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Saggi

Climate and Environmental Justice: A Comparative Perspective to 'Think Different' about Long-Lasting Issues

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SUMMARY: Introduction. – 1. Scientific assessments on climate change. – 2. Environmental and climate remarkable examples of 'think different'. – 3. Climate and environmental justice: ethical and practical/legal discourses. – 4. Some questions arise. Conclusion.

Introduction

Environmental and climate issues are persistent topics within the global community, involving a wide range of knowledge's branches and methodologies. From the realm of hard-sciences, these topics slowly entered into debates and studies in humanities (Gosh 2016), leading legal

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disciplines as well to adjust long-lasting doctrinal schemes according to novel theories and demands.

In reference to the concept of justice, humankind is still looking for a decisive doctrinal definition. From the eminent definition of justice in terms of distributive function (Rawls 1999), many qualities have been ascribed to the concept: social, transformative, environmental, climate, sometimes combining various topics, as it is the case for transformative approaches in climate change, development and other critical theories (Krause 2019).

With these preliminary reflections in mind, this essay aims to highlight the theoretical framework necessary to endorse a 'think different' approach to climate and environmental issues, exploring the feasibility of legal and conceptual transplants. In doing so, the study introduces the current scientific assessments of climate change and its relevance for the legal and political fields. The third paragraph illustrates the constitutional recognitions of nature's rights as suitable examples for a critical appraisal of the anthropocentric features of law and deals with the right to stand in different legal systems, recalling leading examples from Latin America, South Asia, Oceania, the United States, and the European Union. The following paragraph deals with the concept of climate and environmental justice, surveying different theoretical approaches—as an ethical or normative concept.

1. Scientific assessments on climate change

While hard sciences are ontologically accustomed to deal with natural events, one may oppose two postulations to the question whether there

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could be a proper space for the environment in humanities. Assuming human beings as major driving forces, on the one hand, the Anthropocene «very specifically indicates the loss of resilience and functional integrity of the Earth and its systems» (Kotzé 2014, 130; Woodwell 2002; Amirante 2020), in this way questioning the passive role of humankind; on the other, this new concept—rather than a geological era—«highlights the interconnectedness of natural Earth processes, or put differently, the interconnected nature of the environment, the reciprocity of its processes, and the many linked cause-and-effect relationships that exist on a global scale» (Kotzé 2014, 132). Though, the interest in human behaviours towards the environment is crucial, especially taking into account that individual and plural activities are always governed by free will. Furthermore, recent scientific studies have demonstrated how Earth resilience is not able to cope with potential harms deriving from an uncontrolled expansion of human activities (IPCC 1992; 2007). This new perspective changes the theoretical landscape, posing both environment and humans as necessary subjects interacting with each other, obliging to include a new constant element within the cause-and-effect scheme. Actually, whether humanities should (or may) narrate nature-related events or whether and how the environment or climate change is in the domain of politics and law is a less meaningful issue. Additionally, questioning the role of politics and law in the realm of environmental and climate matters would be an attempt to erase an evident state of fact.

For the purpose of this essay, all the scientific bases to the political and legal reflexions are mainly grounded on the Reports authored by the Intergovernmental Panel on Climate Change (hereinafter IPCC). The United

Nations General Assembly, through the Resolution 43/53 of 6th of December 1988,[1] recognized the «need for additional research and scientific studies into all sources and causes of climate change»; this scientific request was included into the actions promoted by the World Meteorological Organization (WMO) and the United Nations Environmental Programme (UNEP), which recommended the establishment of a coordinated expert team to plan wide-ranging assessments, reviews and advices with respect to scientific knowledge, social and economic impact, as well as potential response strategies to tackle climate change.

The IPCC is actually composed by the Plenary (195 members), and each country representative designates a National Focal Point (NFP), in case of no NFP, the IPCC addresses communications directly to the Parties' Ministries of Foreign Affairs. The Panel elects a Bureau for scientific and technical tasks. The three working groups, namely 'The Physical Science Basis, Impacts, Adaptation, and Vulnerability', 'Mitigation of Climate Change', and the 'Task Force on the National Greenhouse Gas Inventories' are the "technical core" of the IPCC, which provides the necessary scientific resources to the international community.[2] The IPCC has issued a wide range and world's most authoritative scientific assessments on climate change, publishing methodology and special reports, as well as technical papers, in response to requests for information on specific sci-

[1] UN General Assembly Resolution 43/53, *Protection of global climate for present and future generations of mankind*, A/RES/43/53 (6th of December 1988).

[2] *See* https://www.ipcc.ch/about/structure/ (accessed 15 August 2020).

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entific matters mainly addressed by the United Nation Framework Convention on Climate Change (UNFCCC), domestic governments or international organizations.

