Earth Jurisprudence: new paths ahead

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«E in questa pianura, fin dove si perde, crescevano gli alberi e tutto era verde.
Cadeva la pioggia, segnavano i soli, il ritmo dell'uomo e delle stagioni.
Il bimbo ristette, lo sguardo era triste, e gli occhi guardavano cose mai viste
e poi disse al vecchio con voce sognante: "Mi piaccion le fiabe, raccontane altre!"»
Il Vecchio e il bambino, Francesco Guccini, 1972

On the 10th of December 2018, for the 70th anniversary of the UN Universal Declaration on Human Rights, the *Earth Trusteeship Initiative* – a civil society organization led by Klaus Bosselmann, the chair of the IUCN World Commission on Environmental Law Ethics Specialist Groups – launched *The Hague Principles for a Universal Declaration on Responsibilities for Human Rights and Earth Trusteeship*[1]. The following list of principles are one of the many examples of the development and endorsement of a new way of conceiving the human-environment relationship and how it intertwines with the evolution of law:

1.1. All human beings, individually and collectively, share responsibility to protect Nature, of which we are an integral part, the integrity of Earth's ecological systems and Earth as a whole, home of all living beings.
1.2. Each state individually, and the international community of states collectively, acknowledge that they have, and share, responsibilities for Nature, in cooperation and in alliance with their citizens as equal trustees of Earth and the integrity of Earth's ecological systems.
2.1. Human rights are grounded in our membership within the community of life, the Earth community, which qualifies what rights we are called on to honor and what responsibilities we have for each other and for Nature.
2.2. Responsibilities for Nature, the Earth community and rights of Nature are grounded in the intrinsic values of nature and of all living beings.
3.1. All human beings are responsible for the protection of human rights and for affirming human rights in their ways of thinking and acting.
3.2. Each state has a prime responsibility for the protection of human rights as a trustee of its citizens and all human beings.

The Declaration recognizes the impressive advancements made by human rights law but underlines the paramount importance to complement human rights with a further recognition: the recognition of the rights of nature. What is evident from reading these concise but powerful provisions is the appreciation of the intrinsic value of nature, as the ethical cornerstone for the construction of a new law and ethic of individual and collective responsibility towards nature.

These principles and ethical foundations find a common background and elaboration in the theories of Earth Jurisprudence, a theory of law first proposed by Thomas Berry[2] and later developed by Cormac Cullinan and many other scholars «based on the idea that humans are only one part of a wider community of beings and that the welfare of each member of that

* 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] See www.earthtrusteeship.world (accessed December 2020).

[2] BERRY 1999; 2006.

community is dependent on the welfare of the Earth as a whole»[3]. From the realization of such interdependence, the recognition of rights to natural entities appears as a possible first step towards the realization of legal and governance systems more appropriate than present ones to preserve human and non-human life on Earth. In order to promote their realization, Berry elaborates a set of *principles for jurisprudence revision*[4]. These principles claim for the recognition of the fact that the rights of both humans and the natural world originate from the universe itself, and that each holds species-specific and mutually limiting rights.

This monographical section of the journal Diritto & questioni pubbliche – hosting contributions by Rodrigo Míguez Núñez, Livio Perra, Sofia Ciuffoletti, Matija Žgur, Giada Giacomini, and myself – aims at introducing the theory of Earth Jurisprudence as «one of the new kids on the block as far as rights theories are concerned» (ŽGUR 2020). «It is a holistic philosophical undertaking that argues for a radically new ethic and a transformation of our political institutions, public policies, legal regulation, as well as collective and individual practices» (ŽGUR 2020). It proposes a return to natural law theories grounded on the recognition of human rights as well the rights of non-human natural entities (SAJEVA 2020). Whether or not walking back to natural law theories is the right path ahead to justify the recognition of rights to non-human entities, this process indeed has so far concretized in international and national court decisions, laws and even constitutions. Many are in fact the states that are going through a process of *legal anthropomorphization* (PERRA 2020) and have recognized certain rights to nature or natural entities, the most famous being the 2008 Ecuadorian Constitution which enhances the common recognition of the need to protect the environment by recognizing it as a right holder. The Constitutional Preamble announces the creation of «a new form of public coexistence, in diversity and in harmony with nature, to achieve *buen vivir*, *sumak kawsay*». *Buen vivir* is proposed as the indigenous alternative to economic development[5] based on the interdependency between humans and Pacha Mama[6], which is recognized «the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes» (art. 71).

Many states and international organizations have followed in Ecuador's footsteps. In 2009 the United Nations proclaimed the 22nd of April as the *International Mother Earth Day* and, in that same year, the General Assembly launched the *Harmony with Nature* Dialogues[7], «a network of state and non-state actors, academics and scientists who believe that climate change, biodiversity loss, desertification, and the disruption of natural cycles and ecosystems are provoked by our disregard for Nature and the integrity of life-supporting processes» (GIACOMINI 2020). This process of yearly consultation has helped to define and leverage the ideas, principles and demand for change that Earth Jurisprudence conveys.

