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ABSTRACT
The article introduces the reader to the theory of Earth Jurisprudence through an analysis of the writings of Thomas Berry, Cormac Cullinan and Peter Burdon. After looking at the main revisions that the scholars of Earth Jurisprudence propose to the theory of law, the article recognizes the fact that they all move in the direction of natural law theories and questions the opportunity to take this path in order to change the relationship between human law and the environment.

KEYWORDS
Earth Jurisprudence, Great Jurisprudence, Wild Law, Earth community, natural law theories, natural law

ISSN 1825-0173

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«That you don't know what you've got 'till it's gone.
They paved paradise
and put up a parking lot»
Joni Mitchell, *Big Yellow Taxi*, 1970

«[...] the intricate and glorious diversity of relationships that previously existed between people and with their environments is rapidly disappearing under the sterile, global uniformity of parking-lot culture»
Cormac Cullinan, *Wild Law*, 2002

1. *Introduction*

Comments concerning the current state of the Earth surround us every single day, picturing the ever-worsening illness of the Planet. An illness affecting us all and beyond – animals, plants, abiotic components of the Earth, future generations – and finding its root causes in the actions of humankind, to the point we might have entered the so called "human-epoch": the Anthropocene[1].

In order to cure the illness of the Planet, human actions need to change to become able to access and use natural resources in non-detrimental and respectful ways. As one of the instruments that guide human behavior, the law could be designated as one of the tools through which such illness is cured. Environmental law, international environmental law and associated fields not only build on the assumption that it is a possible and potentially successful enterprise, but also that they may lead it. The *corpus* of multilateral environmental agreements is wide and deep, with more than 500 documents adopted so far[2] that cover many different aspects of the relationship between humankind and nature. However, significant gaps remain. These gaps include the fact that international environmental law is composed of many separate, essentially fragmented regimes, often lacking coordination even when addressing strongly interconnected issues[3]. Moreover, the need to find compromises when adopting new international conventions, or deci-

* This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 841546.

[1] In 2019, the *Anthropocene Working Group* of the *Subcommission on Quaternary Stratigraphy* agreed that it is correct to regard the Anthropocene as a self-standing geological epoch, describing it as «the present geological time interval, in which many conditions and processes on Earth are profoundly altered by human impact» (available online at http://quaternary.stratigraphy.org/working-groups/anthropocene/ (accessed July 2020).

[2] UN General Assembly, 2018, *Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment*, A/73/419.

[3] Each document is the result of different negotiations among different actors, undertaken in different historical moments, and that carry the burden of different environmental discoveries, crisis and national needs and interests. The principles of customary environmental law (SANDS et al. 2012) may have an important and in some cases efficacious role in harmonizing and filling these gaps, as well as to keep the law up to date, however it has proven not to be enough (UN General Assembly, 2018, *Gaps in International Environmental Law*, cit.). For example, the legal instruments for the protection of biological diversity do not include provisions concerning the conservation of forests, pollution of marine areas by microplastic, and the protection of soil.

sions of the Conference of the Parties of a Convention, invariably leads to the creation of documents that all too often lack necessary details, rigorous targets and clear obligations[4]. This issue is also reflected in the fact that local stakeholders' needs, values, priorities – that incorporate those of indigenous peoples and local communities, women and youth organizations, citizens, trade unions and the like – are still very often kept out of the negotiating rooms, thus, reducing the applicability of legal instruments to local realities and losing the opportunity to work together and profit from their support, knowledge and actions.

More basic and all-encompassing critiques have been moved towards national and international environmental law. Philippopoulos-Mihalopoulos describes it as an unadventurous discipline whose nature-management approach has been unable to create new relationships with either humankind or other legal disciplines[5]. Focusing too narrowly on "managing" ecosystems, environmental law has not sufficiently intertwined with fields that are inextricably related, such as ecology, development studies and sociology. On the contrary, as it actually touches upon every significant aspect of life, a «*radical reconfiguration of environmental law*» is needed, «one that will no longer rely on the old semantics of environment as a resource of the human at the centre»[6] and able to overcome its «idiosyncratic features» that make it fluctuate from law to non-law – science, sociology, politics, and the like – and from a luxury issue to be dealt with after «survival, development, economic viability», to a life or death matter *vis à vis* climate change, toxic wastes and desertification[7].

Many proposals taken forward in the last few years seek to modify international environmental law to make it more *fit* to face the challenges of the Anthropocene. Proposals, to name a few, range from a *Global Pact on the Environment*[8] – a binding multilateral convention grouping all principles of international environmental law in one document –; the elaboration of a *Declaration on Human Rights and Climate Change* proposed by the members of Global Network for the Study of Human Rights and the Environment[9]; the recognition of a *Global Environmental Right* to bind corporations, States, communities and individuals to avoid any action that may hinder the environment[10]; and the creation of a World Environment Organization[11].

