Back to the future: building harmony with nature in the European Union by learning from our ancestors*

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1. The oxymoron of "sustainable development"

When I began writing this chapter, the news and social media were just releasing the first reactions of politicians and civil society to Greta Thunberg's speech at the United Nations Climate Action Summit in New York, on 22nd September 2019, just a few months before the COP25 in Santiago de Chile, scheduled between 2nd and 13th December, 2019.

I would like to recall a passage from Greta's speech, because what she said, and in particular the place and the institutional context in which she spoke, are related to the content of this paper. Quoting from Greta's words, addressed to the representatives of all the Nations of the world that were taking part in the summit: «people are suffering, people are dying, entire ecosystems are collapsing, we are at the beginning of a mass extinction and all you can talk about is money and *fairy tales of eternal economic growth*». She has clearly understood the crucial problem: perpetual economic growth, the mantra of capitalism, is blatantly irreconcilable with the defence of nature and the preservation of the earth's eco-

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system in the same state in which humanity as a species has evolved on this planet until now. Scientists have been repeating this easy equation for many decades: advocating never-ending growth on a planet with finite resources can only lead to dramatic, and maybe irreversible changes (at least in the short term) in the earth's ecosystem[2]. Indeed, the International Commission on Stratigraphy (ICS), the largest scientific organisation within the International Union of Geological Sciences (IUGS), has created a working group[3] in order to decide if we are really entering a new geological era, the Anthropocene (McNeill and Engelke 2014), characterised by the fact that a sole species, *homo sapiens*, is now responsible for current climate change.

So, once the "enemy" has been identified, it should be easier to find a way to stop it from destroying life on Earth. And apparently Greta pronounced her "j'accuse" in the most fitting place to tackle planetary issues, that is, in the United Nations headquarters, during a Climate Action Summit. In fact, among the purposes listed in the Charter of the UN, besides those of maintaining international peace and security, there is «To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character» (art. 1, c. 3). This is precisely the point where Greta's purposes coincide with the aims of this paper. First of all, I would like to reflect on the equivocal role played by the UN in this case, both as the causal factor of the problem and the source of possible solutions. In this paragraph, I will briefly describe the ambiguous attitude of the UN towards the relationship between economic growth and the protection of the environment, that is evident when analysing the implementation of the United Nations Environment Programme over the years; I will then concentrate on the description of the most recent efforts that the UN has dedicated to supporting a change in the global epistemological paradigm, through the creation of the Harmony with Nature Programme (HwN) (§ 2); finally, as a contribution to the HwN Programme, I will go back to medieval times in Europe, in order to re-discover some old institutions like "partecipanza" or "collective meadows and fields", currently still existing in some European areas (§ 3); in my conclusions, I will suggest that it is absolutely necessary to combine the old practices of land management, as transmitted by indigenous peoples and ancient rural traditions, with new technologies and scientific knowledge, within a broad ecological perspective (§ 4).

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[2] The scientific literature in support of this assertion is nowadays huge: it can be useful and more practical to read the IPCC Special Reports, periodically released and published at https://www.ipcc.ch/reports/.

[3] The Anthropocene Working Group (AWG), http://quaternary.stratigraphy.org/working-groups/anthropocene/.

In a wonderful book, published some years ago, Ulrich Grober traces the history of both the idea of "sustainability", and the actual word, from the Renaissance in Europe to the present. In doing so, he could not avoid analysing the history of the concept of "development", accidentally coined by President Truman in his 1949 Inaugural Address (Grober 2012: 71).

The concept of "sustainability" was created as a way to describe a best practice in forestry. Quoting from Carlowitz's *Sylvicultura oeconomica*, Grober says: «Economics is an imitative science. It must not go against nature, but must follow it, and this includes the proper husbanding of resources. This means not cutting more wood than the forest can bring forth and support. Carlowitz calls for «a balance between the planting and growth and the harvesting of trees». To ignore the matrix, that is, the regenerative power of nature, will inevitably lead to overexploitation, to depletion» (Grober 2012).

Sustainability is based on the idea that the limit in using a resource corresponds to its capacity for self-regeneration (Grober 2012: 88). Its ecological and conservative dimension is quite clear. The first time this word is used outside the agricultural sphere, to become a keyword in global socio-economic policy, is in the Brundtland Report *Our Common Future*, in 1987. The Report was commissioned by the Secretary-General of the UN for the newly instituted World Commission on Environment and Development (1983). The Report, for the first time, combines the two concepts of "sustainability" and "development", offering the well-known definition: «[…] to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs». The Report recognises that this implies the existence of limits in the exploitation of natural resources, due to the need to respect the natural processes of regeneration and recycling of waste, but adds that «technology and social organisation can be both managed and improved to make way for a new era of economic growth». With these two paragraphs a miracle was performed: the idea of *sustainable economic growth* had been legitimised. The concept was then institutionalised in the so-called Rio Declaration and in the Agenda 21, both documents approved by all UN members gathered at the Earth Summit of Rio de Janeiro, in 1992. Things have not changed since then, as «*sustained* [inclusive and equitable] *economic growth*» was reaffirmed as the main instrument to realise sustainable development, in the UN Declaration "The future we want", the outcome of the Rio+20 UN Conference on Sustainable Development in 2012; and immediately afterwards, «*sustained*, inclusive and sustainable *economic growth*» was inserted as Sustainable Development Goal no. 8 of the new Agenda 2030[4], approved by the General Assembly in 2015.