In fact, following the path of *International Mather Earth Day*, on the 22nd of April 2010, 35.000 people joined the *World People's Conference on Climate Change and the Rights of Mother Earth*[8], in Cochabamba, Bolivia, to discuss and approve the *Universal Declaration of the Rights of Mother Earth*. The Declaration clearly draws on Berry's principles for jurisprudence revision. It proclaims that «just as human beings have human rights, all other beings also have rights which are specific to their species or kind and appropriate for their role and function within the communities within which they exist» (art. 1.6). Interestingly, and showing the existence of a common movement that engages civil society, international organizations, and states, the report of the last dialogue of *Harmony with Nature* called member states to «engage in a formal dialogue

[3] CULLINAN 2011, 13.
[4] BERRY 2006, 149.
[5] BALDIN 2014, 29.
[6] BENALCÀZAR ALARCÒN 2009, 325 f.
[7] See www.harmonywithnatureun.org (accessed December 2020).
[8] Available at https://pwccc.wordpress.com/programa/ (accessed December 2020).

among academics, non-governmental organizations and civil society organizations regarding the drafting of a universal declaration of the rights of Mother Earth reflecting the growing worldwide commitment and calls to protecting Earth and future generations of all species»[9]. In December of the same year, Bolivia adopted the *Ley de Derechos de la Madre Tierra*, calling for the respect and protection of the rights of Mother Earth and, in 2012, adopted the *Ley marco de la Madre Tierra y desarrollo integral para vivir bien* institutionalizing the concept of *integral development* as that form of development to be pursued in harmony with nature.

As PERRA (2020) notes, these advancements do not *come out of the blue*. They are not a «fanciful construction of lawmakers and judges»[10]. They are a tentative adaptation of Western instruments to incorporate nature's interest in response to the claims of indigenous peoples and local communities for the recognition of their worldviews and needs. In 2016, the Atrato river was recognized as a legal person by the Colombian Supreme Court of Justice and the indigenous peoples and local communities living in the region were nominated to be its guardians[11] (PERRA 2020). In 2017, on the other side of the Pacific Ocean, New Zealand adopted the *Te Awa Tupua (Whanganui River Claims Settlement) Act* that granted legal personhood to the Whanganui River and elected the Maori iwi (communities) living along the river as its guardians[12]. In 2019, the Constitutional Court of Guatemala, acknowledging the spiritual and cultural relationship between indigenous peoples and water, recognized the water itself as a living entity[13].

MÍGUEZ NÚÑEZ shows the historical and theoretical background of the never-ending evolution of nature and natural entities from objects to legal subjects granted with rights. As he explains, «to extend or reduce the cluster of rights holders, or the very definition of person, is not a neutral enterprise. Changes in the recognition of subjectivity are determined by which are the values that a legal system strives to protect»[14]. In Ecuador, Bolivia, Colombia, India, New Zealand, and Guatemala they are the product of the encounter of indigenous cultures and the law of the states where they reside (PERRA 2020). In other cases, they are the evolution of a scientific understanding of the need to change the relationship with nature and of the evolution of Western environmental ethics (SAJEVA 2020). These elements are all present in the theory of Earth Jurisprudence which proposes a rediscovery of indigenous peoples' worldviews, draws on advancements in ecology, and builds on ecocentric ethic theories.

However, changes in «who can bring legal actions in front of a judge to turn their private troubles into public matters» (CIUFFOLETTI 2020) come with repercussions for the subjects and for the way rights themselves are conceived. The recognition, or denial, of subjectivity as capacity to hold rights is, in fact, very often the result of political decisions aimed at including or excluding not simply animals, plants and rivers, but even human beings (MÍGUEZ NÚÑEZ 2020). These political decisions may go in one direction or another, depending on social and ethical grounds. It is still an on-going process whose complexity does not allow us to know how it will end.

Moreover, the political and moral issues behind the *adventures of the subject*[15] are accompanied by technical and legal challenges. As ŽGUR (2020) explains, especially when it concerns non-sentient animals and non-animal natural entities, the issues that arise from the application of some of the *revisions* of Earth Jurisprudence are still copious. Is the idea of nature's rights

[9] *Harmony with nature*, report of the Secretary-General, General Assembly, A/74/236, available at https://undocs.org/en/A/74/236 (accessed December 2020).

[10] My translation.

[11] Court opinion T-622, see CASTILLO GALVIS et al. 2019

[12] In the same year, recognition of legal personhood arrived also for the Ganga and Yamuna Rivers and all their tributaries in India, through words of the High Court of Uttarakhand at Nainital, and the year after to the Colombian Amazon river thanks to a decision of the Colombian Supreme Court.

