The Earth's Constitution: an International Law Response Based on Complexity and the Situational Gear in Ecological Systems

Constitución de la Tierra: una respuesta del derecho internacional a partir de la complejidad y el reloj situacional en los sistemas ecológicos

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Abstract

We analyze the incapacity of Nation–States to become subjects of legislation and ecological policies in International Public Law. To do so, this article leans towards three arguments: A) The epistemological incapacity of positive science to fully understand ecological problems, for which the concepts of complexity (Morin) and situation (Geertz) are deemed relevant. B) The ultra–structural gear of nature, barely attainable by the predictive and knowledge timing gears of the latest human generations, therefore, the idea of "perpetuity" must be considered. C) Nation–States are subjected to an excessive situation and conjuncture level, producing limitations to the legal principles of sovereignty and responsibility. Based on these arguments, we propose to consider Ferrajoli's idea regarding a Constitution of the Earth, which, although involves some limitations, it addresses the redefinition of Nation–States as objects and subjects of the ecological legislation and policies.

Keywords: International public law, Ecological legislation, Complexity, Sovereignty, Nation–States, Constitution of the earth.

Resumen

Se analiza la incapacidad de los Estados–Nación en constituirse en sujetos de la legislación y la política ecológica en el derecho público internacional. Para ello, el artículo se decanta por tres argumentos: A) La incapacidad epistemológica de la ciencia positiva en comprender exhaustivamente a los problemas ecológicos, para lo que se indican pertinentes los conceptos de complejidad (Morin) y situación (Geertz). B) El reloj ultra estructural de la naturaleza, apenas alcanzable por los relojes de predicción y conocimiento de las últimas generaciones humanas, para lo que se maneja la idea de perennidad. C) La excesiva situacionalidad y coyunturalidad a las que están sometidas las dinámicas inherentes de los Estados–Nación, para lo que se analizan las limitaciones de los principios jurídicos de soberanía y responsabilidad. A partir de estos argumentos, se propone considerar la idea de Ferrajoli sobre una Constitución de la Tierra que, aunque implica limitaciónes, atiende la necesaria redefinición de los Estados–Nación como objeto y sujeto de la legislación y política ecológica.

Palabras clave: Derecho publico internacional; Legislación ecológica; Complejidad; Soberanía; Estados–Nación; Constitución de la tierra.

Summary

1. Introduction: A diagnosis of Ecology from the complexity point of view

Before introducing the concepts of relationality and political interdependence, to be used in this work, it is important to note that these concepts are grounded in a general epistemological framework, consisting of two central concepts: one from sociology –complexity– and the other from anthropology –situation.

The idea of *simplification*, in contrast to *complexity*, has been detrimental to both science and, more importantly, to the political practice of the relationship between decision–making, individual interests, and the common good. Simplification has become a prevailing interpretative framework in science, as the pursuit of specialization often leads to the rejection of a holistic view, which posits that the nature of the object should be presented in its entirety. Instead, science favors the knowledge of experts or the segments of interest, primarily due to their specific weight in shaping scientific discourses or their representation of political power, whether democratic or not. In relation to science, Edgar Morin pointed out:

> "We live under the reign of the principles of disjunction, reduction, and abstraction, whose sum constitutes what I call the 'paradigm of simplification' […] The only way to remedy this disjunction was through another simplification: the reduction of complexity to simplicity (reduction of the biological

> to the physical, of the human to the biological). Hyper–specialization would further tear and fragment the complex fabric of reality, making it appear that the arbitrary cut made on reality was reality itself. At the same time, the ideal of classical scientific knowledge was to discover, behind the apparent complexity of phenomena, a perfect order legislating a perfect machine (the cosmos), itself made up of micro–elements (atoms) variously arranged into objects and systems"[1].

For Morin, science, and consequently, all public policy, grapples with the fact that much of current knowledge is rooted in highly dangerous disjunctive foundations.

It is not difficult to conclude about the special danger of this in the field of ecological policy: the disjunctive foundations indicated in Morin's texts point to problems in the epistemological construction of scientific knowledge, which, in the optimal case, should be the source of legislative formulation and ensuing policies. Thus, the problem of complexity becomes even more pertinent.

