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HUMAN RIGHTS AND THE ENVIRONMENT
Legal, Economic and Ethical Perspectives

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CHAPTER I
BETWEEN ECOLOGY AND ENVIRONMENTALISM

Francesco Viola

SUMMARY: 1. Ecology as theory and environmentalism as practice. – 2. The order of nature as a choice. – 3. Holistic Ecology and Relational Ecology. – 4. Political ecology. – 5. A new way for environmentalism: the commons. – 6. Commons as a source of rights. – 7. Environmental new institutionalism.

1. *Ecology as theory and environmentalism as practice*

Ecology has two facets, that of science and that of wisdom (ecophilosophy). As a science, since its origin, also in virtue of its Darwinian roots, it has proposed to reorganize all the sciences that deal with the relationships between an organism and the environment, so as to reconstruct all the factors that make its existence and development viable. It therefore has a holistic vocation, which, however, has to reckon with the reductionist tendencies of the sciences to which it makes reference. As wisdom, it aspires to a general conception of nature, of a philosophical or even a religious character, giving rise to an ecological culture that animates constantly increasing groups and social agitations. The fact remains that the configuration of nature as an ecosystem is a by-product of natural science, just as configurations of nature as creation, as a set of useful goods, as territory, as a store of resources, are a by-product of theology, of law, of politics and of economics (Viola 1995). Nature has many faces, because we only arrive at it through culture (Viola 1997, 3-26). The ecological conception of nature too is a product of human culture.

This holistic vision of nature is by no means unitary and compact, but is ramified in an archipelago of different versions, which only have in common one basic principle, the general principle of the interconnectedness of living beings in the context of the physical conditions necessary for their existence (Commoner 1971, 29). This principle also unites ecology as wisdom with ecology as science.

There is obviously an interaction between the scientific perspective and the philosophical one. The former furnishes the empirical basis to which the latter in turn resorts and the latter influences the former, driving it to broaden its investigations, taking in ever-new research sectors. Since

man's work interferes more and more profoundly with the equilibriums of nature, human sciences too are involved in the ecological issue, mainly meaning economics and politology, that is to say exploitation of resources and organization of society. In this way the scientific approach loses its original compactness, which in itself was already problematic. It has to be recognized that today the ecological issue affects a conglomerate of heterogeneous scientific disciplines, impossible to place under unitary scientific management, which instead was the original aspiration of the naturalist Ernst Haeckel, who in 1866 coined this term to launch a new field of scientific research.

The multiplication of sciences interested in the ecological issue tends to confer greater and greater centrality on ecological ethics as the control room for the use of information coming from heterogeneous disciplinary sectors. Since the ecological ethics is dependent in turn on ecophilosophy, one easily understands the increasing practical importance that the philosophical and cultural debate on this theme is taking on. And it is precisely at this theoretical aspect of the ecological question that this paper intends to look.

In this field it is difficult to reconcile theory with practice. Theory – as has already been observed – has a holistic aspiration in that the general principle of interconnectedness accepts no confines and would therefore require world government of the protection of nature. Practice, instead, is always circumstantial and particular, necessarily linked to circumscribed horizons. Theory is ecological, while practice is environmental. Here lies the root of the distinction between ecology and environmentalism, though we are talking about fluctuating denominations influenced by contingent uses. As a rule we can trace out this distinction on the basis of three criteria: that of the goal, that of the object or content and that of the extension.

As regards the goal, the original target of ecology is the strictly scientific one regarding knowledge of nature, while environmentalism is an action movement that proposes to stimulate an ethical conscience and a lifestyle sensitive to the effects of human behaviours on human and nonhuman nature. It therefore has a prescriptive character and not, like ecology, a descriptive one. Environmentalism appears as political, social and legal action. This programme of action, which is emotionally nurtured by direct experience of environmental decline, requires theoretical bases that are more and more rigorous on the scientific plane, in order also to adequately justify the sacrifices that are required of economic powers and consumers. In this way one understands why, in the history of relations between ecology as science and environmentalism as practice, in the last few decades there has been a progressive process of rapprochement, down to acceptance, by the latter, of the very concept of 'ecosystem'. Nevertheless, the ecosystem itself – as has already been said and will be seen more clearly afterwards – can be seen in a different way and this means that the use of scientific data is not univocal and is open to challenges and debates in which politics and ethics interact with natural science.