[13] For the Court decision see http://files.harmonywithnatureun.org/uploads/upload958.pdf (accessed December 2020).

[14] My translation.

[15] MÍGUEZ NÚÑEZ 2018.

compatible with either the choice theory or the interest theory of rights? Or do they have to bend their concepts and assumptions to the extent of risking to lose their *point*?

Regardless of whether recognizing nature's rights is the best way to proceed or not, as CIUFFOLETTI (2020) notes, «a gap has opened up between written law and effective protection [...so] the role of domestic, international and supranational courts [...] appears, therefore, essential to fill the gap of effectiveness and implementation of rights». If systems of remedies are lacking, legal entitlements – on whom or whatever behalf – are meaningless because their rights, rather than being «practical and effective» simply remain «theoretical and illusory» (CIUFFOLETTI 2020). In her article, CIUFFOLETTI (2020) looks at how the issue of *locus standi* is faced and managed by national and transnational courts and how it reflects on the «challenges and potentialities of the green litigation from the perspective of the effectiveness of rights and remedies». Loosening the rigidity of *locus standi* may in fact be a practical necessity *vis à vis* the need to upturn the protection of nature and natural entities, as it is sometimes a necessity also to give protection to the most marginalized sectors of society (where victims may be in a condition of impossibility to claim for the protection of their fundamental rights).

So yes, indeed, «it's all about us, silly» (ŽGUR 2020). The subjectivation of nature is, as MÍGUEZ NÚÑEZ (2020) rightly says, one more route towards anthropomorphizing nature. The Anthropocene beings and ends with human beings, and any invention, decision, and change will inevitably host at least a hint of anthropocentrism. But maybe, as we cannot escape being ourselves, we shall embrace and take out the most out of human attempts to deviate the course of things and try to enter – as Berry hoped – the Ecocene. The theory of Earth Jurisprudence delineates a possible path ahead, drawing our attention on some of the promising initiatives that can be undertaken. We can learn from it, adapt it to the differences of the world and of human culture and law and do our best to make the Anthropocene a better epoch to live in, as humans.

«Someone's got to stop us now, save us from us, Gaia, no one's gonna stop us now.
We thought we ought to walk awhile,
So we left...»
Gaia, James Taylor, 1997

References

BALDIN S. 2014. *I diritti della natura nelle costituzioni di Ecuador e Bolivia*, in «Visioni Latino-Americane», 10, 2014, 29 ff.

BERRY T. 1999. *The Great Work*, Bell Tower.

BERRY T. 2006. *Evening Thoughts: Reflecting on Earth as Sacred Community*, in TUCKER M.E. (ed.), Sierra Club Books.

BENALCÀZAR ALARCÒN P. 2009. *Il buen vivir – sumak kawsay – La construzione di un paradigma per una diversa umanità (Ecuador)*, in Martufi R., Vasapollo L. (eds.), *Futuro Indigeno. Il Futuro Delle Americhe*, Jaca Book, 325 ff.

CASTILLO GALVIS S.H., D'JANON DONADO M.L. AND RAMÍREZ NÁRDIZ A. 2019. *El control de convencionalidad y el diálogo judicial frente al medio ambiente como sujeto de protección y reparación*, in «Revista Mexicana de Derecho Constitucionales», 41, 2019, 397 ff.

CIUFFOLETTI S. 2020. *Have trees got standing? A brief account of* locus standi *doctrines and case law in the environmental litigation on the basis of the principle of effectiveness of rights*, in «Diritto & questioni pubbliche», 2, 2020, 71 ff.

CULLINAN C. 2002. *Wild Law*, Siber Ink.

GIACOMINI G. 2020. *The Interactive Dialogues of* UN Harmony with Nature*: for a paradigmatic shift to Earth-centred governance*, in «Diritto & questioni pubbliche», 2, 2020, 103 ff.

MÍGUEZ NÚÑEZ R. 2018. *Le avventure del soggetto. Contributo teorico-comparativo sulle nuove forme di soggettività giuridica*, Mimesis.

MÍGUEZ NÚÑEZ R. 2020. *Soggettività giuridica e natura. Spunti per una riflessione civilistica*, in «Diritto & questioni pubbliche», 2, 2020, 29 ff.

PERRA L. 2020. *L'antropomorfizzazione giuridica*, in «Diritto & questioni pubbliche», 2, 2020, 47 ff.

SAJEVA G. 2020. *Do we Need Earth Jurisprudence? Looking for Change in New Old Friends*, in «Diritto & questioni pubbliche», 2, 2020, 11 ff.

ŽGUR M. 2020. *All the Earth's legal children. Some sceptical comments about Nature's legal personhood*, in «Diritto & questioni pubbliche», 2, 2020, 87 ff.