munaljarlai man, Stanley Yuke. She grew up in a household that cared for her maternal grandmother. Sadly, Grandmother Jenny Graham was one of only a few Kombumerri women to survive on the traditional homelands of the Kombumerri. This land was invaded and eventually covered in concrete: it became the tourist city of the Gold Coast.

However, even though my mother's family witnessed the human-induced climate change of her traditional lands, and therefore had to adapt to the imposed culture, she was still able to pass on to me the habit of noticing nature. What I mean by this is that it was a subtle way, if not a subliminal intent, to pass on the importance of the Land as the Law, in a world bent on turning a paradise of natural environmental wealth into a poverty-stricken concrete mass of shining lights, high-rise apartments and artificial parks and waterways. My mother and her siblings had little chance of

impacting on, or even comprehending, what was going on and what it would lead to. But then very few people are in a position to have such foresight, and still to this day are not in a position to see the impact of such madness. Perhaps, therefore, it might appear more sensible to consider that the planet is in a constant state of change and that the madness will also change over time and other priorities will supplant those of the present day. The knowledge to assist in that change comes from remembering stories from long ago, and that would appear to be my responsibility to my clans – to remember the stories.

### *The coming of a story*

It is fascinating the way stories come to you, even though the Badger would appear to be telling us it is normal. There is a story I was told by a descendant of the farmer who cultivated the clan land of Bilum Bilum. In 1893, this farmer, rather than shooting Bilum Bilum or King Jackie Jackie and his clan, as was the practice of the day to acquire land, instead employed and handed down this story through the family over the centuries. King Jackie Jackie, as he was known to them, tried to warn the family of an impending flood. The farmer could see no evidence of this coming flood and therefore ignored Bilum Bilum's warning. Disappointed, Bilum Bilum then took his clan to higher ground and waited for the flood. The flood indeed arrived, and became one of the worst floods on record in South-East Queensland.

This story of Bilum Bilum and the flood came to me while I was writing up my doctorate. Not long after hearing this story, I changed my disciplines and moved from humanities to law. Ever since, I have felt that Bilum Bilum and other ancestors have helped chart my course through academia and the eventual writing of this book, as well as the use of our Yugumbeh<sup>2</sup> language to name the jurisprudence that will be developed in this book.

### *Journey through academia*

My journey through academia revealed to me an array of stories from Indigenous peoples across the world. I found these stories fascinating and essential in aiding my children to build their character over time. Little did I realize that the stories which came to me were actually shaping my mind into that of a jurist. Therefore, on meeting William MacNeil (2007) and Shaun McVeigh (2006) of the Griffith Law School, I began to see Western law in a different way. Rather than finding the stories of Western law and their jurisprudence daunting, I found them *wanting* – especially as I began to mix with critical legal theorists (McVeigh 2006) and listened to their insights into the *wantings* of their law. I began to realize that this law could not help Indigenous peoples; rather it was a hindrance to them. As I

enjoyed daily discussions with my friend Shaun McVeigh about the finer points of Western jurisprudence, sat through my doctoral supervisory sessions with William MacNeil, and engaged in other light-hearted discussions of popular culture, I began to shape my own understanding of Australian Aboriginal jurisprudence based on my personal experience and the texts found in this book.

Having said that, I could not even have begun such a narrative of Law without the dialogic engagement I experienced with my fellow Kombumerri, Mary Graham, and the formation of my understanding of the Australian Aboriginal world-view by Lilla Watson, on whose clan land I was born. Undergirding all this, however, was the essential engagement with the land of my ancestors, for it was that act of *walking the land* of my ancestors that actualized and authenticated the knowledge I had acquired through those dialogic encounters.

These journeys have also been literal, and have taken me into other Indigenous worlds where I have met guiding lights such as Hinsha Waste Agli Win, Mr Moana Jackson, Stephen Augustine, Joan Ropiha, Ephraim Barney, Ron Day, Adrian and Henrietta Marrie, Ahasiw Maskegon-Iskwew, Mogobe Ramose, Christine Zuni Cruz, Lyndon Murphy and Dale Kerwin. Then there are my colleagues, who helped to guide me into a deeper understanding of the dominant culture: Thelma Jackson, Bradley Sherman, Ben Goldsmith, Tony Bennett, Michael Meadows, Tom Round, Russell Bomford, AJ Brown, Michelle Barker, Larry Crissman and Julia Howell. I'm deeply appreciative of the life-saving editing of Sue Jarvis and Teresa Chat-away. And I sincerely thank Richard Johnstone, director of the Socio-Legal Research Centre, Griffith Law School for the centre's financial support.

Finally, my gratitude must be expressed to my mother and sister, Beverly, to whom the book is dedicated. I thank my children, Ashley, Maleah and Kapun, and my grandchildren for just being there. Just as much, I thank my friends Glenda Donovan, Colleen Wall, Rita Mazzocchi, Kine Camara, Jonathan Richards, Robin Trotter, Donna Weston, Carol Ballard, Marianne Mitchell and cousins Marjorie, Leona, Shirley and Robin. Thanks to my clans, Kombumerri and Munalarlai, and the 'living dead' on all sides of my family, and to the Lands of Gold Coast, Beaudesert, Kimberley, East Arnhem Land, Central Australia, Torres Strait Islands, Aotearoa, the great Turtle Island and South Africa.

### *Entering the gawarima*

This book is shaped in a particular pattern – the pattern found on its cover. It is meant to evoke a sense of engagement, with the reader travelling through a series of camps and sitting down at each camp to listen to the



Law story conveyed there. There are nine camps in all, each with its own multi-level story, which in turn is encircled into a series of relationships with the other camps. Readers are asked to use their imaginations and perceive a circular pattern as they make their way around the camps. Allowing the imagination to flow with the reading enables a new layer of meaning to enter into what basically amounts to black letters on a flat page. The knowledge in this book stems from a multi-dimensional fluxing world-view. It is hoped that the reader will allow the joy of the flux of the Law of the Land to influence the way in which they receive the jurisprudence found in the following pages.

The main conversation in this book speaks in a triadic way: an Indigenous speaking to an Indigenous readership with the 'other' as observer. It is an appeal to Indigenous people to consider what makes their Law profoundly sensible and essential for the adaptation to climatic, economic and social unrest as energy and food shortages become evident, and to seek solutions within their own epistemologies and jurisprudence. I further contend that they should turn to their ancient narratives rather than taking a D'Artagnan-like musketeer approach of intellectually duelling with the Rule of Law, for I would argue that this approach has actually 'grown up' a whole generation of people who have neglected their own Law stories and succumbed to the 'Rule' stories of legal dualism. As Isleta Appellate Court judge Christine Zuni Cruz (2003) found as she travelled around the tribal courts:

From the outset the elders exposed the attorneys' western knowledge of the law and procedure as laden with values and concepts in conflict with the Indigenous worldview of the people of Isleta. It is clear that two knowledge systems are vying for superiority in the development of tribal court systems.

(2003: 2)

There is a dearth of books and articles on Indigenous jurisprudence and a glut of texts on Indigenous peoples and Western jurisprudence. The existing definitions surrounding Indigenous jurisprudence therefore have been influenced by the way in which Indigenous peoples have been assimilated under the Rule of Law. This assimilation process has taught our youth to regard Indigenous Law as something of a 'collective' version of Western law, whereas by travelling through the series of camps set out in the book, the reader will come to understand that the true source of the Law is the Land.