The risk of a dilemma in implementation regarding the specific complexity of nature and the intersection of political interests represented by the particularly volatile and particularistic character of nations or corporations in the interplay of global political decisions, makes the problem of complexity in scientific epistemology a major issue. One of the problems reality faces is measurement through mathematical operationalizations, which are a) incapable of restoring the qualitative condition of things and b) reducing the complexity of relationships to pure models, sometimes biased. Therefore, it is likely that mathematics, like economic models or industry impact models on ecosystems, become tools favoring the particular interests of nations, as the axis of legislative policy in international law, since measurements provide a veneer of reality that, in fact, exploits simplistic diagnoses toward particularisms:

> "Such knowledge would establish its rigor and operability necessarily upon measurement and calculation; however, mathematization and formalization have increasingly disintegrated beings and existences by considering only

1 MORIN, E. *Introducción al Pensamiento Complejo*. 1990, pp. 15–16 https://acortar.link/GIYlWd

> formulas and equations governing quantified entities as realities. Ultimately, simplifying thought is incapable of conceiving the conjunction of the one and the multiple (*unitas multiplex*). It either abstractly unifies by nullifying diversity or, conversely, juxtaposes diversity without conceiving unity"[2].

On the other hand, the problem of complexity leans towards the necessity of recovering the notion of the situation. This will be addressed through the problem of *time gears,* or *clocks,* as said in Spanish. That is, not every social change occurs at similar times, according to the apparent determining force of the agent of change. Rather, structural and conjunctural inertia can impose their own factorial force and factorial on sun=bjects such as the transformative spirit of the law, the will of the politician, the faith of the social movement, or individual planning strategies. These inertias are described by Castro Aniyar in three *clocks*:

> "a) The structural clock, which can be associated, for example, with language, kinship, mode of production, system, and gender. It is the most static clock but always serves as a source of an indirect and more determining dimension of reality.
>
> b) The conjunctural clock, associated with means of production, and stable political and ideological regimes. It exists at an intermediate level of determination regarding social change and is often confused with the structural clock in order to attribute it an axiomatic character it does not yet possess.
>
> c) The situational clock, associated with discourse, legislation, fashion, media trends, and new ideas. It is a clock that captures the reality of concrete social relations, which seek to rise above the two previous clocks to escape their transience and form planes of greater conceptual purity and referential stability"[3].

2 MORIN, E. Op. cit. p, 15.

3 CASTRO ANIYAR, D. "El Arte de la Predicción" en Varios Autores *El futuro del delito*. Quito: Editorial Mawil, 2023. https://acortar.link/DIv52A

Therefore, it is not possible to think about the ability to predict and, consequently, diagnose and efficiently intervene in the practicality of a law or policy without making diagnoses related to the objectives of the action in relation to the slower clocks. This idea leads to a description of reality where the situational clock corresponds to the very reality of things, which are projectively expressed in the other clocks, which are external to the reality of concrete relations, but whose ideas narratively weigh less in social change than the slower clocks. In other words, the situation is the reality of things, understood as the world that individuals encounter and relate to at birth. It is the only source of reality because it is the only connection to concrete relations and the dynamics of signs in the present, but it nourishes the historical forms that constitute the *nomos* of knowledge or culture.

However, in the case of ecology, the clock of nature, whose dynamics do not depend *per se* on social relations, constitutes a kind of *macro clock*, astronomically more static and stable than all human clocks.

Castro Aniyar, Albert e Hidalgo discuss the dilemmas of specific relationships between things (primarily social things) in contrast to the dangers of comprehensive grand narratives that are proposed as substitutes for reality:

> "The situation is embedded in the life world of individuals, defined by the nature of interplays (interactions, transactions, functions, communication, etc.) that are specific to scenarios in the physical space, virtual space, personal–logical space, opportunity, agreement, family tradition, roles, various complexity levels, neurodiversity, all distinguishable by categories of lower abstraction, time (greater dynamism), and relevance (determination in their own universe). It is the dimension par excellence of emotions, subjective quality of symbols and their interactions, so it is necessary to observe them both rationally in visible interplays and understand them empathetically or sympathetically. The social sciences lose grandiosity in this clock because it is difficult to extract general recipes for humanity's major problems, such as global crime reduction, hunger, or the absence of freedom. It is not a field to discover revelations about the general condition of things. However, patterns are extracted, and thus, methods that have cleverly approached the life worlds have proven to be efficient, as in the cases of individualized education,

crime reduction in territories, peacebuilding, psychological therapy, as well as economic and social ventures"[4].

