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Law and Environment: Ecocide and the Rights of Nature

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Notes

This essay examines two emerging legal concepts: the proposed international crime of Ecocide and the growing Rights of Nature front. These radical changes challenge existing environmental laws and provoke technical and philosophical questions, here analysed through the unique case study of Venice.

Law and the environment are becoming ever more intertwined, with their relationship gaining growing attention in both academic and public spheres. Today, two key issues stand at the centre of the debate, drawing the focus of experts, social movements, and environmental organizations alike. These topics not only spark conversations among specialists in the field but also resonate with the general public, reflecting the increasing awareness and urgency surrounding environmental challenges in contemporary society. The two crucial issues we aim to isolate and critically evaluate are the proposal for an ecocide law and the so-called rights of nature.

Ecocide has a powerful discursive and political effect and can serve as a way of identifying the growing, massive, immense, and outrageous acts and effects of large-scale and long-lasting destruction of entire ecosystems and biodiversity. Ecocide is a word – much like biodiversity – that has become a political slogan. It is as if a spontaneous understanding of what ecocide actually means is enough, as if the word speaks for itself.

In this commitment against environmental destruction, the proposal of an ecocide law, or more precisely, the inclusion of the crime of ecocide within the Rome Statute of International Criminal Law, raises a series of issues. The term 'ecocide' has no clear definition yet but a growing green and critical criminological literature advocates for its introduction as a crime along the lines of human genocide. This crime is attributed to corporations (Whyte 2020) and states (White, Kramer 2015) as well as ordinary behaviours that contribute to the climate breakdown (Agnew 2020). A recent proposal consists of establishing a climate change criminology (White 2018). Although ecocide itself is a legal hypothesis, critical or radical criminological approaches tend to not interface with legal techniques, perhaps considering them too entangled with power. As noted by two criminologists, Natali and White (2019, 188):

> As a broad generalisation, ecocide is defined first and foremost by the destruction, degradation and demolishment of ecosystems and specific environments, with harmful consequences for the living creatures within these. When this occurs due to particular types of human activity, then ecocide also becomes terminology that describes a particular form of *criminality.* Specific acts of environmental destruction, within particular war-time contexts, are presently officially considered international crimes. For some, however, this particular legal definition is too restrictive, and especially given present environmental trends including global warming, does not address those activities that may have even greater impact than those associated with military action.

As is often the case, what sociology or criminology considers reductive sounds confusing or all-encompassing to legal science; vagueness certainly cannot be useful, indeed it is dangerous, for legal purposes. First and foremost, as Françoise Tulkens (2016), chair of the International Monsanto Tribunal, highlights, the principal prob-

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lem is to clearly define what one intends to punish. This is the principle known to jurists as the principle of legality.

The understandable intentions of expansion (and not reduction) that are typical of the social sciences, even though they are proposing, as mentioned above, a definition of the concept of ecocide must therefore be carefully evaluated, risking going in the direction of a broadness that is the opposite of a guarantee. In other words, for the social sciences not to deal with a legal definition that respects fundamental rights is risky. Indeed, to dispense with law simply risks being ineffective, that is, dispensing with a powerful toolbox to advance social struggles (Chiaramonte 2022).

There are many types of conduct, both lawful and unlawful, that damage and deplete available resources; and, those considered illegal are already punishable. Therefore, the potential introduction of a new international crime of ecocide requires not only the identification of conducts that are criminally relevant but which among them are of such gravity as to reach the appropriate threshold of disvalue for this type of crime (Fronza 2021, 2421-2).

In a nutshell, ecocide, as an autonomous offense, requires establishing three main elements: the threshold of seriousness of the damage, a formulation that covers the diversity of concrete behaviors and the *mens rea*, that is, the criminal intention (Fronza and Guillot 2015).

These questions encourage us to rethink the concept of ecocide by addressing the complexities of environmental harm, the anonymity of its causes, and the potential limitations of punitive justice in tackling these global crises. Overall, these efforts seek to confront the environmental and climate challenges of our century, positioning the law at the forefront of crucial transformations. Legal frameworks are vital for developing effective solutions and ensuring justice in this context.

Parallel to the ecocide movement, a growing force pushes for the recognition of 'Rights of Nature' (RoN): a general recognition of 'Nature' as a living and acting entity, invested with its own legal personhood. The movement pushing for RoN has come and gone in waves, first in the 70s, with Law professor Christopher Stone asking "Should Trees have Standing?" – and being consequently ridiculed by many of its peers – and more recently in the Constitution of Ecuador in 2008.

After a series of indigenous uprisings, then-President Rafael Correa updated the country's Constitution based on the concept of *sumak kawsay* (a Quechua neologism commonly translated to 'good living') and on the traditional consideration of 'Nature' as 'Pachamama': 'Mother Nature'. According to the new rules any citizen, as an integral part of Nature, can legally act in its name, bringing therefore any legal person – human or not, for example a Corporation – to court. This brought a series of legal actions, especially in recent years: half of the 55 cases being debated between 2019 and 2022. In 2021, in a landmark case, Nature won a case against the Minister of Environment and Water and the National Mining Company, protecting the forest of Los Cedros[1] against mining developments.