The object of environmentalism, that is to say its specific approach to nature, does not fully coincide with that of ecology. Ecological thought, especially in its most radical versions, those of Deep Ecology, does not love to speak of 'environment' or of 'environmentalism' (Naess 1973 and 1989), since in this term it sees a residue of an anthropocentric culture. The environment seems to have a functional or subordinate character in relation to man as its reference point. The environment is the place inhabited by man or the set of living and nonliving beings that surround him. The ecosystem, by contrast, has neither centre nor outskirts, but is only a network of horizontal relationships in which human beings are parts in the same way as the other ones. And it is for this reason that the notion of environment is more suitable for traditional legal thought, so much so that around it the real legal and political tools in defence of nature are worked out. They constitute an important aspect of the welfare state, concerned to protect not only public health but also natural and cultural goods. All this would be insufficient if there were not also an intervention on the plane of the international and transnational law (Munari and Schiano di Pepe 2012). Nevertheless, by itself the notion of environment is not 'anthropocentric' and must not be confused with that of 'landscape', which instead is anthropocentric. However, it is 'anthropomorphic' not only in the sense in which all human thought is necessarily anthropomorphic, including ecological thought, but also because of the specific fact that the prescriptions of environmentalism are addressed to human beings and pay attention to the harmful effects for the environment produced by human actions. Even if the environment is not necessarily thought of as functional to human beings, the fact remains that they are the only beings to which a responsibility for the environment, where their actions have or can have a perverse effect, can be attributed. In this sense and in any case man is not a part of the environment in the same way as the other parties: man is the only being that has at the same time rights and duties, that is to say a sense of justice. If we wish, this too can be considered as *an anthropological point of view* that is not merely utilitarian but also benevolent.

Lastly, ecology and environmentalism also differ for the extension of their field of research and action. While as a principle the scope of ecology is global and holistic, that of environmentalism is local and sectorial. The distinction between global and local is not absolute, but depends on the point of view (Elster 1992 and cf. also Walzer 1983). The local dimension can indicate a portion of nature or a territory over which a political power has jurisdiction. In this case environmental policy will have national or regional scope. But 'local' can also mean 'sectorial', that is to say concerned with specific environmental problems (for instance, pollution, conservation of resources or demographic growth) or even more particular aspects of the latter (for instance, toxic waste and dangerous substances) and concentrating on the way of facing these problems each time. This strategy is deemed a more promising one than the globalistic one, which because of the enormosity of the issues at stake is often paralyzing on the

practical plane. Nevertheless, this approach substantially gets round the general principle of interconnectedness, which is at the basis of ecology as science and as philosophy. Critics of sectorial environmentalism also observe that it substantially aims at provisional solutions to staunch or reduce environmental damage without seeking to eliminate them once and for all (conservative environmentalism). The very formula of 'sustainable development' can be criticized as a search for a compromise that in the end is always advantageous for man, interested in not entirely chopping off the branch on which he is perched (Stewart 2013). But there is also a further variation regarding the local dimension. It concerns the criteria to follow in facing sectorial problems within environmental damage. One wonders if they have a general scope or depend on the political and cultural contexts in which they arise, so there is not a standard way to face the same environmental issues all over the world. It is more logical to think that there is not one and only one reasonable environmental policy, because in the field of practical reason the correct answer is often not a single one, and that in this case the cultural factor has to be of some importance. Nevertheless, the process of expansion of environmentalism beyond national and regional confines imposes uniform political and legal prescriptions (culminating in international law), which may prove unsuitable or penalizing at a local level.

In conclusion, the dialectical tension between ecology and environmentalism is referable to that between thought and action: thought tends to universality and generality, while action is always particular. The development of science makes it possible to know better, but never fully, the distant, and often unintended effects, of human actions, reminding us that being situated in a place on earth does not relieve us of responsibility towards nature as a whole.

2. The order of nature as a choice

It must not be forgotten that all ecological and environmentalist problems rest on a basic philosophical issue that places humankind face to face with an entirely new dramatic choice. From natural science in itself one can only derive legal and ethical norms after certain values are recognized and have been taken as the goals of action (Viola 2011). Thus, maintaining that if a given human behaviour is seriously harmful for nonhuman nature it has to be forbidden implies the evaluative judgment that damaging nature is evil. However, natural science as such does not have the authority to affirm this, unless it embraces scientism, which is an ideology. It is necessary to appeal to an ethical judgment required in turn by the effects of technological and industrial development put to use by capitalistic economy.

As long as man was not able to modify the order of nonhuman nature, this appeared as necessary to him, that is to say as a set of physical and biological laws that could not be violated without falling into chaos. This

necessity was endowed with moral value only insofar it was interpreted as the divine will. But modern science does not need this hypothesis and therefore this necessity in his eyes is completely devoid of ethical meaning. But when technology has shown the possibility of modifying and even overwhelming the order of nature, then it makes sense to wonder whether it was right or not to safeguard this order as we found it. On the other hand, the principle of disorder is present in order, as entropy has shown by throwing into contingency the eternal laws of modern science. It therefore begins to make sense to wonder whether this 'necessity', having become unnecessary, must be respected and to what extent. In this way the order of nature becomes the object of ethical problems – not meaning a choice between other possible orders but rather the decision to safeguard or not that contingent order in which we find ourselves living. It now appears clear that the illusion of Laplace has been shattered (Capek 1961), that is to say the order of the world is contingent, that it was formed through long processes of selection, and that human life participates in this history of nature and is inseparably linked to all other natural beings.