There are, yet other proposals whose attempts to break with the past are somewhat more radical and groundbreaking and that address the law both as a cause and as a potential cure of the Anthropocene. Among these proposals, those that can be identified under the term *Earth Jurisprudence* are increasingly known in legal, philosophical and political discourses. Earth Jurisprudence is a theory of law that builds on the works of many diverse scholars, including the environmental philosopher Aldo Leopold, the scientist James Lovelock, the cultural historian, priest and expert of world religions Thomas Berry, and the lawyer Cormac Cullinan, as well as the cosmologies of many indigenous peoples around the world[12]. The proponents of Earth Jurispru-

4 Moreover, international legal instruments, even if binding, rely on States to adopt national laws to give implementations to their provisions, must ensure that Courts control their implementation, and be taken into consideration when developing national policies. Furthermore, implementation is lagging behind because of the lack of coordination with other sectors and their international agreements and organizations – as it is the case with trade agreements, intellectual property rights, and human rights law and Courts, and sustainable development.

5 See PHILIPPOPOULOS-MIHALOPOULOS 2011, 1 f.

6 PHILIPPOPOULOS-MIHALOPOULOS 2011, 25.

7 PHILIPPOPOULOS-MIHALOPOULOS 2011, 24.

8 See *Global pact for the environment*, preliminary draft, 24 June 2017, available at https://perma.cc/L4PM-PTV2 (accessed November 2020); Le club des juristes, *White Paper: Global Pact for the Environment* (2017). The Pact was brought to the UN General Assembly that adopted resolution 72/277, entitled *Towards a Global Pact for the Environment*. See also TIGRE, LICHET 2020.

9 DAVIES et al. 2017.

10 TURNER 2014.

11 BIERMANN 2001; ESTY 1994.

12 CULLINAN 2011, 22.

dence take as a point of departure the belief that the current Western governance systems and approaches to law are among those most accountable for the environmental crises the Anthropocene represents – as an epoch and as a rhetorical tool – because «they are designed to perpetuate human domination of Nature»[13]. They propose a paradigm shift in the ways in which humans perceive themselves, the purpose of their legal and governance systems and their very idea of law. Such a shift is meant to lead to an entire rethinking of law and governance to turn them into tools to, eventually, benefit the Earth and its community[14].

2. *Ethical foundations*

In order to grasp the progressive proposals of Earth Jurisprudence, it is first necessary to look at the relatively new field of environmental ethic. It provides the fertile ground on which the juridical changes Earth Jurisprudence proposes are engrained and the point of departure for deeper cultural and social transformations.

Earth Jurisprudence is firmly grounded on the stream of non-anthropocentric environmental ethics[15], particularly ecocentric. The common division between anthropocentric and non-anthropocentric ethics corresponds to the sharp opposition between the recognition of instrumental or non-instrumental value to nature. According to anthropocentric environmental ethics, the environment only has value insofar as it is relevant for the fulfilment of human needs, interests, and desires[16]. On the contrary, non-anthropocentric positions assume that non-human life has a value in itself, regardless of whether it has a utility for humankind or not. The environmental challenges of the last century have inspired many philosophers to elaborate different non-anthropocentric theories, extending moral considerations to different non-human entities: at times to animals retaining certain characteristics, at other times to all living things or entire species, or to non-living natural entities, including the Earth as a whole.

Among these, Aldo Leopold is one of the principal proponents of ecocentric ethics regarding the entire Earth and its ecosystems as an all-encompassing ecological community possessing self-standing value and a certain degree of life in itself[17]. Ecological communities comprehend living and non-living entities – «soils, waters, plants, and animals, or collectively: the land»[18] – as part of an interconnected whole and are at the center of moral concern. In his essay *The Land Ethic*, Leopold extends the borders of moral consideration to all animals, plants, soil, water, and air. Humans do not have a privileged position: they are members of the Earth's community, just like all other natural elements. From this *description*, Leopold formulates his *land ethic* according to which «a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community»[19]. «[T]he role of *Homo sapiens* [changes] from conqueror of the land-community to plain member and citizen of it. [Land ethic] implies respect for his fellow-members,

[13] CULLINAN 2011, 13.

[14] CULLINAN 2002, 23.

[15] Western environmental ethics can be described as being divided into two main streams, both striving to answer the same question: how do we understand what ought to be recognized value and why? Anthropocentric and non-anthropocentric ethics provide different answers to whether the environment or some of its elements have non-instrumental value.

[16] Anthropocentric environmental ethics build on the understanding of the duty to respect other human beings and, by extending the needs of human beings to those concerning the environment, they include duties to conserve it. Such duties, however, are not towards the environment, they simply regard the environment. They are duties towards humankind and are "a matter of prudence" (DESJARDINS 2013, 98).

[17] LEOPOLD 1949.

[18] LEOPOLD 1949, 239.

[19] LEOPOLD 1949, 262.

and also respect for the community as such»[20]. Land ethic relies on ecology to frame moral principles[21], to the point that Leopold is often accused of falling for the naturalistic fallacy, i.e. of deriving normative conclusions on the human-nature relationship from descriptive considerations about how nature actually is. He argues that since all living and non-living entities are members of the same land community, and since the stability of the latter depends on its integrity, «they are all entitled to continuance»[22]. Leopold hopes to overcome the naturalistic fallacy through the study and understanding of ecology by humankind. A study that should, according to him, lead to an internal change in human «intellectual emphasis, loyalties, affections, and convictions»[23] so that humans come to love and admire the Earth, without any need to justify the recognition of its intrinsic value. Once everybody perceives the intrinsic value of the Earth there will be no need to overcome the naturalistic fallacy, because it will become self-evident to desire and pursue the «integrity, stability and beauty of the biotic community»[24].