[4] Resolution adopted by the General Assembly on 25 September 2015, *Transforming our world: the 2030 Agenda for Sustainable Development Declaration*, Point 3, p. 3.

In an article about *Law, Time and Oxymora*, Rostam Neuwirth speaks about sustainable development as an oxymoron, underlining the contradiction between economic growth and the preservation of the environment (Neuwirth 2019; Rist 2014: 174; Kothari *et al*. 2019: 105). He suggests that a possible solution to dissolve the oxymoron in the future, could be to approach the issue from *homo synaestheticus*'s perspective. Synaesthesia is a rhetorical figure where one sense is described in terms of another. The invitation is to create a sensorial relation between humans and non-humans in order to be able to sense the *harmony with nature* that should be at the basis of ecological legal norm, and even the recognition of further categories of subjects of law. Despite the fundamental role that the UNDP has played in the creation and diffusion of the concept of sustainable development as a non-questionable myth, invented by humanity, another UN Programme was implemented in 2009 (as a UN Initiative), based on principles and values similar to Neuwirth's *homo synaestheticus*. This is what next paragraph will talk about.

2. A new approach to understanding environmental problems: the UN Harmony with Nature Programme and the global movement for the recognition of Nature's rights

Between 2008 and 2009 two constitutional events marked a turning point in the history of environmental law. After participatory constituent processes, characterised by the involvement of many sectors of civil society in debates on the contents of the new Constitutions, including indigenous communities and minority groups (Prada Alcoreza 2014), Ecuador and Bolivia constitutionalised the concept of "*buen vivir-sumak kawsay*" and "*vivir bien-suma qamaña*", respectively the Kichwa and Aymara version of an Andean cosmovision, deeply rooted in the idea of living in harmony with nature. "*Sumak kawsay*" literally means "fullness of life" and represents the ideal of good life for many Andean indigenous communities, from the Kichwa in the North, to the Mapuche in the extreme South. It is a communitarian and ecological worldview, which accepts the inter-dependence between all Earth beings and understands their connection with natural cycles and laws. For this cosmovision, living a good life means sharing with the other members of the community, being compassionate, helpful and sympathetic, but also respecting Nature, and defending her capacity to create, nourish and regenerate life (Huanacuni Mamani 2010).

In Ecuador, "*buen vivir*" appears many times in the constitutional text: in the preamble, as the main objective of the State's policy, and in other chapters, both

as a system of rights (*derechos del buen vivir*) and as a value or principle to be used to interpret and implement other constitutional norms. But the Ecuadorian Constitution did not stop at that. The more impressive innovation is, without doubt, the recognition of Nature as a legal entity, as a direct consequence of the recognition of "*sumak kawsay*" as a national value and a guiding principle of the State's policy: «Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem».

In Bolivia, the Constituent was more parsimonious, but nevertheless "*suma qamaña*" is mentioned in art. 8, as an ethical and moral principle to which the State adheres, together with other values of the Andean indigenous cosmovision. In the Bolivian Constitution, nature has not been recognised as a subject of rights, even if living in harmony with nature is mentioned in different contexts: among the guiding principles of the international relationships (art. 255); as one of the conditions that the economic system must respect (art. 311); and as a characteristic of the indigenous territories (art. 403).

In recent years, environmental and indigenous movements all over the world have found a powerful ally in the Plurinational State of Bolivia. So, even without an explicit legitimation of the rights of Nature in the Bolivian Constitution, the Peoples' World Conference on Climate Change and the Rights of Mother Earth was organised in Cochabamba, Bolivia, from 20 to 22 April 2010. There, all the participants approved the draft of the Universal Declaration of the Rights of Mother Earth, an idea that had first been launched by President Evo Morales at the UN General Assembly meeting the year before (*infra*).

As a consequence, under the strong influence of the world indigenous movements, the rights of nature were introduced in the Bolivian legal system by primary Acts (Act no. 71 of 2010, *Ley de derechos de la Madre Tierra*; and Act no. 300 of 2012, *Ley marco de la Madre Tierra y desarrollo integral para vivir bien*). These Acts provide Mother Earth with a long set of rights, similar to the ones recognised by the Ecuadorian Constitution. Moreover, an *Autoridad plurinacional de la Madre Tierra* was instituted, with functions of planification and the coordination of public policies on environmental issues, as well as the management of enforcement programmes and projects on the integral system of development of *vivir bien*, which, however, has mainly remained inoperative.

Despite these premises, the Morales' Government has betrayed many of the expectations that Bolivians, as well as foreign activists, had hoped for. For instance, the government continues to support new mining projects, and signs contracts, such as the one concerning the construction of a highway in the TIPNIS protected area. In fact, if we carefully go through the texts of both Acts, we can sometimes perceive a dystopic approach. On the one hand, the 2010 Act recognises a complete set of rights for Nature (to live, develop, regenerate, be restored, etc.); on the other hand, the 2012 Act, instrumental in implementing the principles established by the previous Act, shares the "development" approach, so much so that one of the State obligations is to promote the «industrialisation of the components of Mother Earth», although within the framework of the characteristics of "*vivir bien*" and integral human development (art. 10, no. 6).

