Environmental Sustainability in the European Union: Socio-Legal Perspectives

Edited by
Serena Baldin and Sara De Vido

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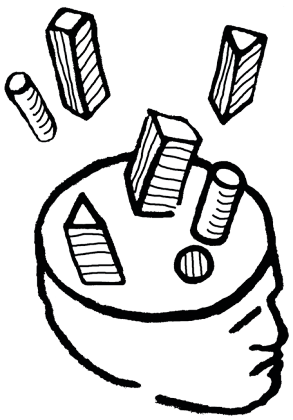

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Table of Contents

Introduction

SERENA BALDIN, SARA DE VIDO

This book concludes the project entitled "Environmental Sustainability in Europe: A Socio-Legal Perspective" (2017/2020) coordinated by prof. Serena Baldin of the University of Trieste (Italy) and co-funded by the European Union through the Actions Jean Monnet Modules. The aim is to collect contributions on the topics that have been tackled during the three-year project and to offer a reflection on new paradigms in law, sociology and economics related to the protection of the environment, with specific regard to sustainable development.

Sustainability is a concept that finds its way these days in the majority of legal instruments, both binding and non-binding, at the international, regional, and national levels. Owing to its vagueness and its abusive use, the idea of sustainability is too often taken for granted and not appropriately analysed. To the contrary, sustainability must be object of continuous studies and research from an interdisciplinary point of view, in order to grasp the complexities and the current challenges in the so-called Environmental Governance. Environmental Governance, according to the definition of the United Nations Development Programme, comprises the rules, practices, policies and institutions that shape how humans interact with the environment. The European Commission has developed an assessment framework for environmental governance covering the

following dimensions: transparency, participation, access to justice, compliance assurance/accountability and effectiveness/efficiency.

The volume specifically focuses on two aspects. Firstly, it searches for a theoretical basis to promote a paradigm shift capable of responding to the severe loss of biodiversity and the incumbent climate breakdown, finding inspiration in the concept of common goods and in ecocentrism as well as in the ecosystemic approach. Secondly, it concentrates on recent trends in highly sensitive environmental issues, namely environmental democracy, flood risk prevention, payments for ecosystem services, social eco-compatibility in tourism sector. The aim of the book is not to provide all the answers to the multiple concerns and issues that have emerged over the years regarding the protection of the environment, but surely to enrich the debate.

The book opens with the chapter written by Barbara Pozzo. After a brief illustration of the origins of the sustainable development principle, the Author investigates the current evolution of the concept, discussing which concrete legal tools can implement sustainable development goals in an effective way, and hence highlighting the role of the EU as trend setter in environmental matters.

The first part of the volume is then devoted to "Nature, Climate and Water as common goods and the search for new paradigms in face of biodiversity loss and climate crisis". Luigi Pellizzoni introduces three different approaches to the commons – as socio-material assemblages, as "commoning" and as rights – discussing their critical import in this regard. Subsequently, the notion of inoperative praxis, or inoperosity, as especially developed by Agamben is discussed. Inoperosity does not mean contemplation or resignation, but a non-instrumental modality of living and acting, capable for this reason of suspending the apparatuses of domination and exploitation. This perspective, it is argued, may effectively help to assess "new materialist" mobilisations, as well as the promises and perils of the Green New Deal.

The chapter authored by Serena Baldin deals with biodiversity and its protection in the Natura 2000 network, an aspect from which the commons emerge as traditional practices carried out in forestry and agriculture. She recognises some analogies between the approaches related to the management of collective pool resources and those related to the ecocentric vision, giving a few examples of the application of the nature-based approach in the Natura 2000 sites. Finally, she concludes with some reflections on the possible explicit recognition of the nature-based approach at EU level.

Silvia Bagni analyses an innovative approach which is useful to grasp the challenges of environmental issues of these days: the United Nations Harmony with Nature programme and the global movement for the recognition of na-

ture's rights. Stressing how climate change is a fact, not a theory, the author suggests that an ecological shift in the legal paradigm could consist in recognising new subjects of rights, as the global movement for Nature's Rights demands. She also explains the recent title introduced in the Italian Civil Procedural Code on collective actions, contending that this provision would be quite useful in environmental class actions, with the purpose of eliminating all the negative effects of contamination and of restoring the damaged ecosystem.

Talking about new paradigms, Sara De Vido focuses on the right to a healthy environment, suggesting that we should get rid of a strict anthropocentric approach and embrace ecocentric considerations in order to protect the environment per se and for the existence of humanity itself. She relies on the Advisory Opinion rendered by the Inter-American Court of Human Rights in 2017 and builds a strong argument in favour of the consolidation of a right to a healthy environment combined with the rights of the nature.

Roberto Louvin reflects on climate stability as a common good, or better as a "common question", being of common interest for the whole humanity, as evidenced by the intergenerational perspective adopted in the international agreements that explicitly identify a responsibility towards future generations. His reflection paves the way for a European Strategy that is based on this understanding of climate. The author concludes by pointing out the risk of an overconfidence in new technologies to address the problem of global warming and the limits of the European eco-modernist approach.

Juan José Ruiz Ruiz has worked on the Right2Water initiative, the first European Citizens' Initiative that has reached 1,000,000 signatures, and on the response given by the European Commission to the concern expressed by civil society. His analysis also provides some considerations on the development of the human right to water, whose recognition at the international level has been quite complex and not entirely achieved, and on water as common good. According to the author, the Court of Justice of the European Union case law on the Water Framework Directive, along with European Economic and Social Committee opinions, should be welcomed as a major contribution to specify what is meant by the right to water.

The second part of the volume is entitled "Recent trends in environmental issues". Francesco Deana focuses on environmental democracy that, to a large extent, is realised through the right of the general public to access documents and information held by EU bodies in environmental matters. Even though the matter is ruled by the "widest possible access" principle, the Author observes a recent increase in presumptions of confidentiality and still existing difficulties in establishing when there is an overriding public interest in disclosure rather seem to favour some secrecy than disclosure and openness. Therefore, his chap-

ter aims to answer the question whether the EU regime on access to documents and information in environmental matters is genuinely democratic or not.

Yumiko Nakanishi develops the concept of environmental democracy in the specific context of the Economic Partnership Agreement between the EU and Japan, which has recently entered into force. She investigates the treaty with a focus on civil society and how the latter influenced the adoption of the agreement. Her chapter also deals with the question of how the agreement can influence non-governmental organisations and the civil society of Japan in the future.

Emilia Pellegrini reflects on the European strategy to address the growing concerns regarding water resources protection and flood risk management is centred on the so-called Integrated River Basin Management. The European Water Framework Directive, first, and then the Flood Directive recognise the river basin as the appropriate spatial scale to improve the quality of water resources and to enhance the capacity of flood risk management. Moreover, both directives promote the active involvement of civil society in the elaboration of river basin plans. In so doing, both directives represent an outstanding attempt to institutionalise the Integrated River Basin Management approach throughout European countries.

The chapter authored by Stefania Troiano regards payments for ecosystem services. They are considered as a tool to avoid risks owing to unsustainable use of water resources. Since abuse of natural capital persists because the full value of the benefits it produces is reflected neither in private nor in public decision-making processes, the role of citizens is fundamental. In this perspective, to encourage and support more sustainable behaviours, the promotion of Market-Based Instruments and, in particular, the Payments for Ecosystem Services schemes seems to be useful.

Moreno Zago investigates how the European Union have tried to reconcile sustainability with the growth of tourism and the management of overtourism in urban contexts and fragile areas. He deals with the problem of elaborating the meaning of landscape and how it should be experienced and proposed by communities, pointing out the importance of the concept of *social eco-compatibility* that enhances both residents and the expressions of of their local culture as well as the natural resources.

Sustainable development

BARBARA POZZO

1. Premise

The idea of sustainable development is deeply connected with the debate around the concept of well-being that our society acknowledge. If the idea of social well-being was strongly linked with the ideology of "development" as economic growth in the first part of the XXth century, since the end of World War II that ideology began to fade away and to leave space to a more complex vision of the world, where respect of the environment gained a central place.

The 1950s and 1960s were indeed a time of growing awareness of environmental problems. Since the publication of *Silent Spring* by Rachel Carson published in 1962 (Carson 1962), documenting the adverse environmental effects caused by the indiscriminate use of pesticides, the public opinion world-wide began to pay more attention to environmental protection issues and sustaining national and international policies to cope with the new situation.

While the debate around the possibility of reconciling the needs of development with the protection of the environment is not new, however it is only in the second part of the twentieth century that the concept of sustainable development started to be elaborated in its actual form, assuming an increasingly important role in the development of various policies at EU and international level.

Sustainable development also relies on a commitment to equity with future generations. The idea to leave future generations at least the same level of opportunity as we ourselves have had, although simple in theory, seems much more difficult to reach in practice: what legislative measures should be adopted in order to achieve this magical point of equilibrium between the needs of today and those of tomorrow? This question lead us to investigate which concrete legal tools allow us to implement sustainable development goals in an effective way.

2. A brief history of the sustainable development principle

In 1972, the *Club of Rome* published a report by Dennis and Donella Meadows entitled "*The Limits to Growth*" (Meadows *et al.* 1972), in which the two scientists investigated five major trends of global concern: accelerating industrialisation, rapid population growth, widespread malnutrition, depletion of nonrenewable resources, and a deteriorating environment.

The conclusions formulated in the Report pointed out that if the present growth trends in world population, industrialisation, pollution, food production, and resource depletion continued unchanged, the limits to growth on this planet were going to be reached sometime within the next one hundred years. In this case, the unavoidable result would have been a rather sudden and uncontrollable decline in both population and industrial capacity.

On the other side, the two Authors pointed out that it was possible to alter these growth trends and to establish a condition of ecological and economic stability, sustainable far into the future. In this perspective, the state of global equilibrium could be designed so that the basic material needs of each person on earth are satisfied and each person has an equal opportunity to realise his individual human potential.

Even before *The Limits to Growth* was released, Eduard Pestel and Mihajlo Mesarovic had started working on a much more elaborate model that distinguished ten regions of the world and involved 200,000 equations compared to 1,000 in the Meadows model. The research by Pestel and Mesarovic had the full support of the Club of Rome and its final publication, "*Mankind at the Turning Point*", was accepted as an official "second report" to the Club of Rome in 1974.

Similar conclusions were formulated by Nicholas Georgescu-Roegen in "*The Entropy Law and the Economic Process*" (1971), where the Author argued that our economic system, like all physical systems, is subject to the laws of thermodynamics, emphasising the dangers of economic growth. Georgescu-Roegen actu-

ally became a member of the Club of Rome, while Dennis Meadows acknowledged the influence of Georgescu-Roegen's ideas on the team of authors of *Limits to Growth* (Levallois 2010).

In 1972 the *United Nations Conference on the Human Environment* was held in Stockholm, gathering 114 governments representatives. The meeting adopted the *Declaration of the United Nations Conference on the Human Environment*, or *Stockholm Declaration*, containing 26 Principles. Principle 1 states: «*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*», thus formulating the idea of responsibility for future generations that will form a cornerstone of the sustainable development principle.

In 1980, the *International Union for Conservation of Nature and Natural Resources* (IUCN) with the advice, cooperation and financial assistance of the *United Nations Environment Programme* (UNEP) and the *World Wildlife Fund* (WWF), in collaboration with the *Food and Agriculture Organization* of the United Nations (FAO) and the *United Nations Educational, Scientific and Cultural Organization* (UNESCO) prepared *The World Conservation Strategy – Living Resource Conservation for Sustainable Development.* The Report is the first international document on living resource conservation produced with inputs from governments, non-governmental organisations, and other experts. It targets policymakers, conservationists and development practitioners with its core tenets of protection of ecological processes and life-support systems, preservation of genetic diversity and sustainable utilisation of species and ecosystems.

The *World Conservation Strategy* laid the foundations for defining the principle of sustainable development, arguing that for development to be sustainable, it should support conservation rather than hinder it.

In 1983, the United Nations General Assembly established the United Nations World Commission on Environment and Development (WCED) that in 1987 published a Report entitled "*Our common future*". The document came to be known as the "*Brundtland Report*", after the Commission's chairwoman Gro Harlem Brundtland, and provided a broad definition of sustainable development: «*Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own need*» (Brundtland, 1987). The Report was divided in three parts: Part I dedicated to the "Common Concerns", Part II devoted to the "Common Challenges", and Part III identifying the "Common Endeavours".

In Part I, the Report highlights the close relationship between the principle of sustainability and intangible values, pointing out that «*Sustainability requires views of human needs and well-being that incorporate such non-economic variables as*

education and health enjoyed for their own sake, clean air and water, and the protection of natural beauty» (Brundtland 1987: Part I, no. 39).

The Second Part aims at outlining Strategies for Sustainable Industrial Development, encouraging to integrate resource and environmental considerations into the industrial planning and decision-making processes of government and industry: «*This will allow a steady reduction in the energy and resource content of future growth by increasing the efficiency of resource use, reducing waste, and encouraging resource recovery and recycling*» (Brundtland 1987: Part II, no. 47).

Finally Part III highlights the relationship between governments and private parties, stressing that sustainable development must be at the center of common efforts: «*Environmental protection and sustainable development must be an integral part of the mandates of all agencies of governments, of international organizations, and of major private-sector institutions. These must be made responsible and accountable for ensuring that their policies, programmes, and budgets encourage and support activities that are economically and ecologically sustainable both in the short and longer terms. They must be given a mandate to pursue their traditional goals in such a way that those goals are reinforced by a steady enhancement of the environmental resource base of their own national community and of the small planet we all share*» (Brundtland 1987: Part III, no. 17).

In 1991, the *International Union for Conservation of Nature and Natural Resources* (IUCN), together with United Nations Environment Programme and the World Wide Fund for Nature publishes "*Caring for the Earth*", the successor to the World Conservation Strategy published in 1980. This strategy is focusing on practical action to be taken, setting the «*targets for the changes in our lives that will move us towards a sustainable society and urges a concerted effort to make this ethic a global force in personal, national and international relations*».

Meanwhile, with the fall of the Berlin Wall on 9 November 1989 and the unification between East and West Germany, the Iron Curtain between the West and Soviet-controlled regions came down. After the dissolution of the Soviet Union in 1991 a new international conference was launched by the United Nations in order to create the basis to cooperate together internationally on development issues. The "Earth Summit" was held in Rio de Janeiro in December 1992 and gathered representatives from 172 states, including 108 heads of state and government and tens of thousands of people. There was considerable media coverage (10,000 journalists present), while the big absentee was President Bush Sr.

The conference was the backbone for a new phase of environmental law, which increasingly became globalised. The Earth Summit in particular resulted in a series of documents (Rio Declaration on Environment and Development; Agenda 21, Forest Principles) and of binding conventions (Convention on Biological Diversity, Framework Convention on Climate Change, United Nations

Convention to Combat Desertification) that can be considered milestones in the subsequent development of environmental law.

Ten years after the Rio Conference, the United Nations World Summit on Sustainable Development was held in Johannesburg, with the dual role of a budget of the past decade and the relaunch of the commitment to sustainable development towards the future (Fodella 2003: 385). The Johannesburg Declaration on Sustainable Development "*From our Origins to the Future*", adopted on September 2, 2002, is a political document signed by the Heads of State and Government, with obligations and implementation proposals for sustainable development (Pallemaerts 2003: 1).

3. The principle of sustainable development in the EU

Initially, the Treaty establishing the European Economic Community in 1957 did not provide for any specific Community competence in the environmental field, which was introduced only in 1987 with the Single European Act. With the Maastricht Treaty in 1992 the principle of sustainable development was introduced at Art. 2: «*The Community has the task of promoting […] a harmonious and balanced development of economic activities throughout the Community, sustainable, non-inflationary and environmentally friendly growth*».

Nowadays the Treaty features the *principle of sustainable development* in various provisions: as well as in the Preamble. In particular, the principle of sustainable development is established in Art. 3, where it is put in connection with the establishment of the internal market («*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment*»), but also with the role that Europe wants to play at international level in order to promote sustainable development worldwide («*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter*»).

Art. 21 further foresees that sustainable development will have a guiding role in Union's external action. In particular, the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to foster the sustainable economic, so-

cial and environmental development of developing countries, with the primary aim of eradicating poverty and help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

The principle of sustainable development is moreover recalled in Art. 37 of the Charter of Fundamental Rights dedicated to the environment, which states that «*A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development*».

The idea encapsulated within the principle of sustainable development – in theory – appears to be simple: it is to leave future generations at least the same level of opportunity as we ourselves have had. As the Brundtland Report was stating: «*Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs*» (Brundtland 1987). On the other hand, it is more difficult – from a practical point of view – to determine what legislative measures should be adopted, and what the right mix of legal instruments (between public law and private law) is in order to achieve this magical point of equilibrium between the needs of today and those of tomorrow (Brown-Weiss 1989; Manne 1996; Farber and Hemmersbaugh 1993).

Sustainable development as a concept has remained relatively open-ended, providing «*a space for dissension and socio-political struggle where competing discourses of the economic and environmental paradigms are joined*» (Hajer 1997). Others have suggested that the concept of sustainability has a more long-term function, claiming that it falls within the classification of «*ideas that make a difference*» (McNill 2000).

In order to give consistence to the principle, sustainable development has been mainstreamed into EU policies and legislation, implementing a specific *EU Sustainable Development Strategy* of 2001[1], where the Commission states that economic growth, social cohesion and environmental protection must go hand in hand, calling for a better coordination among the wide range of policies to address the economic, environmental and social dimensions of sustainability and launching the global role of the EU in this field.

The *EU 2020 Strategy*[2] was published in the aftermath of the economic crisis of 2008, focusing on three priorities for the development to 2020:

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[1] Communication from the Commission, "A sustainable Europe for a Better World: A European Union Strategy for Sustainable Development", Brussels 15.5.2001 COM (2001) 264 final.

[2] Communication from the Commission, "Europe 2020 – A strategy for smart, sustainable and inclusive growth", Brussels, 3.3.2010 COM(2010) 2020.

1. Smart growth – developing an economy based on knowledge and innovation
2. Sustainable growth – promoting a more resource efficient, greener and more competitive economy
3. Inclusive growth – fostering a high-employment economy delivering economic, social and territorial cohesion.