A few years later, James Lovelock went some way towards responding – though not explicitly – to Leopold's call proposing, from the stances of ecology, the Gaia hypothesis: the Earth biosphere, atmosphere, oceans and soils compose Gaia, a complex entity – almost an organism – whose «homeostatic feedback system» functions thanks to the interaction of all living and non-living matters. Gaia self-regulates itself to maintain the conditions (acidity of the oceans, levels of oxygen and carbon dioxide in the air, temperature, etc.) necessary for life to continue. As if it were «the largest living creature on Earth»[25], Gaia acts as an *almost* intelligent being that maintains the optimal physical and chemical conditions for life to continue[26]. Lovelock recognizes that Gaia's destiny is precariously placed due to the growing number of humans and of their crops and livestock that now occupy a substantial portion of its total biomass[27] and calls for a shift of consciousness of human actions.

In the same vein, indigenous peoples' environmental worldviews can – in very sketched terms – be described as ecocentric[28], being based on the idea of interconnection between human, animal, floral and abiotic elements of ecosystems, where humankind is an integral part of nature. Many are shown to share cosmocentric worldviews based on the assumption that everything in nature is interconnected and interdependent[29]. Everything in nature is worth respect and exploitation of

[20] Leopold 1949, 240.

[21] DesJardins 2013, 152 and 163.

[22] Leopold 1949, 247.

[23] Leopold 1949, 246.

[24] Alike it is for the recognition of human dignity and rights that builds on the presupposition of a norm that prescribes that *humans are owned respect* or *humans are holders of dignity and it shall be protected* or *human beings hold human rights, regardless of their justification* (see Jacques Maritain, cited by Beitz 2009, 21, reporting a remark made during the negotiations of the UN Universal Declaration on Human Rights «we agree about the rights but on condition that no one asks us why»).

[25] Lovelock 1979, 31.

[26] «Each species to a greater or lesser degree modifies its environment to optimize its reproduction rate. Gaia follows from this by being the sum total of all of these individual modifications and by the fact that all species are connected ...» (Lovelock 1979, 120). However, Lovelock does not fully embrace the thesis according to which Gaia exists and is an intelligent being. He notes that she «is not alive as an animal, able to reproduce itself», and in the final pages he writes «*If* Gaia exists, then she is without doubt intelligent in this *limited* sense at the least» (138, emphasis added).

[27] Lovelock 1979, 120 and 123.

[28] This description of indigenous peoples is partial, and it simplifies and homogenizes complex cosmologies and worldviews of very diverse indigenous peoples. The construction of indigenous peoples as ontological conservationists needs to be treated with care to avoid falling for the ecologically noble savage myth (Redford 1991; Ellingson 2001). The ecologically noble savage myth, as all romanticizing, is a naive illustration of indigenous peoples as intrinsically ecological that may give little help to indigenous peoples and conservation movements weakening the understanding of the nuances and dynamics of reality.

[29] Swiderska et al. 2009

natural resources is regulated by customary laws whose enforcement is overseen by Spirits or Gods[30]. Their ethical underpinnings often comprehend different forms of respect and *stewardship* for the Earth. The term stewardship – as well as *guardianship* and *custodianship* – is in fact widely used in literature concerning the relationship of indigenous peoples with the environment. This relationship, rather than being based on private property claims, commodifiable and alienable lands and goods[31], is based on fiduciary rights, care, and responsibilities that build on a genealogy of relatedness, affiliation, and non-separateness between the human and non-human[32], and according to which the Gods/spirits reside in and are part of the natural world.

As Callicott affirms, the construction of a new environmental ethic drawn from the worldviews of indigenous peoples «represents an important and essential first step in the future movement of human material cultures toward a more symbiotic relationship, however incomplete and imperfect, with the natural environment»[33]. Such a different understanding of *stewardship* may also be interpreted from certain stances of the Judeo-Christian tradition, to which Berry – being a member of the Congregation of the Passion of Jesus Christ – was observably very close. According to it the world is «an expression of God's creative purposes, and God is indwelling» in it[34]. In this interpretation, humankind is not only the holder of special rights and privileges towards what God created, but also special responsibilities because they are given the Earth *in trust* and must, therefore, take good care of it[35].

Regardless of their different genealogies and rationales – ethics, ecology, indigenous worldviews, Judeo-Christian tradition – these different understandings of stewardship share the common ground of recognizing intrinsic value to the natural world and holding humankind responsible for *caring* for it, a vision which is at the root of Earth Jurisprudence theories. The principle of care is, in fact, the guiding principle of Earth Jurisprudence which postulates that human powers and abilities shall be turned towards the realization of the wellbeing of the Earth community as a whole[36].