Many contradictions can be detected in both Constitutions, where "*sumak kawsay*" and harmony with nature coexist with an economic system almost entirely based on extractivism and the exploitation of natural resources. Comparing the constitutional and legal frameworks with the political choices and economic programs implemented by both States in the last decade, it is evident that nature's rights and the public support to mega-mines and oil extraction cannot stand together (Bagni 2017). Nevertheless, the absolute novelty introduced with the recognition of nature as a subject of law was extremely significant for all the social movements and scientific research groups that were promoting a new approach to the environmental and climate problems, and were studying alternatives to development (Klein and Morreo 2019).

A few months after the implementation of Bolivia's new Constitution, on 22 April 2009, during the 63rd session of the UN General Assembly, after inter-governmental negotiations promoted by the Bolivian Government, the General Assembly declared that same date "International Mother Earth Day" (resolution A/RES/63/278). Evo Morales addressed the Assembly with a speech in which he stated that the 21st century should be the century of Mother Earth's rights. He invited all the world's Nations to agree on a Universal Declaration of the rights of Mother Earth, and he suggested four fundamental rights to be recognised: the right to life, the right to regeneration, the right to a clean life and the «right to harmony and balance with and among all and everything» (Berry 2009: 133). The latter focuses on the inter-dependency of all natural elements, whether alive or not, and so encourages us to live in harmony with nature.

On 23 September 2009, during the 64th session of the UN General Assembly, Evo Morales spoke again to his fellow representatives of the international community, with a speech entitled «If We Don't Defend Mother Earth's Rights, There's No Use in Defending Human Rights». In this speech, Morales highlighted that the causes of the financial and climate crisis were economic inequalities

and the model of capitalist production. He stressed that, for indigenous communities, «not only harmony with human kind, but harmony with Mother Earth is sacred» and stated that the only way to guarantee peace and human rights was to defend the rights of Nature. He advanced a proposal consisting of three main points:

1) payment of climate debt by developed countries;
2) institution of an International Court for Climate Justice;
3) the recognition of the rights of Mother Earth by all countries.

None of the above proposals were implemented. Instead, on December, the first UN General Assembly Resolution on Harmony with Nature (A/RES/64/196) was adopted. This resolution requested the Secretary-General to issue a first Report on Harmony with Nature, which was delivered the following year, in August 2010. In the Report, the Secretary-General went back to the roots of the concept of "harmony with Nature", stating that «ancient civilisations have a rich history of understanding the symbiotic connection between human beings and nature» (HwN, Report of the Secretary-General 2010: 5), as I will try to confirm in the next paragraph. Despite the creation, inside the UN, of a special "observatory" on HwN and despite evidence showing a connection with ancestral worldviews, the Report continued to stress that «45. The holistic concept of sustainable development can guide human beings' efforts to rebalance their relationship with the Earth», so refusing to innovate on the epistemological perspective.

In the following resolution on HwN no. 65/164, of 20 December, 2010, the General Assembly required the Secretary-General to convene an interactive dialogue between States, institutions, experts and stakeholders from all over the world, in order to explore «ways to promote a holistic approach to sustainable development in harmony with nature».

Since then, the Secretary-General has prepared a Report on HwN every year and the General Assembly has approved a resolution on the subject-matter. While, at the beginning, following the input of the General Assembly, the interactive dialogues were focused on possible ways of reconciling "development" with "harmony with Nature", since the first Virtual Dialogue of the General Assembly on Harmony with Nature in 2016, the epistemological paradigm of expert contributions has shifted towards Earth Jurisprudence, and consequently their findings and recommendations have taken a more pronounced direction towards advocating a change from anthropocentric, or human-centered, to non-anthropocentric, or Earth-centered, personal and social attitudes. Since the 2015 Resolution, an on-line multidisciplinary expert network has been formally created, involved with Earth Jurisprudence, a recent discipline «which advocates an eco-centric

approach to law and governance in order to ensure that human governance systems are consistent with natural systems of order» (Cullinan 2010: 1).

The founder of Earth Jurisprudence is considered to be Thomas Berry, a US professor of History of Religions, but also a theologist and philosopher, who died in 2009. His many books and articles about the need for an ecological reorientation of our entire religious and cultural order, written from the Seventies onwards, are strikingly topical, almost prophetic. The starting point of his argumentation is that «Our human destiny is integral with the destiny of the earth» (Berry 1990: XIV; Berry 2009: 81, 135). He supports the idea that we share a universal coding with the grass, stones, other animals, the Earth, stars and the other planets, expressed in the curvature of the Universe, that possesses an impressive re-generative and creative energy. After denying this primordial nature for centuries, with the arrogance of attempting to prosper alone, humanity must rediscover nature and listen for the guidance of her inner coding. Acting like this can still allow a harmonious life on earth on an egalitarian basis for all humans and non-humans. Indigenous people can be a model, since they have defended their relationship with the Earth, resisting the industrial era.