If the situation represents the reality of social relationships, but its intervention does not guarantee its impact on larger mechanics, such as the conjuncture (where the validation of Nation–States is legally protected) or the structure, then its effect on ecological relationships is even less efficient. Put differently, the situation, corresponding, for example, to scientific and political debates in the realm of citizen representations, ecology referendums, notions of fashion, interpersonal experiences, dominant political discourse in schools and cinema, corresponds to a very volatile and simplifying clock. However, it seeks refinement and consensus because its vocation is to stabilize in the conjuncture, i.e., in laws, legal–political discourses, ideologies, and policy design. Even these two clocks do not reach the structural clock, let alone the ecological one. The human species' understanding of the world, whose diagnoses depend on situations and conjunctures, simplifies but does politically determine change. It limits and conditions the relationship between law, the rule of law, and ecology, creating a dangerous illusion of political power over the universe.

1.a The complexity of ecological systems

Ecological systems, *per se*, are complex due to several factors:

a) Eco–cultural or bio–cultural relationships involve large amounts of quantitative and qualitative information and connections that are not yet available.
b) Global impact factors, such as global warming, ocean acidification, cellular acidification, clash with the oversimplification of diffuse criminal responsibilities or positivist legal systems based on evidence and validation procedures characteristic of human systems for empirically validating reality.
c) The *epitome* of complexity lies within ecological systems themselves.

4 CASTRO ANIYAR, D., ALBERT, J., HIDALGO, H. Glen y Michelle: Hacia una fenomenología no estructuralista del femicidio y la violencia de género. *Encuentros. Revista de Ciencias Humanas, Teoría Social y Pensamiento Crítico*. 2022, n° 15 Enero–Junio, pp: 352–365

Examples of this include marine migrations, the extreme interdependence of both internal and external habitats, genetic leaps in evolution, the influence of celestial bodies like the sun and moon, and connections between as–yet–unknown fields.

d) The decisive drive of capitalism to generate profits in conditions of environmental fragility affects political will or the continuity of policies, no matter how well–designed they may have been. The key actors in this latter complexity factor are nations and large corporations.

So, the indicated complexity is increasing because eco–cultural systems are being impacted by the growing economic and political interests of nations and large corporations. In the advancement of the capitalist mode of production, global impact factors are more responsive to profit and the perpetuation of forms of power than to the drive for justice and conservation. Additionally, the internal political maps of nations change in every political scenario due to the dynamics of democracy and power struggles within the factions represented in the states. Ecological systems are not prepared for the changes that surround them, so their responses, based on evolution and adaptation, consistently indicate vulnerability against human presence and actions.

The role of the law as a barrier to the characteristic ambition of the system has been extensively explored by legal sociology, critical criminology, and neo–constitutionalism. This role has recently been explained in the context of the major earthquake in Ecuador by Judge Alexandra López (2019, p. 236):

> "… it is logical to activate labor guarantees in the scenario and context of April 16, 2016, in which the violation of rights was inevitable due to the unsupportive nature of the economic and objective material bases of society. However, in social practice or the realization of the law, the material bases prevent it, demonstrating the importance of revitalizing and regenerating the rule of the tyranny of materia. Therefore, it is essential that the legal norm allows for the regeneration of citizen's time based on the violated material right, which is possible to restore, and in other cases, possible to control"[5].

5 Translation from Spanish, in the original. LÓPEZ, A. El ciclo de regeneración material de la norma: Una reflexión a partir de la ilegalidad de los despidos masivos no compensados en el terremoto de Ecuador.

Therefore, the author, in other words, considering the malign nature of society driven by profit as the very engine of the system, will always tend to violate the weaker, including nature. The judge proposes a category, the "cycle of material norm regeneration", to understand the true function of the Law:

> "From this tension arises the existence of a 'cycle of material norm regeneration', as proposed in this article. This implies that, given the structural and material conditions in which the law is produced, or let's call it, modern legal artifice, the needs and rights of natural persons are part of a stable cycle, unalterable within their historical and economic context, exposed and conditioned to the dominant interest of the mode of economic production and its rationality"[6].