3. *A Theory of Law*

Even though it strongly relies of ethical considerations, Earth Jurisprudence is a theory of law. It is the product of many years of discussions, meetings, writings and proposals, as well as on-the-ground actions and court cases for the recognition of nature's rights, all finding a common commencement in the work of Thomas Berry[37] who discussed the need for a new jurisprudence according to which the whole Earth, not just humans, holds intrinsic value[38]. Berry maintained

[30] The studies have also revealed that the communities are guided by the ethics of reciprocity in exchanges with nature (as much as is taken is given back); equilibrium with nature (society must be in harmony with nature); duality within nature (everything has a complementary opposite and balance must be kept) (SWIDERSKA et al. 2009; see also FOREST PEOPLE PROGRAMME 2011). Further evidence has been provided by an extensive study organized by the IUCN and other supporting organizations on *sacred natural sites* (VERSCHUUREN et al. 2010). The study provides evidence of the relevance of sacred natural sites, mostly attributed to indigenous and local communities, for biodiversity and ecosystems' conservation. A literature review from a hundred different studies from Africa and Asia has shown that sacred meanings attributed either to nature itself or to heroes, structures or histories grounded in the territory, have led to the preservation of reservoirs of biodiversity equally rich, or richer, than close-by protected areas.

[31] BAVIKATTE 2014, 114 and 128.

[32] WHITT et al. 2001.

[33] CALLICOTT 1997, 69.

[34] ATTFIELD 2018, chp. 7.

[35] For a reconstruction of this interpretation of the Judeo-Cristian Traditions see CALLICOT 1994.

[36] MASON 2011, 37.

[37] His main publication on the topic is *The Great Work* (1999).

[38] TUCKER et al. 2019.

that the environmental crisis is the product of a cultural crisis[39] where industrialization, resource exploitation, and globalization are not counteracted by the law, but are instead presented by law itself as means to promote human wellbeing[40]. Anthropocentrism, he claims, led to the creation of laws, rights and legal systems that only consider the needs, interests and will of humankind, and neither incorporate the limits, nor the needs of the Earth[41]. Non-human living entities and non-living ones are treated as resources[42], and most often, as unextinguishable resources generally used to satisfy the desires of their human owners[43].

Berry draws heavily on Leopold's theory to develop his concept of Earth community according to which humankind is part of an interconnected, mutually supporting, community of life in which all parts – living and non-living – are holders of inherent value[44]. Much like Leopold's desire to change human psychology through the study of ecology, Berry[45] develops and proposes a *new story* of the Earth and of its co-evolution with the human species as the «basic framework for education» to undertake a «deep cultural therapy»[46] to foster a paradigm shift in Western thinking, culture and actions. A paradigm shift that should lead to the abandonment the old anthropocentric telling of the story of the Earth. This telling, Berry claims, developed during the third, and current, period of human history[47]. During the first, the tribal-shamanic one, the universe was incomprehensible and mysterious; in the second – the religious cultural one – human culture, theologies, and social structures evolved; and in the third – the scientific-technological one – «the magic word "progress"»[48] transformed the relationship of power between humans and the natural world.

> «Our secular, rational, industrial society with its amazing scientific insight and technological skill has established the first radically anthropocentric society and has thereby broken the primary law of the universe, the law of the integrity of the universe, the law that every component member of the universe should be integral with every other member of the universe and that the primary norm of reality and of value is the universe community itself in its various forms of expression, especially as realized on the plan»[49].

Just as the environmental philosopher Hans Jonas called for the shift towards a new ethic of responsibility[50], and far before the advent of narrative of the entrance in the Anthropocene[51], Berry called for a passage to an ecological – *Ecozoic*[52] – era in which humans recognize being part of

[39] BURDON 2011, 152.
[40] BERRY 2006, 108.
[41] BURDON 2011, 152.
[42] MASON 2011, 36.
[43] BURDON 2011, 154.
[44] BERRY 1994, cited in BURDON 2015, 47 and 60.
[45] SWIMME, BERRY 1992; BERRY 1987.
[46] BERRY 2006, 22, 17.
[47] BURDON 2015, 70.
[48] BERRY 1987, 206.
[49] BERRY 1987, 205.
[50] JONAS 1979.
[51] It was proposed in 2000 by the Noble laureate Paul Crutzen during a conference (ZALASIEWICZ 2017, 118). The formal proposal to use the term to describe a new geological era was then launched in CRUTZEN, STOERMER 2000.
[52] BERRY 1981, cited in BURDON 2015, 70; BERRY 2006, 19 and 43. It is not clear whether for Berry the movement towards the Ecozoic era and out of the Cenozoic era *is happening* or *should* happen. On page 43 (2006) Berry writes that the current ecological crisis is of such a magnitude that we are terminating our presence in the Cenozoic and entering in the Ecozoic. On page 19 (BERRY 2006) instead, he writes that there exist at the moment the energy necessary to move to the Ecozoic era, but that such time and energy for action is passing – as if this passage could be lost if the right path is not undertaken.

The Cenozoic era is divided in three into three periods, the current being the Quaternary. The Quaternary is divided into epochs: the Pleistocene, the Holocene and, if validated, the Anthropocene. Berry's proposal, for as for-

a greater process of co-evolution together with the other members of the Earth community[53]. According to Berry, through the study and understanding of ecology «the supreme subversive science»[54] humans will understand that:

> «survival is possible only within the Earth system itself, in the integrity of its functioning within the genetic codings of the biosphere, the physical codings of Earth process and within the universe whose vast codings enable the universe to continue as an emergent creative reality»[55].