The most highly influential Earth Jurisprudence author still alive today is probably Cormac Cullinan, Berry's disciple and a South African lawyer. With his best-seller *Wild Law. A Manifesto for Earth Justice* (Cullinan 2012), he tried to strengthen and further develop Berry's ideas. The aim is to build up a new legal framework, to be applicable both to humans and non-humans, in a way that could guarantee an opportunity to exist and develop to every species, respecting the ecological interaction between all the elements that compose the Earth's Ecosystem. He speaks of "wild law", in the sense that it should reflect the natural rules that govern "wildness", which is usually considered outside the law. The premise of his argumentation is that Nature must be considered as a whole, and human beings as part of Nature, whereas the actual legal paradigm puts Man above all other creatures and separates him from Nature, as an autonomous and independent subject (Cullinan 2012: 59). This false postulate is the cause of the current social and environmental crisis, that the global legal order is not able to tackle. We need a complete shift in our understanding of what "law" is, and for whom and for which goal law must be implemented, but we also need to rediscover how to communicate, feel empathy and care for Nature and other beings, "*sentipensar*" with the Earth, in Escobar's words (Escobar 2014).

The HwN Experts Network includes members affiliated with various NGOs, trying to persuade Governments to reform their legal systems in order to introduce Nature's Rights. In this context, some of them, led by Mumta Ito, founder of the NGO Nature's Rights, are working to formally submit a European Citizen Initiative (ECI) on «Being Nature – A European Citizens Initiative for recognis-

ing and respecting the inherent rights of nature»[5], with the aim of convincing the European Commission and Parliament to approve a directive that would force each Member State to adapt its own legal system by introducing some fundamental rights for Nature.

The point is how to convince Europe that a new Enlightenment is necessary, based on ecological values and principles, inspiring policies and legislation, that indigenous people around the world are still implementing in their own communities, where their biocultural rights have been recognised, and State institutions have granted space to self-government. In fact, Cullinan affirms that the only existing models of really sustainable governance are those of the few indigenous peoples left, who live in harmony with nature (Cullinan 2012: 161). This is unfortunately extremely rare. In fact, in Europe there is only one indigenous people left, the Sámi, which is gasping to save its own way of life from cultural and legal uniformisation and climate change.

However, there could be another way left, and it could be easier and more attractive than how it may appear at first glance. We Europeans only need to make a quick journey back to our past, and try to revitalise institutions that were widespread all over Europe before the industrial and capitalist revolution.

3. Tracing back the relationship between man and Nature in the European context

3.1. *The Italian legal system as a European case-study*

A change to some Western legal concepts, such as legal personhood, right of ownership, land and territory, and a shift towards a new eco-centric legal paradigm have recently been fostered in countries where indigenous communities have been vindicating the recognition of their own cultural identity for years, and have fought to be included in state policy-making processes without being discriminated against.

This legal trend mostly involves Latin America, but also other continents, and even some Western countries, where colonisers have begun to pay their historical debt towards First Nations, such as in Australia and New Zealand.

But what about Europe, where the only indigenous group left is the Sámi[6] and each state was built on a nation-based principle? Would it be possible to

[5] See at https://therightsofnature.org/wp-content/uploads/pdfs/Ito__EuropeanCitizensInitiative%20Project%20Summary.pdf.

[6] See at https://www.samediggi.fi/sami-info/?lang=en.

trace back communitarian practices and spiritual bonds between man and Nature, rooted on ancient cultural and religious traditions, alive before the enclosures that propitiated the industrial era and the liberal revolutions of the 18th century (Capra and Mattei 2017: 84)? Or has mainstream legal jurisprudence, based on liberalism, individualism, liberism and capitalism, irremediably cancelled all traces of them? Is it also possible to detect in Europe (De Martin 1990: 325 ff.) signs of the legal trend that is revitalising ancient cultural traditions, in order to foster a new, more inclusive, solidary and ecological framework for the management of land and the defence of Nature?

First of all, only in a very broad and general sense is it possible to consider Europe as a homogeneous cultural entity, as we do when the so called Western legal tradition is opposed to that of other legal families in the world. Europe has always been a complex mosaic of religions, cultures, nationalities, and languages, so much so that the EU motto chosen in 2000 by the European institutions was "United in diversity". As we all know from the current crisis of consensus on European Institutions, the European Union project has not been able to strengthen the common cultural background of all its member states. For these reasons, I will try to answer the above questions focusing only on the Italian case, that could be possibly used as a model for other European countries belonging to the Western legal tradition.

In the Italian constitution, there are no references at all to Nature (*Natura*), land (*terra*) or the environment (*ambiente*).

The word "territory" (*territorio*) (Manetti 1994) is always used to indicate the land under Italian sovereignty or the territorial organisation of the State. Italy is a regional State, but this decentralised system was "invented" during the constituent process and did not correspond to ethnical, historical or cultural traditions, except for the five Regions with special autonomy, where separatist movements and/or the presence of linguistic minorities justified the recognition of a different status (Bartole 1999: 2).