Finally in 2019 the EU's *Better Regulation Agenda*[3] was published. The introduction of better regulation principles had its origins in the desire for better European governance, and for anchoring sustainable development in the Union's policy-making by looking at economic, social and environmental impacts together.

As we will see, the development of a sustainable development agenda at EU level does not focus anymore only on public law instruments but – on the contrary – recognises the role that private law instruments can play.

3.1. *The Green Economy debate*

A further pillar that delineates the reference cultural framework is the debate surrounding the development of green economy. Green economy is a manifestation of the issue set out above in the area of sustainability, as it is based on the conviction that current well-being and that of future generations is highly dependent upon environmental risks and the scarcity of natural resources.

When we refer to green economy we start from the premise that the economy developed according to the parameters of neo-classical theories and that did not take due account of the value of the environment, which was used within production processes, or was even destroyed and pillaged by these (Altman 2001). By failing to take account of the value of these environmental resources within the calculation of business costs, economic development had occurred at a cost that was not sustainable in environmental terms.

It should be stressed that natural resources are largely presented as non-appropriable resources, such as public goods, for which the market is unable to express an exchange value and will be unable to operate correctly as a mechanism for the optimal allocation of those resources. Reference is made in these cases to the concept of market failure (Bator 1958), construed as a situation in which either the market is entirely non-existent (given that environmental resources have the economic status of public goods) or does not adequately reflect the "true" cost or the social cost of economic activity.

[3] "Better regulation – Taking stock and sustaining our commitment", European Commission, 15 April 2019.

Absent any specific allocation of property rights over natural resources, the price system has generally not been able to send the correct signals to the productive system in order to act as a guide for it in achieving an efficient consumption of such resources. And it is precisely in relation to these issues that lawyers will be required to review the concept of ownership in order to achieve a more efficient indication of the ownership of environmental resources.

A green economy approach, on the other hand, is one in which – by definition – the costs resulting from the degradation of ecosystems are internalised within productive processes (Steiner 2010: 845). The model endorsed by the green economy thus analyses not only the economic benefits of a given production regime, consisting in an increase in gross domestic product, but also the impact and damage that such a regime will have on environmental resources.

This assessment of environmental impacts can be extended to the various states of the raw materials transformation cycle starting from their extraction, through transportation and transformation into energy and finished products to the possible environmental damage caused by their definitive elimination of disposal[4].

4. The Millennium Development Goals and the UNEP programme

In delineating the reference context under examination, it is also necessary to recall the various initiatives adopted by the United Nations, including the so-called *Millennium Development Goals,* which relaunch a new idea of well-being strongly centred around non-economic values[5].

Also within this perspective, it is necessary to stress how the environmental strategies were supplemented within the agenda of *priorities* set by the United Nations: in fact, the Millennium Declaration dedicates an entire section to en-

[4] The conceptual framework adopted by the green economy stresses that such damage often has a negative effect also on gross domestic product: GDP will in fact tend to fall as a result of the reduction in output by economic activities that benefit directly from a good quality environment, such as agriculture, fishing, tourism and public health. Other negative effects on GDP may also result indirectly due to the fact that a lower quality environment could lead to situations of environmental degradation or – in the most serious cases – environmental disaster requiring a strong financial intervention by the state in order to promote clean-up operations.

[5] The *Millennium Declaration* adopted in plenary session contained eight objectives which the contracting parties undertook to achieve by 2015: to eradicate extreme poverty and hunger, to guarantee universal primary education, to promote gender quality and the empowerment of women, to reduce infant mortality, to improve maternal health, to combat HIV/AIDS, malaria and other diseases, to guarantee environmental sustainability and to develop a world *partnership* for development.

vironmental protection, referring explicitly to climate change, desertification, biodiversity, and the management of forests and water.

The *United Nations Environmental Program* also developed along similar lines, pursuing a series of strategies to promote the transition of the global economy towards the *green economy*, which is defined by the UNEP itself as «*a system in which the costs resulting from the degradation of ecosystems are internalised*» (Steiner 2010: 843).

As highlighted by the UNEP Report itself, the internalisation of these costs depends on the proper operation of markets; however, absent appropriate legislation regulating a range of variables[6], the markets will be unable to provide the answers that are expected in order to achieve a transition towards a greener economy.

The global markets could thus play a very important role within the transition towards the green economy, provided that there is an adequate normative framework at international level in order to induce the markets to work towards sustainable development.

According to what is now a classic viewpoint (Jacobs 1991), the actual problem of the policies adopted at international level is to determine effective legislative instruments in order to ensure that the ecological limits imposed on economic activities can be accepted and specifically applied.

It is important to point out that these indications must relate both to the supply side (i.e. businesses), as well as the demand side (i.e. consumers).

The 2011 UNEP Report, which regulates the supply side, stresses the necessity to develop specific assessment criteria to determine the value of environmental resources that suffer damage or degradation because of production processes. These costs must be internalised in order to enable the market to correct the shortcomings previously brought about by the fact that it did not take due account also of the costs of environmental resources[7].

From the demand side on the other hand, a key role will be played by the information to consumers regarding the effective environmental impact of certain products. It has been emphasised that the role of policies in avoiding excessive environmental degradation is premised on the availability of information, incentives, investments and appropriate institutions. Better information concerning the state

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[6] The information which must be made available to consumers, the holders of environmental assets and the criteria for its assessment.

[7] As stressed by the UNEP Report from 2011, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*, p. 16: «*Environmental valuation and accounting for natural capital depreciation must be fully integrated into economic development policy and strategy. As suggested above, the most undervalued components of natural capital are ecosystems and the myriad goods and services they provide. Valuing ecosystem goods and services is not easy, yet it is fundamental to ensuring the sustainability of global economic development efforts*».

of the environment, ecosystems and biodiversity in fact appears to be essential for all of the decisions that have to be taken, both by private actors as well as by public authorities, in order to determine the allocation of natural capital for economic development[8].

It will therefore come as no surprise that there has been a revaluation of market instruments precisely within this context, with a view to creating a broader range of instruments to be used in environmental policies.

5. The Quest for new instruments of environmental policy

Over the course of the last twenty years, from a comparative law perspective we can observe a general trend towards the identification and development of new legal instruments in order to better achieve the goals of sustainable development. In particular, the European Commission has adopted new guiding principles elaborated within the legal international framework, introducing them within specific action plans, that gave birth to new legislative initiatives.

Within this context, there are two lines of evolution that have emerged gradually over time. On the one hand, the revisiting of private law instruments with a view to achieve a more efficient involvement of all parties in the protection of the environment; on the other hand, it appears clear that in the field of environmental protection policies, the classical distinction between public and private law is slowly fading away.

This evolution started to be clearly felt since the Fifth Environmental Action Programme, adopted by the Commission on 18 March 1992, entitled "*Towards sustainability*"[9], which considered the expansion of the range of environmental policy instruments.

In order to lead the change in approaching environmental problems and to incentivise a spirit of "shared responsibility", the Commission called for the need to propose a broader range of instruments that could enable business to participate in a process of awareness raising regarding environmental issues[10].

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[8] UNEP Report, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*: «*the role of policy in controlling excessive environmental degradation requires implementing effective and appropriate information, incentives, institutions, investments, and infrastructure. Better information on the state of the environment, ecosystems, and biodiversity is essential for both private and public decision making that determines the allocation of natural capital for economic development. The use of market based instruments, the creation of markets, and where appropriate, regulatory measures, have a role to play in internalizing this information in everyday allocation decisions in the economy*».

[9] The Fifth Programme was published on OJ C 138/5, 17 May 1993.

[10] The new environmental policy instruments and the concept of "shared responsibility" are examined in point 7 of the Fifth Action Programme, OJ C 138/70, 17 May 1993.

The traditional instruments of environmental policy – those based on the command and control model – were supplemented by so-called market instruments, including taxes, charges, specific environmental incentives, trading systems, ecological labelling schemes and environmental balance, rules governing liability for environmental harm, and finally environmental agreements[11].

The Sixth Environmental Action Programme[12] launched new strategies for the period 2002-2010. The Commission announced that one of the aims of environmental policy was to induce the market to work in favour of the environment, through improved cooperation with businesses, introducing incentive schemes for companies with the best environmental performance, promoting a shift towards greener products and processes, and incentivising the adoption of eco-labels to enable consumers to compare analogous products on the basis of their environmental performance.

This integrated strategic approach was to lead to the incorporation of «*new ways of working with the market, involving citizens, enterprises and other stakeholders*». This new approach was «*needed in order to induce necessary changes in both production and public and private consumption patterns that influence negatively the state of, and trends in, the environment*»[13].

In the most recent Seventh Union Environment Action Programme, entitled "*Living well, within the limits of our planet*"[14], the Commission sets out the guidelines through to 2020, bringing together environmental concerns and market dynamics[15].

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[11] Commission Communication, Europe's environment: What directions for the future? The global assessment of the European community programme of policy and action in relation to the environment and sustainable development, 'Towards sustainability', Brussels, 24.11.1999, COM (1999) 543 final. In the following Communication, entitled: Europe's environment: what directions for the future?, which offered an intermediate report on the application of the programme, the Commission took note of the fact that the previous five years had seen the implication of many new initiates in the Member States in order to incentivise the use of market instruments, recognising that the new policies had achieved the desired results.

[12] See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the sixth environment action programme of the European Community "Environment 2010: Our future, Our choice" – The Sixth Environment Action Programme, Brussels, 24.1.2001, COM (2001) 31 final; see also Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, in OJ 10.9.2002 L 242/1.

[13] See recital 6 of Decision 1600/2002 laying down the Sixth Community Environment Action Programme.

[14] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020, in OJ of 28.12.2013, L 354/171.

[15] Point 17 of the action programme.

This is part of a renewed conception of well-being in which economic prosperity and the well-being of the Union are closely related to its natural capital.

The Seventh Action Programme reflects the Union's commitment to transform itself into an inclusive green economy that can guarantee growth and development, protect human health and welfare, create decent jobs, reduce inequalities and invest in biodiversity[16].

In order to achieve these ambitious goals, the Commission stresses that there is a need for «*an appropriate mix of policy instruments*»[17] in order to enable businesses and consumers to improve their understanding of the impact of their activities on the environment and to manage that impact. These political instruments crystallise in a broad examination of legal instruments, public and private law, including economic incentives, market instruments, information requirements, and in voluntary measures and instruments which commit stakeholders on various levels, as supplements to legislative frameworks[18].

The current trend within countries with advanced economies thus seeks to promote models of consumption and production that can internalise positive and negative environmental impacts through a combination of various instruments. These involve a revisiting of classical private law instruments such as liability for environmental harm, property instruments within the regulations governing tradable emissions permits and – finally – voluntary agreements that restate the issue of environmental policies developed on a contractual basis.

5.1. *Liability for environmental damage*

Civil liability for environmental damage has been presented from various quarters as a strong instrument for guiding the conduct of business and as an instrument of *deterrence* (Schwartz 1994) against conduct that is harmful to the environment, as well as an efficient instrument to achieve the internalisation of negative environmental externalities.

The comparative analysis has stressed how civil liability can actually be a valid instrument within this sector (Pozzo 1996; Id. 2002), provided that several conditions are met. In particular, in order for civil liability to achieve an effective internalisation of negative environmental externalities, it is necessary to have:

1) a clear definition of *environmental damage*;

[16] Point 10 of the action programme.

[17] Recital 33 to Decision no. 1386/2013/EU.

[18] Recital 33 to Decision no. 1386/2013/EU.

2) a clear indication of the parties that are subject to the particular liability regime;
3) a clear definition of *standing to sue*, enabling the plaintiff to take action quickly to get the right incentives to sue;
4) a *liability regime* that meets with the particular features of environmental damage;
5) *evalutation criteria* for environmental damage, which renders insurability feasible.

The various Community initiatives that have emerged in this area[19] resulted in the adoption of Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage[20].

5.2. *Revisiting ownership*

A similar revisiting of a private law institute has occurred with the evolution of tradable pollution rights, which are used in the environmental domain in order to provide an incentive to use resources in a sustainable manner. Tradable pollution rights were introduced at the end of the 1960s (Dales 1968) in the USA in response to the need to limit emissions required under US legislation on atmospheric pollution, without thereby halting economic growth. The *Clean Air Act* provided for maximum concentrations of specific polluting substances for each area, which gave rise to the problem as to how to ensure that economic growth would continue also in the regions in which the concentration thresholds had already been reached or exceeded.

The idea underlying proprietary economic instruments, such as tradable pollution rights, is that environmental degradation is the result of the incomplete attribution of proprietary rights over the use of natural resources. For many environmental goods and services, there are no markets, or only incomplete markets,

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[19] See for example the *Green Paper on remedying environmental damage*, presented as a Communication from the Commission to the Council and Parliament and the Economic and Social Committee, presented by the Commission of the European Communities, COM (93) 47, Brussels, 14 May 1993, in: OJ no. C/149 of 29 May 1993. The Green Paper examines the usefulness of tort law as an appropriate means for apportioning responsibility for the costs associated with environmental clean-up work. The same approach was also taken in the *White Paper on Environmental Liability*, in COM (2000) 66 final.

[20] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, in OJ 30.4.2004, L 143/56.

and this shortcoming is a source of economic inefficiency. The supporters of the instruments in question consider that there is a strong tendency to exploit and degrade resources that are under common ownership.

Command and control rules entail a provision (often implicit) of merely public law proprietary rights over environmental resources, whilst emissions trading systems provide for a combination of public and private property. Public property rights vest the state with the power to set emissions reduction quotas, whilst private property rights attributed to industries enable them to allocate the costs of reducing pollution in a more efficient manner through the market (Cole 1999).

Accordingly, "rights" to use resources or to pollute the environment have been created, which may be traded on the market. In this way the market is used in order to allocate a scarce resource, i.e. the capacity of the environment to absorb pollutants in an efficient manner.

The European Union has worked on the creation and allocation of well-defined, enforceable and tradable property rights over environmental goods and services, as one of the solutions for improving the functioning of markets for environmental products, which is necessary in order to permit an increasingly greater integration of the environment into economic policy.

Within a system of transferable pollution rights, the commodity that is exchanged on the market is comprised of quotas of pollution that is admissible within a given area.

It should be stressed that the operation of this market is not influenced by the type of initial distribution of pollution rights, as it is the market that sets the final price which, under conditions of equilibrium, will settle at a level that is equal to the aggregate marginal cost of reducing pollution.

The instrument of tradable pollution rights works efficiently when the number of business operating within the market is high, as the presence of a small number of operators could cause the circulation of pollution rights to grind to a halt, since operators may decide not to exchange rights, thereby preventing the entry of new business into the market.

In addition, it should be pointed out that this instrument works in relation to large-scale pollutants the presence of which is not merely occasional.

The instrument of tradable pollution rights enables costs of reducing emissions to be minimised as reductions occur when their cost is less high. In addition, it acts as an effective incentive mechanism to promote progress in the field of pollution control technologies. In fact, whilst the public authorities are unable to establish all of the possible techniques available to individual installations, the flexibility of tradable pollution rights makes it possible to exploit the full potential of the technological ingenuity of private operators, providing a strong impetus for innovation (Cellerino 1993).

The instrument in question fully implements the "polluter pays" principle, and has attracted widespread consensus throughout industry.

A further reason why tradable pollution rights have been welcomed by businesses, politicians and bureaucrats is that they enable the environmental debate to be depoliticised, removing decision making power from the political arena and transferring it to the market.

From the environmental viewpoint, pollution rights enable environmental quality standards to be managed in detail, whilst allowing individual operators to vary their emissions levels.

However, many opponents of that system ask how it can achieve a reduction in pollution year after year, given that the reductions of emissions achieved by some operators are offset by the excess emissions of other operators that acquire emission rights from the former. The only way to reduce pollution is to reduce the number of pollution rights each year. However, it is unlikely that business will actually want to enter this market if their pollution rights are reduced each year (Beder 2001). One possible alternative is to maintain unchanged the number of rights in circulation, whilst reducing the permitted pollution quota corresponding to them, although this case will also involve an element of uncertainty, which could discourage potential buyers. In addition, both cases involve a kind of confiscation by the state, and hence it could be argued that the state should pay adequate compensation.

Although they have also been used in fields such as water pollution, the most widespread area in which tradable pollution rights are applied is atmospheric pollution, where the localisation of sources often plays a negligible role within control. In fact, the application of these instrument has proved to be efficient above all in relation to problems of global pollution, and in particular greenhouse gases, as the location of installations is of no importance in achieving efficient control, given that greenhouse gas pollutants have exactly the same effect irrespective of the location of installations, and in addition greenhouse gases are easy to monitor.

At international level, these instruments have also achieved greater attractiveness since, alongside a series of policies and measures which must be applied or devised by the individual parties, the Kyoto Protocol also provided for the possibility to use market mechanisms, which should enable the economic costs of achieving reduction targets to be lowered.

The Kyoto Protocol[21] in fact introduced market instruments in order to guarantee the achievement of targets, including:

[21] See http://unfccc.int /resource/index.html.

a) international emission trading (*IET*),

b) joint implementation (*JI*),

c) clean development mechanisms (*CDM*).

In March 2000, the European Commission adopted a Green Paper on greenhouse gas emissions trading within the EU[22], which was followed by the adoption of Directive 2003/87/EC of 13 October 2003[23] establishing a scheme for greenhouse gas emission allowance trading within the Community, thereby providing for the first implementation within Europe of one of the mechanisms provided for under the Kyoto Protocol.

Directive 2003/87/EC thus redesigned proprietary schemes and regulated the trading of emissions rights with a view to achieving emissions reductions throughout the Community where their cost is less high.

5.3. *Contract law and the environment. the use of other forms of negotiation*

In an attempt to achieve increasing involvement of industries in the dynamics of ecological policies, "voluntary agreements" between business and public administration have become more widespread, with the aim of achieving specific objectives within the field of environmental protection.

In 1996, the Commission published a Communication to the Council and the Parliament on environmental agreements[24]. At that time, environmental agreements amounted to a new strategic instrument to complement regulatory measures. The Communication acknowledges that environmental agreements have a range of potential benefits, including a more participatory approach by industry, the possibility to create tailor-made and cost-effective solutions, and finally the quicker fulfilment of environmental objectives.

The 1996 Communication observed that, in order to achieve these results, the agreements must have clearly defined objectives, be transparent in such a manner as to avoid purely formal agreements, include mechanisms for implementation along with fines and other sanctions, in addition to other strategies for avoiding free-riders.