One also wonders why we have to treat man differently than other natural beings whose evolutionary processes are not subject to ethical evaluation. If man belongs to the ecosystem with the same right as the other parties, why on earth not leave him to conduct his struggle for survival in his own way?

The fact that nature has become one of the possible orders of being because of man's manipulative power also has to be reconciled with the irreversibility of technological action, already stressed by Hans Jonas¹. We are here faced with a double frailty: science does not succeed in foreseeing all the possible effects of technological action (Tallacchini 1999, 59) and technology is not able integrally to restore what it has destroyed (despite the theses on compensatory justice in Taylor 1986). The helplessness of the experts – as Fritjof Capra has observed (1982) – is a characteristic sign of the crisis of contemporary civilization. We can transform the world to our liking, but we cannot backtrack. All this confers particular value on the present order of nature. It is something that is given to us, that we can destroy and that we cannot artificially reproduce.

It also needs to be observed that these problems cannot be limited to moral or human good. In this connection, wondering if and why it

¹ The irreversibility of environmental damage is the main difference between the ecology of the ancients and that of the moderns. Apart from that, it is striking to see how old the complaints are about the degradation of nature by man. Plato noted that deforestation of Attica had made the land like a thin body that was all skin and bones (*Critias*, 111a-e) and the Roman naturalist Pliny bitterly remarked on the result of mining: "Spectant victores ruinam naturae". Cf. Weeber 1990 and also Sallares 1991.

is necessary to protect nature also implies an ontological issue, which the ancient philosophers considered ‘ontological goodness’, that is to say reflecting on the intrinsic goodness of nature, on nature as a value in itself². This orientation is worked out in wider and wider concentric circles: from protection of the living beings closest to human beings, beginning from the primates, to a shift towards all sentient beings (animal rights) and then towards life in general, that is to say towards organisms composed of living cells and ending with the ecosystem in which natural species support each other in a holistic dimension. Here the theory of intrinsic value has reached its maximum extension, since recognizing that ecological systems have a purpose in themselves also means including rocks, air and water.

From all this it must be inferred that nonhuman nature can no longer be simplistically thought of in the category of the necessary ‘de facto datum’. If we can tamper with the order of nature, then we have to ask ourselves if and why we have to respect it as it is, that is to say if it constitutes a limit to the exercise of our rights; we have to ask ourselves if we have the duty to safeguard those bonds between living beings that a history of contingency has woven.

The general principle of interconnectedness by itself excludes the dichotomies typical of the modern world, like those between nature and spirit, nature and culture, necessity and liberty. The history of human liberty and that of nature now tend to seek common roots: the former becomes aware of its biological bases and its bonds with corporeity³ and the latter, through the capacity of being different from what it is, becomes the object of a choice and a value, not only ontological, but also moral. Nature opens up its doors to liberty, losing its necessity, but liberty in turn becomes aware of its conditions of possibility. “Liberty is only possible through nature” (Jaspers, 1948, 228 – my translation).

3. *Holistic Ecology and Relational Ecology*

Ecophilosophy is not a unitary idea, but allows a great plurality of interpretations of the relationship between man and nature. In it we can

² The Preamble to the *World Charter for Nature*, adopted by the United Nations in 1982, affirms that “Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action”. But care is also taken to point out both that humanity is part of nature and that culture is rooted in nature, so that biodiversity and cultural pluralism are linked to one another.

³ “It remains an open question whether recognizing freedom also means recognizing human nature, since freedom is possible only among natural beings” (Spaemann 1994, 79). My translation.

approximately distinguish two main currents: holistic and relational ecophilosophy (Mathews 1998).

According to the holistic vision there are not strictly individuals or separate entities, but only relationships that provisionally coagulate in forms of life functional to the existence of the ecosystem, which is the only entity that has a stable ontological meaning (Lovelock 1979). The qualities or the prerogatives that we are wont to attribute to determined beings in reality belong to the ecosystem as such. Nature is personalized and man is naturalized, but this communication of quality can be understood with different accentuations of gradualness. This holistic vision can in turn develop according to a projection of the subjective conscience into a transpersonal conscience proper to all nature (transpersonal ecology) or into postulating total absorption of the human self in natural processes.

On one side, conscious identification with the biotic community is a broader way to perceive the self and its relationship with otherness, so that taking care of other beings is not perceived as different from taking care of oneself (Naess 1987). The self is identified with the whole world (cosmocentrism). However, transpersonalism has to neutralize people as individuals and their ontological difference from other beings to look to a broader and more comprehensive Self. People having been removed as individual entities, transpersonalism actually becomes a form of impersonalism, which, however, does not intend to arrive at total negation of the person, but attempts to preserve some prerogatives of its own after being stripped of the negative one of the egoistic self, which is the stronghold of possessive anthropocentrism. The impersonal is an imprint left by the single person. Behind the most generous and altruistic expressions of *Deep Ecology* – which goes as far as to challenge the very presence of man on earth if it is seriously prejudicial for the equilibrium of the ecosystem – inevitably one clearly glimpses the imprint of the person in his or her noblest altruistic manifestations.