As far as the relationship between Nature and human beings is concerned, the Italian constitution is totally silent. The constitutional right to a healthy environment was recognised by the Constitutional Court only in 1987, under pressure from the international community (the Brundtland Report was published that year). The judgement was based on the combined interpretation of art. 9, on the protection of landscape, and art. 32, on the right to health[7].

As for the concept of property, art. 42 of the Italian Const. says: «Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognised and guaranteed by the law, which

[7] Const. Court, judgement n. 210, 28 may 1987.

prescribes the ways in which it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all». Even if there is an opening to the "social function" of property, liberalism still stands at the basis of this formulation: only two types of property exist, private or public, *tertium non datur*.

This is the current Italian legal framework, as far as the institutions we are focusing on are concerned. My aim is now to search for hints of a different relationship with land, territory and the environment in the Italian legal, cultural and religious traditions, to find «a non-proprietary background» (Rodotà 2013: 461; Mattei and Quarta 2018: 33), that could be rediscovered or transplanted, in order to legitimise a shift towards a more eco-centric legal paradigm in our system of law.

3.2. *Religious influences on the relationship between mankind and Nature*

The Catholic Church in the last few years has been trying to influence environmental policies at a national and international level, taking on, in particular in Italy (but in general in all Catholic countries) the same active role that indigenous worldviews are playing in other countries (Martinez-Alier *et al*. 2016).

It is well known that in the Bible the Lord recognises Man as the *dominus* of creation, giving him the power to govern over all the creatures of Eden. At least, this is most common interpretation of the Genesis, where man's superiority is represented by the power to name all things. However, the last three Popes have dedicated various discourses and encyclical letters to the environmental issue, fostering a different interpretation of the relationship between Man and Nature[8]. Pope Francis chose his name from Saint Francis of Assisi, a symbol of poverty, but also one of the first ecologists in history. In the famous *Cantico delle creature*, written in 1226, Saint Francis praises God for creation. All natural elements are referred to as brothers and sisters, so man is not put above creation, but in a family bond with Nature. However, the most recent document by the Catholic Church that has tried to reinstate the relationship between Man and Nature on a more egalitarian and solidary basis is the Encyclical Letter *Laudato si'* on care for our common home. This truly ecumenical discourse is addressed to every man or woman on Earth, notwithstanding his/her faith, because the ecological crisis is global and is affecting humanity as a whole. In the document,

[8] See the Encyclical Letter *Caritas in veritate* of the supreme pontiff Benedict XVI to the bishops, priests and deacons, men and women religious, the lay faithful and all people of good will on integral human development in charity and truth, June 29, 2009: «Our nature, constituted not only by matter but also by spirit, and as such, endowed with transcendent meaning and aspirations, is also normative for culture» (§ 48).

Pope Francis refers to the Saint of Assisi, whose teachings he defines as an example of an integral ecology (§ 11). In § 23 climate is considered a common good. The ecological crisis is intimately related with economic inequalities[9]. In fact, climate change will affect first and foremost the poorest people, that have already been forced to leave their homes due to the negative impact of climate change[10]. In § 63 Pope Francis states that "Given the complexity of the ecological crisis and its multiple causes, we need to realise that solutions will not emerge from one single way of interpreting and transforming reality. Respect must also be shown to the various cultural riches of different peoples, their art and poetry, their interior life and spirituality". So religious and cultural worldviews can be useful to better understand the problem, and to find new solutions. In the *Laudato si'*, Pope Francis speaks about the original harmony that existed between Man and Nature, exactly in the same way that indigenous cosmovisions usually do. Pope Francis invites us to interpret Genesis in a more correct way: that book cannot be understood as a blank mandate for Mankind to dominate the earth, but as a responsibility of care and protection (§ 67-68)[11]. Human beings are not superior and every life has intrinsic value. Pope Francis underlines "that everything is interconnected, and that genuine care for our own lives and our relationships with nature is inseparable from fraternity, justice and faithfulness to others" (§ 70). All creatures together form a sort of universal family (§ 89). However, the Encyclical Letter doesn't want to go so far as to adhere to a bio- or eco-centric perspective: human beings have a unique worth that put them at the centre of creation, but also implies a tremendous responsibility towards the rest of it.

In the Encyclical Letter, a whole chapter is dedicated to defining "integral ecology", that is, to applying ecological principles to all the fields of human life: social ecology, cultural ecology, economic ecology, human ecology.

Finally, the Encyclical Letter upholds the theory of the Commons: «93. Whether believers or not, we are agreed today that the earth is essentially a shared inheritance, whose fruits are meant to benefit everyone. […] The principle of the subordination of private property to the universal destination of goods, and thus the right of everyone to their use, is a golden rule of social conduct and "the first principle of the whole ethical and social order" […] 95. The natural en-

[9] This assumption has been recently confirmed by the Interamerican Court of Human Rights, in its advisory opinion OC-23/17, of the 15th of November 2017, § 67: «*Además, la Corte toma en cuenta que la afectación a estos derechos puede darse con mayor intensidad en determinados grupos en situación de vulnerabilidad. Se ha reconocido que los daños ambientales "se dejarán sentir con más fuerza en los sectores de la población que ya se encuentran en situaciones vulnerables"*».