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[22] COM(2000) 87 of 8.3.2000.

[23] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (Text with EEA relevance), OJ L 275 of 25.10.2003, 32–46.

[24] COM(96) 561 final of 27.11.1996.

The most well-known examples of Community agreements developed in relation to the environment are those of the European, Japanese and Korean car producers on the reduction of CO_2 emissions produced by cars. These agreements have been first recognised in some Commission recommendations[25]. The Decision of the European Parliament and of the Council establishing a scheme to monitor the average specific emissions of CO_2 from new passenger cars[26], then supplemented such agreements.

The most exhaustive inquiry into the use of this instrument was carried out by the OECD in a Report published in 1999 (*Voluntary Approaches for Environmental Policy – an Assessment*), in which it was concluded that environmental agreements are more effective if they are used as part of a *policy mix* in conjunction with economic and legislative instruments.

Environmental agreements can come from a variety of sources. Firstly, they can be purely spontaneous decisions initiated by stakeholders in a broad range of areas in which the Commission has neither proposed legislation nor expressed an intention to do so. The Commission encourages stakeholders to be proactive in developing such agreements. Secondly, they can be a response by stakeholders to an expressed intention of the Commission to legislate. Thirdly, they can be initiated by the Commission. The assessment criteria and procedural requirements for handling environmental agreements will depend in part on the source of the initiative.

Policy makers have shown an increasing interest in environmental agreements in recent years. The potential of such agreements among stakeholders – often representative associations of business – to contribute to environmental policy objectives is widely recognised. Member States and the Community have already gained some experience with environmental agreements, and the results so far are encouraging. While such agreements are not an environmental *panacea*, nor will they be the optimal instrument in all circumstances, they have a potentially valuable role to play in complementing – but not replacing – other policy instruments, notably legislation.

Clarity of definition is required from the outset. The terms "voluntary agreement", "environmental agreement" or "long term agreement" are frequently used without distinction, although the legal form and content of these instruments may differ widely. The term "agreement" is usually also applied to instruments which, in legal terms, are unilateral commitments from industry or business. In the interest of simplicity and clarity, this Communication only uses the term "environmental agreement".

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[25] Recommendations 1999/125/EC, 2000/303/EC and 2000/304/EC.

[26] Decision no. 1753/2000/EC of 22 June 2000, OJ L 202 of 10.8.2000, page 1.

Environmental Agreements at Community level are those by which stakeholders undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives set out in Art. 174 of the Treaty. This Communication does not prejudge the dispositions to be defined by the inter-institutional agreement nor the modalities and criteria to be applied for voluntary agreements in other fields than the environment. Environmental agreements are not negotiated with the Commission. They can be acknowledged by the Commission either by an exchange of letters, by a Recommendation by the Commission, by a Recommendation accompanied by a Parliament and Council Decision on monitoring or under coregulation decided by the Community legislators. These environmental agreements should be distinguished from the environmental agreements entered into by the Member States as a national implementation measure of a Community Directive.

Subsequently, in 2002, the Commission published a new Communication on environmental agreements[27] in which "voluntary environmental agreements" are presented as instruments that are best suited to the new requirements resulting from the Fifth Programme onwards.

The consensus-based logic of the agreement enables the conflictual view of the relationship between the environment and economic development to be overcome, thus also achieving a change in the way of conceiving of industry, from a cause of the problem to a protagonist in its solution.

6. From linear to circular economy

In order to develop a sustainable, low carbon, resource efficient and competitive economy, the EU has supported the transition to a more circular economy, where the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste minimised.

According to the EU Commission's approach, the transition to a circular economy will encourage sustainability and competitiveness in the long term. It will also help in particular to:

- preserve resources – including some which are increasingly scarce, or subject to price fluctuation
- save costs for European industries

[27] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Environmental Agreements at Community Level – Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, Brussels, 17.7.2002 COM(2002) 412 final.

- unlock new business opportunities
- build a new generation of innovative, resource-efficient European businesses – making and exporting clean products and services around the globe
- create local low and high-skilled jobs
- create opportunities for social integration and cohesion.

If action is taken at EU level, it will drive investment, create a level playing field, and remove obstacles stemming from European legislation or its inadequate enforcement.

That is why on 2 December 2015, the European Commission put forward a package to support the EU's transition to a circular economy. On 4 March 2019, the Commission reported on the complete execution of the action plan. All 54 actions included in the 2015 plan have now been delivered or are being implemented. This will contribute to boost Europe's competitiveness, modernise its economy and industry to create jobs, protect the environment and generate sustainable growth.

7. The 2030 Agenda for Sustainable Development

In September 2015, at the United Nations General Assembly, countries around the world signed up to the 2030 Agenda for Sustainable Development (United Nations 2030 Agenda) and its 17 Sustainable Development Goals (SDGs), agreeing on a concrete "to-do list for people and planet".

In order to analyse the tasks that the EU will encounter in adopting the 2030 Agenda, the European Commission has published a Reflection Paper[28], where the role of sustainable development is given central importance in the development of European society: «*Sustainable development is about upgrading people's living standards by giving people real choices, creating an enabling environment, and disseminating knowledge, and better information. This should lead us to a situation where we are "living well within the limits of our planet" […] through smarter use of resources and a modern economy that serve our health and well-being*» (Reflection Paper: 14).

This will imply for the European economy a transition to a low-carbon, climate-neutral, resource-efficient and biodiverse economy. This approach will go hand in hand with the initiatives in the field of circular economy that will focus on various policies such as requiring new designs of materials and products so that we are properly equipped to re-use, repair and recycle more and more. This will in

[28] *Reflection Paper: Towards a sustainable Europe by 2030*, European Commission COM(2019)22 of 30 January 2019.

turn not only cut waste, it will also reduce the need for new resources to be extracted at great financial and environmental cost: «*When a product reaches the end of its life, be it a pair of jeans, a smartphone, food container, or piece of furniture, a true circular economy ensures that most of its material value is preserved, so what was previously considered waste can be used again for making new products*» (Reflection Paper: 15).

8. The introduction of sustainable development chapters in EU free trade agreements

Sustainable development is directly linked with international trade and free trade agreements. In the era of globalisation, each economy of the world is trying to achieve sustainable development through international trade. Free trade agreements (FTAs) are the broader category of agreements under which participant countries agree to remove trade barriers (Yao *et al*. 2019).

In particular, sustainable development has become an important part of the EU trade policy since it gets on meeting the needs of the present whilst ensuring future generations can meet their own needs. All EU FTAs include a Trade and Sustainable Development (TSD) chapter, which seeks to ensure that partners follow international requirements in the three pillars that compose sustainable development: economic, environmental and social[29].

The adoption of the UN Agenda 2030 has pushed the Commission to review its Trade and Sustainable Development chapter and to table a new proposal, identifying 15 action points drawn from a large debate with member states, the European Parliament as well as the civil society.

Environmental issues such as fisheries conservation, endangered species, forest governance and trade in environmental goods are increasingly regulated in FTAs. According to the TREND dataset on environmental provisions found in 630 trade agreements signed between 1947 and 2016, the most frequent provisions are exceptions to trade for the conservation of natural resources and similar exceptions for the protection of the health and life of plants or animals, found in almost half of the FTAs, followed by reference to environmental institutions and agreements as well as the right to technical barriers to trade related to the environment.

As far as the effectiveness of these environmental provisions in FTAs in concerned, recent studies examine their concrete impact on pollution[30]. According

[29] *The future of sustainable development chapters in EU free trade agreements*, Policy Department for External Relations Directorate General for External Policies of the Union PE 603.877 – July 2018.

[30] *The future of sustainable development chapters in EU free trade agreements*, cit., p. 12.

to these studies, FTAs with environmental provisions induce pollution convergence among the signatory countries and can have an impact on environmental policy reform, especially in developing countries[31].

9. Conclusions: The role of Europe as trend setter in the implementation of sustainable development

The EU can set the standards for the rest of the world if it takes the lead in the implementation of the SDGs and the transition to a sustainable economy, including through smart investments in innovation and key enabling technologies. The EU would then be the first to reap the benefits of the transition. It would also have the strongest competitive advantage in the global marketplace of tomorrow. This will contribute to building stronger Member States in a stronger Union, helping people pursue their goals in freedom and well-being, and thus fulfilling Europe's vision.

A vast literature points out how Europe has become in this sector a *normative power*, able to impose its own perspective and regulation on how environmental protection should be taken into consideration (Manners 2002; Lightfoot and Burchell 2005), becoming a global producer of norms in this as in other important fields (De Morpurgo 2013).

Comparative law scholars have always been interested in the problem of legal transplants, a phenomenon with which we usually identify the process of imitation from one legal system to another of norms, institutions or legal concepts (Watson 1964).

Today the reasons that drive the circulation of models can be very heterogeneous and new methods of analyzing the phenomenon have been suggested (Graziadei 2007: 441) and it is very interesting to follow the path to diffusion that some concepts have taken, like the concept of sustainable development.

An important role is played today by international cooperation, which in recent decades has affected many aspects of the legislation of emerging economies (Delisle 1999). As the European experience can teach us, environmental cooperation has become one of the leading instrument in inducing legal transplant, as «*environmental integration clauses are included in most EU agreement of a general nature*» (Marín Durán and Morgera 2012).

If we look to the role of the EU in the last decades, we should stress the role of vehicle of policy diffusion as far as the sustainability principle is concerned.

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[31] *The future of sustainable development chapters in EU free trade agreements,* cit., p. 13.

Since the Johannesburg Summit it was clear that, in the light of the statements of the EU Environment Commissioner Margot Wallström, that the «*European Union has to play the leading role in ensuring that Johannesburg delivers concrete progress towards sustainability goals*» (Wallström 2002: 1). This form of "championing" the EU's role was evident among its own officials, but also among other participants. A number of NGOs also called on the EU to push sustainable development, arguing that «*this summit can only deliver meaningful results if the EU shows true leadership*» (Lightfoot and Burchell 2005).

The role of the EU as promoter of the principle will face a substantial challenge if it transplants effectively the global norm of sustainable development. As Catherine Day has argued, the EU «*must make sure we develop and implement sound policies at home and make them compatible with those we advocate internationally*» (Day 2003: 3).

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Nature, Climate and Water as common goods and the search for new paradigms in face of biodiversity loss and climate crisis

Commons, capitalism and inoperative praxis: beyond the Green New Deal?*

LUIGI PELLIZZONI

1. Introduction

The theme of the commons has long been debated, taking in recent years an increasing sense of urgency, arguably not unrelated with economic stagnation, environmental threats and political insecurity. A number of meanings and perspectives has stratified, often blurring analytical and normative purposes. In a way or another, however, capitalism is a main critical target of the case for the commons. Critique takes different forms, according to the perspective adopted. In this work I address three, finding all of them wanting. This sobering outcome invites to explore other directions. In the last section I tentatively reflect on a perspective – "inoperative praxis", or "inoperosity" – which to my knowledge has not yet been connected with the issue of the commons but I believe deserves a thorough elaboration. This also in the light of what can be considered the latest capitalist move, as expressed in the emergent narrative and policy framework of the "Green New Deal".

* This chapter is a revised and expanded version of the article "Commons and critique of capitalism", to be published in the journal *Esercizi Filosofici*.

2. Three approaches to the commons

2.1. *Commons as socio-material assemblages*

The first approach kick-started and constitutes the backbone of the debate over the commons. It originates from the famous article by Garret Hardin (1968), about the "tragedy of the commons". Point of reference is the extensive theoretical and empirical work carried out by Elinor Ostrom and her group, which from a disciplinary perspective belongs to institutional economy.

Hardin defines the commons as easily accessible and exhaustible resources. The tragedy of their overexploitation and exhaustion can be avoided, he claims, only through state control or (preferably) privatisation. In this approach the commons emerge from the combination of resources' own features with human goals and means. Borrowing an expression largely used in the field of Science and Technology Studies, the commons are "socio-material assemblages"; assemblages that do not remain static but change over time according to a variety of factors (demographic, cultural, technical etc.). About human behaviour, Hardin assumes that it is driven by egoistic motivations and that there is no exchange of information among competing users. This looks simplistic. Even from a rational choice theory perspective it is commonly admitted the possibility, and actually the probability, of communication and recognition of shared interests.

This is precisely Ostrom's point of departure. Also for her commons are assemblages of "things" and humans, and the features of the former cannot be neglected by the latter, if their goals are to be realised (Ostrom's approach does not change when she deals with immaterial, or cognitive, commons. See Hess and Ostrom 2007). Her research, however, shows that the commons can be managed successfully and for a long time, without recourse to state control or privatisation, provided that appropriate rules of interaction are set, targeted to the specific situation yet designed according to some basic principles: from a clear definition of the content of the resource to the possibility of excluding untitled parties; from community members' participation in decision-making to effective systems of self-monitoring and sanctioning (Ostrom 1990). Moreover, rather than just by the presence or absence of property, the relationship with resources is modulated by a bundle of rights: access (the right to enter a given physical property), withdrawal (the right to the "products" of a resource, for example to catch fish), management (the right to regulate use modalities and to modify a resource to "improve" it), exclusion (the right to assign access rights and define how these may be transferred), alienation (the right to sell or lease the rights of management and exclusion) (Schlager and Ostrom 1992).

2.2. *Commons as "commoning"*

The second approach to the commons develops later (say around 2000) and in a different disciplinary field, namely (post-Marxist) political theory. This approach does not read the commons as assemblages of things and humans but as the result of social practices of "commoning".

According to Hardt and Negri, "common" means not only «the common wealth of the material world – the air, the water, the fruits of the soil, and all nature's bounty», but «*also and more significantly* those results of social production that are necessary for social interaction and further production, such as knowledges, languages, codes, information, affects, and so forth» (2009, p. viii, emphasis added). Similarly, according to Dardot and Laval (2014), the common is a principle, on which political obligations and the search for the common good are grounded, and not a thing, a substance or a quality of something. In this approach, therefore, the human takes a marked precedence over the nonhuman. What counts first and foremost is not how a biophysical entity or a process manifests itself to humans when they approach it, affecting the latter's plans, but humans' own act of establishing or recognising something (a forest, the sea, genetic information and everything else) in common, partitioning, assembling and handling it accordingly.

The conceptual shift from the commons as socio-material assemblages to commoning as a social process is important also because this term embroils with a most controversial politico-ethical notion: the "common good". Common good roughly corresponds to the reasons or the basic goals that hold a community together; what is regarded as fair and desirable for all and everyone. Commoning as a constituent process is therefore the act by which the common good is established or recognised. This draws attention to the fact that considering a use regime only according to efficiency criteria neglects how such criteria imply a given distribution of power and agency (however legitimated: from gender to lineage, to the right of occupation), and assumptions concerning what is to be regarded as success or failure. For example, in the *Second Treatise on Government*, Locke remarks that «the wild Indian» who is «still a tenant in common», can be «a king of a large and fruitful territory» and yet «feeds, lodges, and is clad worse than a day-labourer in England» (Locke 1823[1689]: 116, 122). One can argue, however, that Locke and the wild Indian had different views about what makes a person wealthy and a life worthy of living, or what is sound for nature or other people. A direct comparison of their approaches in terms of efficiency, therefore, is spurious.

Compared with the institutional economy outlook, the commoning one seems actually to build on a different imaginary. The former is affected by the

idea of physical scarcity, which connects it with classic, rather than neoclassic, economy, and above all with the "limits to growth" narrative that, similarly to Hardin's "tragedy", emerges around 1970 as a result of the growing saliency of environmental threats. The commoning approach, whatever its theoretical underpinnings (Marx, Spinoza, a combination of the two or other scholarship), implies a view of unlimited ordering power. In this sense it is aligned with the "growth of limits" narrative that post-Fordist capitalism and neoliberal regulation have imposed since the 1980s (Pellizzoni 2011); a narrative that reaffirms in an intensified way the primacy of human agency over the material world that the environmental crisis and the ecologist movement had brought into discussion.

2.3. *Commons as rights*

The third approach builds on legal and historical studies. The focus is on the marginalisation of the commons in modern society to the benefit of the state/market dichotomy, in the framework of proprietary individualism (the idea that property is a fundamental individual right, of use and abuse, which by extension applies also to the state as a legal person), as theorised by 17th-century thinkers and adopted by modern legislation.

The crucial historical event are the "enclosures", the fencing and entitling to private owners of portions of land previously open to local communities; a process begun in England, where it was prominent especially between the 17th and the 19th century, but extending to mainland Europe and elsewhere (first with colonisation and then with the "modernisation" programmes imposed to decolonising countries). No less relevant was cultural change, with an inversion in the conceptualisation of the relationship between private and common property. While for Cicero as well as for Aquinas resources, as a rule, are owned in common, their exclusive attribution being an exception to be adequately justified, Locke reverses the argument. Resources, he claims, can be beneficial to any particular person only if this person owns them. Moreover, if nature gains value through the application of human labour, conferring exclusive control of the outcomes of such labour to those who have worked is both morally right and collectively beneficial, because of the increased yield this work ensures. Private property, therefore, has priority – «at least where there is enough, and as good left in common for others» (1823[1689], p. 116), Locke adds, showing how the primacy he assigns to private property builds on an imaginary of abundance.

As Harvey (2003) and others have argued, enclosures are not a historically delimited process but occur whenever mechanisms of separation and commodification are applied to any type of resource, often thanks to new technical pos-

sibilities. The approach of rights, therefore, tries to address new or intensified enclosures, often drawing inspiration from non-modern or pre-modern institutions and practices, from indigenous conceptions of the Mother Earth as the gathering together of all beings, human and non-human (the Quechua notion of *sumak kawsay* or the Aymara one of *suma qamaña*, rendered in Spanish as *buen vivir*), to medieval "collectivist" institutions like the German *Marke* or the Russian *obščina* (which entailed common properties or use rights over land, pastures and forests), or early written legislation on the commons, especially the English *Charter of the Forest*, a complementary charter to the *Magna Carta* first issued in 1271, which warranted rights of access to the royal forest (Linebaugh 2008). Also Roman law is reconsidered by those who claim that, contrary to frequent allegations (Mattei and Capra 2015), it does not conceive of private property as premised but as subordinated to common property (Thomas 2002).

