Exploring Wild Law

The Philosophy of Earth Jurisprudence

Edited by Peter Burdon

Wakefield Press

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Dedicated to the life and memory of

Fr Thomas Berry (1914–2009)

and

Ng'ang'a Thiong'o (1958–2010).

'Wild law is a gathering force beginning to sweep around the world. This excellent compendium is a must for all those who wish to practise it.'

– James Thornton, CEO ClientEarth

'These essays collectively advocate a new legal paradigm of "Earth Jurisprudence", based on recognition of the connections and continuity between our legal systems and the Earth system. The various, expert contributors offer a rich, informed and transformational perspective that builds on past jurisprudence in the form of natural law and embodies more recent conceptions such as deep ecology and bioregionalism. The fundamental and compelling message is, to quote the editor, Peter Burdon, that "we must question the values and legitimacy of any law that surpasses the ecological limits of the environment to satisfy the needs of one species".

This is a most timely and compelling volume, given the urgency of the threats posed to humanity by climate change, loss of biodiversity and ongoing economic and population growth. Its message is of universal importance and will hopefully be received and absorbed by policy-makers around the globe.'

– Professor Rob Fowler, Chair, IUCN Academy of Environmental Law

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'This work, *Exploring Wild Law*, breaks new ground in the field of Earth Jurisprudence. Such a perspective is sorely needed for responding to multiple environ-mental issues from a legal perspective. We are immensely grateful to Peter Burdon for his important efforts in compiling this timely book.'

– Mary Evelyn Tucker, Yale University, Forum on Religion and Ecology

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'This book is a wonderfully diverse bouquet of perspectives on wild law that will delight anyone who is interested in creating communities and societies that flourish in harmony with Nature. By drawing the varied insights and perspectives of leading thinkers and activists from around the world together in a single volume, Peter Burdon has created a multi-dimensional and nuanced understanding of wild law and Earth jurisprudence. This is a book that Earth-loving people will be reading and re-reading for many years to come.'

– Cormac Cullinan, Enact International and author of
Wild Law: A Manifesto for Earth Justice

'*Exploring Wild Law* is multi-dimensional and multi-disciplinary, both practical and wildly innovative. This complex, multi-vocal work contributes elegantly to a growing chorus of scholars, activists and artists who are singing up visionary and pragmatic forms of more-than-human conviviality here on planet Earth.'

– Professor Deborah Bird Rose, author of
Reports from a Wild Country: Ethics for Decolonisation

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Preface

In his final book, *The Great Work*, Fr Thomas Berry (1914–2009) called on human society to enter a new covenant with nature. He writes, 'history is governed by those overarching movements that give shape and meaning to life by relating the human venture to the larger destinies of the universe. Creating such a movement might be called the Great Work of a people'. In the context of our present environmental crisis, he notes that the Great Work is 'to carry out a transition from a period of human devastation of Earth to a time when humans would be present to the planet in a mutually beneficial manner'. This book is intended to be one step in the fulfilment of this work and while it is focused on the discipline of law, those engaged in science, philosophy, religion and cultural studies will find sections engaging. Certainly the eclectic nature of the book is unique and represents a deliberate effort to connect distinct fields and provide vital context for understanding Earth Jurisprudence.

This book represents the effort of countless people, working across four countries. I would like to extend particular thanks to the staff and editors at Wakefield Press, in particular Michael Bollen and Jessica Marshallsay for their vision and hard work publishing this book. I would also like to thank the University of Adelaide School of Law for providing such a stimulating environment in which to lecture, study and think up new projects. Finally, special thanks to Friends of the Earth Adelaide for support, friendship and handwork in bringing this project together.

Thank you also to *Resurgence Magazine* for permission to re-print Thomas Berry's article, 'The Rights of Nature'; Cormac Cullinan for permission to reprint 'If Nature Had Rights, What Would We Need to Give Up?', Stephan Harding and Imprint Academic Publishers for permission to reprint parts of 'Gaia and Earth Jurisprudence' and *Penn State Environmental Law Review* for permission to reprint sections of Judith E. Koons' 'What is Earth Jurisprudence? Key Principles to Transform Law for the Health of the Planet', vol. 18, 2009, p. 47.