[10] «49 […] Today, however, we have to realise that a true ecological approach *always* becomes a social approach; it must integrate questions of justice in debates on the environment, so as to hear *both the cry of the earth and the cry of the poor*».

[11] The excessive anthropocentrism of modernity is denounced also forward, at § 116.

vironment is a collective good, the patrimony of all humanity and the responsibility of everyone». The defence of the earth as a common good implies acting in a long-term perspective, because we also have to guarantee the rights of future generations (§ 159).

3.3. *Communitarian practices from the chthonic legal tradition*

In recent socio-political and legal discourse, the idea that the commons and collective property can be a valid environmental governance option in the Western world is being reconsidered, even if mainly as a theoretical construction (Ostrom 1990). Besides, many experiences of common management of land and fundamental resources can be found in the history of European civilisations (Cristoferi 2016; Parascandolo 2016: 20; Gutwirth 2018: 87). Perhaps, the most famous example is illustrated by the Charter of the Forest, extracted from the Magna Charta in 1217 and definitively published by King Henry III in 1225 as an autonomous corpus of norms. The Charter can be considered the first written legal document in European legal history regulating the collective use of natural resources (Carducci 2016: 41), in order to satisfy common and basic human needs, like access to water, to land to sow or to graze, to gather fruits or roots, to hunt game, to chop wood to build shelters.

The devastating power of annihilation of the past that the industrial revolution (and the ideologies that supported it) produced, has affected modern society, which, unable to remember the precedents of other ways of ownership in the past, is very uncomfortable with the theory of the Commons, or of collective property, and labels it as unrealistic and "barbaric", almost a retrocession in human evolution to the Middle Ages.

«In western society, property law provides some of the most foundational ideas about the land and about our place in the environment. Many of these ideas are so ingrained that we rarely give them second thought. The common 'idea' of private property is individual or absolute entitlement over a thing (what Blackstone called 'sole and despotic dominion'), which is protected by the will of the State. Our home is our castle, our zone of personal influence 'where we make the rules'. Our legal conception of property also tells us that the land can be divided into discrete and distinct bundles of legal relations, which individuals hold in relation to each other» (Burdon 2010: 63).

However, even if this "theology" of ownership was far the most widespread in Europe in the 19th century, Paolo Grossi demonstrated, in a powerful book entitled "*Un altro modo di possedere*" (Another way of possessing: Grossi 1977), that a minority group of scholars, mainly historians, undertook a cultural battle during

the second half of the '800s, to show that, by applying a historical and comparative method, the collective origin of the human relationship with the land appeared quite evident. These authors founded their conclusions on many experiences of the communitarian use of land in Europe and abroad, starting from medieval times and sometimes still lasting until today. Although this literature never became mainstream, it showed that individual and absolute property was not natural, but a cultural construction of human civilisation (Grossi 1977: 247; Garay Montañez 2018: 137).

Even if the individualistic proprietary paradigm continues to be the cornerstone of our legal systems, many influential critical voices have arisen in the last decades (Rodotà 2013: 459 ff.). New "objects" of rights (the body; Internet; biological materials; cultural heritage; health and sufficient food and water) have questioned the wisdom of using the property framework as the only model with which to measure everything that has economic relevance. On the other hand, the increasing imbalance between the few richest people in the world and the great majority of poor people, together with the ecological crisis that is undermining the very survival of the human species on Earth, have highlighted the problems of the redistribution of resources and of guarantees of a minimum standard of living for everyone, especially with respect to basic needs, such as the right to water and to sufficient and nutritious food.

Moreover, even in the classical period, Romans were conscious that property was not an institute coming from natural law[12]. Occupation, the first means of property acquisition recognised by Roman law, did not originally give an absolute entitlement to things, but a mere transitory power of use, that lasted as long as the time of possession, as explained by Blackstone, quoted by Sumner Maine[13]. The earth and its fruits were originally common goods: "Thus the ground was in common, and no part was the permanent property of any man in particular" (p. 140). Sumner Maine considered that it was much more plausible that property was born collective, as the ancient law was the law of the family, the social group, the community, and not of the individual (Sumner Maine, 1999: 140 and 148).

In Italy, there are legal institutions comparable to indigenous property: civic uses and many local experiences of collective property, widespread along the

[12] «They certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind» (Sumner Maine 1999: 139).

[13] «For, by the law of nature and reason he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted» (Sumner Maine 1999: 140).

whole peninsula during the Middle Ages, created in the North from Roman-German laws, lasting almost unaltered until the 19th century (Grossi 1977: 191 ff.), regulated with the *decreto* 751 of 22 May, 1924, converted into the *Legge sugli usi civici*, no. 1766 of 16 June, 1927, and finally with Act no. 168 of 2017 on collective domains.