About contemporary climate issues, the Synthesis Report (SYR) of the IPCC provides an overview of up-to-date scientific knowledge on climate change.[3] According to this study, since the ’50s unprecedented alterations in climate have occurred in a different way with respect to the previous changes (IPCC 2014). Without uncertainties, current studies acknowledge that the anthropogenic emissions of GHGs are at their highest level if compared to the pre-industrial era. This gain produces atmospheric concentrations of carbon dioxide, methane and nitrous oxide «that are unprecedented in at least the last 800,000 years», demonstrating the influence of human activities on the so-called climate system and the overheating since the mid-20th century (IPCC 2014, 2, 4). Furthermore, the Report affirms that climate risks affect the most vulnerable communities at all levels of development (IPCC 2014, 13).

As far as present and future human activities are concerned, the contemporary climate scenario is distant from being in a static and descriptive situation. In fact, the resilience of the ecosystems and adaptation policies are not the sole aspects on which humans must intervene, considering that the intensification of GHGs emissions, that mainly depends on socio-economic development and climate policy, influence «all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems». Thus, mitigation

[3] The IPCC Working Group I expects to finalise the new Report *AR6 Climate Change 2021: The Physical Science Basis* in 2021.

policies for «substantial and sustained reductions of greenhouse gas emissions» have become necessary (IPCC 2014, 4, 5).

In this holistic set of elements, the main task for challenging climate change is to find the right interplay between adaptation and mitigation, which are complementary measures. On the one hand, adaptation policies could be widely diverse, depending on the single region and sector involved, and are constantly and strictly climate-dependent, as well as context-related (co-benefits, synergies and trade-offs). On the other hand, mitigation may involve all sectors, but it mainly requires «an integrated approach that combines measures to reduce energy use and the greenhouse gas intensity of end-use sectors, decarbonize energy supply, reduce net emissions and enhance carbon sinks in land-based sectors» (IPCC 2014, 26, 28).

The simultaneous and long-term practice of adaptation and mitigation will reduce climate risks, carrying more adaptive circumstances and lower costs of mitigation, therefore contributing to «climate-resilient pathways for sustainable development» (IPCC 2014, 26). In doing so, effective decision-making is crucial, integrating «governance, ethical dimensions, equity, value judgments, economic assessments and diverse perceptions and responses to risk and uncertainty» (IPCC 2014, 32). The main issue will be the right implementation and effectiveness, which demands an interdisciplinary, synergic and multi-level approach in the legal and political fields, producing appropriate rules to foster an integrated response from the international to the local level and vice-versa.

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2. Environmental and climate remarkable examples of 'think different'

Currently, we may get evidences of the growing understanding of environmental and climate issues mainly referring to two pivotal aspects: 1) the substantive recognition, at the constitutional and state level, of rights and duties related to environmental/climate issues; 2) the 'brave' response of the judiciary in setting unexpected and far progressive standards.

As far as the constitutional field is concerned, one may recall three remarkable examples of 'constitutionalization' and state legislation of environmental rights and duties, as well as of personification of nature and regulation of the *locus standi*: a) the concept of *Pachamama* as expressed in the Constitution of Ecuador (2008); b) environmental rights in the Bolivian Constitution (2009); c) the example of New Zealand through the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

Since the Preamble, the Constitution of Ecuador "celebrates" nature or *Pachamama* (Mother Earth), «of which we are a part and which is vital to our existence». Regarding the legal field, Chapter seven of the Constitution is entitled to the rights of nature, and Art. 71 states that «the Pachamama, 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». Along with the legal recognition of nature's right, the fundamental law establishes that all persons, communities, people and nations may foster public authorities' intervention for the implementation and the enforcement of such clauses. Particularly interesting for the legal debate is Art. 72, that entitles

to Nature the right to be restored and the obligation for the State and individuals to compensate persons or communities for those damages that affected the natural systems on which they depend. Another remarkable constitutional provision related to the destruction of the ecosystems, the extinction of species and to the natural cycles obliges the State to adopt restrictive and/or preventive measures.[4]

The Constitution of the Plurinational State of Bolivia (2009) provides for a quite penetrating discipline related to environmental rights, although there is no direct recognition of the Nature's *locus standi*[5]. To this extent, Art. 34 states that «Any person, in his own right or on behalf of a collective, is authorized to take legal action in defence of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment».

Similarly to Ecuador's perspective of considering the Nature as a legal entity, in New Zealand, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 shows the same trend in recognizing natural beings as 'legal entities.' On this aspect, Art. 14 of the Act declares that the river Te

[4] Art. 72, Constitution of Ecuador, 2008: Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. *See* Baldin (2014b).

In those cases of severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

[5] On the legal status of the Nature in Bolivia *see* Ley de derechos de la Madre Tierra, n. 71/2010. For a specific analysis on this topic *see* Baldin (2014b).