Berry's vision emphasizes the reciprocal need of all components of the Earth: no species nor individual nourishes by itself, without entering in relationship with other living and non-living entities[56]. Each of them is a subject capable of having rights, not an object to be exploited[57]. In order to accomplish a transformation compatible with this vision, Berry claims that a new «interspecies jurisprudence is needed»[58]: Earth Jurisprudence[59]. Current legal theory is «fundamentally human centered» and «directed toward maintaining hierarchical structures for the protection of property and economic growth»[60]. The goal of Earth Jurisprudence is to understand what the real content of the law is. Its aim may be summarized as follows:

> «for the vast majority of western history, our law has reflected an anthropocentric human-Earth relationship. How can law as an evolving social institution, shift to reflect the modern understanding that human beings are interconnected and dependent upon a comprehensive Earth Community?»[61].

For Berry, legal theorists and jurists should take in their hands the destiny of the Earth, refuting to abide to economic interests and creating a new legal theory. Modern States, Berry notes, are hard to change because they do not recognize any authority above them – «neither in heaven nor on Earth»[62] – and rely solely on humanmade law, principles and rights. Earth Jurisprudence, instead, aims at fostering change advocating that the source of the new law should not be solely human[63]. Positive and orally based human law should derive from the Great Law «which represents the principle of Earth community» and should be understood by looking at the concept of ecological integrity[64]. The Great Law is, in other words, to be read from Nature: «[b]y recognizing that Nature is the source of law, humanity's primary responsibility is to learn how to read her law, her language»[65]. As such, humans need to re-awaken their ability to listen to nature and halt

ward-looking as it was first proposed in the '80s, is not a scientific proposal unlike Cruzen's one. The fact that he proposes a change in era, rather than epoch, demonstrates the little knowledge he had of how these time periods are elaborated and established. However, his aim was far from being related to the dating of rocks and detriments, and much more focused on the need to make an "epochal" turn in human relationship with the Earth.

53 BURDON 2015, 68-73.

54 BERRY 1987, 212.

55 BERRY 1987, 212.

56 BERRY 2006, 150.

57 BERRY 2006, 149 f.

58 BERRY 2006, 20.

59 Berry's accounts of Earth Jurisprudence are quite broad and scattered in different writings (BURDON 2015, 79). The brief reconstruction here proposed benefits from the interpretations of Burdon and other authors. Cullinan, who extensively wrote on Earth Jurisprudence, is partially kept separate from the reconstruction of Berry's theory because he often deviated from it, developing his own theory.

60 BURDON 2015, 5.

61 BURDON 2011, 158.

62 BERRY 2006, 112.

63 CULLINAN 2002, 63.

64 BURDON 2015, 79.

65 HOSKEN 2011, 27.

their law-making and simply «become aware of it»[66]. The ability of the Western world to read the law has atrophied because it lost its connection with the land, the territory, the proximity of life[67]. Giving that such connection is most often broken in the Western world[68], Cullinan and Berry suggest looking at science as «the path to wisdom»[69], starting from the understanding of the principles and laws that describe the functioning of the natural world – from the force of gravity to the evolution of species[70]. Knowing and understanding the law of nature is necessary to comprehend the consequences of human actions and attune them to the natural world in order to guide humans towards a mutually enhancing relationship with nature: once such «intimate communion» is rebuilt «it becomes impossible to act in ways that are actively harmful to nature»[71].

According to Burdon – who draws from Cullinan – the role of such a hierarchically superior Great Law is to provide a moral justification for human law to be binding. If human law deviates from the principles of the Great Law, humankind is justified in not abiding to it. Of course, the Great Law does not cover all human activities and relationships[72], but only those relevant for the common good of the Earth community and for the rights of each of its living and non-living components (for example environmental law, construction law, agricultural law, and laws on the extraction of natural resources). All other laws are untouched by the Great Law and left for humans to deal with.

The Great Law[73], whose source is in the Universe itself[74], provides ten *principles for jurisprudence revision* that require human law to recognize the rights of geological and biological components of the Earth. They are all to be treated as subjects, not objects, holders of the right to be, the right to inhabit, and the right to fulfil ones' role in the Earth community. All of these rights qualitatively differentiate one from the other: rivers have river rights, birds have bird rights, and humans have human rights[75]. And, most importantly, not all human rights automatically trump the rights of other species[76]. However, Berry does recognize a special role of humans, recognizing their «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 need by human emotions for personal fulfilment»[77].

Earth Jurisprudence suggests the need to look at the law of indigenous peoples, commonly described as not deriving from their leaders (at least not perceived as such): they do not create the law, they simply interpret it from nature, the Gods or the Sprits, and supervise its application in their communities. Their law, as the law of most communities in the past[78], is built upon their understanding of an intrinsic dependence on nature, which strives to regulate human behavior, thus, making it compatible with the requirements of nature and avoiding self-destructive attitudes and practices.