The 1927 Act on civic uses was influenced by the liberal concept of property as an absolute right, codified after the French revolution, and was designed to react to vestiges of feudalism in the South of Italy. So, it imposed a uniform regulation of all prior forms of collective agro-forest properties, assigning the management of land to the Municipalities, and accepting the survival of only few exceptions to agrarian associations. Nevertheless, the legislator recognised the public interest connected to this type of property and bound the normative status of these lands to a particular regime: indivisible; imprescriptible; unalienable; with a specific and unchangeable use.

The 1927 Act remained substantially unenforced (Cervati 1990: 38), until the Italian democratic legislator approved new Statutes that reinstated the previous local and customary laws, the traditional forms of management of collective property in the Alps[14] (*Carte di Regole*, *Vicinie*, *Comunità di villaggio*, ecc.; see Salsa 2017) and also allowed regional legislators to regulate the matter following local traditions. Moreover, on various occasions the Italian Constitutional Court recognised and stated the "constitutional value" of civic uses, with particular reference to the protection of landscape and the environment (sent. n. 156/1995, n. 310/2006 and, more recently, n. 113/2018; see Di Genio 2018).

The expression "civic uses", applied by the 1927 legislator, used to be a synonym of "collective property", even if the two concepts have a different scope: both consist of collective rights on inalienable and indivisible lands, but, on one hand, civic uses limit someone's else right of ownership (both public or private); whereas speaking about collective property means that the holder of the bare ownership of land and its ultimate user (for sowing, breeding, grazing, forestry, …) correspond to the entire community (Lorizio 1994: 1). The terminology has recently been changed by the 2017 Act into "collective dominions" (art. 1.1). The Act has submitted to the same regulations all the institutions and practices regulated by the 1927 Act, but also those exceptions that escaped the uniform legislation before.

Civic uses and collective ownership in Italy were not only enforced in the mountains. In my region, Emilia-Romagna, the most widespread communitarian institution was the "*partecipanza agraria*", an institution in force in the Municipalities of Villafontana, Medicina, S. Giovanni in Persiceto, Sant'Agata bo-

[14] See the two Statutes on mountain communities: *Legge* no. 991 of 25 July 1952 and *Legge* no. 1102 of 30 December 1971.

lognese, Cento, Nonantola and Pieve (once also in Budrio, but that was dissolved before the law came into force). Most of these "*partecipanze*" were excluded from the application of the 1927 Act on civic uses, ex art. 65 of the same Act, and so maintained their autonomous set of rules. These are very ancient institutions: the "*partecipanza*" of Villafontana was probably founded in 1215 (Melega 1940: 17); that of San Giovanni derived from episcopal emphyteusis around 1170 (Forni 1896: 16). They are closed collective properties, originally assigned to farmers by bishops or feudal Lords, who wanted dense forests and wetlands to be reclaimed, farmed or deforested. In order to achieve these goals, they gave the lands in perpetual use to those families who engaged their workforce for this objective. At the beginning, the lands were freely occupied or distributed equally, by sort and rotation, to all the families of the territory, who organised themselves with autonomous rules and mechanisms to ensure the efficient collective management of the "*partecipanza*" (Forni 1896: 60; Forni and Gigli 1909). Then, when the community grew in population, there arose a need to exclude newcomers from the benefits of the periodical assignment of portions of land, in order to ensure its economic sustainability. For instance, in S. Giovanni in Persiceto, between 1400 and 1570 (Forni 1896: 31), a new rule was introduced, that admitted to the periodical division of land use only the families that had originally contributed to the reclamation work and the improvement of the fields (Forni 1913). The rule was not always strictly enforced, also because some portions of land were sublet by the tenants to other families, sometimes coming from the city's aristocracy, or because sometimes parts of the lands had to be pledged as a guarantee to rich money lenders for the debts of the community. For all these reasons, the Commoners (all members of the Municipality) and the Participants (the original collective owners), at the beginning forming a single community, were finally legally divided into two different institutions around 1814 (Fregni 1995: 161). After that, fields were periodically assigned to the families included in the Statute of the "*partecipanza*", for a period of 9 years, during a public auction in the main public square. So, the "division" of lands into portions for the "exclusive" use of each family, for the period established by the rules of each "*partecipanza*", was a practice which began around the 16th century and accomplished different goals: to defend the original community of farmers who had lived in those lands since time immemorable from expansion by the city's rich aristocracy; to prevent new portions of land being given away to refund the community's debts; to re-create equality between all the participants, because with the periodical round of new assignments, rich and poor members of the "*partecipanza*" regained the same chances of receiving the most valuable and productive portions of lands (Cazzola 1995: 224).

Legal experts on civic uses recognise that the revitalisation of studies on collective property is a sign of a renewed attention to alternative forms of possession and the rediscovery of values such as solidarity and the common good, in connection with a need to protect the environment, that requires a governance no longer based on the absolute right of ownership (Marinelli 2000: 20, 43; De Martin 1990: 19, 24 f.; Marinelli 2019: 158; Gutwirth 2018).

The theory of the Commons and civic uses shares many elements with indigenous communitarian practices for the management of collective lands. Unlike in Europe, in other parts of the world the existence of indigenous communities that still defend their traditional way of life and their relationship with Nature and the environment has produced important legal results, influencing the normative process, so as to incorporate collective property and biocultural rights in the national legal systems[15].