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Awa Tupua is a legal person, bearing «all the rights, powers, duties, and liabilities of a legal person» (O'Donnell & Talbot-Jones 2018).

Not only the constituent/constitutional and the legislative fields adopted a "green trend", but also the judiciary. An example is the 2016 case *Center for Social Justice Studies et al. v. Presidency of the Republic et al.*, settled by the Colombian Constitutional Court, that recognized «Atrato River, its basin and tributaries as an entity subject to rights of protection, conservation, maintenance and restoration by the State and ethnic communities». Furthermore, the Court imposed to «the national government to exercise legal guardianship and representation of the rights of the river», along with ethnic communities that live in Chocó, thus creating the 'guardians of the river.'[6]

The recognition of legal subjectivity to non-human entities is not a new phenomenon within Indian jurisprudence. On the 20th of March 2017, the Uttarakhand High Court (India) declared both the Ganges and the Yamuna, as well as «all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers» as «legal and living entities having the status of a legal person with all corresponding rights, duties and liabilities».[7] Currently, this case is still pending before the Supreme Court, due to the numerous legal issues that arise from this decision, especially regarding the guardianship in case of water management duties among different states in a federal system, the definition of the persons *in loco parentis*, and the subject that could be liable for damages caused by the rivers (O'Donnell 2017).

[6] *Center for Social Justice Studies et al. v. Presidency of the Republic et al.*, T-622/16, Constitutional Court of Colombia (November 10, 2016).

[7] *Mohd. Salim v. State of Uttarakhand & others*, Writ Petition (PIL) 126/2014, Uttarakhand High Court at Nainital, 2017.

More recently, also in Europe a significant judgment related to climate change issues has been delivered. The 20th of December 2019, the Dutch Supreme Court (Civil Section) declared that «the State's appeal in cassation must be rejected. That means that the order which the District Court issued to the State and which was confirmed by the Court of Appeal, directing the State to reduce greenhouse gases by the end of 2020 by at least 25% compared to 1990, will stand as a final order».[8] This case emphasises that merely comply with reduction targets does not suffice in facing climate change, because «the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR [...] This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous». Furthermore, the Dutch Court stated that «If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible».[9]

Regarding climate change issues, and despite the narrative of a refractory political attitude that finds its allies in a formalistic approach to the legal system, in the United States another step ahead in climate/environmental protection has been taken in the case *Juliana et al.* v. *United States*, especially regarding the scientific evidences of anthropogenic emissions as

[8] *State of The Netherlands (Ministry of Economic Affairs and Climate Change Policy) v. Urgenda Foundation*, ECLI:NL:HR:2019:2007, Supreme Court of The Netherlands, Civil Division, 19/00135, 20 December 2019. *See* Jacometti (2019); Minnerop (2019); Verschuuren (2019); Mayer (2019).

[9] *Ibid*.

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causes of the existing climate change, considering the evidence of climate change and its impacts as "copious," "compelling," and "substantial."[10]

Within this framework, also the establishment of specialized judicial bodies determines an advancement in environmental and climate legal fields. Different legal systems have adopted combined suitable solutions according to their own judiciary, showing an increasing global trend in establishing Environmental Courts and Tribunals (ECTs). According to the study conducted by G. Pring and C. Pring (2016; Amirante 2012) under the aegis of the United Nations Environment Programme, from few specialized courts, currently 1200 ECTs have been established in 44 countries, at the state, as well as at regional, provincial, and local levels. The reason of this demand of environmental justice through the activity of the judiciary could be explained, as D. Amirante (2012, 442) affirmed, on the basis that «often the executive powers, unable to enforce the law, tend to successfully abdicate their responsibilities to the judiciary, regardless of the effectiveness of the penalties concerning environmental infringements, crimes, and the level of expertise of the judicial bodies concerned».

3. Climate and environmental justice: ethical and practical/legal discourses

[10] *Juliana v. United States*, No. 18-36082, slip op. at 14-15, 19 (9th Cir. Jan. 17, 2020). *See* Banda (2020). On the same topic: Konisky (2020).

In spite of a different understanding of the terms 'justice' and 'litigation' in common law systems and Anglophone cultures, in some languages these two terms seem to appear synonymic or to serve each other. For instance, the Italian term '*giustizia*' and the Spanish one '*justicia*', both coming from the ancient Latin term '*iustitia*', merge 'justice' and 'litigation' into a complex meaning based on both ethical and technical features.