Cullinan complements Berry's theory with the ideas of Wild Law and Great Jurisprudence. In his

66 HOSKEN 2011, 26.
67 HOSKEN 2011, 26.
68 MASON 2011, 41.
69 BERRY 2006, 125.
70 CULLINAN 2002, 69.
71 MASON 2011, 40.
72 BURDON 2015, 91.
73 BERRY 2006, in 149 f.
74 BERRY 1999, 161 ff.
75 For an analysis of the normative positions contained in these rights and for a critique on the opportunity to consider as their rights holder non-sentient animals and non-animal entities, see ŽGUR 2020 in this special issue of the journal.
76 BERRY 2006, 44. Berry brings the example of property rights not trumping nature rights (BERRY 2006). Property is, however, not unanimously recognized to be a human right meant as a fundamental interest protected by special tools.
77 Principle 10, BERRY 2006, 150.
78 CULLINAN 2002, 63.

hierarchical order, Great Jurisprudence lays atop, comprehending all rules and principles that govern the universe, from gravity to the rules of thermodynamics. By looking at nature through the eyes of reason and empathy[79], human comprehension of such rules means finding the most suitable ways to behave in accordance with them. For Cullinan, Great Jurisprudence is about nature and the universe, while its application to humans and their societies takes the form of Earth Jurisprudence, the second layer of his hierarchy. Earth Jurisprudence may be a system of laws, but it may equally govern the use of seeds traditionally selected by a community, or concretize in the rites of passage immerged in sacred natural sites and songs and verses that follow the rhythm of seasons. Earth Jurisprudence comprises the very diverse governance systems and cultural practices of human societies around the world that respect the rules and principles of Great Jurisprudence. In other words, the heterogeneous customs, practices, legal, cultural and religious systems that do not harm, constrain, or jeopardise ecosystems. To explain the Earth Jurisprudence concept – «a species-specific elaboration of the Great Jurisprudence»[80] – Cullinan fleshes out the difference between a seed carefully selected over centuries to produce an edible plant, and rapidly genetically engineered seeds that are fast-growing but sterile[81]. While the first is a human enterprise that modifies the Earth community abiding to the principles of Great Jurisprudence, the second is an alteration that does not respect the «constraints of a particular social and ecological system»[82] and privileges short term economic gains.

A society that organizes itself around the principles of Earth Jurisprudence may also, according to Cullinan, develop an appropriate Wild Law, i.e. a non-anthropocentric and Earth-centered human law that not only provides for the interests of humans – and their institutions, groups, organizations, enterprises – but also and foremost for the Earth as a whole[83]. Wild Law promotes a form of governance able to express Earth Jurisprudence, whose content is such that it fosters human relationships with nature and protects the freedom of nature and of the whole Earth community to self-regulate and continue playing their role in the evolution of the Planet[84]. Last but not least in the hierarchy, Earth governance is «government of the people, by the people, that is *for the Earth*»[85]. It is best realized by adopting a bioregional approach that orients decision making towards a specific ecosystem or bioregional so to be truly fitting with the special characteristics of the place and communities that live there[86]. Such genuine Earth governance should be guided by Wild Laws that respect and abide to what Cullinan considers to be the principles of Earth Jurisprudence that shadow and further develop Berry's ten *principles for jurisprudence revision*[87]. Cullinan's principles may be summarized as the following[88]:

- The Universe is the primary law giver, not human legal systems. Consequently, it is also the supreme arbiter of right and wrong.
- Human Jurisprudence, as well as Earth Jurisprudence, are embedded in the Great Jurisprudence. Hence, legal, as well as political, economic and social systems must be consistent with the principles that constitute it and must be able to promote human behavior that protects the health and integrity of the Earth community. Human law that infringes these principles

[79] CULLINAN 2011, 76-79.
[80] CULLINAN 2011, 128.
[81] CULLILAN 2011, 129.
[82] CULLILAN 2011, 129.
[83] MASON 2011, 41.
[84] CULLINAN 2002, 10.
[85] CULLINAN 2002, 138.
[86] CULLINAN 2011, 194. This approach rediscovers the role of indigenous peoples and local communities as holders of *biocultural diversity*, meant as the vast knowledge about the ecosystems of their lands and the centrality of the environment in their practices and beliefs (see WILSON 2016).
[87] BERRY 2006, in 149 f.
[88] CULLINAN 2002, 84 ff; CULLINAN 2011.

is unlawful and illegitimate[89].
- Law must be adaptable to the different conditions of the places where it is applied. Uniformity must not be imposed where differences lay.
- The Earth community and all the beings that constitute it have must be recognized as subjects before the law, holders of fundamental rights.
- The rights of each being are limited by the rights of other beings to the extent necessary to maintain the integrity, stability and health of their communities.
- A balance needs to be maintained between the rights of humans and of other beings on the basis of what is best for the Earth as a whole. The wellbeing of single members of the Earth community (humans as well) cannot prevail over the wellbeing of the Earth community as a whole[90]. Human rights, hence, do not always trump the rights of other members of the Earth Community to fulfil their roles: «[t]hey are limited by the "rights" of other members of the Community». This principle allows for the long-term survival of humankind[91] as a species, whose action would otherwise destroy the very grounds of their subsistence and wellbeing.
- If harm is inflicted on the Earth Community or part of it, justice must be sought through restorative, rather than solely punishing means[92].