I would also like to individually thank Dr Paul Babie, Associate Professor Alexander Reilly, Professor Pamela Lyon, Joel Catchlove, Sophie Green, and my beautiful wife Shani and daughter Freya for their love, support and inspiration during the editing process.

This book is dedicated to the life and memory and of Fr Thomas Berry. May his work continue to inspire and his spirit infuse us all. Shortly before the publication of this book, barefoot lawyer and inspirational orator of Earth Jurisprudence, Ng'ang'a Thiong'o, suddenly passed. This book is also dedicated to his memory and the hope that his words find a place in all of our hearts.

Peter Burdon
12 March 2010,
Tandanya Bioregion, South Australia

Part One

What is Earth Jurisprudence?

Dedication to Thomas Berry

Jules Cashford

Anyone who ever heard Thomas Berry laugh would know why this book on Earth Jurisprudence could only be dedicated to him! It was the most resoundingly generous, compassionate, all-embracing laugh, resonating with joy and wonder at the beauty of the universe. It would follow a devastating critique of the current state of western civilisation as easily as it would a chanting of his favourite poem to a circle of friends outside on the grass. It was everything he wanted us to be with Nature: spontaneous, intimate, wild, reverential, authentic, passionate, imaginative, mutually enhancing – gloriously expressive of the manifold dimensions of the sacred.

The sacred was at the heart of his work: why we had lost it and how we could recover it, not just for ourselves but, more crucially, for the celebration of the universe in the new cosmology:

> We will recover our sense of wonder and our sense of the sacred only if we experience the universe beyond ourselves as a revelatory experience of that numinous presence whence all things come into being. Indeed, the universe is the primary sacred reality. We become sacred by our participation in this more sublime dimension of the world about us.[1]

We could believe him because he entirely embodied what he said in who he was. In his deep gravelly tones, in talks and lectures across many continents, he would tell again and again the story of the universe, with humour, gravity and passion, in order to move us beyond our small human-centred preoccupations into the sublime wonder of the vision of the whole. The story of the universe, he would say, 'is the new sacred story,' the only story that will help us to renew the world.[2] If we do not start with the universe, how can we understand ourselves in any context but our own? We cannot see that all our human institutions – governments, religions, universities, corporations, and especially the legal systems underpinning them – all rest upon 'a mode of consciousness that has established a radical discontinuity between the human and other modes of being and the bestowal of all rights on the humans'.[3]

A perspective centred exclusively on the human finds other modes of being inferior; they become 'a collection of objects not a communion of subjects'; an 'it', not – as in earlier times and still today by indigenous people – a profoundly respectful 'Thou'. This results, inevitably, in unlimited plunder and exploitation of

other life forms: they are given no intrinsic value of their own: 'They have reality and value only through their use by the human',[4] no inherent right to their own specific life.

The 'Great Work,' as Thomas called it, is then to carry out the transition from a period of human devastation of the Earth to a period when humans would be present to the planet in a mutually beneficent manner'.[5] The task has to begin by moving to an Earth-centred norm of reality and value, which recognises that the universe is the enduring reality, and the source of value. This is a work not chosen by us; indeed, it was chosen *for* us, by the fact of our being born into this time of crisis when the very structure of the Earth is threatened and the extinction of species continues unimpeded. It requires of us that we align our own work to the Great Work of the universe, for the 'small self of the individual reaches its completion in the Great Self of the universe'.[6] To put it the other way, 'The story of the universe is the story of each individual being in the universe',[7] and so the journey of the universe – forever evolving, continually emerging – 'is the journey of each individual being in the universe'.[8] But that means everyone, *all* the children of the universe, to whom he gave voice in one of his own favourite poems:

> To all the children
> To the children who swim beneath
> The waves of the sea, to those who live in
> The soils of the Earth, to the children of the flowers
> In the meadows and the trees of the forest,
> To all those children who roam over the land
> And the winged ones who fly with the winds,
> To the human children too, that all the children
> May go together into the future in the full
> Diversity of their regional communities.[9]