The malign or selfish nature tends to be increasingly prevalent in most global economic logics, as evidenced by the persistent existence of economically motivated wars, the ongoing atomic threats associated with imperialism, debt crises, and the dangerous instability of emerging economies.

This context particularly highlights the need to create and strengthen regulatory bodies, especially to protect the environment.

2. Sovereignty and Responsibility: Ecological Issues in the Hands of Nations

Up to date, ecological policies stem from normative bodies dominated by the figure of Agreements within International Public Law. These Agreements can be of a global nature, such as the "International Convention for the Protection of Plants", the "Nuclear Energy Agency", or the "Paris Agreement", or the "Kyoto Protocol". They can also be regional or involve a few countries, like the "Regional Agreement of Escazú".

Because all agreements understand that the primary actors in the legal

Utopía Y Praxis Latinoamericana, 24, 2019, p. 236. https://produccioncientificaluz.org/index.php/utopia/article/view/27439

6 CASTRO ANIYAR, D., ALBERT, J., HIDALGO, H. Op. cit., p. 237.

system are the States, the main tension in all of them is the one between sovereignty and responsibility.

We argue that these two principles are contradictory within the realm of Public International Law. In other words, it posits that their inherent contradiction cannot be resolved at both political and legal levels.

This is because, on the one hand, the State has the right to be sovereign regarding the use and enjoyment of its territory, and this logic defines its tax, revenue, and financial existence. Consequently, the State will always tend not to be responsible for the impacts on the territories of other States. This is true regardless of the interests represented in the governments of the time, which may further violate laws or ecological systems not legally covered within their own territory.

This happens because a production system can affect a connected territory (such as a production action on a border), and because ecosystems are interdependent over large territories, most of the time not falling under the jurisdiction of a single State. Thus, if the problem is crucial in terms of the national budget or its impact on the domestic product, the State's interest, at best, ends at its borders, despite any claims to the contrary. Furthermore, the normative, leadership, ideological, or political volatility characterizing all States, especially peripheral States often subjected to debt crises (i.e., a financial accumulation and control vary from some States to others), seriously jeopardizes the stability of any commitment to phenomena of international or national scope.

A State's responsibility often stems from the responsibility of a territory with a common history, traditionally associated with historical means of production primarily. The contemporary nature of States is not significantly different, and the economic competition among companies, as well as the competition among States to dominate a field of production, services, or speculation, is well known. Assuming that all States, in all times, situations, and circumstances, will uphold their principles of responsibility regarding territories that do not exist within their jurisdictions is *naive*. Therefore, maintaining or containing this balance has been, in practice, impossible. It is because the internal interests, and it is even more complex because of interests related to neighboring states.

The traditional approach to this problem raises the question of *What are*

the consequences of violating an ecological principle? However, according to this article, that is a conceptually insufficient and therefore mistaken approach. The question that should be asked is *What are the consequences of a Nation–State declaring to protect an ecological principle?* The relationship between sovereignty and responsibility, while it can be balanced in certain situations, faces the problem that ecological systems are perpetual, whereas human situational complexity and volatility are simply not. Sovereignty implies only jurisdiction, and since structural and situational *concomitants* are the very logic of the system and are particularly strong in political action, the notion of sovereignty by itself cannot respond to the times of what the law calls "perpetuity", as demanded by ecological systems. Ecology does not adhere to the same clock and, in fact, not to any social clock at all.

There are no socio–political systems that remain inert in any culture, especially not in the context of capitalist wealth accumulation and, even less so, in the context of the demographic shifts and globalization of the 20th and 21st centuries.

As a result, ecological policies based on the responsibility of nations blur positive political situations with the structural relationships between human systems and the time frame of nature or ecology. Such confusion is rooted in naive optimism, often well–intentioned but with limited relevance in discrete political opportunities.

In fact, there is no clock as stable as the ecological clock in any of the economic, political, or cultural practices of humans. This explains why there is no such full protection correspondence between the most traditional indigenous communities and their environments, even though their relationship with nature is much more stable and symbiotic than capitalism. Therefore, ecological policies (laws, agreements, declarations, plans, or theoretical foundations, like this one, for example) are illusions of efficiency that have consistently yielded to the evidence of modern political practices of capitalism, which tend towards accumulation and profit.

Despite this mistake, the solutions offered by Public International Law do not allow for thinking outside the framework of Nation–States. In the United Nations, countries demand that other countries not interfere in the economic, political, or ecological systems of others, and create legal instruments based on

Agreements for this purpose. As explained, these procedures are biased in favor of the circumstantial condition of the Nation[7].

So, consequential legal tools, being tools among Nation–States, originate from invalid political decision–making units for ecological issues, from their very conception.

Despite what is often taught in nationalist discourses, a nation's sovereignty over its natural resources stems from the foundational principle of territorial sovereignty, which, in turn, is the result of wars, histories of resource appropriation (often of a predatory nature), ethnic and religious alterities, and ancient colonial histories. It never arises from the existence of ecosystems. In

7 See: UNITED NATIONS GENERAL ASSEMBLY. General Assembly resolution 1803 (XVII) of December 14th. 1962, "Permanent sovereignty over natural resources". https://www.ohchr.org/en/instruments-mechanisms/instruments/general-assembly-resolution-1803-xvii-14-december-1962-permanent / OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. Declaration on the Right to Development. United Nations. Resolution 41/128 of December 4th, 1986. https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-development / AD HOC ARBITRAL TRIBUNAL (1982) The Government of the State of Kuwait v The American Independent Oil Company ('Kuwait v Aminoil')., 21 I.L.M. 976. https://www.biicl.org/files/3938_1982_kuwait_v_aminoil.pdf / UNESCO (1972) Convention Concerning the Protection of the World Cultural and Natural Heritage, Thursday, 16 November, art. 15, 11 I.L.M. 1358, 1363. https://whc.unesco.org/en/documents/170665/ / UNITED NATIONS ENVIRONMENT PROGRAMME (1992). Convention on Biological Diversity. Secretariat of the Convention on Biological Diversity. Montreal, June 5th, principles 2, 31 ILM 818. https://www.cbd.int/doc/legal/cbd-en.pdf / SOCIETÉ DES NATIONS (1933). Convention relative à la conservation de la faune et de la flore à l'Etat naturel, avec annexe et protocole. November 8th, article 9(6), 172 L.N.T.S 241. https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20172/v172.pdf / UNESCO. Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention). art. 2(3), 996 U.N.T.S. 245 February 2th, 1971. https://www.ramsar.org/sites/default/files/documents/library/current_convention_text_e.pdf / UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. International Tropical Timber Agreement, November 18th. 1983, art 1. https://www.itto.int/direct/topics/topics_pdf_download/topics_id=3363&no=1&disp=inline / UNEP. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22th, 1989, art. 12, 28 I.L.M. 649, 668. CEPAL. https://observatoriop10.cepal.org/en/media/251 / UNITED NATIONS. United Nations Framework Convention on Climate Change, May 9th, 1992, art. 14, 31 I.L.M. 849, 867. https://unfccc.int/resource/docs/convkp/conveng.pdf

cases where ecosystems define a nation's territorial boundaries by themselves, this corresponds to: a) the impenetrability of territories and marine areas, which would otherwise have allowed for the premature colonization of the same (as is the case of a significant portion of the Amazon contained within Brazilian sovereignty), b) the ecosystem being the very object of economic exploitation, exercised by an usurping authority (such as the management of the Nile by Egypt, or Mesopotamia within present–day Iraq, two good examples of how these nations depleted their ecological systems in pursuit of political power and regional power struggles). Therefore, a nation never corresponds to an ecological system *per se*. And an ecological system is never independent of other ecological and biocultural systems.

In International Public Law, agreements on sovereignty responsibility are merely reflections of circumstances or even fleeting situations, such as national customs and diplomatic systems, accepted by national and international courts as a reflection of international customs. The procedure is prejudiced from its very inception[8].

The agreements consistently uphold the sovereignty of Nation–States as a constitutive source of order, without questioning why or for what purpose this is the case, such as it is said by Principle 2 of the 1992 Rio Declaration:

> "In accordance with the United Nations Charter and the principles of international law, States have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[9].

Or, in other words, States have responsibilities towards other States because they are the central actors in the agreement, without much reflection on this

8 CRUZ MARTE, I. "Crimen internacional y castigo". Tomo I. Editorial Mar Abierto. *ISSUU.* 2016. https://acortar.link/8uSoPc

9 UNITED NATIONS (1992). Rio Declaration on Environment and Development. Report of the United Nations Conference on Environment and Development. https://acortar.link/TZ4VGy

aspect. In a way, established ideas about social, political, economic, and cultural conflicts are being shifted to ecological issues without significant justifications. The responsibility of sovereignty may not be comfortable when facing the complexity of the perpetual clock represented by ecological dynamics. It is, therefore, a conflict between clocks.

Castro Aniyar, in his writings on social prediction, emphasizes the importance of not forgetting that human action corresponds to different times, as explained at the beginning of this argument. Social changes are more susceptible in the faster clocks, and much more challenging in the slower ones, while some changes are moving in several mid–speed time gears, connected to the previous clocks. However, in all this vast temporal complexity, there is no social correspondence to the time of the perpetuity[10] of ecological dynamics. This explains why the ecological clock in humans corresponds to a dimension close to mythical time, that of the ancient gods, the time of the creation and configuration of the universe, which is foreign to the political condition of humans but not to their intelligence and consciousness.

2.a The Partial Agreements

The complexity stated at the beginning of this essay indicates a very different nature in ecological systems, which confronts not only circumstantial but also partial visions of human interest. When political agreements focus on specific, partial, and inconsequential aspects of the ecological phenomenon, such as "wood", "Conservation of Wetlands of International Importance", "Transboundary Movements of Hazardous Wastes", or "Radioactivity", they address specific problems that often transcend the scope of the agreement's action.

For example, the relationship between logging and the survival of forests, creating reforestation programs and hunting bans, often does not consider the impact that certain invasive tree species have on ecosystems. When artificially replacing one plant mass with another species, as has recently been done with neem or *Azadirachta Indica* (because it has a faster foliage cycle and provides soil erosion control), the consequences are not always better in terms of the forest's

10 We use the idea pf perpetuity form International Public Law tradition

longevity. The invasive species are more efficient than the local biodiversity, replacing it and threatening some habitat balances due to its bioinsecticidal characteristics. Since they are different onto–chronological systems connected only by the delicate thread of scientific intelligence, risks always exist. Therefore, legal and political systems, while they may have some relevance, are not capable of addressing their complexity adequately from a partial perspective.

2.b Current Positive Law and Ecology

In terms of legal processes, the law exhibits an inherent deficiency: justice depends more on evidence and the clarity of procedures than on the actual existence of justice itself. This is because the sources of legal positivism, in order to prevent the harm caused by human idealisms and subjectivities, consider anything that does not correspond to "hard" evidence, properly presented and procedurally documented, to be outside the realm of legal reality. This leads to the fact that, in the absence of other contaminating factors such as poorly conducted litigation or corruption, the law does not have the full conditions to adequately process a conflict brought between states, representing their political interests and sovereignties, and in the name of nature.

2.c Jurisprudence: The Ecuadorian Constitution and Antarctica

Ecuador, a small country in South America, has 24 volcanic ecosystems, a portion of the Amazon, and the Galapagos Marine Reserve. Its Constitution stablishes:

a) Nature is subject of rights and, therefore, can lodge complaints or file lawsuits.
b) Nature or Pacha Mama has the right to have its existence fully respected, as the maintenance and regeneration of its vital cycles, structure, functions, and evolutionary processes.
c) All ancestral communities, peoples, or nationalities have the right to demand the fulfillment of the rights of nature.
d) These communities have the right to benefit from the environment and natural resources that enable them to the "well living" (Sumak Kawsay).

Ecuadorian legal experts have concluded that this constitutional mandate

is still impractical and constitutes a philosophical contradiction, as Arroyo's comprehensive analysis concludes[11]:

> "The construction of law in the context of recognizing nature as a subject of rights in the Ecuadorian Constitution is related to its local application and effectiveness as well as its regional and global projection. From this perspective, the authors believe that the understanding of recognizing nature as a subject of rights is a response to the ongoing debate in the history of humanity, promoted by ecological philosophy in relation to anthropocentrism and biocentrism".

But, at the same time, it reveals the fundamental contradiction of this essay: If ecological systems are so complex (in the simplest sense of this: we do not fully understand them), and the temporary political interests of States tend to represent themselves (be it their sovereignty, or the instrumental political use of their sovereignty, for natural or particularistic purposes) in a dispute, who represents nature?

However, epistemologically, the legal system of International Criminal Law shows different logics in the case of Antarctica, demonstrating the central point of the argument that supports it.

Exactly because national jurisdictions find it complex to colonize their territories (as happened in the past with places like the Galápagos or the Amazon in the case of Ecuador), there are cases where the notion of sovereignty has been displaced in favor of a *Common Heritage of Humanity*.

Antarctica, like Brazil during the Iberian colonial era, remains an unexplored and challenging frontier to colonize, although its importance in the economy and ecology has been determined. This led to the establishment of a kind of free space. The migration of whales or birds also involves a significant international dimension in their territories, but they do not enjoy this kind of free space that Antarctica does. This is due to the clear fact

11 ARROYO BALTÁN, L. Perspectiva Actual De La Naturaleza Como Sujeto De Derechos. *Derecho y Opinión ciudadana*. Instituto de Investigaciones Parlamentarias, Congreso del Estado de Sinaloa.2017, año 1, número 1, p. 70, Sinaloa. https://acortar.link/Xhh19d

that the human circuits where the sovereignties of Nation–States are already firmly established.

In the case of Antarctica, however, another problem arises: the notion acquired by the United Nations is that of "world ownership". Since it cannot belong to any particular state, and the division of the continent in the form of slices of a cake is not easily sustainable, Antarctica is not handed over to nature or to any supranational entity. Instead, it is the collective property of all nations under an administrative agreement.

This case once again highlights the principle of Roman Law "res publica", it means, that the historical source of law is property. Thus, the riches of Antarctica are not the property of States but are the property of Humanity through the concept of public property. Once again, the prevailing notion is the human use of nature, this time shared. The central sense of ecology and its vulnerability to the onto-chronological threat of human systems is not considered. Once again, the same tension is confronted, with known consequences: the usufruct of nature through State sovereignties on one side, and the States protection responsibilities on the other.

Could it happen that, in the course of the dynamics of struggles for political control of economic systems, in the near future, Antarctica succumbs to becoming a battleground for wars and resource appropriations, as has happened and is happening with the Amazon? Is it possible that it is already happening? The agreement has signatories from around the world to date, but it originated during the Cold War, so it does not constitute an extra state delivery of territory but rather a "freezing of claims":

> "Sovereignty was simply set aside in favor of international cooperation, and all signatories have chosen to renew the agreement to maintain this situation. Since then, Antarctica is a territory without full national sovereignties, although there are claims, and in which all countries can set foot across the entire continent"[12].

12 VALLS TORNER, X. El acuerdo sobre la Antártida, un milagro en plena Guerra Fría. *La Vanguardia*, 01/12/2022 https://acortar.link/Lggz1f

3. The proposal by Ferrajoli: The Constitution of the Earth

Luigi Ferrajoli[13] proposes that, in the face of the new crossroads where progress is reversed, a new global contract is necessary. In his opinion, this should be equivalent to the global agreements that followed the rise and defeat of fascism. The critical problems of contemporary times have a scale that can only be addressed by a global perspective: global warming, the nuclear threat (with the capacity to destroy humanity multiple times over), the health emergency associated with the lack of basic food and clean water, within which the Coronavirus pandemic falls, among others, serve as references to this. The author believes that the pandemic is evidence of the problems of disintegration and the absence of interdependence in the political factor, revealing the fragility of the disintegrated model.

All of this leads to the need for a "civilization leap" in law, represented by the formulation of a Constitution of the Earth, as has been proposed since 2020. It would involve an expansion of constitutionalism to the international order.

The proposal not only addresses the drama of social, military, and migratory conflicts, racism, and inequality but primarily the global challenges of ecology, with its specificity.

Given the fact that states hold these forms of sovereignty characteristic of the 20th century, we must rethink the idea that sovereignty belongs to the peoples, so it is "of everyone and at the same time, of no one". This perspective is crucial, and only "global supraconstitutionalism" can save civilization.

"National State policies are impotent […] they depend on national elections and the narrow spaces of their jurisdictions", Ferrajoli declares in the same source. States do not know how to advance public demands because politics has lost the notion of "perpetuity", learned after the wars and the declarations of "never again". In part, this may be related to the pressures of electoral polls, which impose an electoral, short–term agenda rather than a substantive one. Democracy is the one that fundamentally conflicts with the Earth's time.

13 FERRAJOLI, L. EN VIVO / Conferencia Magistral "Constitución de la tierra para enfrentar los problemas globales". 10 de marzo, 2021. Cámara de Diputados de México.https://acortar.link/btr1kW

"It's not a utopian hypothesis, but rather the only realistic solution" Ferrajoli asserts[14]. This involves the refoundation of modernity, in the same way that Thomas Hobbes understood it during the transition from the 18th to the 19th century, based on the idea of a social contract, when the state of nature was perceived as predatory.

The crisis today has a much greater destructive potential than in Hobbes' times. Today's catastrophes, such as ecological ones, are irreversible. From this, a pact for peaceful coexistence must be derived, in the manner of the consciousness that humanity gained when the Universal Declaration of Human Rights was promulgated.

According to the author, *guarantees* mean: *freedom*, *immunity*, and also *obligations*, which is why fundamental rights require clear rules of conduct. It is then a matter of globally ensuring health, food, and the protection of nature. Regarding the latter, he argues for the need to protect large forests and water sources to safeguard future generations.

The new Constitution of the Earth should innovate in two ways:

a) The creation of primary guarantee institutions for fundamental rights and labor, rather than solely relying on spaces for debate and consideration through national representation, and
b) The establishment of secondary guarantee institutions of a jurisdictional nature that allow for the annulment of all national regulations that are contradictory to primary guarantees. This would require the possibility of building a global oversight agency to make fiscal movements and capital resources transparent.

The opposite would imply resource devastation, war, deforestation, and extinction.

4. Conclusion

The arguments developed cast doubt on the epistemological and practical reach of available international environmental legal tools. Sociological, philosophical, and anthropological sources are used to question whether international

14 *Idem*, min. 31:38

norms, adhering to the principles of national sovereignty and security, can reverse the current ecological crisis. The concepts of complexity and situation suggest that human, and even more so, national clocks are inadequate for predicting, controlling, and managing ecological policy.

The alternative suggested, following Ferrajoli's line of thought, the creation of a Constitution of the Earth to change the quality of political authority, should improve the jurisdiction of actions, and strengthen the principle of the common good . It was normal to believe that it was not necessary, because we had not the imperative to do it. Human Rights, and foundations of modern international law were produced without the need to understand the link between nature and culture, and for so, nations shaped the interests of the common good:

"Scientific conceptual cognition, which nowadays strictly describes the elements of the highly-sophisticated technology and social material culture, fails to appreciate Nature in its fascinating orderliness, ontical creativity and complexity. Its prejudices have been pre-set, not only by the above-mentioned predatory spiritual paradigm but also, much earlier, in the pre-scientific understanding of the world, by common language and cognition. (…) we never in the past needed to know what Nature and life were like, what Culture was like and what the place of Culture was within Nature. Such knowledge, a theoretical model of the artificial purposeful subjectivity of Culture and of the wider natural subjectivity of Nature, is needed only today"

In this way, the expansion of national constitutions to the global level would project the principles of sovereignty and responsibility to the same level, and would more efficiently address the crucial moment that ecology is currently facing.

However, even with the existence of a Constitution of the Earth, the planet would still face three unsolved problems:

a) The nature of positive law, which reduces criminal evidence to properly documented, objective, and procedural material proofs, which may not always recognize or reflect the essential complexity of the ecological phenomenon. This expresses the gap between the fast clock of situation (where human complexity uses to exist) and steadier clocks, such as the conjuncture and the human structure ones. Nature's clock is steadier than the steadiest human clock, where its complexity uses to exist. This problem

also expresses that the knowledge of nature does not always correspond to the nature of the knowledge, nor our notions of Law's truth.

b) The inherent contradiction between human time and the enduring time of ecological dynamics, which makes it particularly difficult to protect nature through policies that result from Earthly constitutional practices. The practices made by humans, including Scientific practices, are too segmented compared to the multi-systemics, multi-level and multi-dimensional events in nature.

c) The capacity of the Earthly institution to exert legal force, based on material (economic and political legitimacy) over the major vested interests created within States, corporations, and the capitalist economic system itself. Whether these interests are legal, illegal or anarchic.

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