4. *Just, another, natural law theory?*

Earth Jurisprudence appears as an innovative, groundbreaking, theory. Its proponents treat current content and form of Western law as one of the causes of the current environmental crisis but, nevertheless, do not abandon the aspiration to use it as one of the instruments to repair such relationship. In order to repair such a relationship, Earth Jurisprudence enters the land of critical legal theory[93], seeking to bring back into the discussion all those that perceive the environment as holder of intrinsic value. It tries to open the doors of jurisprudence to non-anthropocentric thinkers, be they philosophers, indigenous peoples, minorities, and whoever else. In order to do so, it proposes a shift from purely humanmade law to a law that must abide to overarching natural principles meant to guide humankind to a harmonic relationship with nature.

However, the idea that humanmade law is true, legally binding law, insofar as it derives its content from natural, non-humanmade law, is not really new to, nor groundbreaking for, legal theory. Natural law theories have long inhabited, and still inhabit, the texts of scholars from those of ancient Greeks to Thomas Aquinas, John Finnis and many more[94]. What Thomas Berry and others sketch as the characteristics of their jurisprudence are near enough to what, for example, Finnis describes as the tradition of natural law[95]. Just as Great law or Wild Law, in order to be morally binding, must comply with the *principles for jurisprudence revision* (Berry) or with Earth Jurisprudence (Cullinan), for Finnis «the act of "positing" law (whether judicially or legislatively or otherwise) is an act which can and should be guided by "moral" principles and rules»[96], and the respect of these moral principles and rules (that concretize in the respect of the Rule of Law and human rights[97]) is

[89] Cullinan 2002, 131.
[90] Cullinan 2002, 111.
[91] Cullinan 2002, 111.
[92] Cullinan 2002, 133.
[93] Burdon 2015, 80. Critical legal theorists have widely advocated against the exclusion of many people from the making of the law and of legal theory itself. As Burdon notes, the classic lawyer or legal philosophers, is white, male and upper class, leaving aside all *others*.
[94] For a general description see Finnis 2020a; Finnis 2020b.
[95] Burdon 2011, 158.
[96] Finnis 2011, 290.
[97] Finnis 2011, 23.

necessary to explain and justify the obligatory force of positive law[98].

The originality of Earth Jurisprudence, hence, does not rest in the development of a new theory of law imagining the existence of natural law. It, instead, lays in the content that natural law is described to have. While for Finnis what distinguishes between «ways of acting that are morally right or morally wrong»[99] concerns human flourishing and good[100]; for Earth Jurisprudence what is to be protected against the whims and biases of humanmade law are not *only* humankind's basic interests, nor those of any specification of humankind – such as women, children, indigenous peoples, disabled. It is, *also*, the natural world, the Earth in its entirety, the Earth community. It could, of course, be argued that in order to achieve human flourishing and good, the conservation of the environment is a necessary enterprise. However, Earth Jurisprudence embraces an ecocentric ethic approach according to which the wellbeing of the Earth is a value that shall be pursued *per se*, because the Earth and all its living and non-living inhabitants are holders of intrinsic value. It is, hence, an enterprise that humanmade law should pursue regardless of its use for the protection of human basic goods.

Another innovative aspect of Earth Jurisprudence *vis à vis* recent natural law theories, such as Finnis', may be found in the origins of the moral norms and principles compiling natural law. For Finnis, «those moral norms are a matter of objective reasonableness, not of whim, convention, or mere "decision"»[101]. They hold good as mathematical principles do[102], and derive from the «pre-moral principles of practical reasonableness, and not from any facts, whether metaphysical or otherwise [and] make no reference at all to human nature, but only to human good»[103]. Berry instead, maybe naively, does not attempt to circumnavigate the naturalistic fallacy making appeal to human reason and good. He embraces the facts and rules (hence the *is*) of nature and the principles that govern it and looks to them – as Cullinan looks at the Great Jurisprudence – as a guide to conduct humans in what he calls the Ecozoic era. Science is «the path to wisdom»[104] and the *principles for jurisprudence revision* derive from the universe that is treated as the source of the rights of geological and biological beings of the Earth[105]. For Berry, these principles are to be read by – not derived from – human practical reasonableness and they are to be accepted, as moral principles, because they tell us what nature needs to continue its existence. In other words, through the development of the *new story* of the Earth[106], Berry fully shares Leopold's idea according to which humankind should undertake an intellectual[107] and cultural[108] change such as that the «integrity, stability and beauty of the biotic community» becomes a self-evident good, without any need to deduce it from other moral principles.