On the other side, complete naturalization of the human being, as suggested in *Land Ethics* by Aldo Leopold (1968), leads to the ecosystem itself being equipped with an unconscious biological function of self-protection, with the disappearance of the strictly 'moral' perspective. It is not human beings that are to protect tropical forests: it is the latter that protect human beings. Nevertheless, in this way it proves very difficult to develop an ecological ethic in that moral good requires an evaluating subjectivity for which the ontological goodness of the ecosystem is perceived as a goal of action and a source of duties. Total naturalization of the human being suppresses this possibility and consequently deprives ecology of a proper ethical justification. For this reason holistically oriented ecophilosophers prefer to opt for transpersonalism, seen in various ways.

The relational version of interconnectedness seeks to save at one and the same time the identity of the beings that populate the ecosystem and their ontological differences. Besides, protection of biodiversity would not make sense if the importance of differences were lost. However, the

radically relational character of every being means that it cannot be considered separately from the whole without falling into nothingness as well as into non-existence.

The relational version can be upheld with different degrees of intensity, so that this conception is placed between elimination of essences, proper to the holistic version, and the essentialist ontology of the old metaphysics.

Relational interconnection is interdependence. This means that the relationships can be of different types: symmetrical and asymmetrical, ascendant and descendant (like those of the food chain), linear and circular, direct or indirect. Every being is distinguished from the other by the configuration of the relationships that it has with other beings, that is to say by the role that it plays in its own environment of life.

In this context the natural world appears as a community in which the forms of relationship serve to specify beings and therefore also to distinguish them from one another. The expression 'biotic community' is strictly speaking suited to the relational conception and indeed it was soon abandoned by the holistic conception. In a community, identity is found in the role played by each one. Just as people are fathers because there are children (asymmetrical relationship) and there are brothers because there are brothers or sisters (symmetrical relationship), so people are human beings because there are relationships with other human and nonhuman beings in the presence of given material and climatic conditions. Playing one's own role, one protects the biotic community and realizes oneself. There is thus prefigured a sort of ecological communitarianism.

Maintaining the balance of the relations between heterogeneous factors and their delicate dosing is what renders possible life on earth and the very existence of human beings. Accordingly the natural study of man, as a being endowed with the greatest complexity of relationships, becomes the guide to understanding the very physical conditions of the universe. The naturalization of man thus becomes, paradoxically, one reason more to emphasise his dignity. This 'anthropic principle' (cf. for instance Carr and Rees 1979) has resulted in varied interpretations and developments, among which one can mention the return of the teleological explanation. But the most important thing is that the bonds between human beings and the world are restored and that their common destinies are recognized. From this point of view ecology is humanized (human ecology), though carefully avoiding the anthropocentric principle.

The principle of interdependence makes it possible to establish the connections between nature and culture, between the order of the world and the organization of human societies. The ecological issue becomes a problem of justice and the problems of justice themselves can be treated as an ecological issue. On one side, in the context of distribution and exploitation of resources one must bear in mind not only the rights of human beings but also the respect due to nature, which thus becomes a criterion of justice. On the other side, injustices and social inequalities can be considered, in addition to their effects on other species, also as

ecological damage inflicted by human beings on other human beings. Justice towards humanity is connected with justice towards nature, down to the point of producing cosmopolitical visions in the strict sense of the term. Hence political ecology arises, which overcomes the original distinction between ecologism and environmentalism, because in politics human responsibility is in the forefront but at the same time its object is now extended to the whole order of the world. The most burning themes of political ecology and the manifold national and international organizations, official and unofficial, that promote it are – as everyone now knows – those of ozone depletion, global warming, acid rain, air pollution, water shortage and the decline in its quality, disruptions caused by global climate change, desertification, loss of topsoil, nuclear waste disposal, depletion of global fisheries, impoverishment of biodiversity, the growth of the global population, and environmentally related illnesses. But to these we have to add the social injustices of capitalism and those caused by ecological policies themselves consisting above all in making the poorest and weakest pay its costs and the externalities.

4. *Political ecology*

Political ecology as a programme of public action inevitably intercepts political ideologies and is diversified according to the main ideological currents (Clark 2012). We have, however, to distinguish between long consolidated political conceptions, which now welcome the ecological issue as a new and important political and economic drive, from those that are constituted from scratch around the priority objective of the protection of nature and biodiversity, with consequent effects on the organization of social life. If we wish to maintain the distinction between environmentalism and ecologism, we can ascribe to the former not only the conservative orientation and the liberal one, which are distinguished by the way of treating the market for the purposes of the ecological crisis, that is to say either as free of restrictions or as necessarily regulated, but also deliberative democracy insofar as it also extends to the ecological issue the communicative rationality of the ethic of public discourse (Dryzek 2002).