According to the Cambridge Dictionary, 'justice' has several meanings: 1) fairness in the way people are dealt with; 2) the system of laws in a country that judges and punishes people; 3) a judge in a law court.[11] In the same way, also the term 'litigation' is defined as: 1) the process of taking a case to a court of law so that a judgment can be made; 2) the process of taking an argument between people or groups to a court of law; 3) the process of causing a disagreement to be discussed in a court of law so that an official decision can be made about it.[12]

When we think about climate and environmental discourses, other factors become essential. Currently, there is a wide body of scholarship on climate and environmental justice, as well as on climate litigation, but they seem to correspond to two different and divided realms, where only in sporadic cases there is an epistemological crossover (Jafry 2019; Lees & Viñuales 2019; Burger & Gundlach 2018; Ruppel, Roschmann & Ruppel-Schlichting 2013). Despite the fact that the term 'justice' assumes specific connotations (climate, environmental, social, gender, etc.), as first one could refer to the concept of 'distributive' as proposed by J. Rawls in his eminent book *A Theory of Justice*. According to the concept of distributive

[11] *https://dictionary.cambridge.org/it/* (accessed 15 September 2020).

[12] *Ibid*.

justice, two principles arise: 1) «each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others»; 2) «social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all» (Rawls 1999, 53). These two principles may serve climate issue considering it as a global concern, but, at the same time, they justify the demand of developing countries for being allowed to act as the developed ones over the past centuries. Thus, the 'distributive' approach does not properly tackle a series of issues, such as the justification of harming activities on the base of an historical (and differentiated) liability. The practical application of such perspective, which postulates to satisfy fair equality of opportunity through differentiated approaches, may fulfil the (primarily moral) obligations imposed by historical burdens, as well as justify an anti-climate policy approach in some specific cases. This position sets a combined approach of distributive and corrective justice, 'crafting' an enquiry on 'how to assign responsibilities' (Moellendorf 2012). Step by step, the distributive/corrective attitude calls for four further approaches, namely i) egalitarian; ii) rights-based; iii) global/local; iv) diachronic (past/present/future generations).

As I. Boran (2019) pointed out, climate justice is characterized by heterogeneity, rather than unifying features that meet its own dualistic nature, both theoretical and practical. The diversity of visions of justice highlights that there are no-mutually exclusive theoretical and practical directions. Despite the lack of unity in scholarship, climate justice could be identified as a social movement or as a normative inquiry.

The concept of climate justice as a social movement relies on a moral and ethical understanding of a phenomenon with «anti-establishment roots […] perceived as divisive by those in power» (Jafry, Mikulewicz & Helwig 2019, 1), it is a synthesis of justice claims, different and overlapping 'shapes' of justice (e.g. environmental and ecological), and private activism; in all these intersecting and interrelating forms, pluralism is the leading theme. However, in all these cases practice is part of theories, so the main aim for legal systems is to institutionalize the claims. In other words, «the key remaining question is how we institutionalize the engagement necessary for multiple conceptions and practices of [climate,] environmental and ecological justice to be shared, deliberated, understood, and implemented» (Schlosberg 2007, 187).

4. Some questions arise. Conclusion

As C. Espinosa (2015) suggests, «according to the rights of nature interpretive repertoire, environmental destruction results from assumptions engrained in legal structures, and not from inadequate enforcement of environmental laws».[13] New attitudes of environmental/climate scholarship emphasise the concept of 'transformative,' that implies an ameliorative change. However, if we take a look at the main legal literature, especially in reference to the concept of constitutionalism, usually this term is used by scholars of the Global North to depict an ongoing process of establishing, modernizing, upgrading of a legal system according to

[13] For further hypothesis on this approach: Bagni (2015); Bagni (2013); Baldin (2014a).

Western features, hiding an axiological–or even colonialist–approach or an evaluation (Darian-Smith 2015; Alam *et al*. 2015). Thus, this essay contributes to the present and open debate through four key-questions for further research and analysis: 1) How much justice do we have inside the concept of litigation?; 2) Are European legal systems ready to face the challenges of new legal subjectivities?; 3) Is law shaped with anthropomorphic features or may it serve a more holistic and heuristic approach?; 4) Is there any path towards a shift in the legal paradigm?

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Abstract

Climate and Environmental Justice: A Comparative Perspective to 'Think Different' about Long-Lasting Issues

The essay deals with environmental and climate issues conveying a 'think different' approach to the legal debate, introducing the connection between science and law in reference to climate and environmental issues. From an interdisciplinary perspective, the inquiry focuses on constitutional clauses and state norms recognizing peculiar prerogatives for natural entities and environmental rights (Ecuador, Bolivia and New Zealand), as well as on remarkable leading cases concerning procedural and substantial rights (Colombia and India) and state responsibility for lacking climate actions (The Netherlands). Finally, the critical approach suggests key-questions that could merge environmental and climate justice/litigation, as well as foster the debate on new legal paradigms, mainly addressed to EU legal systems.

Keywords: climate and environmental law; climate and environmental justice; legal comparison.