Of course, one thing is to talk of a right *of* the commons, or the Mother Earth, as with the constitutions of Ecuador and Bolivia; another is to talk of a right *to* the commons, as many legal scholars do, often focusing on access rather than property. This is the approach adopted by a bill filed in 2010 at the Italian Senate to amend the civil code, according to which the commons are «things expressing utilities functional to the exercise of fundamental rights and the unconstrained development of the person» (the bill can be found at https://www.senato.it/service/PDF/PDFServer/DF/217244.pdf). Access to such things must therefore be ensured independently of ownership. In this way the case for a right to the commons resembles closely the case for commoning, in a functionalist rather than voluntarist key. If the commons are relations rather than things (Mattei 2011), then their list varies according to the contingent outcomes of political conflict. It has been stressed that between resource or service and community there is a circular relationship, one being constitutive of the other (Marella 2012). Yet this remains more a theoretical enunciation than a principle from which regulative consequences are drawn, for example in terms of relations between state and local communities. Moreover, humans result once more provided with the power of defining the terms of the relation between resource and community, giving things a passive, plastic role.

3. Approaches to the commons and critique of capitalism

The approaches above have not to be regarded as independent of each other. In fact, there is no lack of cross-references in the respective literatures. As said, the institutional economy outlook offers a sort of backbone to any discourse about the commons, in its turn being concerned with issues of rights definition

and allocation. Also, political theory and rights-based approaches can hardly ignore each other, especially when the constitutional level of the commons is addressed. Yet, as we have seen, an analytical distinction highlights interesting peculiarities.

Peculiarities include also the type and intensity of critique of capitalism. Ostrom's criticism is expressed in her contestation of the state and the market as exhausting the possibilities of efficient resource management. Yet, for Ostrom, «a commons is not value laden – its outcome can be good or bad, sustainable or not» (Hess and Ostrom 2007: 14). The commons are not alternative to state and market, but can and should stand by their side. Institutions for the commons can find their place within complex governance arrangements that include hierarchy, market and community self-government. A mix, for example, is regarded as a viable solution for global commons such as the oceans, the atmosphere or biodiversity (Dietz *et al.* 2003).

For Ostrom, in short, the failures of capitalist economy are specific and contingent, not systemic; which is, instead, what theorists of commoning claim. For these, a radical critique of capitalism, for the dramatic injustices and social and environmental devastations it engenders, is mandatory. Not surprisingly, therefore, they consider Ostrom's approach as entertaining an ambivalent relationship with the ruling order: partly critical but partly compatible if not functional. For example, it is noted, this approach may end up supporting the neoliberal case for third sector or community-based initiatives, as simultaneously compensating for market failures and reducing state expenditure for the welfare (Haiven 2016). More in general, a "managerial" approach to the commons is unable to account for power struggles and inequalities, which not only surround any particular commons, but affect also its internal life. Even if self-management regimes are usually considered intrinsically egalitarian, open and participative, they can entail racism, sexism, colonialism and other forms of oppression (Kenis and Mathjis 2014; Haiven 2016). Ostrom acknowledges that, to work effectively, a commons has to circumscribe the range of its users, hence inclusion and participation go hand in hand with exclusion and marginalisation, yet she looks at the issue in terms of efficiency rather than power dynamics, which according to the theorists of commoning prevents from any serious critique of capitalism.

On the contrary, the idea of a right *of* the commons, that is, of nonhumans as inextricably connected with humans and subject of rights like the latter, is clearly at odds with the ruling order. This idea often underpins alter-globalisation movements, especially those of Latin America. Struggles against dams, oil drills, mining, deforestation, genetically modified crops are sometimes described as "ontological" in that they build on a denaturalisation of Western dualisms

(subject/object; nature/culture; public/private etc.) in favour of perspectives by which «all beings exist always in relation and never as "objects" or individuals» (Escobar 2010: 39).

The perspective of the right *to* the commons is more nuanced. The insistence on the necessity to defend and expand the commons represents by itself a critique to proprietary individualism as the only horizon of social regulation. The intensity of criticism, however, varies. The medievalist outlook, which implicitly and explicitly borrows to a remarkable extent from the commoning literature, usually expresses a radical critique of capitalism, regarded as not amenable to reform, hence to be replaced with a new social order. The Romanist approach tends to focus on technical aspects, trying to see how the protection and promotion of the commons can be realised within legal orders which in other respects (for example concerning representative democracy and the protection of individual freedoms) are regarded to work pretty well. The prevailing attitude, in other words, is reformist (see e.g. Lucarelli 2013; Maddalena 2014).

4. Limits of radical critique

To sum up, in the three perspectives on the commons I have addressed the critique of capitalism takes either moderate or radical tones. If it can be said that the moderate positions fail to take into account the seriousness of the economic, political and environmental crisis, which seems to ask for more than cautious adjustments, also radical standpoints show major weaknesses. The latter are often criticised for their typical apodictic tones and vagueness concerning agents, modes and outcomes of the post-capitalist transition (Vitale 2013). Yet a more serious, and in my view theoretically interesting, weakness may reside in the rationale of the argument developed.

The theme of the "capture" of critique by its target has been raised various times with reference to the emergence of post-Fordism. A well-known example is Boltanski and Chiapello's (2005) thesis about the "new spirit of capitalism", as building on the integration of the "artistic critique" raised by intellectuals and social movements against the Fordist mode of production, with the values of freedom, autonomy and creativity being translated into flexibility, networking, communication, and permanent education. Similarly, Paolo Virno defines neoliberalism a "counterrevolutionary" movement that applies revolutionary ideas to contrast revolution: the impetuous innovation of modes of production, forms of life, and social relations promoted by the movements of the 1970s has been transformed, he claims, into «professional requisites, ingredients of the surplus value, and leaven[ed] for a new cycle of capitalist development» (1996: 242). A

further iteration of this argument comes from Nancy Fraser (2009), who detects a "disturbing convergence" of second wave feminism with the demands of post-Fordist capitalism, with reference to the former's case against welfare state's paternalism and neglect of questions of redistribution and political economy in favour of a politics of identity and self-affirmation.

One has to ask, then, if also the radical case for the commons is exposed to the same danger. Its theoretical underpinnings can be drawn to a specific current of post-Marxism, namely the so-called "post-workerism". The post-workerist thesis about cognitive capitalism constitutes the backbone of the argument about the constituent power of the common.

Marx talked of "general intellect" referring to the technical expertise and social knowledge objectified in fixed capital. Post-workerist theorists stress how, the more capitalism builds on knowledge and innovation, that is immaterial labour, the more the general intellect shifts from machines to the linguistic and communicative abilities of humans, their capacity of learning and cooperation, their creativity, affectivity and ethicity (Virno 2004; Moulier Boutang 2007; Vercellone 2007). These capacities, it is claimed, are formed outside production processes, nor capital can and wishes to internalise them, as the generation of surplus value stems precisely from unbridled creativity. The open, informal spaces of the "smart" factory, where workers are free to move, gather, discuss or reflect by their own, emblematise the distance of new capitalism from the old productive model. Labour's subsumption to capital tends to become again formal, rather than real, as happened with the Fordist factory.[2] This provides room for enacting post-capitalist relations and orienting innovation accordingly (frequently cited examples are the various forms of hacking in the ICT and biotech fields). Thus, cognitive workers' commoning is simultaneously central to capital accumulation and to the possibility of radical change. As with feudal society in respect to the advent of capitalism, cognitive capitalism is producing the conditions for its own overcoming.

This claim, which reformulates the classic workerist thesis of the pre-eminence of labour over capital, its constitutive excess in respect to any attempt at capture, is extended by post-Marxist scholarship also to the "infinitely productive" potentiality of non-human nature, «as something presupposed, but not produced, by state and capital» (Braun 2014: 11). It is claimed, for example, that the burgeoning role assigned to "ecosystem services" – defined as the benefits

[2] Marx's distinguished between formal and real subsumption of labour, according to whether workers enter a wage relation with capital while retaining their own skills, hence a creative control over the labour process, or become cogs in the assembly line, their contribution to production being reduced to mere bodily-psychic energy.

biophysical systems provide "by their own" to humans[3] – indicates the growing relevance of «self-organizing dynamics and regenerative social-ecological capacities outside of the direct production processes» (Nelson 2015: 462), the measurement and commodification of which creates continuous tensions and contradictions (Robertson 2012). On both sides, the human and the nonhuman, capitalism appears therefore parasitic on dynamism and vitality that it grabs but is unable to produce and constantly eludes attempts at, and motivation to, control. Such dynamism and vitality, whatever its institutional translations, is what the radical case for the commons is all about.

That things are not necessarily so easy, however, is suggested by opposed evidence. "Commons fixes" (De Angelis 2013) are ever more regarded as crucial, at political and business level, to dealing with economic decline and devastation of social and environmental reproduction without engendering any actual systems change. Commoning efforts are therefore prone from the outset to the risk of integration in the ruling order. For example, many look with enthusiasm at the new forms of sharing and cooperation enabled by ICTs, from open source to crowdsourcing, to digital money. Yet, these result deeply ambivalent, challenging market relations but also offering a template for new business models and, more in general, a fertile terrain for accumulation (Brabham 2013; Söderberg and Delfanti 2015; Berlinguer 2018). One should reflect, moreover, that autonomy and creativity do not operate in a social void, but in a context dominated by prescriptive cultural and organisational models of fulfilment, achievement and reward, including the orientation to result and the domination of client demands, capable of orienting conducts indirectly, beginning with how the "creative" worker portrays herself, the world and what is good and desirable for both (Dardot and Laval 2014; Haiven 2016). The blurring of productive and artistic work, of manual and cognitive-relational tasks, brings into question the very distinction between formal and real subsumption of labour (Chicchi *et al.* 2016).

As for nonhuman labour, the very expression "ecosystem services" conveys the idea of a full acquisition of nature to a logic of economic efficiency and value extraction. If, for example, one looks at industry's position regarding so-called "green infrastructures" (defined as planned and managed natural and semi-natural systems involving water, air and land use), one finds that these are regarded as providing firms with significant benefits compared with traditional gray

[3] These include provisioning (e.g. food, water, energy, genetic and medicinal resources); regulating (e.g. carbon sequestration and climate regulation, waste decomposition, pest and disease control); supporting (e.g. nutrient cycles, soil formation, crop pollination); and cultural services (e.g. spiritual and recreational benefits). See Millennium Ecosystem Assessment (2005).

infrastructures, including reduction of initial and ongoing expenses, increased energy efficiency and effective management of socio-political risk through innovative collaboration with key stakeholders (The Nature Conservancy 2013). The traditional capitalist vision of land as provider of goods free of charge returns in an intensified form. In the past the non-living world could be subsumed to capital only formally (Boyd *et al.* 2001). Now the distinction between living and non-living is questioned in a number of fields, from biology to chemistry and cybernetics (Pellizzoni 2016), and both are simultaneously put to work to enhance productivity, for example when new mining techniques utilise microorganisms (Labban 2014). Similarly to what happens with human labour, the blurring of the living and the non-living makes the distinction between formal and real subsumption increasingly questionable. Everything can be enclosed, disassembled and reassembled in novel configurations to make it (more) suitable to commodification. Biophysical self-organising and regenerative capacities are therefore hardly beyond the reach of capitalist accumulation.

If, moreover, one thinks of most resonant institutional translations of the radical case for the commons, namely, the constitutionalization of the rights of the Mother Earth, the distance between declarations and reality is remarkable. For example, in Ecuador the state retains administrative and decisional control over biodiversity and natural resources, while the President can impose a national development plan. Notwithstanding indigenous and local autonomies, extractivist and productivist policies proceed largely undisturbed (Gudynas 2010). Similarly, regarding Bolivia and the "Indianist" politics of the Morales government, some scholar talks of "neoliberal multiculturalism" (Poupeau 2012: 67), in the sense that the pre-eminence given to ethnic identity over social inequalities turns out functional to neo-extractivist policies and unable to challenge dominant relations of exchange. A recent comparison of the experiences of Ecuador, Bolivia and Venezuela, though more nuanced, reaches no less critical conclusions (Formenti 2016). More in general, the trust placed by much radical critique in "ontological struggles" as attacking the core of capitalist exploitation – the Cartesian, dualist view of nature – fails to consider how non-dualism is the bread and butter of much current science and technology, for example in the biotech field. Indeed, the fundamental feature of biotechnology is the combination of biology and informatics. "Life" becomes simultaneously matter and information, thingness and cognition, presence and pattern, "wet" and "dry", real and virtual, moving fluidly from living cells to test tube, to digital databases (Thacker 2007). As a result, biotech patents can be claimed to cover both genetic information and the organisms incorporating such information. In other words, there is nothing automatically emancipatory in non-dualist ontologies (Pellizzoni 2016; for a similar point from a classic Marxist perspective, see Hornborg 2017).

5. Commons as inoperative praxis

To sum up, the radical case for the commons seems to build on unwarranted assumptions about the capacity of human and nonhuman labour to overhang capital's capture. Indeed, capitalism and its opponents seem to share a same ontology of potency, so that the very vital excess that should ensure the primacy of labour over capital enables from the outset the incorporation of the former into the latter. If life is flux and constant becoming, then capital embodies the vital principle at its purest, given its constitutive inessentiality, its being endless flux and becoming (M-C-M'...). Any emergent excess of the common, in this way, seems bound to be assimilated by the next capitalist reorganisation.

Is there any way out of this deadlock? If the problem is the ontology of potency, then it may make sense to try the opposite route. Along this route one immediately meets the question of inoperative praxis, or inoperosity, a theme that has fascinated a variety of scholars, from Kojève to Bataille, from Nancy to Blanchot, and more recently Agamben. Though accounts of the notion vary, what is sure is that inoperosity does not mean contemplation or resignation, but a non-purposeful, non-instrumental modality of living and acting, capable for this reason of suspending the apparatuses of domination and exploitation. Inoperosity, says Agamben, is «an activity that consists in making human works and productions inoperative, opening them to a new possible use» (2014: 69). For him inoperosity is possible because the human «is the animal who can its own impotentiality» (Agamben 2010: 290), abstaining from actualising its potential. Inoperosity discloses in this way an alternative to a politics grounded on constituent power. The latter finds expression in the commoning approach and more in general in the idea of revolution, of a radical change based on the vital force of a new collective subject, whose violence is allegedly the last one, being bound to abolish all forms of violence. An alternative politics, then, or a politics for a real alternative, can build on "destituent" power.

To think such politics, Agamben says, «we have to imagine completely other strategies, whose definition is the task of the coming politics» (2014: 70). This, however, does not mean that we have no clues to what a destituent power or inoperative praxis may look like. For example, the feast is the day where «what is done – which in itself is not unlike what one does every day – becomes undone, is rendered inoperative, liberated and suspended from its "economy", from the reasons and purposes that define it during the weekdays» (Agamben 2014: 69). Similarly, St. Paul conceives of messianism as the deactivation «of any juridical-factual property (circumcised/uncircumcised; free/slave; man/woman)» (Agamben 2005: 25), so that one can live one's own condition in the form of the "as not". In both cases the indication is that, to change the world, one has not nec-

essary to do different things but to do the same things differently[4]. In this sense the messianic "as not" is not necessarily provided with impolitic consequences. Rather, it suggests that any change begins with a change in the attitude towards oneself, the others, the nonhuman world (post-workerist thought, with its vitalist tones, seems to distort the spirit of a most distinctive trait of workerism, namely, the case for the "refusal of work", that is, of the capitalist instrumentalisation of work to accumulative purposes; see Tronti 1980).

From this perspective the commons could be reconceived as neither resource management regimes, nor the result of political acts of institution or state-backed rules of access, but socio-material assemblages corresponding to an inoperative praxis; the places and times where a "passive politics" (Franchi 2004) is enacted, typically by choosing "not to" – do something doable, achieve something achievable, extract value available, handle something in a possessive way, and so on.

A crucial historical experience in this sense, to which Agamben (2013) pays particular attention, is Franciscanism. In their effort to imitate Christ's life, Franciscans tried to establish a form of life where "poverty" meant abdicating to all types of right, considering the use of things a mere fact, as animals make use of what nature offers them according to their needs. Franciscans, in other words, pointed to a systematic dispossession, of oneself and of the world. The commons in this perspective, rather than something collectively owned or managed, become anything capable of responding to contingent necessities.

Franciscans' attempt to renew Christianity and the Church failed (for Agamben, Franciscans made the mistake of engaging in a long dispute with the Church on the legal meaning of poverty and use, whereas their core standpoint was to place their experience not against but outside law). Yet, from another perspective, it was successful. Their elaboration of poverty, not as a condition but a choice, opened the way on one side to the modern notion of property, as based on an act of will over things (Grossi 1972); on the other to a strategy of use of things as something that can be handled and circulated without being owned, outlining in this way basic categories of modern economic thought, from the idea of use-value to the separation between ownership and management and the modern concept of finance (Todeschini 2004). As Simmel has remarked, at the moment in which poverty is hypostatised it loses any ascetic orientation towards

[4] In the post-messianic condition, Agamben (2000) notes, everything will be as it is now, only a bit different. This may be connected with Adorno's and Benjamin's idea that technology is not necessarily exploitative of nature. The task, then, would be think of "another" technology, not in a sense of a leap forward (the usual gesture of progress) but of a lateral movement – making science and technology inoperative, that is not aimed at instrumentalising the world (including the human body) to goals of infinite value extraction and self-enhancement. Separating feasibility from realisation at any level, from basic research to product commercialisation, is arguably a key move in this direction.

the world, taking instead a managerial outlook, while «money is elevated from its intermediary position to absolute importance» (Simmel 2004: 255).

Then, what can be drawn from Franciscanism, for the purpose of a commons-based critique of capitalism, is that the attitude towards things is crucial: one has not necessarily to give up possession, but to possess as if not possessing. At the same time, such attitude should be more than an expression of will; better, it requires a particular type of will, one which chooses an inoperative praxis, taking, as it were, a step back to let things come to the forefront. Inoperosity means making things work for us (as capitalism actually seeks to do with "green infrastructures") while simultaneously putting us at work for them (something to which capitalism is completely alien). It means, so to say, helping things fulfil themselves, according to their features and dynamics. From this viewpoint, the place of real rights (rights *in rem*) in current legal systems is worthy of a reconsideration. While personal rights (rights *in personam*) entail a relationship, between creditor and debtor, which runs internally to the social world, things being just a means for fulfilling obligations and implied interests, rights *in rem* focus on the relationship with things, with *that particular* thing, with its own features as they endure and change, which give opportunities but also sets limits to human will. Said differently, in rights *in rem* the agency of things is by necessity recognised by owners and anyone else.