Thomas loved poetry. Many a serious discussion would end with Thomas striding out in the direction of trees and flowers and, his flock gathered around him, closing his eyes and raising his arms to the sky while the poems broke forth from him in sheer joy. 'Loss of Imagination and loss of Nature are the same thing. If you lose one you lose the other',[10] he said, elaborating this idea in everything he wrote:

> Only if the human imagination is activated by the flight of the great soaring birds in the heavens, by the blossoming flowers of Earth, by the sight of the sea, by the lightning and thunder of the great storms that break through the heat of summer, only then will the deep inner experiences be evoked within the human soul.[11]

In his poetry he wrote that it is imagination which 'awakens the child to a world of beauty, emotions to a world of intimacy'. He was fond of quoting William Blake's

'Divine Imagination', followed by Shelley's conclusion to his *Defence of Poetry* that 'Poets are the unacknowledged legislators of the world'.[12]

Thomas became aware of his own lyrical Imagination when he was eleven. As he remembered it, in the telling of it, his face would light up with an extraordinary radiance. It was an early afternoon in late May when he saw 'the meadow across the creek':

> The field was covered with white lilies rising above the thick grass. A magic moment, this experience gave to my life something that seems to explain my thinking at a more profound level than almost any other experience I can remember. It was not only the lilies. It was the singing of the crickets and the woodlands in the distance and the clouds in a clear sky. It was not something conscious that happened just then. I went on about my life as any young person might do.[13]

This transforming experience became a touchstone for him – 'normative' throughout the whole range of his thinking: 'Whatever preserves and enhances this meadow in the natural cycles of its transformation is good; whatever opposes this meadow or negates it is not good. My life orientation is that simple. It is also that pervasive. It applies in economics and political orientation as well as in education and religion'.[14]

Thomas, letting the meadow express itself through him, yet again completely embodies what he taught; for here it is as though, in the particular human mode that was himself, the universe is indeed 'reflecting on and celebrating itself in a unique mode of conscious self-awareness'.[15]

The meadow taught him to read the Book of Nature. The universe is the primary text, he would insist, the source of order and law, the primary educator and the primary healer. But it could teach him only because he felt deeply and intimately for it and was profoundly moved by it. It taught him through wonder and awe and gratitude, and he kept his word to it and to all that it evoked in him. He looked at the human-centred world he saw around him through its eyes.

When we came to North America, he wrote in disbelief:

> we brought our sacred traditions with us in a book. We never thought that this continent, its mountains and rivers and deserts, its forests and wildlife, its birds and butterflies, had anything to teach us concerning the deeper meaning of our existence.[16]

In the Earth-centred world, the integral Earth community would learn by 'sensitising' the human to 'the profound communications made by the universe about us',[17] and this would apply to all human activities: economics, medicine, politics, spiritual reorientation and law. For this we need to learn again the language of Nature – a language that is poetic, musical, symbolic, subjective, a language of feeling and intuition, held from the beginning in the archetypal images of the psyche. We can no longer learn from the literal, objective language of the old

science, which reduces the world to human categories in the illusion that it explains reality to the human mind.

Yet if the poet opens up the multivalent language of Earth, the philosopher is also necessary to perceive and reflect upon the creative power in the intelligible order we observe in the universe: 'The philosopher is controlled ultimately by the balance and harmony of things, by reasoning intelligence'. The artist 'revels in the ultimate disequilibrium of things,' from which wildness spontaneously breaks forth. 'Both are valid, both are needed',[18] for between them they manifest the expanding and contracting forces in the universe.

As well as being a poet and a philosopher, Thomas Berry was also a prophet. He diagnosed the sickness of the age and proposed the way to heal it, bearing witness to the divine in new form. 'We are in between stories,' he wrote in 1978, observing that the old story 'shaped our emotional attitudes, provided us with life purpose, energised action. It consecrated suffering, integrated knowledge, guided education'.[19] Who is to lead us from the old story to the new story but one who has been wholly rooted in the old and profoundly moved to the depths of his being by what was missing from the old story: the Earth as a sacred mode of being of the Universe?