In the case of Ecuador Nature is non-defined and limitless, clashing with established legal concepts and creating problematic judgment cases, first and foremost raising the question of stewardship and of who should be entrusted with the power and responsibility to speak for such an abstract being. At the same time, the tool seems to be working as a deterrent for new extractive and damaging economic initiatives. Here *Pachamama* becomes a cultural argument for the institution of a legal principle, but does it solve the human/nature divide? Rather than a philosophical solution, it seems like an answer to a necessity: that of trying to fit a necessarily human-shaped tool to represent something enormously more-than-human. This dilemma accompanies the movement since its very inception. Just as 'streams and

1 See Earth Jurisprudence Monitor's overview on the case: https://ecojurisprudence.org/initiatives/los-cedros/.

forests' do not have the power to speak for themselves – at least not in a human voice needed in court – neither do corporations, or States, infants, municipalities and universities. "Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems" (Stone 1974, 8). A double edged sword that invites cautious development of legal tools.

Another major case is that of the Maori of Aotearoa/New Zealand. Here, the Te Urewera forest in 2014 and the Whanganui river in 2017 were granted legal personhood on the basis of the cultural norm according to which such ecosystems form part of the communities. A famous saying that enshrines this concept is *Ko au te awa, ko te awa ko au* (I am the river, the river is me). Differently to the Ecuadorian case, in which all citizens can act for all nature, the Whanganui and the communities around it form part of the same entity, and on the basis of that the legal personhood is granted and the stewardship system identified. To this day, the Maori way remains untested, perhaps a monument to its deterrent effect.

Other cases have proliferated in recent years: a case in India was overthrown in 2017 because of the transnational nature of the Ganges and Yamuna rivers and the lack of clarity in the stewardship system. The first European case had to wait until 2022, with the Mar Menor – a large saltwater lagoon in the Murcia region. Locals are currently striving to keep the law that recognises legal personhood to the Mar Menor operating, and at the same time develop the adequate tools to represent it.

In this scenario, we can highlight that all Rights of Nature cases globally have been developed with wildly different formats and tools, mirroring the philosophies of the communities that brought them in place and the specificities of the ecosystems represented.

All Rights of Nature laws treat Nature as a legal subject with rights. In all cases, Nature is conceptualized at an ecosystem level rather than at the level of individual flora and fauna. The laws at least implicitly recognize that humans are part of these ecosystems, but they vary in how expansive the boundaries of rights-bearing Nature are (Kaufmann, Martin 2021, 62).

The full impact of RoN is yet to be seen, even though in some cases they brought historical decisions. The main risks such a tool might run into are very similar to the ecocide ones: a definition that is too vague and blurry, leading to ineffectiveness, and a lack of precision in identifying an adequate system of stewardship. Such intricacies lie at the very bottom of the philosophical problem: inviting Nature, an outstandingly non-human entity, into a legal system devised by humans for humans. An inevitably anthropocentric system.

Beyond legal journeys and procedural mazes, the core of such new legal tools invites for a far-reaching transdisciplinary reflection. Only once this complexity is taken into account, new and apt legal forms can participate in laying the basis for a systemic change: one that sees humans as part of a broader cosmos, rather than the centre and ruler of it.

Humanity seems to be crossing a crucial time to re-think its ecological governance model, and can craft new tools based on pre-existing ones. Venice's waters have always been an essential agent in the life of the city – and formerly the Republic – with institutions such as the Magistrato delle Acque and the Proti, experts who would be consulted for the administration of the Lagoon. In modern times, a special law issued in 1973 declared the protection of the Lagoon a matter of national interest, and placed the Italian Republic as the guarantor of its 'landscape, historical, archeological and artistic environment', bound to protect it from pollution and preserve its hydrological balance.[2] UNESCO also protects Venice and its Lagoon as

2 Law 16 April 1973, no. 171. Available (in Italian) here: https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1973-05-08&atto.codiceRedazionale=073U0171&elenco30giorni=false.

World Heritage, highlighting the unique role of the natural environment in the city's history and culture, its fragile and dynamic nature.

Despite these measures the Lagoon finds itself in a deeply unbalanced state, with ineffective decisions as climate change and intense human activities reinforce each other to turn it into an extension of the Adriatic Sea.[3] Venice and the Lagoon are one of the world's post children when it comes to climate change, and are consequently studied and analysed constantly. Perhaps, could a new approach to ecological governance emerge from their brackish waters?

Mandatory Reading

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Further Optional Reading

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3 Experts and activists alike call its current state a 'braccio di mare', an arm of the sea.