Ideologies of the past that are today in decline find in the ecological crisis new lifeblood to renew themselves. One example is eco-socialism, which in Marxist thought finds an effective criticism of the exploitation of nature, and another is eco-anarchism, which from the ecological crisis derives new arguments to contest the centralized political power and the dominion of technology. More strictly ‘ecologist’ are, instead, the movements and doctrines that rethink the organization of society from the bases, challenging the socio-political order of the modern state and the present one of the international community and setting out in search of a new cultural and anthropological paradigm, as happens in bioregionalism, which pursues a recovery of the original harmony between

nature and culture against the artifice of geopolitics, and in post-modern political ecology, which sees the legal and political categories of modernity as the biggest obstacle to promotion of green values. Something separate, seeing its importance, has to be said about ecofeminism, which rejects the sexist ethic of rights to the advantage of the ethic of care, thus acquiring a conceptual paradigm that, assimilating dominion over women to that over nature, closely links the liberation of the one to that of the other.

In conclusion, it can be affirmed that, while the *punctum dolens* of the relations between holistic and relational ecology is the philosophical one of the importance of natural essences or the identity of beings, the watershed in relational ecophilosophy is that of the distinction between conceptions that pursue an adjustment of the modern legal categories and politics and those that instead deem it necessary to subject them to a profound upheaval, meaning that it is a political issue. Since everyone agrees on the need for a cultural change in the use of goods, in general lifestyle and in the consideration of nonhuman nature, we rightly wonder whether this is possible within the economy-driven and political categories to which the principal responsibility for the ecological crisis is attributed. This question becomes even more dramatic where it is believed that this change has to be so radical as to require a drastic break with the selfish order of power, all-powerful consumerism and the hierarchy of the social classes to the advantage of authentic solidarity sustained by compassion and reciprocal help.

Thus political ecology, in which ecologism and environmentalism inevitably come together, is attracted by two opposite extreme tendencies: one which deems it sufficient to broaden the range of action of the legal and political categories of modernity to face the ecological crisis adequately; and one which deems it necessary to enact a radical change of paradigm creating the bases of a palingenesis of the relations between man and nature through a new way of structuring politics, the economy and law. Both solutions are not very convincing and are not really practicable.

The dominant paradigm in modernity, represented by the polarity between state and market, between sovereignty on one side and possessive individualism on the other, as well as being belied by increasing transnational interdependence on all fronts, cannot be corrected from inside and in the ecological field leads at the same time to authoritarianism, hostile to citizenship rights, and to monetarization of pollution rights. If it is true that protection of the environment is the privileged locus of the principle of subsidiarity, in that environmental problems are perceived more fully by those people that are directly affected by them, it is also true that protection of the environment requires a strong authority having a major capacity for resistance and pressure that rarely characterizes local governments. Accordingly, protection of the environment is either insufficient or authoritarian. On the other side, recourse to economics is motivated by the conviction that, instead of opposing the display of self-

interest with legal and political constraints of various kinds, it is more efficient to use the same mechanism to reach objectives of common interest through heterogenesis of goals according to the well-known market logic. But this justification has tragically proved counterproductive and contradictory. Indeed, the method of taxing those who pollute increases, instead of decreasing, the taxing power of the state, and above all, from the ethical point of view, subordinates legitimacy of actions to the costs for putting them in place, discriminating between the rich and the poor. Even taking to the extreme the liberalistic tendency of the economy, for which it would be necessary to create a market in which permissions to pollute would become an object of negotiation and transaction and in which powerful multinationals would be the contractual parts against weak local communities, the result would be that of monetizing rights. In this connection, environmentalism calls rights into play, which are silent in ecologism, and it is sensitive to protection of cultural identities. But law and politics exist precisely because not everything is negotiable, and not everything has a price (Sandel 2012). Law exists precisely to protect citizens from being forced to sell their rights.

The palingenetic solution is clearly utopian. With this I do not mean that it is useless or ineffective, because utopias have an important function for the ethical progress of humanity. They help people to become aware that the pathways of practical reason are manifold and that there is not a single possible answer to the way of seeing man's relations with the world and with other men. Nevertheless, history never starts from nothing, as totalitarianism maintains, but has to take into account the past and the present without indulging in determinisms and with awareness of the need for continual and profound corrections of legal and political categories. This also holds for the history of the interdependence of beings and for man's relations with the world. There is thus prefigured a third way between maintenance of the modern paradigm and rejection of it: the way of integral relational ecology⁴.