6. Conclusion: inoperative praxis and the "Green New Deal"

Along this line of reasoning current social effervescence can be addressed, to see whether and to what extent it builds on and enacts an inoperative praxis. This regards not only "ontological struggles" in the South of the planet, but also new types of mobilisations in the North: from food and energy movements (farmers' markets, community supported agriculture, food policy councils, community energy initiatives, the "transition towns" network, solidarity purchase groups etc.) to the "new domesticity" of crafting and making (canning, sewing, mending, upcycling etc.).

Such initiatives express a "new materialist" politics, which replaces protest with concrete actions at the level of body and materiality, aimed at building alternative forms of community organisation and material flows where individual acts of resistance are at the same time acts of institutional reconstruction, away from the circulations of global capitalism (Meyer 2015; Schlosberg and Coles 2016). New materialist mobilisations, in this sense, seem to represent instances of "commoning" which refrain from celebrating unlimited institutional powers to privilege humbleness, restraint and empiricism, and avoid focusing only on

social relations to pay attention to the relation with things, the embeddedness of action in a particular place and time. Indeed, territory and place seem increasingly key to building forms of resistance and opposition to the global flows of capital (Formenti 2016). Hence the saliency taken, in accounting for emergent conflicts, by political cleavages such as high/low; close/distant; local/global; elite/people; general/particular (Caruso 2010).

The potentials of such mobilisations are at the moment difficult to assess (Davidson 2017). They represent a novelty of these years, looking promising first of all for this reason. However, one has to be aware that insisting too much on corporeity and immediacy, with no proper political elaboration[5], may lead to reproducing vitalist postures, falling back to the emancipatory illusion of constituent power, and that new mobilisations may be, at least in part, functional to reconstituting the substrate of sociality that capital needs but cannot produce. These, however, are issues to be addressed empirically, more than theoretically. To this purpose, the idea of inoperative praxis may provide a valuable analytical key.

Such a key seems especially useful to critically address the promises and perils of the emergent storyline and policy framework identified by the expression "Green New Deal" (GND). In Wikipedia one can read that GND identifies «legislation that aims to address climate change and economic inequality. The name refers to the New Deal, a set of social and economic reforms and public works projects undertaken by President Franklin D. Roosevelt in response to the Great Depression. The Green New Deal combines Roosevelt's economic approach with modern ideas such as renewable energy and resource efficiency» (at https://en.wikipedia.org/wiki/Green__New__Deal#Individuals__2). Ostensibly, therefore, GND aims at (more) just and equitable policies for the mitigation of, and adaptation to, climate change. There is, however, considerable scope for interpretation regarding the type actions GND implies. According to commentators (Garavini 2019), a rather sharp difference is already emerging between those, such as exponents of the American Democratic Party, who put the emphasis on the "new deal" component of the expression, hence on public investment and social justice, and those, such as the newly-installed European Commission, who emphasise the "green" component, in the sense of private investment and market relations, as per the current "green economy". This raises the doubt that GND may end up being little more than a new catchword for the usual greenwash strategy, aimed at hiding, or making acceptable, the reality of an ever-increasing value extraction and resource depletion. In this sense, a crucial question is whether and to what extent the case for a GND can be capable of distancing itself

[5] Adorno (1998) has warned against the primacy of praxis over thought and theory: for him any immediacy is illusory and its celebration fails to acknowledge the conceptual mediations (and related possibilities of manipulation) that underpin it.

from the "ecological modernisation" (EM) framework that dominated environmental politics in the last decades, being supported by and in its turn supporting post-Fordist capitalism. EM and GND seem to share an unconditional trust in the healing virtues of technological innovation. Two issues arise in this regard. First, the way innovation is designed and diffused produces structural (rather than accidental) injustices and inequalities, systematically prioritising commercial and elite interests over social ones, and distributing unevenly the costs and the benefits of innovation (Freudenburg *et al.* 2008; Pellizzoni 2019). Second, there is no hint, in the GND storyline, about the need to address the exploitative, dominative, relationship with the biophysical world (including the human body), which is at the origin of the ecological crisis and which the development of science and technology has incessantly strengthened.

Against this backdrop, the relevance of the case for an inoperative praxis and the significance of new materialist movements in this respect emerge clearly. Only by changing the way innovation is conceived, the assumptions about the human and the nonhuman on which it is based and the goals it is set to pursue – something which at least part of new mobilisations seems committed to actualise in their embodied critique of capitalist relations – it is really possible to conceive of a new way of inhabiting the planet. The need, in other words, is to go beyond GND, at least as it has been understood so far. The idea of the commons as a meeting of people and things, stripped of celebrations of human power, indicates that any "new deal" should crucially concern the relationship with the nonhuman world.

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Biodiversity as a common good: insights into the Natura 2000 network and traces of a nature-based approach in the European Union

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1. Introduction

At international level, biological diversity is conceived as «the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems» (Art. 2, United Nations Convention on Biological Diversity of 1992). Biodiversity is worthy of protection because its conservation is considered a common concern of humankind. In other words, if not considered adequately, it will become a problematic issue with an enduring negative impact on future generations (for the differences between the concept of common concern of humankind and the principle of common heritage of mankind, see Bowling *et al.* 2016: 3). As a consequence, at national level biodiversity conservation should imply the adoption of policies addressed towards intergenerational equity, solidarity, shared decision-making processes and accountability.

Within the European Union (thereinafter EU), the competence of this supra-national organisation on environmental issues dates back to the Single European Act of 1987, when an «Environment Title» provided the first legal

basis for an environmental policy with the aim to preserve the quality of the environment, to protect human health, and to ensure the rational use of natural resources (Art. 130 R).

Currently, the EU environmental policy is based on Articles 191 to 193 of the Treaty on the Functioning of the EU (TFEU). Art. 11 TFEU also requires environmental protection to be taken into account within other EU policies. Indeed, according to Art. 2C, para. 2e, TFUE, the environment is included in the category of the shared competences between the EU and its member states. It means that EU countries exercise their own competences where the EU does not, or has decided not to, its own competences.

Regarding the notion of biodiversity, it is implicitly deduced in the reference to diversity included in Art. 191 TFEU. According to its para. 2, the EU environmental policy «shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union». With respect to secondary law, to date the EU has not approved a framework directive on biodiversity. As a matter of fact, the EU framework on the protection of biodiversity has been described as an «amalgam of directives, regulations, plans and programmes», also referred to in other sectors, such as the Common Agricultural Policy, the Common Fisheries Policy and the Common Commercial Policy (de Sadeleer 2017: 415, 418).

The EU biodiversity strategy to 2020[1] has the goals of preventing the loss of biodiversity and the degradation of ecosystem services as well as of restoring them in so far as feasible. Moreover, it has the goal of stepping up the EU contribution to averting global biodiversity loss. The main tool provided to pursue these objectives is the full implementation of the Birds and Habitats Directives, adopted under the legal basis of Art. 192, para. 1, TFUE[2].

The Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds[3] relates to the conservation of all species of naturally occurring birds in the wild state, while the Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and

[1] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Our life insurance, our natural capital: An EU biodiversity strategy to 2020*, 3.5.2011, COM (2011) 244 final.

[2] That states: «The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191».

[3] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, in OJ L 20, 26.1.2010, 7-25; the first version of the Birds Directive dates back 1979.

flora[4] aims to contribute to biodiversity protection through the conservation of natural habitats and of wild fauna and flora. Conservation, as defined in Art. 1(a) of the Habitats Directive, means «a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status». Although other provisions refer to restoration, the Directive gives no guidance on the parameter for returning ecosystems to be restored (Richardson 2016: 280).

The most ambitious EU project in the environmental field is the building of the Natura 2000 network. The Habitats Directive is the legal basis of the Natura 2000 network, which actually covers almost a fifth of the land area of the EU and over 250,000 square kilometres of sea surface. The network is inspired by the objectives of three international conventions: the U.N. Convention on Migratory Species (1979), the Council of Europe's Convention on the Conservation of European Wildlife and Natural Habitats (1979), and the U.N. Convention on Biological Diversity (1993). The goal of this network is to create a dynamic system of protected sites linked together for the conservation of biodiversity and especially for the protection of habitats and of animal and plant species (Prieur 2003; Amirante 2003).

Having concisely outlined these aspects, the chapter unfolds as follows. Section 2 introduces some legal aspects of the Natura 2000 network and two recent judgements rendered by the Court of Justice of the EU (CJEU), namely the *Białowieża Forest* case of 2017 and the *Tapiola* case of 2019. Section 3 briefly illustrates some theoretical assumptions on the commons and makes reference to traditional practices carried out in forestry and agriculture in the protected areas. These practices are characterised by the management of collective pool resources, a feature attributable to the legal category of commons or common goods. A common good is a shared resource, co-managed and used by a community and that embodies social relations based on cooperation and mutual dependence. Typical examples are water, soil, forests and biodiversity. Section 4 introduces the issue of ecocentrism, giving a few examples of the application of the nature-based approach in the Natura 2000 sites. Lastly, Section 5 concludes with some reflections on the possible explicit recognition of the nature-based approach at EU level.

2. The Natura 2000 network

The Natura 2000 network represents a turning point in the EU environmental policy by virtue of its widespread approach, in the sense that protected areas are

[4] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in OJ L 206, 22.07.1992, 7-50.

no longer considered as islands outside residential areas, but rather as parts of a more comprehensive plan of territorial management. The Natura 2000 sites are selected on the basis of technical-scientific criteria with the aim to ensure a long-term survival of protected species and natural habitats according to the Birds and Habitats Directives. Once fully operational in all member states, the Natura 2000 network is enshrined in two legal tools: the so called Special Protection Areas (SPAs), regulated by the Birds Directive to protect the habitats of rare or vulnerable bird species and migratory species listed in its Annex I; and the Special Areas of Conservation (SACs), regulated by the Habitats Directive to protect particular non-birds habitats of interest. Regarding the stages of the selection of SACs, firstly each member state proposes a national list of sites; then, the Commission adopts a list of Sites of Community Importance (SCIs); lastly, the SCIs are designated at national level as SACs (Amirante 2003; De Vido 2016; de Sadeleer 2017).

In relation to the engagement of citizens in environmental decision-making, it must be stressed that the consultation procedures for the selection of the Natura 2000 sites are not set out at EU level. Therefore, the member states have adopted different approaches: in some cases, the identification of sites has been marked by in-depth discussions with owners and users of the areas involved, while in other cases the consultations with the interested parties have been scarce or null.

Once the sites have been designated, member states are required to provide suitable conservation measures and to avoid the deterioration of these areas and whatever significant damage to the species. It is noted that Art. 6 of the Habitats Directive plays a crucial role for the management of the Natura 2000 sites, insofar as it assigns to the member states the task of establishing the necessary activities for the conservation of the sites. Pursuant to its para. 1, the elaboration of necessary conservation measures involves the design of appropriate management plans and the adoption of appropriate statutory, administrative or contractual measures to fulfil the ecological requirements listed in Annex I and II of the Directive. With respect to the appropriate evaluation referred to para. 3, it is stated that any plan or project likely to have a significant effect on the management of a site shall be subject to appropriate assessment of its implications. The outcome of this assessment is legally binding for the competent national authority and it conditions its final decision.

With regard to the adoption of suitable statutory, administrative or contractual measures, it can be emphasised that contractual tools may include consensual forms of site management, such as contracts with private individuals or other negotiated planning tools (Amirante and Gusmerotti 2003). In order to be aligned with the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental

Matters, in 2003 the EU adopted the Directive 2003/35/EC to guarantee the right of public participation in environmental matters (Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC – Statement by the Commission, in OJ L 156, 25/06/2003, 17-25). In the aftermath of this Directive, it has been noted that participatory approaches have emerged at national level, enforcing the acceptability of the Natura 2000 policy among stakeholders (Baffert 2012). These participatory mechanisms are similar to those envisaged for commons, since the necessary involvement of public bodies, private owners and local stakeholders is one of their most important characteristics.

Given the difficult implementation of Art. 6 in the member states, the European Commission has made available a specific Interpretation Guide, now updated to 2018 (Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC, 21.11.2018, C(2018) 7621 final). This Guide is intended to assist member state authorities, as well as anyone involved in the management of Natura 2000 sites and in the permit procedure, in the application of the Habitats Directive.

What are the most problematic issues related to the Natura 2000 sites that more often have been brought before the CJEU? The last two judgments are illustrative in this regard. The first decision concerns the site of the Białowieża forest in Poland, in the case C-441/17 R, *Commission v. Poland*, 17 April 2018. Because of the constant spread of a tree parasite, in 2016 the Polish Minister for the Environment authorised an intense harvesting of wood in the Białowieża forest district, and the carrying out of active forest management operations such as sanitary pruning, reforestation and restoration, in areas where any intervention was previously excluded. In 2017, the European Commission brought an action before the CJEU claiming that the Polish authorities had not ensured the integrity of the Białowieża forest during those operations, disregarding the adoption of the necessary measures for the conservation of this Natura 2000 site.

The Court (Grand Chamber) recognised the failure of the Republic of Poland to fulfil its obligations under: a) Art. 6(3) of the Habitats Directive, by adopting an appendix to the forest management plan without ascertaining that that appendix would not adversely affect the integrity of the SCI and SPA constituting the Białowieża forest Natura 2000 site; b) Art. 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive, by failing to establish the necessary conservation measures corresponding to the ecological requirements for which the SCI and SPA constituting the Białowieża forest Natura 2000 site were designated; c) Art. 12(1)(a) and (d) of the Habitats Directive, by failing effectively to

prohibit the deliberate killing or disturbance of those beetles or the deterioration or destruction of their breeding sites in this Natura 2000 site; d) Art. 5(b) and (d) of the Birds Directive, by failing to ensure that they will not be killed or disturbed during the period of breeding and rearing and that their nests or eggs will not be deliberately destroyed, damaged or removed in the Białowieża forest district (for a comment, see Koncewicz 2018).

In particular, it has been reaffirmed that the impact evaluation of a plan or project to be adopted in a site has a crucial importance, since the assessment is to be appropriate to meet any scientific doubt regarding possible detrimental effects of a measure. It must be kept in mind that, especially in this sector, information and data available for a decision to be taken by the competent authorities are often incomplete or unclear. Basically, a plan must comply with the precautionary principle enshrined in Art. 191 TFUE, which aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk. In other words, if, after having considered all the scientific data available, significant doubts on the negative impact of a plan still persist, it should not be approved.

The second decision concerns wolf hunting in Finland, in the case C-674/17, *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry*, 10 October 2019. The practice of wolf hunting is aimed at preventing attacks against dogs and at increasing the residents' sense of security. Moreover, it is justified by the need to prevent illegal poaching. The case arises from a request for a preliminary ruling submitted by the Supreme Administrative Court of Finland concerning the interpretation of Art. 16(1)(e) of the Habitats Directive. Art. 12 of the Habitats Directive requires member states to establish a strict protection regime for certain animal and plant species, including wolves, while Art. 16 allows states to derogate from that strict protection system. Thus, the derogation may allow the deliberate killing of wolves but under specific conditions, namely: there must be no satisfactory alternative; the derogation must not be detrimental to the maintenance of the species at favourable conservation status in their natural habitat; and the derogation may only be applied for specific reasons. Over the years, this provision has been brought to the attention of the Luxembourg judges several times, and the case law makes it clear that any derogation should be interpreted strictly.

The *Tapiola* case significantly limits the possibility that hunting can be used as a management tool for wolf conservation. From the documents made available to them, the judges argue that it is not apparent that the conditions under which the derogation permits were granted and the manner in which compliance with those conditions is monitored ensure the respect of Art. 16(1)(e) of the Habitats Directive regarding wolf hunting in Finland. Moreover, this is a welcome decision because, for the first time, the CJEU has explicitly applied the precautionary principle in the context of fauna conservation.

The Court (Second Chamber) has affirmed that the Habitats Directive must be interpreted as precluding the adoption of decisions granting derogations where: a) the objectives invoked in support of such derogations are not defined in a clear and precise manner and where, in the light of rigorous scientific data, the national authority is unable to establish that the derogations are appropriate with a view to achieving that objective; b) it is not duly established that their objective cannot be attained by means of a satisfactory alternative, the mere existence of an illegal activity or difficulties associated with its monitoring not constituting sufficient evidence in that regard; c) it is not guaranteed that the derogations will not be detrimental to the maintenance of the species concerned at a favourable conservation status in their natural area; d) the derogations have not been subject to an assessment of the conservation status of the species concerned and of the impact that the envisaged derogation may have on it; e) not all conditions are satisfied in relation to the taking, on a selective basis and to a limited extent, under strictly supervised conditions, in limited and specified numbers, of specimens of the species, compliance with which must be established in particular by reference to the population level, its conservation status and its biological characteristics.

Basically, the derogations must be granted in accordance with the precautionary principle and with other very strict requirements (for comments, see Heslop and Gallego 2019; Bétaille 2019).

3. The commons discourse: an overview

In recent years, legal scholars have shown an increased interest in the commons discourse, aimed at resisting enclosures, that is to say privatisations (Bailey *et al.* 2013; Marella 2013). The goods included in this concept are very diverse and, as a legal category, the commons are not consolidated except in a few states, mainly in Latin-America, where the practices of collective management of lands and water resources have been formalised at constitutional or legislative level (Foroni 2014; Ariano 2016). In addition to these experiences, there are worthwhile contributions to the current debate on the features of commons and proposals for their legal recognition in European countries. There are also movements aimed at requesting the recognition of commons at EU level, with the conviction that this could help reinvigorate Europe (Hammerstein and Bloemen 2016).

The paradigm of commons involves a redefinition of what should remain in the market and what should be left out. This assertion helps understand why several scholars see the commons as an alternative to the current economic model and the expansion of capitalism. In a broader perspective, commons are

conceived as key elements of the social-environmental issues and the related conflicts they trigger (Checa-Artasu 2019). In this regard, commons affect the (Western) concept of sustainable development, which is based on the supposed balance between economic growth, environmental protection, and social progress (for different visions related to the concept of sustainability, which do not include development, see Kothari *et al*. 2019).

In essence, commons are conceived of as a third option in addition to the concepts of public and private ownership or to the state/market dichotomy. They are resources to manage collectively according to the logic of distribution of power and with an inclusive and participatory approach. The Nobel prize Elinor Ostrom owes her reputation to the demonstration that people are able of developing rules and institutions that allow for a sustainable and equitable management of shared goods (Ostrom 1990). Commons are resources that, because of their characteristics, challenge the dominant idea of ownership and require joint responsibility; they are irreplaceable with other goods; and the access to these resources cannot be restricted, due to the fact that commons belong to a community which manage them taking into account collective needs. What must be kept in mind is that «the governance of commons works at local level only» (Carducci 2018: 48).

It is the use of a resource that defines whether it can be considered a common good or not (Scott Cato and Mattei 2016). Commons are relational resources to be used collectively, whose value of utility prevails over the value of exchange (Nivarra 2013). The reason for this lies in the fact that commons «express utilities functional to the exercise of fundamental rights as well as the free development of the person, and they are based on the principle of intergenerational safeguard of utilities» (Commissione Rodotà 2007).

It is worth noting that the community is not conceived of as a formal owner of a common good; a community is entitled to manage and to benefit from it independently if the owner is a public entity or a private individual or company (Ciervo 2012). In other words, the common feature of commons is given by the specificity of the ownership of the good. This is a particular type of ownership by an indistinct group of individuals, and therefore does not coincide with formal property, often a public one but not suitable (or no longer suitable due to privatisation constraints) to ensure the satisfaction of the general interest. This consideration leads to a relevant consequence in the context of justiciability: since a community is entitled to manage a common good, the legitimacy to bring an action before a court in defence of its rights as user should be guaranteed for all (Commissione Rodotà 2007).

A fundamental aspect in the debate on commons addresses the participation of users in the collective management of these types of goods. There is a growing consensus on the need of a new participatory model of management,

able to involve local communities alongside public and private entities and on equal terms in the decision-making process and in the stewardship of commons (Lucarelli 2010; Somma 2011). This is a requirement that gives value both to participatory democracy and to horizontal subsidiarity. In addition, the commons approach considers people as «actors deeply embedded in social relationships, communities, and ecosystems. This holistic perspective also tends to overcome dominant subject-object dualisms and to consider human activity as a part of the larger living bio-physical commons» (Hammerstein and Bloemen 2016: 63).

The current EU approach is far from the paradigm of commons. Nevertheless, there have been some efforts to redirect EU policies towards a commons configuration through the request of adoption of measures consistent with this perspective, namely a vision that «takes a community and ecosystem perspective, placing issues of stewardship, social equity and long-term stability at the forefront of policy» (Bloemen and Hammerstein 2015). In this respect, the draft of a European Charter of the Commons is an attempt to elaborate a new legal framework for the EU, addressed towards the recognition of the right of citizens to participate in the use and the management of commons, with the aim of tackling the threats to the public interest posed by privatisation (Simonati 2018; for references on water as a commons in the EU, see Varvello and Montaldo 2017).

In the Natura 2000 sites, activities referable to the category of common goods can be found. Traditional forestry, agricultural and pastoral practices are examples of the shared management of natural resources by local communities. The EU is well aware of the link between the environment and cultural heritage, expressed through the safeguarding of traditional knowledge and landscapes. In this respect, in the implementation of the Habitats Directive the broadest participation of local communities should be guaranteed in the planning of conservation measures and in the management arrangements addressed to the Natura 2000 sites. The aim of this is to safeguard local cultures and ancestral knowledge expressed in good practices on natural resource management.

Given that the measures adopted pursuant to the Habitats Directive have «to take account of economic, social and cultural requirements and regional and local characteristics» (Art. 2, para. 3), the question arises as to whether a traditional practice is in contrast with the goal of promoting the maintenance of biodiversity. It is worth pointing out that traditional activities, such as cutting trees or extracting peat, are allowed only on condition that they do not have a negative impact on species or habitats. This leads to the possible downsizing of local communities' interests in favour of a greater one, namely biodiversity. This helps understand that traditional methods of natural resource management do not always have a positive impact on biodiversity, as they could jeopardise the objective of its conservation.

The integrated management of the Natura 2000 network serves biodiversity, and biodiversity is conceived of as inseparable from the general objective of sustainable development, as mentioned in the recitals of the Habitats Directive. It is asserted that the objectives of Natura 2000 are in line with sustainable development due to the fact that Natura 2000 is a long-term conservation project of natural resources in Europe. It is a project that implies economic benefits as clearly affirmed by the European Commission: «By conserving and enhancing its natural resource base and using its resources sustainably, the EU can improve the resource efficiency of its economy and reduce its dependence on natural resources from outside Europe» (EU biodiversity strategy to 2020).

This means that the Natura 2000 network takes into account the importance of biodiversity without sacrificing the economic and social needs of the present generation. According to this view, biodiversity conservation is compatible with the use of soils and territories, and this compatibility is the precondition for their sustainable and enduring use. But this assumption clashes with the final evaluation of the sixth EU Environment Action Program of 2013, in which one reads that unsustainable trends continue in four priority areas: nature and biodiversity; climate change; environment and health; natural resources and waste. As argued by de Sadeleer, «the road to the reconciliation of economic development with the conservation of natural resources under the aegis of the principle of sustainable development – a key EU treaty objective – remains strewn with pitfalls» (de Sadeleer 2017: 427).

Biodiversity loss as well as climate crisis can no longer be faced on the basis of an ideal balance between economic and environmental interests in which, in reality, the former prevail all too often and where the concept of sustainable development has become an ambiguous guiding principle in environmental law, which can lead to misinterpretations (Rühs and Jones 2016: 1).

4. Ecocentric ethics and traces of a nature-based approach in the European Union

In the debate on the conservation of biodiversity, ethical approaches to ecological issues come into play, namely anthropocentrism and ecocentrism. Anthropocentrism is based on the separation between human beings and nature. This perspective, which is not necessarily in opposition to nature conservation, focuses on people and their needs and assesses nature through this point of view. The anthropocentric frame is at the basis of environmental strategies and of the role of law in ecological issues, and it permeates the concept of sustainable development. Conversely, in the ecocentric perspective, human beings are not conceived of as superior to their surroundings and are inextricably linked

to environmental systems and their abiotic aspects (Statement of Commitment to Ecocentrism 2019). Ecocentric environmental ethics disagree on the effects of the economic system, in the terms in which the law is addressed to guarantee only a conditional protection to the environment, to satisfy economic interests primarily. This leads to the necessary rebalancing of the relationship between humans and nature. The holistic perspective of commons appears to be in tune with the ecocentric approach. And it is in tune with the human and nature-centered perspective on which the Natura 2000 network is based.

From a legal point of view, supporters of ecocentrism are calling for the affirmation of ecological law in place of environmental law as the latter is considered unable to reverse the negative trends which are affecting the Earth. Their proposal is based on the concept of sustainability. As explained by Bosselmann (2016: 16), sustainability predates the concept of sustainable development. Sustainability derives from the notion of *Nachhaltigkeit* (sustainability), coined in 1713 by a German scientist, Hans Carl von Carlowitz, to indicate the system of forest management in which the preservation of natural systems supports human life. It is not to be confused with the notion of sustainable development, because the essence of sustainable «is neither 'economic sustainability', nor 'social sustainability', nor 'everything sustainable', but 'ecological sustainability'» (Bosselmann 2016: 64). According to this theoretical perspective, advocates of ecological law support measures of conservation with a nature-based rights approach. The idea of the rights of nature has been catching on gradually in this last decade, after several years of disregard since this theory was put forward by Christopher D. Stone in the Seventies (Stone: 1973/2010; on the current legal circulation of the idea of nature's rights, see Baldin 2014). The nature-based approach relies on a conceptual frame in which securing the right of the natural environment itself to be healthy and thrive also means securing the human right to a healthy environment, and in which the integrity of the ecosystems is more important than their economic value. The ecosystem approach, envisaged in the U.N. Convention of Biological Diversity, has a point in common with the nature-based approach in the terms in which it is defined as «a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way» (Secretariat of the Convention on Biological Diversity 2004: 6).

Can we trace cases of ecocentric or nature-based approaches within the Natura 2000 network? Given that ecocentrism is inherent in the cosmovision of indigenous peoples, as a first example it can be reasonably supposed that in the Natura 2000 sites in Northern Finland, where the indigenous Sámi live, this ethical approach is still prevalent (Markkula *et al*. 2019). As a second example, one may point out the Nassogne forest in Belgium, part of a Natura 2000 site. In

recent years, a project of transformation of the forest with the aim of restoring and improving the forest and biodiversity as naturally as possible has been set up. For its management, an innovative model of governance has been proposed at the social, institutional and environmental levels, following an integrated approach according to the commons paradigm (Piron 2016).

As a third example, ecocentrism also seems to be present in Italy, in the protected areas regulated by law no. 394 of 1991, which was approved a few months before the Habitat directive (which in Italy was adopted in 1997 with the Presidential Decree no. 357, subsequently modified and integrated by the Presidential Decree no. 120 of 2003). In the parks and natural reserves regulated by this law, the interest of biodiversity conservation is superior to any other public or private interest. A distinguished jurist and former Constitutional Court judge, Paolo Maddalena, has argued that the protected areas are common goods subject to collective ownership, in which private appropriation is allowed in exceptional cases only, and that law no. 394 of 1991 has envisaged a paradigm shift from anthropocentrism to ecocentrism where nature is the "subject" (not the object) to whom those rules are addressed (Maddalena 2011; see also Di Plinio 2008). Although the protected areas governed by law no. 394 do not perfectly overlap with the Natura 2000 sites, in actual fact these two types of areas partly match in several cases.

It is worth pointing out that the Natura 2000 sites are generally more extensive than the protected areas, and that in the protected areas environmental bans for biodiversity conservation are stricter than in the Natura 2000 sites. In this regard, the ecocentric vision prevails over the anthropocentric one in the areas of the Natura 2000 sites that overlap with the protected areas, at least for as long as law no. 394 remains in force. Indeed, currently it has been proposed to amend this law with the declared aim «to place man once again at the centre of the park». In this draft amendment proposal it is also asserted that the law in force considers humans subjected and dominated by the park and it calls for a change in line with green economy policy and its innovative function in terms of development (see http://www.senato.it/leg/18/BGT/Schede/Ddliter/48764.htm).

It is also remarkable that the case law of the CJEU seems to be in line with the nature-based approach. As Schoukens has recently highlighted, there are shared points between the rationale behind the theory of the rights of nature and the existing EU environmental law. These points are found through the interpretation of the Birds and Habitats Directives and the Water Framework Directive. This path towards a more ecocentric approach appears in several contexts, such as the notion of integrity of ecosystems, the precautionary principle, and non-deterioration obligations (Schoukens 2019).

5. Final remarks

In face of the ongoing environmental crisis, ecological sustainability is considered a fundamental concept for the transformation of environmental law and governance at global level, since it embeds the duty to protect and restore the integrity of the Earth's systems (Montini 2015: 246 ff.).

Sustainability has been incorporated in many national laws on nature conservation and, to a certain extent, is also present in the EU environmental framework. Besides the cases already mentioned, the 2015 report by the Horizon 2020 Expert Group on "Nature-Based Solutions & Re-Naturing Cities" is worth pointing out, where four goals have been identified for the promotion of systemic and sustainable nature-based solutions, namely: enhancing sustainable urbanisation, restoring degraded ecosystems, developing climate change adaptation and mitigation, and improving risk management and resilience. These recommendations are not addressed to the EU alone, but also to its member states (European Commission – Directorate-General for Research and innovation 2015: 8). Moreover, the increasing interest towards more effective approaches to the transition to a sustainable Europe has led the European Economic and Social Committee to commission a study on the "Charter of fundamental rights of nature" for the EU. This Charter should bring together «"ecological elements" in the "essential content" of fundamental Rights already established in the EU» and decline «the relationships between Nature and Human Interests in terms of the sharing of mutual "vulnerability"». This does not imply the draft of a catalogue of new rights. The theme of the rights of nature is considered here in the terms of interpretation of fundamental rights in an ecological view. In other words, the challenge is to reformulate the essential content of rights in an ecological, and not anthropological, perspective (AA.VV. 2019: 16).

In the U.N. Sustainable Development Goals Report 2019 it is underlined that the most urgent area for action is climate change and that the clock for taking decisive actions is ticking. Since the stake is the survival of all the living beings, a radical paradigm shift is needed, and also legal science has to be adapted to this reality. Perhaps, the ecological law may be one of the tools with which to face climate crisis and biodiversity loss.

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Back to the future: building harmony with nature in the European Union by learning from our ancestors*

SILVIA BAGNI

1. The oxymoron of "sustainable development"

When I began writing this chapter, the news and social media were just releasing the first reactions of politicians and civil society to Greta Thunberg's speech at the United Nations Climate Action Summit in New York, on 22nd September 2019, just a few months before the COP25 in Santiago de Chile, scheduled between 2nd and 13th December, 2019.

I would like to recall a passage from Greta's speech, because what she said, and in particular the place and the institutional context in which she spoke, are related to the content of this paper. Quoting from Greta's words, addressed to the representatives of all the Nations of the world that were taking part in the summit: «people are suffering, people are dying, entire ecosystems are collapsing, we are at the beginning of a mass extinction and all you can talk about is money and *fairy tales of eternal economic growth*». She has clearly understood the crucial problem: perpetual economic growth, the mantra of capitalism, is blatantly irreconcilable with the defence of nature and the preservation of the earth's eco-

* § 3 of this chapter is part of a broader research published in *Revista General de Derecho público comparado*, no. 26/2019.

system in the same state in which humanity as a species has evolved on this planet until now. Scientists have been repeating this easy equation for many decades: advocating never-ending growth on a planet with finite resources can only lead to dramatic, and maybe irreversible changes (at least in the short term) in the earth's ecosystem[2]. Indeed, the International Commission on Stratigraphy (ICS), the largest scientific organisation within the International Union of Geological Sciences (IUGS), has created a working group[3] in order to decide if we are really entering a new geological era, the Anthropocene (McNeill and Engelke 2014), characterised by the fact that a sole species, *homo sapiens*, is now responsible for current climate change.

So, once the "enemy" has been identified, it should be easier to find a way to stop it from destroying life on Earth. And apparently Greta pronounced her "j'accuse" in the most fitting place to tackle planetary issues, that is, in the United Nations headquarters, during a Climate Action Summit. In fact, among the purposes listed in the Charter of the UN, besides those of maintaining international peace and security, there is «To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character» (art. 1, c. 3). This is precisely the point where Greta's purposes coincide with the aims of this paper. First of all, I would like to reflect on the equivocal role played by the UN in this case, both as the causal factor of the problem and the source of possible solutions. In this paragraph, I will briefly describe the ambiguous attitude of the UN towards the relationship between economic growth and the protection of the environment, that is evident when analysing the implementation of the United Nations Environment Programme over the years; I will then concentrate on the description of the most recent efforts that the UN has dedicated to supporting a change in the global epistemological paradigm, through the creation of the Harmony with Nature Programme (HwN) (§ 2); finally, as a contribution to the HwN Programme, I will go back to medieval times in Europe, in order to re-discover some old institutions like "partecipanza" or "collective meadows and fields", currently still existing in some European areas (§ 3); in my conclusions, I will suggest that it is absolutely necessary to combine the old practices of land management, as transmitted by indigenous peoples and ancient rural traditions, with new technologies and scientific knowledge, within a broad ecological perspective (§ 4).

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[2] The scientific literature in support of this assertion is nowadays huge: it can be useful and more practical to read the IPCC Special Reports, periodically released and published at https://www.ipcc.ch/reports/.

[3] The Anthropocene Working Group (AWG), http://quaternary.stratigraphy.org/working-groups/anthropocene/.

In a wonderful book, published some years ago, Ulrich Grober traces the history of both the idea of "sustainability", and the actual word, from the Renaissance in Europe to the present. In doing so, he could not avoid analysing the history of the concept of "development", accidentally coined by President Truman in his 1949 Inaugural Address (Grober 2012: 71).

The concept of "sustainability" was created as a way to describe a best practice in forestry. Quoting from Carlowitz's *Sylvicultura oeconomica*, Grober says: «Economics is an imitative science. It must not go against nature, but must follow it, and this includes the proper husbanding of resources. This means not cutting more wood than the forest can bring forth and support. Carlowitz calls for «a balance between the planting and growth and the harvesting of trees». To ignore the matrix, that is, the regenerative power of nature, will inevitably lead to overexploitation, to depletion» (Grober 2012).

Sustainability is based on the idea that the limit in using a resource corresponds to its capacity for self-regeneration (Grober 2012: 88). Its ecological and conservative dimension is quite clear. The first time this word is used outside the agricultural sphere, to become a keyword in global socio-economic policy, is in the Brundtland Report *Our Common Future*, in 1987. The Report was commissioned by the Secretary-General of the UN for the newly instituted World Commission on Environment and Development (1983). The Report, for the first time, combines the two concepts of "sustainability" and "development", offering the well-known definition: «[…] to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs». The Report recognises that this implies the existence of limits in the exploitation of natural resources, due to the need to respect the natural processes of regeneration and recycling of waste, but adds that «technology and social organisation can be both managed and improved to make way for a new era of economic growth». With these two paragraphs a miracle was performed: the idea of *sustainable economic growth* had been legitimised. The concept was then institutionalised in the so-called Rio Declaration and in the Agenda 21, both documents approved by all UN members gathered at the Earth Summit of Rio de Janeiro, in 1992. Things have not changed since then, as «*sustained* [inclusive and equitable] *economic growth*» was reaffirmed as the main instrument to realise sustainable development, in the UN Declaration "The future we want", the outcome of the Rio+20 UN Conference on Sustainable Development in 2012; and immediately afterwards, «*sustained*, inclusive and sustainable *economic growth*» was inserted as Sustainable Development Goal no. 8 of the new Agenda 2030[4], approved by the General Assembly in 2015.

[4] Resolution adopted by the General Assembly on 25 September 2015, *Transforming our world: the 2030 Agenda for Sustainable Development Declaration*, Point 3, p. 3.

In an article about *Law, Time and Oxymora*, Rostam Neuwirth speaks about sustainable development as an oxymoron, underlining the contradiction between economic growth and the preservation of the environment (Neuwirth 2019; Rist 2014: 174; Kothari *et al*. 2019: 105). He suggests that a possible solution to dissolve the oxymoron in the future, could be to approach the issue from *homo synaestheticus*'s perspective. Synaesthesia is a rhetorical figure where one sense is described in terms of another. The invitation is to create a sensorial relation between humans and non-humans in order to be able to sense the *harmony with nature* that should be at the basis of ecological legal norm, and even the recognition of further categories of subjects of law. Despite the fundamental role that the UNDP has played in the creation and diffusion of the concept of sustainable development as a non-questionable myth, invented by humanity, another UN Programme was implemented in 2009 (as a UN Initiative), based on principles and values similar to Neuwirth's *homo synaestheticus*. This is what next paragraph will talk about.

2. A new approach to understanding environmental problems: the UN Harmony with Nature Programme and the global movement for the recognition of Nature's rights

Between 2008 and 2009 two constitutional events marked a turning point in the history of environmental law. After participatory constituent processes, characterised by the involvement of many sectors of civil society in debates on the contents of the new Constitutions, including indigenous communities and minority groups (Prada Alcoreza 2014), Ecuador and Bolivia constitutionalised the concept of "*buen vivir-sumak kawsay*" and "*vivir bien-suma qamaña*", respectively the Kichwa and Aymara version of an Andean cosmovision, deeply rooted in the idea of living in harmony with nature. "*Sumak kawsay*" literally means "fullness of life" and represents the ideal of good life for many Andean indigenous communities, from the Kichwa in the North, to the Mapuche in the extreme South. It is a communitarian and ecological worldview, which accepts the inter-dependence between all Earth beings and understands their connection with natural cycles and laws. For this cosmovision, living a good life means sharing with the other members of the community, being compassionate, helpful and sympathetic, but also respecting Nature, and defending her capacity to create, nourish and regenerate life (Huanacuni Mamani 2010).

In Ecuador, "*buen vivir*" appears many times in the constitutional text: in the preamble, as the main objective of the State's policy, and in other chapters, both

as a system of rights (*derechos del buen vivir*) and as a value or principle to be used to interpret and implement other constitutional norms. But the Ecuadorian Constitution did not stop at that. The more impressive innovation is, without doubt, the recognition of Nature as a legal entity, as a direct consequence of the recognition of "*sumak kawsay*" as a national value and a guiding principle of the State's policy: «Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem».

In Bolivia, the Constituent was more parsimonious, but nevertheless "*suma qamaña*" is mentioned in art. 8, as an ethical and moral principle to which the State adheres, together with other values of the Andean indigenous cosmovision. In the Bolivian Constitution, nature has not been recognised as a subject of rights, even if living in harmony with nature is mentioned in different contexts: among the guiding principles of the international relationships (art. 255); as one of the conditions that the economic system must respect (art. 311); and as a characteristic of the indigenous territories (art. 403).

In recent years, environmental and indigenous movements all over the world have found a powerful ally in the Plurinational State of Bolivia. So, even without an explicit legitimation of the rights of Nature in the Bolivian Constitution, the Peoples' World Conference on Climate Change and the Rights of Mother Earth was organised in Cochabamba, Bolivia, from 20 to 22 April 2010. There, all the participants approved the draft of the Universal Declaration of the Rights of Mother Earth, an idea that had first been launched by President Evo Morales at the UN General Assembly meeting the year before (*infra*).

As a consequence, under the strong influence of the world indigenous movements, the rights of nature were introduced in the Bolivian legal system by primary Acts (Act no. 71 of 2010, *Ley de derechos de la Madre Tierra*; and Act no. 300 of 2012, *Ley marco de la Madre Tierra y desarrollo integral para vivir bien*). These Acts provide Mother Earth with a long set of rights, similar to the ones recognised by the Ecuadorian Constitution. Moreover, an *Autoridad plurinacional de la Madre Tierra* was instituted, with functions of planification and the coordination of public policies on environmental issues, as well as the management of enforcement programmes and projects on the integral system of development of *vivir bien*, which, however, has mainly remained inoperative.

Despite these premises, the Morales' Government has betrayed many of the expectations that Bolivians, as well as foreign activists, had hoped for. For instance, the government continues to support new mining projects, and signs contracts, such as the one concerning the construction of a highway in the TIPNIS protected area. In fact, if we carefully go through the texts of both Acts, we can sometimes perceive a dystopic approach. On the one hand, the 2010 Act recognises a complete set of rights for Nature (to live, develop, regenerate, be restored, etc.); on the other hand, the 2012 Act, instrumental in implementing the principles established by the previous Act, shares the "development" approach, so much so that one of the State obligations is to promote the «industrialisation of the components of Mother Earth», although within the framework of the characteristics of "*vivir bien*" and integral human development (art. 10, no. 6).

Many contradictions can be detected in both Constitutions, where "*sumak kawsay*" and harmony with nature coexist with an economic system almost entirely based on extractivism and the exploitation of natural resources. Comparing the constitutional and legal frameworks with the political choices and economic programs implemented by both States in the last decade, it is evident that nature's rights and the public support to mega-mines and oil extraction cannot stand together (Bagni 2017). Nevertheless, the absolute novelty introduced with the recognition of nature as a subject of law was extremely significant for all the social movements and scientific research groups that were promoting a new approach to the environmental and climate problems, and were studying alternatives to development (Klein and Morreo 2019).

A few months after the implementation of Bolivia's new Constitution, on 22 April 2009, during the 63rd session of the UN General Assembly, after inter-governmental negotiations promoted by the Bolivian Government, the General Assembly declared that same date "International Mother Earth Day" (resolution A/RES/63/278). Evo Morales addressed the Assembly with a speech in which he stated that the 21st century should be the century of Mother Earth's rights. He invited all the world's Nations to agree on a Universal Declaration of the rights of Mother Earth, and he suggested four fundamental rights to be recognised: the right to life, the right to regeneration, the right to a clean life and the «right to harmony and balance with and among all and everything» (Berry 2009: 133). The latter focuses on the inter-dependency of all natural elements, whether alive or not, and so encourages us to live in harmony with nature.

On 23 September 2009, during the 64th session of the UN General Assembly, Evo Morales spoke again to his fellow representatives of the international community, with a speech entitled «If We Don't Defend Mother Earth's Rights, There's No Use in Defending Human Rights». In this speech, Morales highlighted that the causes of the financial and climate crisis were economic inequalities

and the model of capitalist production. He stressed that, for indigenous communities, «not only harmony with human kind, but harmony with Mother Earth is sacred» and stated that the only way to guarantee peace and human rights was to defend the rights of Nature. He advanced a proposal consisting of three main points:

1) payment of climate debt by developed countries;
2) institution of an International Court for Climate Justice;
3) the recognition of the rights of Mother Earth by all countries.

None of the above proposals were implemented. Instead, on December, the first UN General Assembly Resolution on Harmony with Nature (A/RES/64/196) was adopted. This resolution requested the Secretary-General to issue a first Report on Harmony with Nature, which was delivered the following year, in August 2010. In the Report, the Secretary-General went back to the roots of the concept of "harmony with Nature", stating that «ancient civilisations have a rich history of understanding the symbiotic connection between human beings and nature» (HwN, Report of the Secretary-General 2010: 5), as I will try to confirm in the next paragraph. Despite the creation, inside the UN, of a special "observatory" on HwN and despite evidence showing a connection with ancestral worldviews, the Report continued to stress that «45. The holistic concept of sustainable development can guide human beings' efforts to rebalance their relationship with the Earth», so refusing to innovate on the epistemological perspective.

In the following resolution on HwN no. 65/164, of 20 December, 2010, the General Assembly required the Secretary-General to convene an interactive dialogue between States, institutions, experts and stakeholders from all over the world, in order to explore «ways to promote a holistic approach to sustainable development in harmony with nature».

Since then, the Secretary-General has prepared a Report on HwN every year and the General Assembly has approved a resolution on the subject-matter. While, at the beginning, following the input of the General Assembly, the interactive dialogues were focused on possible ways of reconciling "development" with "harmony with Nature", since the first Virtual Dialogue of the General Assembly on Harmony with Nature in 2016, the epistemological paradigm of expert contributions has shifted towards Earth Jurisprudence, and consequently their findings and recommendations have taken a more pronounced direction towards advocating a change from anthropocentric, or human-centered, to non-anthropocentric, or Earth-centered, personal and social attitudes. Since the 2015 Resolution, an on-line multidisciplinary expert network has been formally created, involved with Earth Jurisprudence, a recent discipline «which advocates an eco-centric

approach to law and governance in order to ensure that human governance systems are consistent with natural systems of order» (Cullinan 2010: 1).

The founder of Earth Jurisprudence is considered to be Thomas Berry, a US professor of History of Religions, but also a theologist and philosopher, who died in 2009. His many books and articles about the need for an ecological reorientation of our entire religious and cultural order, written from the Seventies onwards, are strikingly topical, almost prophetic. The starting point of his argumentation is that «Our human destiny is integral with the destiny of the earth» (Berry 1990: XIV; Berry 2009: 81, 135). He supports the idea that we share a universal coding with the grass, stones, other animals, the Earth, stars and the other planets, expressed in the curvature of the Universe, that possesses an impressive re-generative and creative energy. After denying this primordial nature for centuries, with the arrogance of attempting to prosper alone, humanity must rediscover nature and listen for the guidance of her inner coding. Acting like this can still allow a harmonious life on earth on an egalitarian basis for all humans and non-humans. Indigenous people can be a model, since they have defended their relationship with the Earth, resisting the industrial era.

The most highly influential Earth Jurisprudence author still alive today is probably Cormac Cullinan, Berry's disciple and a South African lawyer. With his best-seller *Wild Law. A Manifesto for Earth Justice* (Cullinan 2012), he tried to strengthen and further develop Berry's ideas. The aim is to build up a new legal framework, to be applicable both to humans and non-humans, in a way that could guarantee an opportunity to exist and develop to every species, respecting the ecological interaction between all the elements that compose the Earth's Ecosystem. He speaks of "wild law", in the sense that it should reflect the natural rules that govern "wildness", which is usually considered outside the law. The premise of his argumentation is that Nature must be considered as a whole, and human beings as part of Nature, whereas the actual legal paradigm puts Man above all other creatures and separates him from Nature, as an autonomous and independent subject (Cullinan 2012: 59). This false postulate is the cause of the current social and environmental crisis, that the global legal order is not able to tackle. We need a complete shift in our understanding of what "law" is, and for whom and for which goal law must be implemented, but we also need to rediscover how to communicate, feel empathy and care for Nature and other beings, "*sentipensar*" with the Earth, in Escobar's words (Escobar 2014).

The HwN Experts Network includes members affiliated with various NGOs, trying to persuade Governments to reform their legal systems in order to introduce Nature's Rights. In this context, some of them, led by Mumta Ito, founder of the NGO Nature's Rights, are working to formally submit a European Citizen Initiative (ECI) on «Being Nature – A European Citizens Initiative for recognis-

ing and respecting the inherent rights of nature»[5], with the aim of convincing the European Commission and Parliament to approve a directive that would force each Member State to adapt its own legal system by introducing some fundamental rights for Nature.

The point is how to convince Europe that a new Enlightenment is necessary, based on ecological values and principles, inspiring policies and legislation, that indigenous people around the world are still implementing in their own communities, where their biocultural rights have been recognised, and State institutions have granted space to self-government. In fact, Cullinan affirms that the only existing models of really sustainable governance are those of the few indigenous peoples left, who live in harmony with nature (Cullinan 2012: 161). This is unfortunately extremely rare. In fact, in Europe there is only one indigenous people left, the Sámi, which is gasping to save its own way of life from cultural and legal uniformisation and climate change.

However, there could be another way left, and it could be easier and more attractive than how it may appear at first glance. We Europeans only need to make a quick journey back to our past, and try to revitalise institutions that were widespread all over Europe before the industrial and capitalist revolution.

3. Tracing back the relationship between man and Nature in the European context

3.1. *The Italian legal system as a European case-study*

A change to some Western legal concepts, such as legal personhood, right of ownership, land and territory, and a shift towards a new eco-centric legal paradigm have recently been fostered in countries where indigenous communities have been vindicating the recognition of their own cultural identity for years, and have fought to be included in state policy-making processes without being discriminated against.

This legal trend mostly involves Latin America, but also other continents, and even some Western countries, where colonisers have begun to pay their historical debt towards First Nations, such as in Australia and New Zealand.

But what about Europe, where the only indigenous group left is the Sámi[6] and each state was built on a nation-based principle? Would it be possible to

[5] See at https://therightsofnature.org/wp-content/uploads/pdfs/Ito__EuropeanCitizensInitiative%20Project%20Summary.pdf.

[6] See at https://www.samediggi.fi/sami-info/?lang=en.

trace back communitarian practices and spiritual bonds between man and Nature, rooted on ancient cultural and religious traditions, alive before the enclosures that propitiated the industrial era and the liberal revolutions of the 18th century (Capra and Mattei 2017: 84)? Or has mainstream legal jurisprudence, based on liberalism, individualism, liberism and capitalism, irremediably cancelled all traces of them? Is it also possible to detect in Europe (De Martin 1990: 325 ff.) signs of the legal trend that is revitalising ancient cultural traditions, in order to foster a new, more inclusive, solidary and ecological framework for the management of land and the defence of Nature?

First of all, only in a very broad and general sense is it possible to consider Europe as a homogeneous cultural entity, as we do when the so called Western legal tradition is opposed to that of other legal families in the world. Europe has always been a complex mosaic of religions, cultures, nationalities, and languages, so much so that the EU motto chosen in 2000 by the European institutions was "United in diversity". As we all know from the current crisis of consensus on European Institutions, the European Union project has not been able to strengthen the common cultural background of all its member states. For these reasons, I will try to answer the above questions focusing only on the Italian case, that could be possibly used as a model for other European countries belonging to the Western legal tradition.

In the Italian constitution, there are no references at all to Nature (*Natura*), land (*terra*) or the environment (*ambiente*).

The word "territory" (*territorio*) (Manetti 1994) is always used to indicate the land under Italian sovereignty or the territorial organisation of the State. Italy is a regional State, but this decentralised system was "invented" during the constituent process and did not correspond to ethnical, historical or cultural traditions, except for the five Regions with special autonomy, where separatist movements and/or the presence of linguistic minorities justified the recognition of a different status (Bartole 1999: 2).

As far as the relationship between Nature and human beings is concerned, the Italian constitution is totally silent. The constitutional right to a healthy environment was recognised by the Constitutional Court only in 1987, under pressure from the international community (the Brundtland Report was published that year). The judgement was based on the combined interpretation of art. 9, on the protection of landscape, and art. 32, on the right to health[7].

As for the concept of property, art. 42 of the Italian Const. says: «Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognised and guaranteed by the law, which

[7] Const. Court, judgement n. 210, 28 may 1987.

prescribes the ways in which it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all». Even if there is an opening to the "social function" of property, liberalism still stands at the basis of this formulation: only two types of property exist, private or public, *tertium non datur*.

This is the current Italian legal framework, as far as the institutions we are focusing on are concerned. My aim is now to search for hints of a different relationship with land, territory and the environment in the Italian legal, cultural and religious traditions, to find «a non-proprietary background» (Rodotà 2013: 461; Mattei and Quarta 2018: 33), that could be rediscovered or transplanted, in order to legitimise a shift towards a more eco-centric legal paradigm in our system of law.

3.2. *Religious influences on the relationship between mankind and Nature*

The Catholic Church in the last few years has been trying to influence environmental policies at a national and international level, taking on, in particular in Italy (but in general in all Catholic countries) the same active role that indigenous worldviews are playing in other countries (Martinez-Alier *et al*. 2016).

It is well known that in the Bible the Lord recognises Man as the *dominus* of creation, giving him the power to govern over all the creatures of Eden. At least, this is most common interpretation of the Genesis, where man's superiority is represented by the power to name all things. However, the last three Popes have dedicated various discourses and encyclical letters to the environmental issue, fostering a different interpretation of the relationship between Man and Nature[8]. Pope Francis chose his name from Saint Francis of Assisi, a symbol of poverty, but also one of the first ecologists in history. In the famous *Cantico delle creature*, written in 1226, Saint Francis praises God for creation. All natural elements are referred to as brothers and sisters, so man is not put above creation, but in a family bond with Nature. However, the most recent document by the Catholic Church that has tried to reinstate the relationship between Man and Nature on a more egalitarian and solidary basis is the Encyclical Letter *Laudato si'* on care for our common home. This truly ecumenical discourse is addressed to every man or woman on Earth, notwithstanding his/her faith, because the ecological crisis is global and is affecting humanity as a whole. In the document,

[8] See the Encyclical Letter *Caritas in veritate* of the supreme pontiff Benedict XVI to the bishops, priests and deacons, men and women religious, the lay faithful and all people of good will on integral human development in charity and truth, June 29, 2009: «Our nature, constituted not only by matter but also by spirit, and as such, endowed with transcendent meaning and aspirations, is also normative for culture» (§ 48).

Pope Francis refers to the Saint of Assisi, whose teachings he defines as an example of an integral ecology (§ 11). In § 23 climate is considered a common good. The ecological crisis is intimately related with economic inequalities[9]. In fact, climate change will affect first and foremost the poorest people, that have already been forced to leave their homes due to the negative impact of climate change[10]. In § 63 Pope Francis states that "Given the complexity of the ecological crisis and its multiple causes, we need to realise that solutions will not emerge from one single way of interpreting and transforming reality. Respect must also be shown to the various cultural riches of different peoples, their art and poetry, their interior life and spirituality". So religious and cultural worldviews can be useful to better understand the problem, and to find new solutions. In the *Laudato si'*, Pope Francis speaks about the original harmony that existed between Man and Nature, exactly in the same way that indigenous cosmovisions usually do. Pope Francis invites us to interpret Genesis in a more correct way: that book cannot be understood as a blank mandate for Mankind to dominate the earth, but as a responsibility of care and protection (§ 67-68)[11]. Human beings are not superior and every life has intrinsic value. Pope Francis underlines "that everything is interconnected, and that genuine care for our own lives and our relationships with nature is inseparable from fraternity, justice and faithfulness to others" (§ 70). All creatures together form a sort of universal family (§ 89). However, the Encyclical Letter doesn't want to go so far as to adhere to a bio- or eco-centric perspective: human beings have a unique worth that put them at the centre of creation, but also implies a tremendous responsibility towards the rest of it.