It takes a man who became a monk at the age of 20 (there were two places where you could be alone to think, he would say with a grin, a prison and a monastery, and I chose the monastery), who belonged to the Passionist Order, and whose mentor was his namesake Thomas Aquinas, to be able to say that Christianity has failed the Earth: 'Nature gradually disappeared from Christian consciousness'.[20] He did not believe that the present situation could be explained simply as a consequence of post-Cartesian empirically based sciences, or eighteenth century Enlightenment, or the excesses of the industrial age. Neither did it arise out of a Buddhist, Hindu, Chinese or Islamic context. Rather, it 'arose out of a civilisation with a biblical religious and Greek humanist matrix'.[21] Thomas came to see one aspect of this inheritance as a tragedy:

> the tragedy of so emphasising the transcendence of the divine that the earth becomes desacralised, the tragedy also of so emphasising the spiritual dimension of the human that the earth becomes only a resource base for whatever humans choose to do with the earth.[22]

While, in the medieval period, Aquinas had embraced the universe as a whole, saying that 'the whole universe together participates in the divine goodness and represents it better than any single being whatsoever',[23] the church's later preoccupation with human redemption and salvation largely replaced discussions on creation. The increasing focus on a linear process of revelation through history diminished the earlier spatial mode of understanding and participating in the great cyclical dramas of the Earth's transformation that had taken place for thousands of years. These had always been occasions for the celebration of the 'great liturgy

of the universe'[24]: in spring and summer, autumn and winter, in the dawn and dusk, in the ever-changing phases of the moon, and in the darkness of night which reveals the universe.

Further, the replacement of the cyclical with the temporal linear mode of revelation gave rise to an expectation of an 'infra-historical millennial period in which the human condition would be overcome'.[25] This gave a destructive mythic drive to the intrinsically secular doctrine of progress, which helps to explain the 'technological trance' in which humans knowingly cut off the source of their own, and everyone else's, life. Like all prophets, Thomas saw though the false forms of his age and gave them a name. He described the industrial age as:

> a period of technological entrancement, an altered state of consciousness, a mental fixation that alone can explain how we came to ruin our air and water and soil and to severely damage all our basic life systems under the illusion of 'progress'. Now the trance is passing, we need to 'reinvent the human' as integral with the whole of the Earth community.[26]

He alerted us to a 'deep cultural pathology'; he warned that the industrial mind had co-opted the language in which our values are expressed. It is the language of profit and loss – and what of 'the Earth deficit'? – of being 'productive,' of regarding the Earth as a 'resource' to be 'used,' a 'product' to be 'developed,' 'exploited,' 'dominated,' discarded when no longer useful. It perceives limitation as a 'demonic obstacle to be eliminated',[27] heroically conquering everything in its way as a manifestation of 'a deep inner rage' at the human condition.[28] Indeed, this 'degradation' of the Earth is seen as the condition for 'progress of humans,' which makes the Earth 'a kind of sacrificial offering'.[29]

If it would be the Poet who feels the sacrifice passionately as his own, and the philosopher who makes it intelligible as a deviation from the true path of cosmogenesis – the continual unfolding of the universe – then it may be the Prophet who finally refuses this sacrifice, setting up an opposing value in its place.

'This little meadow,' as he called the meadow of his childhood, was also the most eloquent advocate for 'Earth Jurisprudence'. For who has the right to deprive that meadow of its own life, to sacrifice it on the altar of human progress? On the contrary, 'what is good recognises the rights of this meadow and the creek and the woodlands beyond to exist and flourish in their ever-renewing seasonal expression even while larger processes shape the bioregion in its sequence of transformations'.[30]

As with all other forms of human culture, the anthropocentrism of human law for human beings had to become integral to the primary lawgiver, the universe. This is what Thomas called the 'Great Jurisprudence', the inherent order and lawfulness of the cosmos which structures and sustains all life within it. This lawfulness is written into the pattern of birth and death for all of creation, and into the rhythms of all of our lives. Consequently, the new Earth Jurisprudence begins

with the universe, derives its validity from the universe, and upholds the sacred values of the new Universe Story.