5. A new way for environmentalism: the commons

In this overview of legal and political categories, in the light of the relational principle of interdependence and with particular reference to property rights and the practice of democracy, drives from the past are found again that were buried or ignored by the concentration of strong and dominant powers sustained by the aggressiveness of modern science towards nature. In this connection it is out of place to fear a return to the pre-modern epoch or even to the Middle Ages. We must not allow the

⁴ There is also a reference to 'integral ecology' in the recent Encyclical Letter of the Holy Father Francis *Laudato si'*. *On Care for Our Common Home*.

ideological prejudices of modernity to prevent valorisation of cultural resources that belong to the great narrative of humanity. On one side the past is never repeated in an identical form, while on the other demonizing it derives from a stupid religion of progress. When we find ourselves at a deadlock, at times it is necessary to return to the interrupted pathways of the past to open up new roads.

Often reference to the 'new Middle Ages' is connected to the institutional dimension, that is to say to the present fragmentation of the centres of power, to the diffusion of a disorderly and transversal polycentrism, no longer linked to given places and therefore globalized, and to porosity of borders. It is like a network that has very many knots but no centre (Castells 1998). This is an ambiguous situation that does not by itself guarantee respect either for rights or for nature. Everything depends on governance. Nevertheless, environmental protection has to take cognizance of this circulation of powers and their displacement if it wants to be effective. This implies awareness of the impossibility of a single plan of global action; it requires attention to specific situations of a cultural and environmental character and demands diversification of the modalities of action, but also the need for cooperation and consultation. But it is not the institutional aspect that I intend to develop here, because it in turn implies the possibility of opening up new pathways for law and politics. That this is possible is shown, as an emblematic example, by the present-day problems of the commons, on which I will dwell in the conclusion only for illustrative purposes. This is a different way of seeing the relationship between man and goods that challenges once again property rights, which are the most threatening modern legal category for ecologism (Rodotà 2013).

At first sight present-day reflection on commons appears as a maze of visions that inextricably interweave. The general trend is to underline a set of goods that escape the traditional dichotomy between public and private, because their destination would prove to be thwarted by application to them of the regime of private ownership or that of public law. Their inevitable or possible decline would produce double damage: to nature and to man, in that we are talking about goods essential for the realization of human life and for distributive justice itself. This leads us to prefigure appropriate management of these goods, management that is neither public nor private, 'common' management as a *tertium genus*. Therefore, strictly speaking, these goods are qualified as 'common', also, and above all, because of their particular management or particular governance. As we know, the pioneering and illuminating researches of Elinor Ostrom (1990), on the basis of examination of concrete cases, have shown how and on what conditions it is possible to trace out new institutions that allow common management of these goods in a fruitful way.

It must not be forgotten that one of the traditional justifications of private ownership appeals precisely to the demands of conservation and valorisation of goods. Ironically, it is assumed that self-interest is beneficial

for respect for nature and its protection. But private ownership leads to exclusion of others not only from enjoyment but also from protection of these goods, also frustrating their rights as citizens. The drift of private ownership introduced by possessive individualism has made it necessary on the historical plane to look for other solutions for the governance of particularly important goods. The same must be said, *mutatis mutandis*, for state management of goods. But, if we distinguish, as we should, between public and state, then common goods are very close to non-state public goods. Between state and market there is the non-state public sphere and civil society. In any case it is necessary to reject the rigid dichotomy between public and private. Many institutions that govern commons are a rich mixture of *private-like* and *public-like* (Ostrom 1990, 14). In short, the governance of these common goods has an eminently pragmatic character. It is necessary to see case by case what regime is most suitable for enjoyment of particularly important external goods, whether material or immaterial, so that they are protected and at the same time remain accessible to everybody. It is important to stress that in these cases there is not opposition but superimposition and convergence between accessibility and conservation of the good, between human rights and protection of nature.

Certainly these common goods are difficult to classify definitively. In them we find, one next to the other, heterogeneous categories of goods: natural goods (like water), environmental and ecological goods, social goods (like cultural ones), and immaterial goods (like the web). What do these commons have in common? The usual answer arouses some major perplexities. It is believed that while private goods are excludable and are rivalrous and public goods are non-excludable and are non-rivalrous, common goods are non-excludable and are rivalrous. If by 'rivalry' we mean opposition between enjoyment of the good by the single person and enjoyment by others, then it cannot be said that all that the goods today considered as 'common' are rivalrous in this sense regarding consumption. This is not the case, for instance, of cultural goods and those linked to knowledge, like the web: on the contrary, the more these are enjoyed the more they grow. We could certainly rephrase the notion of 'rivalry', stressing equal access of everyone to enjoyment of these goods and their use, that is to say raising a question of distributive justice. But in this way the notion of rivalry would end up being confused with that of non-excludability or of accessibility, which is a normative and not a factual principle, as instead the condition of rivalry is. The only sensible answer to the question of what is common to goods that are so heterogeneous from so many points of view, from that of extension (down to *global commons*) to that of enjoyment, is the one that underlines the inadequacy of submitting them to the regime of the market or of the state. A new legal paradigm is required to maintain the character of commonality on the plane of their management too. And then, on the basis of the territorial or historical circumstances, the sphere of common goods can be broadened or restricted every time that it is necessary to

verify or otherwise a close connection between the advantage that every person derives from use of them and the advantage that others also derive from it, as well as between the duties and the burdens that each person takes on themselves by using them and the duties and the burdens that others also take on themselves. In the commons the benefits and the burdens of all the participants are shared and not opposed (as for private goods) or to be set aside (as for public goods) (Zamagni, 2015, 58). 'Common' comes from *munus* and indicates equitable sharing of duties, just as 'immune' indicates absence of duties.

6. Commons as a source of rights

At the origin of our legal civilization there is a very strong conviction that goods on earth do not in themselves specifically belong to anyone, but are available to be used by everybody. The principle of the common destination of goods originates from Stoic philosophy and – as is well known – was incorporated in the thought of the Fathers of the Church. It was still very much present in the thought of Locke and today is still defended by the social doctrine of the Catholic Church (Mellon 2012). In any case the principle is wholly reasonable and one may also think that it is still a presupposition in Rawls' thought experiment of the veil of ignorance. Originally all goods on earth are common, that is to say are *res omnium* or *res communes omnium*, as Cicero thought. "Secundum ius naturale omnia sunt communia"⁵. If they were *res nullius*, then occupation or *apprehensio* would be sufficient to justify the exclusion of others from enjoyment of the good.

The problem of the subjective right arises precisely to justify the passage from this original state of commonalty to subdivision of ownerships through the property right, which is therefore concentrated in the right of exclusion of others from enjoyment and use of the good. But at first sight it appeared incompatible with the original commonalty of goods and founded only upon reasons deriving from the state of human frailty (Añaños Meza 2013, 108-109). Hence it had to be conceived in such a way as not to eliminate entirely the original destination of goods, but on the contrary to favour it. This was the attempt pursued by Francisco de Vitoria, who can be considered as the historical precursor of the theory of commons. According to Vitoria the regime of private ownership or *dominium proprium* does not do away with *dominium omnium* conceived as a category of public law, which consists in 'sharing' (*communicatio*) in time of necessity, that is as a right to procure what is required to survive (hunting, fishing, firewood), only limited for acceptable reasons, and as a right in the case of extreme necessity; he gives the example of shipwrecked people as a paradigm of the human condition. We are not talking about

⁵ Aquinas, *Summa theologiae*, II-II, 66, 2.

examples belonging to the past if we just think about the immigration tragedy in our own day.

Vitoria's thought is also important from another point of view that directly concerns our theme. There are rights and duties that man derives from his relations with the goods of nature. These goods are seen as the source of these rights and these duties rather than as being merely useful or functional to the exercise of pre-existing rights deriving from subjectivity, as instead people are inclined to consider them today (cf. e.g. Rodotà 2012, 107). Certainly there are rights because there are people, but their content and their exercise depend on the existence of certain goods in relation to which there is also the duty of care and respect for commonalty. There are liberties that are justified and modelled by the goods to which they refer and by the modalities of their use. Such is the group of rights that Vitoria considers relational goods: *ius peregrinandi et degendi*, *ius negotiandi*, the right to communication and participation in the common goods of nature⁶. These fundamental rights do not precede the relationship with goods, conceived as necessary for their satisfaction. On the contrary, the modality of existence of these goods produces non-individualistic fundamental rights, that is to say ones governed by the principle of solidarity. Hence the commonalty we are speaking of here should be seen as a triangular relationship between people and goods and of people with one another. Vitoria intends to trace out an intermediary way between the constraint of things on people and the dominion of people over things, between the subordination of the person to an arrangement of things that is presumed to be natural and the person freeing himself or herself from every bond with nature, leading to the loss of the reference point of human intersubjectivity itself.

As is well known, Vitoria's attempt to reconcile the right to ownership with common use failed because of the presumed impossibility of separating the concept of private ownership from excludability of the good, as besides had been already shown by the medieval debate on Franciscan poverty. Nevertheless, Vitoria stressed that using goods is not a purely factual thing or in itself devoid of a legal dimension. There are some rights that derive from the use of things rather than from the prerogatives of subjectivity or from its dominative voracity.

7. *Environmental new institutionalism*

The return of the problem of commons constitutes an opportunity to go back to these attempts at separation of ownership as exclusion from ownership as common use. This revision is extremely urgent, because the tragedy of *commons*, whatever anyone says about it, can now be considered a *de facto* datum. However, it does not only consist in the environmental

⁶ *De Indis*, I 3, 3-4.

disaster, in the depletion of goods that are vital for human beings and also in unfair distribution of resources, but also in the anthropological drift produced by the solipsistic way of seeing human action and liberty itself. Ostrom has shown that on certain conditions this tragedy is avoidable, that is to say on condition that we place responsible and cooperative use at the centre of social action, as opposed to anthropocentric dominion.

According to Ostrom the traditional ownership sums up in itself five different types of rights: individual right of access to the resource, individual right to exploit the stock of resources, the shared right of management or rather of participation in the formation of the rules of cooperation, the shared right to determine who can be excluded from access to the resource, and the individual right to alienation of the resources. The holders of the first four types of rights are strictly consumers and managers, while it is only with the addition of the fifth right that strictly speaking they become owners (Ostrom 2002). It is worth noticing that agency is fully realized in exercise of the first four types of rights and in itself does not also require the fifth one. The latter, that is to say the individual right of alienation and exclusion, makes the relationship with the good purely contingent and entrusts it to the individual will.

The cooperative process in the management of commons starts from a situation of interdependence, that is a *de facto* datum dictated by things, that is to say linked to use of the same natural or artificial resources, which make it very expensive (though not impossible) to exclude potential beneficiaries from use of them. However, we must here specify that these costs could also concern problems of justice, that is to say have an ethical-political character. This interdependence is not temporary, but is continuous, in that it derives from the nature of those that Ostrom calls 'common-pool resources'.

Under these conditions, so that the beneficiaries or 'appropriators' can use these essential goods in a lasting way, also preserving them for future generations, they must set going self-organization without an external authority. This self-government can also be very complex, with distinction of roles (providers and producers), with various types of rules, which determine who is to take decisions in the different sectors, what actions are permitted or imposed, what procedures must be followed, what information is necessary, what rewards must be assigned and what sanctions inflicted (Ostrom 1990, 51). There will also have to be second-level rules that establish how the first-level ones can be changed. All this has to belong to common knowledge shared among all the participants, prefiguring a real form of rule of law. This means that the language of rights and that of rule of law are necessary for the governance of nature and for distributive justice, on condition, however, that they are worked out in the light of the principle of solidarity in its maximum extension, that is to say also regarding the ecosystem. In this way jurisprudence can avoid becoming responsible for the decline of nature through a profound

change of legal paradigms, leading to a new ecological order in human law (Capra and Mattei 2015).

Lastly, it is interesting to notice that this self-organization of interdependence is aimed at allowing free and independent action by the beneficiaries, which consists in use of the available resource units. In this connection, liberty lies in use and not in exclusion of others, that is to say in ownership. "Use is a free act" (Brett 2011, 23). The beneficiaries appropriate the resource unit and consume it or at any rate use it, but they do not appropriate the system of resources. This means that, at least in these cases, the autonomy and liberty of the subjects considered singly does not precede, but follows, the autonomy of common action and the community arising from the situation of interdependence and supported by the intention to cooperate and by mutual trust. Social bonds are not a constraint on liberty but are the condition making it possible and the guarantee of its equal distribution: *libertatem in communi ponere*⁷.

The category of commons therefore stresses a double relationship of interdependence, one between people and goods and one between people through the goods in question. This interdependence has a particular character, in that from the use of these goods duties and responsibilities arise towards other people and natural resources themselves. It is proper to the dignity of the person to attain independence through self-government of situations of interdependence, but an external authority cannot effect this without an intrinsic contradiction. It must only favour it and make it legally possible. The responsibility of the protection of nature falls first of all on those who have direct relations with it, those who use the goods of the earth, those who take an active part in the life of the ecosystem, those who depend on its conservation, and those who enjoy its benefits and its beauty. It is necessary to recognise every person to have the right to intervene in the decisions that concern his or her environment⁸.

As has already been said, the commons are not only environmental and ecological goods. Ostrom's researches address, rather, productive natural goods and economic resources (meadows, forests, fisheries, groundwater basins), which are most at risk of extinction. Nevertheless, their results, with the appropriate adjustments, are also fully applicable to protection of nature without productive aims. Besides, Ostrom's neo-institutionalism is wittingly connected to the strategy used by biologists for a better theoretical understanding of the biological world (Ostrom 1990, 25). The management of the commons has a highly flexible character and has to take into account the nature of the good and the characteristics of the relationship that the human being has with it. We have also said

⁷ Tacitus, *Annales* 13, 27.

⁸ In the *Declaration of the United Nations Conference on the Human Environment* (Stockholm, 1972) a new subject of international law appears: reference is made to *humanity* rather than to states. Statalism is a by-product of anthropocentrism.

that common goods are a category that is neither homogeneous nor well determined. Their confines are mobile, in continual expansion and sensitive to the circumstances of interdependence, which in turn vary on the basis of different factors, among them signally that of scientific and technological development. The aim here was only to point out a significant example of integral relational ecology that is effectively practicable and thus to show a third way between utopian ecologism and anthropocentric environmentalism.

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