Even though we may be familiar with the way Earth Jurisprudence conceives the law and its origins, its proposals may still appear as too radical a paradigm shift, or as a path too far from Western law, jurisprudence and culture to be reasonably walked by States and endorsed by the majority of Western scholars. As Berry himself recognizes, «since the Enlightenment period

[98] FINNIS 2011, 23.
[99] FINNIS 2011, 23.
[100] FINNIS 2011, 106. The basic goods are practical reflection, life, knowledge, play, aesthetic experience, sociability, practical reasonableness and religion.
[101] FINNIS 2011, 290.
[102] FINNIS 2011, 24.
[103] FINNIS 2011, 34 and 36. How these principles are derived remains, to say the least, blurred. What exactly does it mean that «When discerning what is good, to be pursued (*prosequendum*), intelligence is operating in a different way, yielding a different logic, from when it is discerning what is the case (historically, scientifically, or metaphysically)»?
[104] BERRY 2006, 125.
[105] BERRY 1999, 161 ff.
[106] BERRY 2006, 22, 17.
[107] LEOPOLD 1949, 246.
[108] BERRY 2006, 17.

[...] the independent nation, with the people as the supreme rulers over themselves, recognize no authority beyond itself, neither in heaven nor on Earth, neither in the realm of nature nor in the realms of humans»[109]. In fact, Western countries shifted from ancient to modern ways of conceiving the law[110]. Under the ancient vision, where nature and the world were unchangeable products of a superior being, law was revelation, a manifestation of divine wisdom. Law was natural and as such, it was uncontestable and un-modifiable. With the coming of the modern age and technological scientism, humankind began to consider itself as having power over nature and being independent from divinity. Law ceased to be a revelation and it became the product of human authority and will, and as such, it could be contested and modified. Once this road is walked it is difficult for modern States and western scholars to walk back and accept, once again, to abide to a non-human made law, uncontestable and unmodifiable *because it is what nature prescribes*. It is difficult because it is hard to believe that natural law exists, out there, somewhere in nature. It is equally difficult to accept the idea of having to *receive* the law from someone (who? the scientist, the shaman, the priest, the philosopher?) able to read the real, true law from nature, and, consequently, abandoning the idea that the law is something that can be modified to reflect the diversity of human cultures, desires, or even whims. In other words, it hard to surrender oneself, once again, to the luxury of natural law theories.

However, Earth Jurisprudence still has a lot to teach us, if seen from the right perspective. It could be an invitation to create a new relationship between law – environmental law in particular – and science that allows the latter to guide the law towards more environmentally conscious ways of guiding human behavior. Moreover, Earth Jurisprudence may also be conceived, as Burdon suggests, as a *social movement* «engaged in a grassroots collaborative struggle aimed at shifting laws towards an ecological foundation»[111]. As such, it may help to incorporate and provide a background for many existing achievements of environmental movements or environmentally-related ones fighting against environmental detrimental activities, for the creation of new environmental laws and for the promotion of new understandings of rights – may they be the environmentally related human rights, or, more radically, the rights of nature[112]. National courts decisions as the 2017 *Lalit Miglani v. State of Uttarakhand & others*[113] and the *Atrato River case* at the Colombian Supreme Court[114]; regional courts decisions such as the 2020 *Indigenous Community Members of the Lhaka Honhat (Our Land) Association v. Argentina* of the InterAmerican Court of Human Rights[115], the *Endorois Welfare Council v. Kenya* case of the African Court on Human and People's Rights; and national laws such as the *Te Awa Tupua* (*Whanganui River Claims Settlement*) Act in New Zealand[116] and the Victorian Parliament *Yarra River Protection* (*Wilip-gin Birrarung murron*) Act, the Bolivian *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien*, and the Ecuadorian Constitution[117] symbolize the existence of a social movement directed towards the realization of many of the principles Earth Jurisprudence advocates for.

[109] BERRY 2006, 111 f.

[110] LOMBARDI VALLAURI 1981, 236. Lombardi Vallauri gives an ideal description of a possible way of seeing the transition from natural law to positive law theories at the end of the Middle Ages and at the beginning of what he calls the modern technological scientism (or materialism).

[111] BURDON 2015, 73-78.

[112] As the emblematic article, see STONE 1972. In this special issue of Diritto & questioni pubbliche: MÍGUEZ NÚÑEZ, CIUFFOLETTI, ŽGUR, and PERRA.

[113] ECKSTEIN et al. 2019.

[114] CASTILLO GALVIS et al. 2019; VILLAVICENCIO CALZADILLA 2019; SAJEVA 2021 (forthcoming).

[115] See https://www.escr-net.org/caselaw/2020/indigenous-community-members-lhaka-honhat-our-land-association-vs-argentina.

[116] On the comparison between the New Zealand, Colombia, and Indian cases, see KAUFFMAN, MARTIN 2018. See also STUDLEY, BLEISCH 2018; SAJEVA 2018, chp 5.

[117] KOTZÉ, CALZADILLA VILLAVICENCIO 2017; VILLAVICENCIO CALZADILLA, KOTZÉ 2018; SAJEVA 2017.

Unsurprisingly, many of these achievements are the product of local communities and indigenous peoples struggles that have taken the form of grass roots organizations, collective actions, protests and strikes. They may or may not refer to natural law, Earth Jurisprudence or Pacha mama; they may or may not have ways of conceiving the law closer to natural law scholars; but what matters is that they are encountering organizations, citizens and even States ready to listen more to the content, rather than the form, of their revindications and move towards actions, laws, polities, court decisions and institutional arrangements that treat the Earth as something to be protected from the destructive force of humankind.

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