4. Conclusions

Climate change is a fact, not a theory. The same can be said about its anthropogenic causes. In fact, even in the courts, in climate cases judges have been accepting these premises as proven facts (Bagni 2019). The question, for lawyers, is to identify who could be held legally responsible for the risk of extinction we are facing and for the irreversible damage we are causing to the Earth's ecosystem, what are the legal bases of that responsibility, and in which way it should be asserted.

The international community has been aware of the problem since the 1970s, but its approach is quite ambiguous, divided between supporting economic growth and struggling to achieve environmental protection. This ambivalence is resumed in the concept of "sustainable development", as I have tried to explain in the first paragraph. The excursus of § 2 on the UN's approach to the inter-related themes of development and environmental sustainability has demonstrated that, even if the UN development programme still fosters the old approach of sustained growth, at the same time the UN HwN programme is working on new concepts, principles and paradigms, based on more holistic and eco-centric premises. The HwN network of experts has been investigating these topics and trying to advocate the need for a change in the legal paradigm at different political levels. Even if many of the most innovative ideas and practices come from indigenous peoples' knowledge, I have tried to show that, even in Europe, it is

[15] «The concepts of ownership, property, and property rights regime are alien to customary law. We are guardians and trustees, both for ourselves and for others. Human rights and related responsibilities are a core component of customary law, but it encompasses a wider understanding of community» (Thiong'o 2011: 211).

possible to re-discover traces of a past in which common land prevailed over private ownership, and its "sustainable management" was the responsibility of the entire community (§ 3).

What should be the legal instruments to make the revival of these practices viable in contemporary Europe is still not at all clear and little investigated. The theory of the Commons is, of course, one of the most known proposals, but, as Carducci has clearly stated, the academic approach to the theory is quite descriptive, focused on the legal status of the common good, more than on forms of its common management (Carducci 2018). The consequence is an underestimation of the actual context in which the re-instalment of ancient traditions could happen, its failure at national and supranational levels, with a limited effect on local realities. Referring to the many local examples of a common management of goods in a Western context, Carducci (2018: 48) speaks of a «non-transformative capacity of survival» of these practices, «"another way of owning" (of biochemical origins), within the usual "way of governing" (shaping the "fossil" law)».

Another proposal to foster an ecological shift in the legal paradigm is to recognise new subjects of rights, as the global movement for Nature's Rights demands, an approach which the UN is starting to show some interest in, with the creation of the HwN programme (see above, § 2).

Finally, without abandoning the old anthropocentric legal paradigm, many lawyers, together with NGOs and members of the civil society, are trying to claim new interpretations of "old" rights or the recognition of new human rights before the courts, such as in the different cases concerning the right to a liveable climate. The last solution, which is the judicial one, is very complicated to countries where access to justice is limited, due to the absence of direct action by constitutional courts or class actions; or the many procedural obstacles imposed on applicants.

In this view, Italy is a very interesting case, because it is a legal system where citizens do not have direct access to the Constitutional Court, and class actions have a very limited scope, at least until now. In April 2019, the Italian Parliament approved Act no. 31 on the introduction of a new "Title" in the Civil Procedural Code dedicated to "Collective Actions". Whereas, in the past, class actions in Italy were included in the so-called Consumers' Code, the new dispositions have broadened the scope of these actions, now available for each individual, or every organisation or association whose statutory objectives are to protect "homogenous individual rights", that is to say, collective rights (art. 840 bis). The new procedure is no longer reserved for consumers and their representative associations, but is extended to guarantee all types of collective rights, including environmental ones (Angiolini 2020). Lawsuits can be brought both against private

enterprises and the providers of public services or public utilities, to prosecute acts and conducts that violate homogenous individual rights. Moreover, art. 840 *sexiesdecies* introduces a new collective injunction, that can be promoted by everyone who has an interest in stopping acts and conducts that affect a plurality of individuals or entities. The action aims at ending or prohibiting the illicit conduct, that can be either an action or an omission. In these cases, the court can adopt all the orders it deems necessary for the enforcement of the conviction, including ordering the responsible party to adopt all the measures required to eliminate or reduce the effects of the violation. This provision would be quite useful in environmental class actions, eliminating all the negative effects of contamination and restoring the damaged ecosystem.

Examining the *iter legis* and the parliamentary proceedings, it seems that no-one really realised the innovative potential of these new actions in the environmental field. Discussions concentrated mainly on the economic profile, that is, on the impact that this sort of action could have on the market, discouraging companies and producers from investing in Italy, due to any possible responsibilities they could face if sued. Even the rapporteurs of the statute did not underline the broad scope of application of the actions, focusing only on the extension of procedural legitimation to enterprises. Besides, the legislative *iter* was not particularly complicated: very few amendments to the bill were proposed, limited debate took place, and the text was finally approved in a reasonable time, in the Lower House with no holdouts and 103 abstentions, and in the Senate with only one holdout and 44 abstentions (the FI parliamentary group). The Act will enter into force only in April 2020, so it is too early to express any judgement on its possible impact, although I believe it will be a very useful instrument in the struggle for the recognition of the new substantial rights that represent the innovative approach of harmony with nature.

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