Thomas was not entirely happy with the language of rights, but it was the best we had to be going on with. If, in 1886, corporations could, incredibly, be given the rights of individuals, then so should the Earth in all its gloriously diverse manifestations have the rights of an individual. 'We begin from where you are,' he said. For Law was necessary where morality had failed, and morality was necessary where love had failed. If you love the meadows and the woodlands and the rivers and all the creatures that live in them, then you would not want to harm them, you could not do it. Their wounds are your wounds: we are all mutually dependent, mutually reflecting and mutually enhancing. That is why we need to learn the language of mountains and rivers, trees and birds and all the animals and insects, 'as well as the languages of the stars in the heavens'.[31]

However, the language of rights answers the legal establishment in its own terms. As it is now, existing legal structures in all nation states, so closely allied with the industrial establishment, not only cannot protect the natural world but actually legitimise the destruction of the Earth inherent in the old story. But where do rights come from in the first place? Thomas insists they come from existence itself, not from other humans, and that means that rights cannot belong exclusively to humans, enclosed in their little worlds, cut off from the Earth they take for granted. Indeed, rights are not theirs to give away, to award or withhold from other beings on Earth. In an interdependent world, where every mode of being depends on every other mode of being, then every mode of being has rights derived from the universe which brought them into being and made them who they are. In this sense, every mode of being is equal: 'The well-being of each member of the Earth community is dependent on the well-being of the Earth itself'.[32]

Within this context, Thomas made the following ten proposals expressed in terms of rights which he believed should be recognised in national constitutions and courts of law:

Ten Principles of Jurisprudence

1. Rights originate where existence originates. That which determines existence determines rights.
2. Since it has no further context of existence in the phenomenal order, the universe is self-referent in its being and self-normative in its activities. It is also the primary referent in the being and the activities of all derivative modes of being.
3. The universe is composed of subjects to be communed with, not objects to be used. As a subject, each component of the universe is capable of having rights.
4. The natural world on the planet Earth gets its rights from the same source that humans get their rights: from the universe that brought them into being.

5. Every component of the Earth community has three rights: the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing processes of the Earth community.
6. All rights are role-specific or species-specific, and limited. Rivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights. Difference in rights is qualitative, not quantitative. The rights of an insect would be of no value to a tree or a fish.
7. Human rights do not cancel out the rights of other modes of being to exist in their natural state. Human property rights are not absolute. Property rights are simply a special relationship between a particular human 'owner' and a particular piece of 'property,' so that both might fulfil their roles in the great community of existence.
8. Since species exist only in the form of individuals, rights refer to individuals, not simply in a general way to species.
9. These rights as presented here are based on the intrinsic relations that the various components of Earth have to each other. The planet Earth is a single community bound together with interdependent relationships. No living being nourishes itself. Each component of the Earth community is immediately or mediately dependent on every other member of the community for the nourishment and assistance it needs for its own survival. This mutual nourishment, which includes the predator-prey relationship, is integral with the role that each component of the Earth has within the comprehensive community of existence.
10. In a special manner, humans have not only a need for but also a right of access to the natural world to provide for the physical needs of humans and the wonder needed by human intelligence, the beauty needed by human imagination, and the intimacy needed by human emotions for personal fulfilment.[33]

* * *

The 'mythic vision' has been set into place, he wrote, and he trusted the great powers of the universe to assist us in the realisation of the new story, to help us summon the 'vast psychic energy' required to 'realign our thinking' with the well-being of the entire planet and so to move into what he called the Ecozoic Era. And perhaps we should trust him in his trust of the universe. In his own journey of passionate dedication to the Great Work, as monk, scholar, cultural historian, philosopher, prophet, visionary, and always poet, he has taken us further into the great mystery of existence than we could have gone without him and, if anyone should know, it would be him: