

# JOURNAL OF INTERDISCIPLINARY HISTORY OF IDEAS



2023

Volume 12 Issue 24  
Item 2

– Section 2: Articles –

On Universalizing ‘Nature’ and ‘Property’:  
the Unravelling of a Master Narrative

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## JIHI 2023

Volume 12 Issue 24

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# On Universalizing 'Nature' and 'Property': the Unravelling of a Master Narrative

Michele Graziadei \*

*In this paper I will show why the master narrative that leading thinkers in the West have forged to justify property as an engine of progress is unravelling, and why the future will never be the same, as far as the relationship between property and nature is concerned. Property and markets will remain important to our existence, but a healthy dose of realism and political wisdom by now defeats any narrative that extols the supposed superior virtues of property and markets in regulating human interactions with nature. It is time to look elsewhere to find solutions to have a more sustainable relationship with nature; it is necessary to recognise that there are other ways to think to these problems and to our future.*

## Introduction

In the modern world, property is a ubiquitous institution and, together with contracts, is one of the pillars of the economy. Beyond the economic sphere, in the West, liberal thinkers from Locke to Smith to Hegel have defined modernity and modern selfhood in terms of property. Property has thus been pitted against nature, conceived as an object of appropriation through the establishment of rights over it by human agency. According to this mode of thought, nature is considered as an entity that has no agency, no intentionality of its own, and is thus subject to appropriation through human industry. A bright line is therefore drawn between the inert natural world and humanity: humanity stands apart from nature, and is morally superior to it. Critics of property—from Rousseau to Marx—have pointed to property as a source of alienation (and have considered human beings as part of nature—a central tenet of Darwin's evolutionary

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theory). Many contemporary constitutions reject the notion of property that liberalism defends, to advance a more social view of property. The need for such alternative view of property is obvious. In the wake of the first global financial crisis of 1929, the world witnessed the end of the old liberal order and a notable increase in state intervention in the economy. Nonetheless, after the early attacks on private property launched in the name equality and socialism, by the end of the twentieth century the operation of property regimes and markets expanded enormously all over the world.<sup>1</sup> One of the consequences—which I will not consider here—has been the increase of inequality within nations. Another, which I want to address here, is that reliance on property and on markets to control the appropriation of nature for private purposes has increasingly been presented as *the* way forward. This has happened thanks to the link established between property, markets, and finance.

The financialisation of nature is on the way, with the commodification of everything that exists on earth. Meanwhile, the old idea of nature as being just the object of human beings' endeavours to better their condition is challenged. The way indigenous communities and different cultures express themselves over this question leads in a completely different direction.<sup>2</sup> There is a continuum between man and nature, and nature as a living entity is not simply subservient to man's needs or desires.<sup>3</sup> This leads to the recognition of a non-dualistic anthropology, that does not separate what is human and what is non-human into two distinct ontological domains. This separation is characteristic of Western societies, and is ignored elsewhere.<sup>4</sup> The modern Western world view is therefore the exception rather than the rule in many ways. Interestingly, now the exception appears to be problematic.

<sup>1</sup> Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton UP, 2019), highlights the role of lawyers in this context.

<sup>2</sup> Helaine Selin, ed., *Nature Across Cultures: Views of Nature and the Environment in Non-Western Cultures* (Dordrecht: Springer, 2013).

<sup>3</sup> The notion of a continuum is explored by a number of Western thinkers in the contemporary context as shown by Rodrigo Míguez Núñez, "Personas y cosas en el imaginario hermitiano: por un derecho del 'continuum'", in *Le droit à l'épreuve de la société des sciences et des techniques. Liber amicorum en l'honneur de Marie-Angèle Hermitte*, ed. Nicolas Baya-Laffite, María Valeria Berros and Rodrigo Míguez Núñez (Torino: Accademia UP, 2022), 37 ff., 46 ff.

<sup>4</sup> Philippe Descola, *Beyond Nature and Culture*, trans. Janet Lloyd (Chicago: University of Chicago Press, 2013).

In 2022 Italy amended arts. 9 and 41 of its Constitution. The new version of art. 9 Const. introduces the Republic's duty to protect: "...the environment, biodiversity and ecosystems, also in the interest of future generations. The law of the State governs the ways and means of protection of animals". This amendment was completed by new references to the protection of the environment in art. 41 Const., concerning the regulation of economic activities:

Private economic initiative is free. It cannot be carried out in conflict with social utility or in such a way as to harm health, the environment, security, freedom and human dignity. The law determines the appropriate programmes and controls so that public and private economic activity can be directed and coordinated for social and environmental purposes.

Although the present Government is reluctant to implement this mandate, this constitutional amendment is a sign that something is finally changing: the boundaries of economic initiatives must be established having due consideration for the requirements related to these fundamental aspects. At least for the future, they must get priority over competing economic considerations.

In the following pages I will show why the master narrative that leading thinkers in the West have forged to justify property as an engine of progress is unravelling, and why the future will never be the same, as far as the relationship between property and nature is concerned. Cracks and fault lines are undermining the narratives that have been so central to the making of the modern world. Property and markets will remain important to our existence, but a healthy dose of realism and political wisdom by now defeats any narrative that extols the supposed superior virtues of property and markets in regulating human interactions with nature. It is time to look elsewhere for solutions that have a more sustainable relationship with nature; it is necessary to recognise that there are other ways of thinking about these problems and about our future. Perhaps this is paradoxical, but science—the kind of knowledge first developed in the effort to measure the world, and to unveil Nature's secrets by through experiments—supports such conclusions.<sup>1</sup> Science is warning policy makers in the strongest terms that similar calls cannot be left unanswered. The ghastly

<sup>1</sup> Peter Dorman, *Alligators in the Arctic and How to Avoid Them: Science, Economics and the Challenge of Catastrophic Climate Change* (Cambridge: Cambridge UP, 2022).

dynamic of global warming and the evidence that the devastating pandemic of 2020 is as well related to the ongoing deterioration of ecosystems are loud intimations that an entire model of growth is doomed and must be abandoned.<sup>1</sup>

Following these premises, let us consider in the following pages how the notion of ‘nature’ as inert matter that can be freely appropriated by humans is a cultural construct that is far from being universally shared. It is an illusion to think that the language of ‘nature’ established on similar assumptions reflects the natural order of things, and that ‘nature’ is conceptualised in the same terms everywhere. This assumption reflects a simplistic perspective that assumes a localized way of thinking to be universally accepted as a common-sense notion across all cultures. Such a viewpoint fails to consider the vast differences in cultural norms and values, and oversimplifies the complexity of diverse world-views. This is also true of the idea of property developed in the West, if by property we mean the institution that upholds the importance of the self and the independent decision-making of individuals as a moral good, ensures social orders, and provides incentives for wealth creation, that is therefore to be considered as an unmitigated good. On the contrary, property regimes are varied, they achieve different purposes, and may thus be just or unjust. Indeed, some property regimes are profoundly unjust, cementing dispossession, poverty, and racism. Therefore, although some of the above-mentioned justifications of property contain more than a grain of truth, their unbridled, unthinking propagation in every part of the world should be resisted. An assessment of the social value of the institution in terms of justice, justice for all, considering what the relationship with ‘nature’ must be, is vital for our future.

I hope I shall be excused for presenting here only a sketch of more general argument. This is a topic that needs to be covered more extensively and more in depth, but I trust the other contributions to this issue of the JIHI to fill in many of the gaps of this piece. Ultimately, my aim is to stimulate curiosity and encourage critical thinking about the issues at hand; the overall thrust of the argument presented in the following pages should be clear.

<sup>1</sup> Odette K. Lawler *et al.* “The COVID-19 Pandemic Is Intricately Linked to Biodiversity Loss and Ecosystem Health”, *The Lancet Planetary Health* 5, no. 11 (2021): e840-e850. On capitalist ideas of growth, see Donald Worster, *Shrinking the Earth: The Rise and Decline of American Abundance* (New York: Oxford UP, 2016).



## The Universalisation of the Language of 'Nature'

Does 'nature' have the same referent in the various languages of the world? Let us start from this simple question to explore what lies beneath an idea that seems so familiar to us. The concept of nature itself changes over time and space, and these changes affect how humans relate to the world. Different cultures have different views on 'nature', and within a single culture there may be different views of it.<sup>1</sup>

When the European word 'nature', of Latin origin, is translated into other languages, the so-called equivalents—*zi rān* in Chinese, *tabī'a* in Arabic, *prakṛti* in Hindi, and so on—all carry an etymological, semantic, cultural, and philosophical baggage that distinguishes them from one another and makes them quite distinct concepts. They share some vague analogy but no more. On the other hand, the notion of nature the West has developed has changed in the course of history.<sup>2</sup> The clear cut opposition between man and nature, which tends to place humanity outside the realm of nature, and conceives of the latter as a mere material entity, liable to contemplation or exploitation according to human will, became firmly established only after the demise of older notions of 'nature'. With the diffusion of Christianity in the Roman Empire, 'nature' became more closely linked to the Abrahamic idea of 'creation'. Linguistic evidence shows that in many languages 'nature' features not as lifeless matter but as a generative force of which human beings are a part.<sup>3</sup> This is the case for

<sup>1</sup> Jedediah Purdy, *After Nature: A Politics for the Anthropocene* (Cambridge, MA: Harvard UP, 2005).

<sup>2</sup> Frédéric Ducarme and Denis Couvet, "What Does 'Nature' Mean?", *Palgrave Communications* 6 (2020): 14.

<sup>3</sup> Frédéric Ducarme, Fabrice Flipo and Denis Couvet, "How the diversity of human concepts of nature affects conservation of biodiversity", *Conservation Biology* 35, no. 3 (2021): 1019-1028. The authors examine the etymological and semantic diversity of the word used to translate nature in a conservation context in 76 of the primary languages of the world to identify the different relationships between humankind and nature.

the word *prakṛti* ('proliferation') in Hindi, for the Russian word *priroda* ('generation'), for the Hungarian word *természet* ('vegetation growth'), or for the Finnish word *luonto* (which refers to nature as well). On the other hand, the semitic term *tabi'a* ('inprint') refers to nature as a passive entity, and so does the etymological meaning of the Hebrew word for nature (*teva*: 'the mark of an artist on its work'); they both signify the meaning that became accepted in the worlds of Abrahamic religions. Perhaps the best evidence that there is nothing 'natural' about the way of thinking about nature that has become dominant in the West is that many cultures did not have a concept of 'nature' as we understand it before contact with Western culture. In modern Japanese, the term *shizen*, which has its roots in Chinese, was given a new meaning during the Meiji period to signify what the German word *Natur* means.<sup>1</sup> Prior to this, the Japanese language had a variety of terms used to refer to different aspects of the natural world, but none of them had the all-encompassing characteristics of the Western word 'nature'. As Marcon notes, this was not incompatible with a process of reification of nature that led to the commodification of agriculture, the monetization of society and the development of market-oriented mechanisms of commodity exchange. Nonetheless, compared to the vocabulary in use in Japan prior to the Meiji era to elaborate on the material world, our vocabulary, shows an entanglement of "meanings that surreptitiously summon each other up: physical, metaphysical, aesthetic, religious, cognitive, economic, ethical and political".<sup>2</sup> In other words, in the last centuries we have universalised a view of nature that has a strong ideological component. This idea historically goes together with an idea of progress<sup>3</sup> that is bent on justifying the acceptance of any number of disasters that society should shoulder to obtain the gift of 'civilisation'.<sup>4</sup>

<sup>1</sup> Federico Marcon, "Without Nature: Thinking about the Environment in Tokugawa Japan", in *Rethinking Nature: Contemporary Japan From Tradition to Modernity*, ed. Bonaventura Ruperti, Silvia Vesco and Carolina Negri (Venezia: Edizioni Ca' Foscari, 2017), 97, 97-98.

<sup>2</sup> Marcon, "Without Nature", 107.

<sup>3</sup> On the elaboration of this idea: Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge UP, 1980); David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (London: Penguin, 2021).

<sup>4</sup> François Jarrige and Thomas Le Roux, *The Contamination of the Earth: A History of Pollutions in the Industrial Age* (Cambridge, MA: MIT Press, 2021). In the midst of the century of progress Charles Baudelaire, for example, pronounced civilisation to be nothing but a "great barbarity illuminated by gas": "Edgar Poe, sa vie et ses œuvres" in Id., *Oeuvres complètes*, 2 (Paris: Gallimard, 1963), 297.



Indeed, in the intellectual history of the West the very notion of property has been associated with the notion of civilisation and the association of these two ideas is still evident in certain contexts, i.e. in the nineteenth century approach of the U.S Federal government to the regulation of property law with respect to Indian lands.<sup>1</sup>

## Unbridled Property Rights: The Universalisation of Property

Just as the West has invented and universalised a certain notion of ‘nature’, a parallel movement has led to the invention and to the universalisation of the notion of property. This may seem a rather odd claim considering that in the West no unitary notion of property law prevails.<sup>2</sup> Indeed, property law is considered to be the field of law where great differences remain between the civil law and the common law world. There is no doubt that a lawyer educated in Italy or in any other continental country will have serious difficulties in getting to understand the English law of property, or the law of property of other common law jurisdictions. Property law is more generally considered an eminently ‘local’ subject. This true is to an extent. But this is not really the crux of the matter. What we have universalised is the notion that there can be, and therefore there are, individual titles to all kinds of assets, which can thus be traded on all kinds of markets by self-interested actors. And more than that. We have universalised the idea that potentially *any* asset that is scarce can be an object of property, and therefore be traded on such markets, so that all alternative property regimes have been put under a tremendous pressure.<sup>3</sup> Bringing this idea to an upper level of abstraction, the discovery that all kinds of physical and intangible assets, when considered as investments, can be represented by notions like capital and income, risk and return, etc. has been revolutionary.<sup>4</sup>

<sup>1</sup> Steve Miskinis, “Blurred Visions of Native Americans: Cognizing Cultural Difference in Property Theory”, *Alb. L. Rev.* 85 (2021): 269.

<sup>2</sup> Michele Graziadei and Lionel Smith, ed. *Comparative Property Law: Global Perspectives* (Cheltenham: Edward Elgar Publishing, 2017).

<sup>3</sup> Abraham Bell and Gideon Parchomovsky, “Property Lost in Translation”, *U. Chi. L. Rev.* 80 (2013): 515.

<sup>4</sup> Bernard Rudden, “Things as Thing and Things as Wealth”, *Oxford J. Legal Stud.* 14 (1994): 81.

With the invention of all kinds of new financial instruments and of the largest financial markets ever seen Marx's dictum "all that is solid melts into air" is now truly vindicated.<sup>1</sup> Resistance to this global expansion of market-based property regimes was for a time represented by the property regimes of socialist countries, but with the demise or reform of these regimes, the transition from collectively held property to individual private property has continued, although private ownership of land is still not the rule in Russia, while it is not allowed in China. Nevertheless, socialist regimes that pursued industrialisation did not achieve better results for nature's protection than their capitalist counterparts.<sup>2</sup>

On the other hand, the ascent of modern property has obscured the continuing existence of older forms of collective property ('commons'). These alternatives to private property have survived massive enclosures<sup>3</sup>. For the supporters of individual property, they were no more than archaic leftovers of the past. Hence, their fate was often considered sealed: they should have disappeared, with the transition to a full market economy. Nonetheless, they have showed a surprising capacity for resilience over time. Several regions in Italy still have various areas in which commons prevail, and Italy now grants to these forms of collective property ('domini collettivi') constitutional protection, recognising that they must be defended from further encroachments<sup>4</sup>.

After the fall of the ancient world, Europe took over a millennium to establish the current property regimes axed on individual property. Karl Polany's *The Great Transformation* describes the level of resistance that had to be overcome even in the West in order to consider land as a mere commodity. While charting this territory, Polany recognises that: "What we call land is an element of nature inextricably interwoven with man's institutions. To isolate it and form

<sup>1</sup> Karl Marx and Friedrich Engels, *The Communist Manifesto*, trans. Samuel Moore, introduction and notes by A. J. P. Taylor (1848; London: Penguin 1967), 81. On the trajectory of private law in the past century see Ugo Mattei and Fritjof Capra, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland, CA: Berrett-Koehler, 2015)

<sup>2</sup> Bathsbeba Demuth, "The Walrus and the Bureaucrat: Energy, Ecology, and Making the State in the Russian and American Arctic, 1870–1950", *The American Historical Review*, 124, no. 2 (2019): 483–510.

<sup>3</sup> P. Grossi, *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century*, trans. Lydia G. Cochrane (Chicago UP: Chicago, 1981). The work of politologist and economist Elinor Ostrom show what principles of governance can support commons

<sup>4</sup> Law No. 168 of 20 November 2017, norms on collective domains..

a market for it was perhaps the weirdest of all the undertakings of our ancestors”.<sup>1</sup> If this process took centuries on the European continent, the colonial powers were able to impose it much more quickly in the colonised territories and in the areas of the world under their control.<sup>2</sup> Imitation apparently did the rest, although an inspection of the historical record points to a more complex reality.<sup>3</sup> Even this monumental step was not the last chapter in the story of property regimes. While classical economists were still able to discern differences between productive and unproductive wealth, and to consider the moral consequences of instituting certain markets, neoclassical economics obscured these distinctions. They worked to make economics a science uprooted from the historical and social context. Adam Smith was all in favour of the division of labour as a means of making work more productive, but he was also willing to recognise its deleterious effects on the human psyche<sup>4</sup>. With the advent of neoclassical economics this sensibility was lost. It thus became very difficult to understand why certain things should not be for sale<sup>5</sup>. The distinction between productive and unproductive uses of wealth, became much more blurred<sup>6</sup>. The ascendancy of markets as allocative mechanisms was secured on a grand scale, and what once were only utopian experiment in free markets rapidly entered everyday life. The consequence is that the present economy is all too often a joyless economy<sup>7</sup>. You don’t have to be part of a revolutionary avant-garde to see where the problem lies. During a speech at the University of Kansas on 18 March

<sup>1</sup> Karl Polanyi, *The Great Transformation* (1947; Boston: Beacon Press, 2001), 187.

<sup>2</sup> Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham and London: Duke UP, 2018).

<sup>3</sup> See, e.g., Allan Greer, *Property and dispossession: Natives, empires and land in early modern North America* (Cambridge, Cambridge UP, 2018); Rodrigo Míguez Núñez, *Terra di scontri. Alterazioni e rivendicazioni del diritto alla terra nelle Ande centrali* (Milano: Giuffrè, 2013); Armando Guevara Gil, “La propiedad agraria en el derecho colonial”, in *Estudios sobre la propiedad*, ed. Giovanni Priori Posada (Lima: Lima: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2012), 265.

<sup>4</sup> Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations* (1776; New York: Random House, 1937), 734-735.

<sup>5</sup> Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford: Oxford UP, 2010).

<sup>6</sup> Mariana Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (London: Allen Lane, 2018).

<sup>7</sup> Tibor Scitovsky, *The Joyless Economy: The Psychology of Human Satisfaction* (Oxford: Oxford UP, 1992).

1968, Robert Kennedy commented on the US gross national product reaching the level of \$ 800 billion a year. He noted that statistics on the gross national product count “air pollution and cigarette advertising, and ambulances to clear our highways of carnage”. The gross national product “counts special locks for our doors and the jails for the people who break them. It counts the destruction of the redwood and the loss of our natural wonder in chaotic sprawl”. On the other hand, it

does not allow for the health of our children, the quality of their education or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials (...) it measures everything in short, except that which makes life worthwhile. And it can tell us everything about America except why we are proud that we are Americans. If this is true here at home, so it is true elsewhere in world.<sup>1</sup>



## The Political Dimension

Unfortunately, since these words were spoken, similar plights have become every year truer. Part of this picture is the preference given to market solutions for addressing environmental problems, and the devastation of nature that is putting life on the planet as we know it in mortal danger, with the disappearance of species at risk (or now extinct) and of natural habitats all around world. In the light of experience, it is inevitable to question the efficacy of these solutions. All these schemes have been tested for sufficient time to be subject to examination in light of what has been achieved so far. This is a field in which ‘property’ as an entitlement to assets plays a high-profile role in the management of

<sup>1</sup> Robert F. Kennedy, *Remarks at the University of Kansas*, delivered at the University of Kansas, Lawrence, Kansas, March 18, 1968.

‘nature’. I am referring to all those financial techniques and practices designed with the catchword ‘financialisation of nature’. Financialisation of nature refers to the process whereby nature and its resources are assigned monetary values represented by financial instruments placed to investors, and traded on financial markets<sup>1</sup>. Carbon credits, biodiversity offsetting schemes, and payments for ecosystem services (PES) are financial mechanisms that put a price on nature and provide economic incentives for conservation and proactive management of natural resources.

Society has been transformed by finance. Once upon a time, buying and selling did not usually involve a financial intermediary in the transaction. Nowadays people live on credit, and a financial component easily features in any transaction, be it as simple as buying a loaf of bread with a credit card, or as complex as saving for one’s pension by buying investments.<sup>2</sup>

Access to property is mediated by finance, and finance takes its price for performing this function. Ballooning debt resulting from intermediated transactions is then placed on the market, packaged and repackaged through a variety of techniques, to be sold to those who have some appetite for risk (and who are looking for the reward that should go with risk). But the reverse is also true, finance is actively looking for new types of property to expand the opportunities for investment, it literally invents them by carving rights over them, and by assuming for example, that all tangible and intangibles are capable to have price on and therefore to be traded on a market.

Environmental risks linked to the exploitation of nature in the eyes of an investor—be it an industrial firm, a bank, or money manager—are simply investment risk (and therefore yet another occasion to reap profits).<sup>3</sup> Proponents

<sup>1</sup> Tone Smith, “Financialisation of nature”, in *Handbook of Critical Environmental Politics*, ed. Luigi Pellizzoni, Emanuele Leonardi and Viviana Asara (Cheltenham: Edgard Elgar, 2022), 374.

<sup>2</sup> Not unfairly, as early as the 19<sup>th</sup> century, there are those who make similar remarks: Henry Dunning MacLeod, *The Theory and Practice of Banking*, Volume 1 (London: Longmans, Green, Reader and Dyer, 1875), 172: “If we were asked—What discovery has most deeply affected the fortunes of the human race? We think after full consideration it might be said—The discovery that a Debt is a Saleable Commodity”.

<sup>3</sup> Larry Fink, “A fundamental reshaping of finance: letter to the Ceos for 2020”, available at <https://www.blackrock.com/> (accessed on May 2, 2023). Larry Fink is chairman and CEO of BlackRock, the largest money-management firm in the world, with more than US \$10 trillion in assets under management.

of schemes that support the financialisation of nature (e.g. carbon pricing) argue that the first step to solve environmental problems is to provide markets with the data points that allow investors to make decisions, and thus give them clear signals. This is what is done by introducing financial schemes and techniques that allow for the trading of assets that are linked to a segment of the underlying 'nature'. Working towards this goal would have the virtue of promoting broadly impolitical solutions, i.e., fully compatible with the market system. Nonetheless, the reality of the political choice behind these schemes and techniques is visible. It is there, because it posits, first of all, that the benchmark for any initiative to protect nature is its compatibility with the economy (rather than the other way round).<sup>1</sup> Additionally, the determination of the price for the relevant market comes out of an inherently political decision, which involves ruling on what is worth and what is worthless (and therefore not to be included in the computation). The sore point is the relationship between the price and the value of what is thus marketed.<sup>2</sup> For financial markets and analysts the key factors of the equation in this calculus are those that generate monetary value. Factors that are hard to estimate have traditionally been disregarded, even if they play a major role in securing the welfare of communities and the protection of nature. Following this logic, if the current pricing mechanisms are not perfect, as it is sometimes conceded, they are still liable to be perfected. This impulse to strive further in the same direction allows the search for the holy grail to go on, looking for even more refined analytical tools. Instead, wisdom suggests asking whether markets really have the miraculous healing powers their proponents boast of when it comes to saving nature from devastation. But one thing is clear: no policy maker will ever be held accountable if a finance-based scheme for the protection of nature fails. These schemes are ideally designed to allow to lie the blame at someone else's door. Market based mechanisms for dealing with environmental problems have therefore an immense advantage for political decision makers over direct interventions aimed at the solution of difficult problems. Any failure of these mechanism disperses responsibility among a huge

<sup>1</sup> Peter Dorman, *Alligators in the Arctic and How to Avoid Them* (Cambridge: Cambridge UP, 2022); Adrienne Buller, *The Value of a Whale: On the Illusions of Green Capitalism* (Manchester: Manchester UP, 2022).

<sup>2</sup> Morgan M. Robertson and Joel D. Wainwright, "The Value of Nature to the State", *Annals of the Association of American Geographers*, 103, no. 4 (2013): 890-905.

number of actors. Note that even a minimum measure as the reporting by governments over the implementation of environmental legislation is sometimes not regularly attended to. Indeed, the UK Office for Environmental Protection (OEP) has found that the British government has consistently failed to carry out legally-required post-implementation reviews of environmental laws as of 2023.<sup>1</sup>

The role of governments in this context is that of facilitators, whose first task is to de-risk investment prospects for the private sector. The public sector's financial and policy decisions are to be mobilized to help the private sector to reduce investment risks; the aim of such initiatives is to 'crowd in' private investment to pursue goals that are aligned with the pursuit of worthy causes, such as the protection of nature. This role for the public institutions is not inexplicable: the current financial system requires that government raise money from financial institutions by issuing government bonds, which are regularly bought by financial institutions. The private sectors has thus quietly but steadily come to dominate significant aspects of the activities of the public sector through the leverage of finance.



## Moral and Legal Challenges to the Commodification of Nature

The turn to the financialisation of nature has drawbacks. Financialisation has been defended by arguing that if no price is put on natural resources, they will be treated as having no value. In contrast, if they are accounted for in monetary terms, the value of 'natural capital' will be incorporated into balance sheets

<sup>1</sup> Office For Environmental Protection, *Post-implementation Review of Environmental Law* (Worcester, 2023).

and influence government and business decisions. To an economist, it is obvious that the lower the costs, the more people will consume of any particular resource. Economists are dumbfounded when environmentalists attack proposals to approach the destruction of nature on the basis such a self-evident axiom. Nonetheless, this approach ignores the moral effects of commodification, which strips nature of the last vestige of sacrality, and hides 'nature' from sight, by turning it into its severable parts, each finally identified as a commodity. As an illustration of this theme, it has been argued that, e.g., by disseminating carbon accounting systems at all levels, international bodies have ended up with a paradox and a contradiction.<sup>1</sup> On the one hand, they act to ensure that nations and business organizations consider their impact on nature at the centre of their decision making. At the same time, however, these financial schemes make people forget nature, by establishing a new bureaucratic setting: "When requested to respect standards and methods that commodify nature, individuals adopt the attitude of the Weberian bureaucrat, eliminating all ethical and personal aspects in favor of a purely formal vision of nature".<sup>2</sup> This is by no means without consequences on the way people understand their relationship with nature. A growing number of empirical studies supports the hypothesis that economic incentives can negatively impact on intrinsic motivations for engaging in biodiversity and ecosystem conservation.<sup>3</sup> This emotional reaction brings into the limelight the theme of whether certain markets are legitimate or not, which in turns raises the question whether certain forms of property are legitimate or not. The history of property law shows that, even in the West, property rights have at various times in history been subordinated to political and legal imperatives to promote the well-being of whole communities.<sup>4</sup> To

<sup>1</sup> Régis Martineau and Jean-Philippe Lafontaine, "When carbon accounting systems make us forget nature: from commodification to reification", *Sustainability Accounting, Management and Policy Journal* 1, no. (2020): 487-504.

<sup>2</sup> Ibid.

<sup>3</sup> Julian Rode, Erik Gómez-Baggethun and Torsten Krause, "Motivation Crowding by Economic Incentives in Conservation Policy: A Review of the Empirical Evidence", *Ecological Economics* 117 (2015): 270-282; Tara Grillos, "Economic vs Non-Material Incentives for Participation in an In-Kind Payments for Ecosystem Services Program in Bolivia", *Ecological Economics* 131 (2017): 178-190.

<sup>4</sup> Naomi R. Lamoreaux, "The mystery of property rights: a U.S. perspective", *Journal of Economic History* 71 (2011): 275-306; Ead., "Did insecure property rights slow economic development? Some lessons from economic history", *Journal of Policy History* 1, no. (2006): 146-164.



speak of ‘emotional responses’ to similar considerations is already to opt for a reductionist language. Indeed, it is a language that is not universally accepted: indigenous communities bring to the attention of Western-based legal systems the issue of reparation for the damage done to their lands and their lives, which cannot be compensated by the allocation of money, because it is spiritual in nature.<sup>1</sup>

Digging deeper into the history of the European continent, one can find examples of moral uprisings caused by the monetisation of values that are commonly understood to be outside the sphere of the market. The sale of indulgencies for the remission of sin, which was allowed (and to an extent promoted) by the Catholic Church in the 13<sup>th</sup>-16<sup>th</sup> centuries provoked a similar revolt because the spiritual salvation should have not been tied to money. Almost all branches of Protestantism rejected the penitential system, which included indulgences, either in its entirety or to a large extent. Interestingly, the issuance of permits to pollute raises some of the same of objections that in Christian Europe were first levelled against the sale of indulgencies, such as “what you are selling is not yours to sell”, you are “making rights wrong”, etc.<sup>2</sup>

Close to the area of personality rights, outright commodification of personal data is rejected in Europe. In the EU, the protection of personal data is a fundamental right and “therefore personal data cannot be considered as a commodity”<sup>3</sup>. Nevertheless, even in Europe, personal data are regularly traded on markets. Once again, there is a tension between what is proclaimed by the law and what happens on the market. This tension is not resolved by the fact that consensual data transactions are legally permitted under certain conditions<sup>4</sup>.

<sup>1</sup> Rivera Drago and Diana Carolina, *La consulta previa: daño inmaterial y reparación. Análisis desde la antropología jurídica en la comunidad indígena Iku* (Bogotá: Universidad Externado de Colombia, 2020). But even if this specific problem does not arise, the damage done to autochthonous people may be so vast to imperil their very existence: Patricia Uteaga Crovetto, Frida Segura Urrunaga and Mayra Sánchez Hinojosa, *El derecho humano al agua, los pueblos indígenas y el petróleo* (Lima: Pucp, 2019).

<sup>2</sup> Robert E. Goodin, “Selling Environmental Indulgences”, *Kyklos* 4, no. (1994): 573-596.

<sup>3</sup> Directive 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, recital no. 24.

<sup>4</sup> Giorgio Resta, “I dati personali oggetto del contratto”, in *Le droit à l'épreuve de la société des sciences et des techniques: Liber amicorum en l'honneur de Marie-Angèle Hermitte*, ed. Nicolas Baya-Laffite, María Valeria Berros, and Rodrigo Míguez Núñez (Torino: Accademia UP, 2022), 462.

While the right to personal data is protected as a fundamental right in the EU, a human right to the environment—to refer to the most common formulation—is still not recognised as a fundamental right neither in international documents, nor in EU law. Recent European constitutions or constitutional amendments are more open to recognising this right, although not always as a fundamental right<sup>1</sup>.

The attribution of rights to nature itself is arguably the most powerful expression of a moral and legal uprising against an inherently unjust system, which, due to the imbalanced power dynamics, threatens the existence of a large part of humanity. International legal documents, national constitutions, legislations, city ordinances, and court rulings have granted certain rights to nature.<sup>2</sup> The theme it is currently debated at the world and at the regional level, with the “Harmony with nature” programme, sponsored by the United Nations,<sup>3</sup> and the proposal to adopt a charter on the rights of nature in the European Union.<sup>4</sup>

Traditionally Western legal theory rejects the attribution of rights to a non-human entity. By affirming a sharp distinction between subject and object, the idea of granting rights to what is considered to be just lifeless matter becomes unimaginable. Hence, all non human entities do not (and cannot) have rights.

While many legal texts still set out principles and rules that confirm this philosophy, contemporary legal theory is turning against it. As mentioned above, new legal developments challenge this iron assumption, contesting its ideological tenets and rejecting its practical consequences.<sup>5</sup> Indeed, a close analysis of the traditional distinction between object and subject shows that it was never

<sup>1</sup> On the state of the art: Congress of Local and Regional Authorities of the Council of Europe, *A Fundamental Right to the Environment: A Matter For Local And Regional Authorities: Towards a green reading of the European Charter of Local Self Government*, Report CG(2022)43-15final (26 October 2022).

<sup>2</sup> For a general view of the state of the art: Craig M. Kauffman, “Rights of Nature: Institutions, Law, and Policy for Sustainable Development”, in *The Oxford Handbook of Comparative Environmental Politics*, ed. Jeannie Sowers, Stacy D. VanDeveer and Erika Weinthal (Oxford Academic, online 14 July 2021).

<sup>3</sup> This initiative has a dedicated web site: <http://www.harmonywithnatureun.org/>.

<sup>4</sup> Study for the European Commission, *Towards an EU Charter of the Fundamental Rights of Nature* (Bruxelles, PE 689.328, 2021)

<sup>5</sup> This is true for economics just as for law, though my reflections on the first subject are marginal.

wholly coherent or watertight, so that some fault lines are now apparent.<sup>1</sup> It must also be noted that western philosophy allowed for more variation on this theme than it is usually acknowledged, even though the dominant canon shaped the law.<sup>2</sup>

I have argued elsewhere that there is nothing strange about attributing rights to an object, or a collection of objects, and that it is also possible to recognise them agency.<sup>3</sup> The law of foundations, with its ancient and well-established status in the legal system, is there to remind us of this possibility, if a reminder is indeed needed. It is therefore perfectly logical to assert in law that nature has rights, and that there are rights of nature, if this recognition appears to satisfy a demand that the world of law should accommodate, as it is now doing in various parts of the world.<sup>4</sup> By giving nature the status of subject, some inalienable rights of nature must be recognised as well. Once this has been achieved, the problem of giving legal recognition to the multitude of diffuse and fragmented interests covered by this formula remains to be solved.<sup>5</sup> The technique of legal personality does not provide guidelines for this. One is tempted to say once again: the devil is in the detail. Meanwhile, the judiciary of some countries is warning that “nature is not an abstract entity, a mere conceptual category or a simple legal statement. Nor is it an inert or insentient object (...) it is a complex subject that must be understood from a systemic perspective. Nature is a community of life”.<sup>6</sup> Confronted with claims based on similar foundations, courts are beginning to remedy major illegalities and abuses. The Constitutional Court of Ecuador, who penned the above cited sentences, has thus confirmed the lower courts decisions that have recognised to indigenous communities the right to freely decide the future of their ancestral lands in the Amazon. The country’s highest court ruled that more than 50 gold mining concessions in the

<sup>1</sup> Rodrigo Míguez Núñez, *Le avventure del soggetto: Contributo teorico-comparativo sulle nuove forme di soggettività giuridica* (Sesto San Giovanni: Mimesis, 2018).

<sup>2</sup> The obvious reference for the alternative to the canon is Spinoza’s philosophy.

<sup>3</sup> Michele Graziadei, *Diritto soggettivo, potere, interesse*, in *Trattato di diritto civile*, 2, ed. Rodolfo Sacco (Torino: Utet, 2001).

<sup>4</sup> Kauffman, “Rights of Nature: Institutions, Law, and Policy for Sustainable Development”.

<sup>5</sup> Michele Spanò, “La natura istituita”, *Le droit à l’épreuve de la société des sciences et des techniques: Liber amicorum en l’honneur de Marie-Angèle Hermitte*, ed. Nicolas Baya-Laffite, Maria Valeria Berros and Rodrigo Míguez Núñez (Torino: Accademia UP, 2022), 128.

<sup>6</sup> Constitutional Court of Ecuador, judgment of 22 January 2022, no. 273-19-JP/22, §§ 132-133.

A'i Cofán rainforest must be revoked. The judgment strengthens the protection of nine million hectares of indigenous territories in Ecuador's Amazon region.



## The Financialisation of Nature: Fighting Fire with Fire?

I have already mentioned the programmes that rely on the financialisation of nature as a response to the current emergencies. I have also pointed out the role of property rights in this scenario. Let us now consider the strength of the argument based on them in this context. To address an important issue, consider how the climate crisis is treated as a prime example of market failure, because the true costs of carbon emissions are not reflected in the costs of the activities that produce them. For example, companies involved in deforestation or individuals taking regular international flights do not pay the full cost of the damage caused by their actions. This causes an overproduction of carbon emissions, as the negative effects of such emissions are external to the relevant market transactions. To solve this problem, economists suggest a simple, elegant recipe: any external costs should be integrated into the market by implementing a price mechanism for those emissions. This will incentivize market actors to reduce their emissions and shift economic activity towards less polluting sources of profit, to reduce costs. This approach is central to the concept of 'green capitalism'. Supporters of green capitalism advocate for the internalization of environmental externalities through policies such as carbon pricing. This brings into the picture a classical response to many problems that is, the idea to fight fire with fire<sup>1</sup>. Economists are advocating the above-mentioned approach to emissions because it would have a major advantage over alternative solutions, namely its

<sup>1</sup> Jean Starobinski, *Blessings in Disguise; or, the Morality of Evil*, trans. Arthur Goldhammer (Cambridge, MA: Harvard UP, 1993), 118 ff.

efficiency. Many thus find the simplicity and attractiveness of a market-based solution to environmental problems appealing in comparison to a regulatory or command-and-control approach, which is presented as complicated and inconsistent. Additionally, the idea that those who consume more carbon and cause more environmental damage will pay proportionally more would also reflect a sense of fairness. In core capitalist countries the public sector has thus taken up the idea and is working to implement it when it deals with the development of public policy related to nature's protection. For example, the UN Development Programme, in its 2007 report stated:

this is not the time to come back to a system of massive quotas and bureaucratic controls because of climate change. Emission targets and energy efficiency controls have an important role to play, but it is the price system that has to make it easier to achieve our goals.<sup>1</sup>

When confronted with similar approaches a vital question is: why efficiency should be prioritised over efficacy? What evidence shows that these schemes actually produce the much-needed change of course? While the implementation of a price mechanism to internalize environmental externalities has the potential to be an efficient solution, it is important to consider whether efficiency should be prioritized over efficacy.<sup>2</sup> In this respect—efficacy—the record is rather disappointing. There are few studies that evaluate the ex-post efficacy of such schemes, despite the voluminous literature on the topic. A meta-review of ex-post quantitative evaluations of carbon pricing policies around the world since 1990 highlights four findings.<sup>3</sup> First, even if carbon pricing has been central to political discussions of climate change, only 37 studies examine the effects of the policy on emissions reductions; they are mostly focused on Europe.

<sup>1</sup> UNDP, *Human development report 2007/8* (New York: Palgrave Macmillan, 2007).

<sup>2</sup> For criticism to the priority given to efficiency over efficacy in the regulation of emissions: Buller, *The value of a whale*, 32 ff. ("efficiency evangelism"); Richard Lane, "The Promiscuous History of Market Efficiency: The Development of Early Emissions Trading Systems", *Ecological Politics* 21, no. 4 (2012): 583-603; this criticism is shared by Isak Stoddard *et al.*, "Three decades of climate mitigation: why haven't we bent the global emissions curve?", *Annual Review of Environment and Resources* 46 (2021): 653-689, who frame it in the context of various other considerations concerning the failure of market based mechanisms to abate emissions.

<sup>3</sup> Jessica F. Green, "Does Carbon Pricing Reduce Emissions? A Review of Ex-Post Analyses", *Environmental Research Letters* 16, no. 4 (2021): 043004.

Second, the majority of studies indicates that the aggregate reductions from carbon pricing on emissions are limited—generally between 0% and 2% per year, with considerable variation across sectors. Third, in general, carbon taxes perform better than emissions trading schemes (ETSs). Finally, studies of the EU emission trading scheme, the oldest one in place, show limited average annual reductions—ranging from 0% to 1.5% per annum, while the Intergovernmental Panel on Climate Change states that emissions must fall by 45% below 2010 levels by 2030 in order to limit warming to 1.5 °C—the goal set by the Paris Agreement on climate change in 2015.

The conclusion is inevitable: the evidence indicates that carbon pricing as practiced so far has had a limited impact on emissions. Although this is a compelling conclusion, such schemes are still defended. The lack of substantial, important results, when not flatly denied, is usually explained by the difficulty of finding the correct price in order to implement similar schemes. This is surely a problem, given that firms that are responsible for important polluting activities actually gained by implementing the European trading scheme<sup>1</sup>: a fact that must be taken into account at least to reform the scheme. Whether this is a problem for which there is a solution is another matter entirely. Interestingly, the argument that carbon pricing schemes (or carbon tax schemes) are inherently fair because they allocate the costs of emissions to those who emit the most is also doubtful from a justice perspective. These schemes may have regressive effects, hitting hardest on those parts of the population that are already in economic difficulty.<sup>2</sup> Of course, it is possible to argue that such schemes, while far from perfect, still help to push the market in the right direction. Even if this is true, the question remains whether the huge effort that has gone into introducing these schemes these schemes, is a step in the right direction, or rather

<sup>1</sup> Pietro Quercia, “Polluting for Profit: the Paradox of the EU’s Emissions Trading System”, *IAI Commentaries* 19, no. 38 (2019): 1-4.

<sup>2</sup> Simon Feindt, Ulrike Kornek, José M. Labeaga, Thomas Sterner, and Hauke Ward, “Understanding regressivity: Challenges and opportunities of European carbon pricing”, *Energy Economics* 103 (2021), 105550. Carbon offsetting scheme may legitimate more carbon mining, with continuing impact on the poorest communities: Tamra L. Gilbertson, “Financialization of Nature and Climate Change Policy: Implications for Mining-Impacted Afro-Colombian Communities”, *Community Development Journal* 56, no. 1 (2021): 21-38; Connor Cavanagh and Tor A. Benjaminsen, “Virtual Nature, Violent Accumulation: The ‘Spectacular Failure’ of Carbon Offsetting at a Ugandan National Park”, *Geoforum* 56 (2014): 55-65.

“a dangerous crutch or distraction, rather than a helpful-if-alone-insufficient tool”.<sup>1</sup> The monstrous profits of the big five oil companies in 2022 (amounting to a combined 200 billion dollars) point to the second alternative. It is worth recalling the comment by BP’s company’s finance chief, Murray Auchincloss, on the company’s profits in the last year: “it is possible that we are getting more cash than we know what to do with”.<sup>2</sup>

## Conclusions

The most famous Italian children’s novel in the world—*The Adventures of Pinocchio*—begins with a carpenter working on a piece of wood that suddenly begins to speak: “Don’t hit me so hard!” Even this little episode speaks of nature’s ability to make us think differently, beyond simple models of the relationship between human beings and the natural world. Lawyers, like economists or philosophers, create models to find their way in the world. These models need constant adjustment to work, and may be even tweaked to their limits when they are found seriously wanting, as it happens from time to time. However, even if lawyers have become hardened to a certain way of thinking, sometimes these models need to be discarded in order to build on new foundations. Surely it is our children who will suffer the most serious consequences if we do not abandon the flawed foundations that have been laid over the last few centuries, for discussing the justice of institutions such as property and markets. A fundamental flaw of these foundations is that their design systematically discounts their impact on nature. The recently published high-profile *Review on the Economics of Biodiversity*, commissioned by the UK government to Professor Sir Partha Dasgupta, includes in a footnote a telling admission. Mainstream

<sup>1</sup> Buller, *The Value of a Whale*, 66. For a comprehensive recent assessment of the efficacy strategies to combat climate change: Raymond Cléménçon, “30 Years of International Climate Negotiations: Are They Still our Best Hope?”, *The Journal of Environment & Development* no. 0 (2023): 1-33, who states that the present huge difficulties owe much to “two decades of delay due to climate denialism, unfounded trust in market-based mechanisms, and shameless exploitation of policy failure by a fossil fuel industry that has made trillions of dollars in profit while millions of people around the world pay the price”.

<sup>2</sup> Oliver Milman, “‘Monster Profits’ for Energy Giants Reveal a Self-Destructive Fossil Fuel Resurgence”, *The Guardian*, 9 February 2023.

economics has not taken seriously criticisms of its macroeconomic models of growth and development based on their failure to incorporate the essentiality of Nature.<sup>1</sup> There are reasons to believe that the law has not fared much better in this regard. The time has finally come for a change. An ecological paradigm shift is occurring at the world level with seismic consequences for the law too. In our epoch, the master narrative that extolled the superior virtues of property and markets in regulating human interactions with nature is unravelling. In this respect too, the future of law will never be the same.

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<sup>1</sup> Partha Dasgupta, *The Economics of Biodiversity: The Dasgupta Review* (London: HM Treasury, 2021), 4 fn 5: “Over the years the absence of Nature’s essentiality from macroeconomic models of growth and development has been remarked upon by scholars outside the mainstream of economic thinking and practice. But while it is all too easy to criticise existing practices, it is a lot harder to develop alternative models of comparable analytical depth and empirical reach to ones that have been honed by years of patient work. That may be why the criticisms have not been taken seriously by mainstream economists”.



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