In the Encyclical Letter, a whole chapter is dedicated to defining "integral ecology", that is, to applying ecological principles to all the fields of human life: social ecology, cultural ecology, economic ecology, human ecology.

Finally, the Encyclical Letter upholds the theory of the Commons: «93. Whether believers or not, we are agreed today that the earth is essentially a shared inheritance, whose fruits are meant to benefit everyone. […] The principle of the subordination of private property to the universal destination of goods, and thus the right of everyone to their use, is a golden rule of social conduct and "the first principle of the whole ethical and social order" […] 95. The natural en-

[9] This assumption has been recently confirmed by the Interamerican Court of Human Rights, in its advisory opinion OC-23/17, of the 15th of November 2017, § 67: «*Además, la Corte toma en cuenta que la afectación a estos derechos puede darse con mayor intensidad en determinados grupos en situación de vulnerabilidad. Se ha reconocido que los daños ambientales "se dejarán sentir con más fuerza en los sectores de la población que ya se encuentran en situaciones vulnerables"*».

[10] «49 […] Today, however, we have to realise that a true ecological approach *always* becomes a social approach; it must integrate questions of justice in debates on the environment, so as to hear *both the cry of the earth and the cry of the poor*».

[11] The excessive anthropocentrism of modernity is denounced also forward, at § 116.

vironment is a collective good, the patrimony of all humanity and the responsibility of everyone». The defence of the earth as a common good implies acting in a long-term perspective, because we also have to guarantee the rights of future generations (§ 159).

3.3. *Communitarian practices from the chthonic legal tradition*

In recent socio-political and legal discourse, the idea that the commons and collective property can be a valid environmental governance option in the Western world is being reconsidered, even if mainly as a theoretical construction (Ostrom 1990). Besides, many experiences of common management of land and fundamental resources can be found in the history of European civilisations (Cristoferi 2016; Parascandolo 2016: 20; Gutwirth 2018: 87). Perhaps, the most famous example is illustrated by the Charter of the Forest, extracted from the Magna Charta in 1217 and definitively published by King Henry III in 1225 as an autonomous corpus of norms. The Charter can be considered the first written legal document in European legal history regulating the collective use of natural resources (Carducci 2016: 41), in order to satisfy common and basic human needs, like access to water, to land to sow or to graze, to gather fruits or roots, to hunt game, to chop wood to build shelters.

The devastating power of annihilation of the past that the industrial revolution (and the ideologies that supported it) produced, has affected modern society, which, unable to remember the precedents of other ways of ownership in the past, is very uncomfortable with the theory of the Commons, or of collective property, and labels it as unrealistic and "barbaric", almost a retrocession in human evolution to the Middle Ages.

«In western society, property law provides some of the most foundational ideas about the land and about our place in the environment. Many of these ideas are so ingrained that we rarely give them second thought. The common 'idea' of private property is individual or absolute entitlement over a thing (what Blackstone called 'sole and despotic dominion'), which is protected by the will of the State. Our home is our castle, our zone of personal influence 'where we make the rules'. Our legal conception of property also tells us that the land can be divided into discrete and distinct bundles of legal relations, which individuals hold in relation to each other» (Burdon 2010: 63).

However, even if this "theology" of ownership was far the most widespread in Europe in the 19th century, Paolo Grossi demonstrated, in a powerful book entitled "*Un altro modo di possedere*" (Another way of possessing: Grossi 1977), that a minority group of scholars, mainly historians, undertook a cultural battle during

the second half of the '800s, to show that, by applying a historical and comparative method, the collective origin of the human relationship with the land appeared quite evident. These authors founded their conclusions on many experiences of the communitarian use of land in Europe and abroad, starting from medieval times and sometimes still lasting until today. Although this literature never became mainstream, it showed that individual and absolute property was not natural, but a cultural construction of human civilisation (Grossi 1977: 247; Garay Montañez 2018: 137).

Even if the individualistic proprietary paradigm continues to be the cornerstone of our legal systems, many influential critical voices have arisen in the last decades (Rodotà 2013: 459 ff.). New "objects" of rights (the body; Internet; biological materials; cultural heritage; health and sufficient food and water) have questioned the wisdom of using the property framework as the only model with which to measure everything that has economic relevance. On the other hand, the increasing imbalance between the few richest people in the world and the great majority of poor people, together with the ecological crisis that is undermining the very survival of the human species on Earth, have highlighted the problems of the redistribution of resources and of guarantees of a minimum standard of living for everyone, especially with respect to basic needs, such as the right to water and to sufficient and nutritious food.

Moreover, even in the classical period, Romans were conscious that property was not an institute coming from natural law[12]. Occupation, the first means of property acquisition recognised by Roman law, did not originally give an absolute entitlement to things, but a mere transitory power of use, that lasted as long as the time of possession, as explained by Blackstone, quoted by Sumner Maine[13]. The earth and its fruits were originally common goods: "Thus the ground was in common, and no part was the permanent property of any man in particular" (p. 140). Sumner Maine considered that it was much more plausible that property was born collective, as the ancient law was the law of the family, the social group, the community, and not of the individual (Sumner Maine, 1999: 140 and 148).

In Italy, there are legal institutions comparable to indigenous property: civic uses and many local experiences of collective property, widespread along the

[12] «They certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind» (Sumner Maine 1999: 139).

[13] «For, by the law of nature and reason he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted» (Sumner Maine 1999: 140).

whole peninsula during the Middle Ages, created in the North from Roman-German laws, lasting almost unaltered until the 19th century (Grossi 1977: 191 ff.), regulated with the *decreto* 751 of 22 May, 1924, converted into the *Legge sugli usi civici*, no. 1766 of 16 June, 1927, and finally with Act no. 168 of 2017 on collective domains.

The 1927 Act on civic uses was influenced by the liberal concept of property as an absolute right, codified after the French revolution, and was designed to react to vestiges of feudalism in the South of Italy. So, it imposed a uniform regulation of all prior forms of collective agro-forest properties, assigning the management of land to the Municipalities, and accepting the survival of only few exceptions to agrarian associations. Nevertheless, the legislator recognised the public interest connected to this type of property and bound the normative status of these lands to a particular regime: indivisible; imprescriptible; unalienable; with a specific and unchangeable use.

The 1927 Act remained substantially unenforced (Cervati 1990: 38), until the Italian democratic legislator approved new Statutes that reinstated the previous local and customary laws, the traditional forms of management of collective property in the Alps[14] (*Carte di Regole*, *Vicinie*, *Comunità di villaggio*, ecc.; see Salsa 2017) and also allowed regional legislators to regulate the matter following local traditions. Moreover, on various occasions the Italian Constitutional Court recognised and stated the "constitutional value" of civic uses, with particular reference to the protection of landscape and the environment (sent. n. 156/1995, n. 310/2006 and, more recently, n. 113/2018; see Di Genio 2018).

The expression "civic uses", applied by the 1927 legislator, used to be a synonym of "collective property", even if the two concepts have a different scope: both consist of collective rights on inalienable and indivisible lands, but, on one hand, civic uses limit someone's else right of ownership (both public or private); whereas speaking about collective property means that the holder of the bare ownership of land and its ultimate user (for sowing, breeding, grazing, forestry, …) correspond to the entire community (Lorizio 1994: 1). The terminology has recently been changed by the 2017 Act into "collective dominions" (art. 1.1). The Act has submitted to the same regulations all the institutions and practices regulated by the 1927 Act, but also those exceptions that escaped the uniform legislation before.

Civic uses and collective ownership in Italy were not only enforced in the mountains. In my region, Emilia-Romagna, the most widespread communitarian institution was the "*partecipanza agraria*", an institution in force in the Municipalities of Villafontana, Medicina, S. Giovanni in Persiceto, Sant'Agata bo-

[14] See the two Statutes on mountain communities: *Legge* no. 991 of 25 July 1952 and *Legge* no. 1102 of 30 December 1971.

lognese, Cento, Nonantola and Pieve (once also in Budrio, but that was dissolved before the law came into force). Most of these "*partecipanze*" were excluded from the application of the 1927 Act on civic uses, ex art. 65 of the same Act, and so maintained their autonomous set of rules. These are very ancient institutions: the "*partecipanza*" of Villafontana was probably founded in 1215 (Melega 1940: 17); that of San Giovanni derived from episcopal emphyteusis around 1170 (Forni 1896: 16). They are closed collective properties, originally assigned to farmers by bishops or feudal Lords, who wanted dense forests and wetlands to be reclaimed, farmed or deforested. In order to achieve these goals, they gave the lands in perpetual use to those families who engaged their workforce for this objective. At the beginning, the lands were freely occupied or distributed equally, by sort and rotation, to all the families of the territory, who organised themselves with autonomous rules and mechanisms to ensure the efficient collective management of the "*partecipanza*" (Forni 1896: 60; Forni and Gigli 1909). Then, when the community grew in population, there arose a need to exclude newcomers from the benefits of the periodical assignment of portions of land, in order to ensure its economic sustainability. For instance, in S. Giovanni in Persiceto, between 1400 and 1570 (Forni 1896: 31), a new rule was introduced, that admitted to the periodical division of land use only the families that had originally contributed to the reclamation work and the improvement of the fields (Forni 1913). The rule was not always strictly enforced, also because some portions of land were sublet by the tenants to other families, sometimes coming from the city's aristocracy, or because sometimes parts of the lands had to be pledged as a guarantee to rich money lenders for the debts of the community. For all these reasons, the Commoners (all members of the Municipality) and the Participants (the original collective owners), at the beginning forming a single community, were finally legally divided into two different institutions around 1814 (Fregni 1995: 161). After that, fields were periodically assigned to the families included in the Statute of the "*partecipanza*", for a period of 9 years, during a public auction in the main public square. So, the "division" of lands into portions for the "exclusive" use of each family, for the period established by the rules of each "*partecipanza*", was a practice which began around the 16th century and accomplished different goals: to defend the original community of farmers who had lived in those lands since time immemorable from expansion by the city's rich aristocracy; to prevent new portions of land being given away to refund the community's debts; to re-create equality between all the participants, because with the periodical round of new assignments, rich and poor members of the "*partecipanza*" regained the same chances of receiving the most valuable and productive portions of lands (Cazzola 1995: 224).

Legal experts on civic uses recognise that the revitalisation of studies on collective property is a sign of a renewed attention to alternative forms of possession and the rediscovery of values such as solidarity and the common good, in connection with a need to protect the environment, that requires a governance no longer based on the absolute right of ownership (Marinelli 2000: 20, 43; De Martin 1990: 19, 24 f.; Marinelli 2019: 158; Gutwirth 2018).

The theory of the Commons and civic uses shares many elements with indigenous communitarian practices for the management of collective lands. Unlike in Europe, in other parts of the world the existence of indigenous communities that still defend their traditional way of life and their relationship with Nature and the environment has produced important legal results, influencing the normative process, so as to incorporate collective property and biocultural rights in the national legal systems[15].

4. Conclusions

Climate change is a fact, not a theory. The same can be said about its anthropogenic causes. In fact, even in the courts, in climate cases judges have been accepting these premises as proven facts (Bagni 2019). The question, for lawyers, is to identify who could be held legally responsible for the risk of extinction we are facing and for the irreversible damage we are causing to the Earth's ecosystem, what are the legal bases of that responsibility, and in which way it should be asserted.

The international community has been aware of the problem since the 1970s, but its approach is quite ambiguous, divided between supporting economic growth and struggling to achieve environmental protection. This ambivalence is resumed in the concept of "sustainable development", as I have tried to explain in the first paragraph. The excursus of § 2 on the UN's approach to the inter-related themes of development and environmental sustainability has demonstrated that, even if the UN development programme still fosters the old approach of sustained growth, at the same time the UN HwN programme is working on new concepts, principles and paradigms, based on more holistic and eco-centric premises. The HwN network of experts has been investigating these topics and trying to advocate the need for a change in the legal paradigm at different political levels. Even if many of the most innovative ideas and practices come from indigenous peoples' knowledge, I have tried to show that, even in Europe, it is

[15] «The concepts of ownership, property, and property rights regime are alien to customary law. We are guardians and trustees, both for ourselves and for others. Human rights and related responsibilities are a core component of customary law, but it encompasses a wider understanding of community» (Thiong'o 2011: 211).

possible to re-discover traces of a past in which common land prevailed over private ownership, and its "sustainable management" was the responsibility of the entire community (§ 3).

What should be the legal instruments to make the revival of these practices viable in contemporary Europe is still not at all clear and little investigated. The theory of the Commons is, of course, one of the most known proposals, but, as Carducci has clearly stated, the academic approach to the theory is quite descriptive, focused on the legal status of the common good, more than on forms of its common management (Carducci 2018). The consequence is an underestimation of the actual context in which the re-instalment of ancient traditions could happen, its failure at national and supranational levels, with a limited effect on local realities. Referring to the many local examples of a common management of goods in a Western context, Carducci (2018: 48) speaks of a «non-transformative capacity of survival» of these practices, «"another way of owning" (of biochemical origins), within the usual "way of governing" (shaping the "fossil" law)».

Another proposal to foster an ecological shift in the legal paradigm is to recognise new subjects of rights, as the global movement for Nature's Rights demands, an approach which the UN is starting to show some interest in, with the creation of the HwN programme (see above, § 2).

Finally, without abandoning the old anthropocentric legal paradigm, many lawyers, together with NGOs and members of the civil society, are trying to claim new interpretations of "old" rights or the recognition of new human rights before the courts, such as in the different cases concerning the right to a liveable climate. The last solution, which is the judicial one, is very complicated to countries where access to justice is limited, due to the absence of direct action by constitutional courts or class actions; or the many procedural obstacles imposed on applicants.

In this view, Italy is a very interesting case, because it is a legal system where citizens do not have direct access to the Constitutional Court, and class actions have a very limited scope, at least until now. In April 2019, the Italian Parliament approved Act no. 31 on the introduction of a new "Title" in the Civil Procedural Code dedicated to "Collective Actions". Whereas, in the past, class actions in Italy were included in the so-called Consumers' Code, the new dispositions have broadened the scope of these actions, now available for each individual, or every organisation or association whose statutory objectives are to protect "homogenous individual rights", that is to say, collective rights (art. 840 bis). The new procedure is no longer reserved for consumers and their representative associations, but is extended to guarantee all types of collective rights, including environmental ones (Angiolini 2020). Lawsuits can be brought both against private

enterprises and the providers of public services or public utilities, to prosecute acts and conducts that violate homogenous individual rights. Moreover, art. 840 *sexiesdecies* introduces a new collective injunction, that can be promoted by everyone who has an interest in stopping acts and conducts that affect a plurality of individuals or entities. The action aims at ending or prohibiting the illicit conduct, that can be either an action or an omission. In these cases, the court can adopt all the orders it deems necessary for the enforcement of the conviction, including ordering the responsible party to adopt all the measures required to eliminate or reduce the effects of the violation. This provision would be quite useful in environmental class actions, eliminating all the negative effects of contamination and restoring the damaged ecosystem.

Examining the *iter legis* and the parliamentary proceedings, it seems that no-one really realised the innovative potential of these new actions in the environmental field. Discussions concentrated mainly on the economic profile, that is, on the impact that this sort of action could have on the market, discouraging companies and producers from investing in Italy, due to any possible responsibilities they could face if sued. Even the rapporteurs of the statute did not underline the broad scope of application of the actions, focusing only on the extension of procedural legitimation to enterprises. Besides, the legislative *iter* was not particularly complicated: very few amendments to the bill were proposed, limited debate took place, and the text was finally approved in a reasonable time, in the Lower House with no holdouts and 103 abstentions, and in the Senate with only one holdout and 44 abstentions (the FI parliamentary group). The Act will enter into force only in April 2020, so it is too early to express any judgement on its possible impact, although I believe it will be a very useful instrument in the struggle for the recognition of the new substantial rights that represent the innovative approach of harmony with nature.

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Climate change and the right to a healthy environment*

SARA DE VIDO

1. Introduction and main argument

Twelve years ago, in 2007, the Intergovernmental Panel on Climate Change, working group II, stressed how, by 2020, between 75 and 250 million people living in Africa would have been exposed to an increase of water stress due to climate change, that glacier melting in Himalaya would have increased flooding and rock avalanches, and that small islands would have been especially vulnerable to the effects of climate change, sea level rise and extreme events (IPCC 2007: 13). 2007 can be considered as a watershed for conceiving climate change no longer as "another environmental issue", quite rather "the" environmental issue with severe implications for the "us", namely the environment, human and non-human beings. In the same year, a petition against the United States was presented to the Inter-American Commission of Human Rights by the Center for international environmental law and Earth Justice on behalf of the Inuit asking for the recognition by the human rights body of the connection between global

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warming and human rights[2]. Even though the petition was dismissed for lack of information, the complaint was one of the first ones ever filed before a human rights body and paved the way for a long series of complaints brought in front of domestic and regional courts[3].

In a Special Report of 2018, the same panel scientifically confirmed that human-induced warming – meaning an increase in combined surface air and sea surface temperatures averaged over the globe and over a 30-year period – reached approximately 1 degree Celsius above pre-industrial level in 2017, increasing at 0,2 degree Celsius per decade (IPCC 2018: 2). The panel also explained why it was necessary and vital to maintain the global temperature increase below 1,5 degree Celsius versus higher level. This is the threshold under which adaptation measures would be less difficult and the world would suffer less negative impacts (IPCC 2018: 8).

On the occasion of the UN Climate Action Summit 2019, held on 23. September, the 195 IPCC Member governments approved a Special Report on the Ocean and Cryosphere in a changing climate, which stressed how the "urgent" reduction of greenhouse gas emissions would limit the scale of ocean and cryosphere changes (IPCC 2019: 42). As pointed out by Hoesung Lee, Chair of the IPCC, «the open sea, the Arctic, the Antarctic and the high mountains may seem far away to many people, but we depend on them and are influenced by them directly and indirectly in many ways – for weather and climate, for food and water, for energy, trade, transport, recreation and tourism, for health and wellbeing, for culture and identity» (https://www.ipcc.ch/2019/). UN experts have stressed, anticipating this international UN conference, that «a safe climate is a vital element of the right to a healthy environment and is absolutely essential to human life and well-being»[4], confirming the main findings of the Special Rapporteur's report A/74/161 of July 2019 .

This contribution starts from the assumption that climate change is a scientifically proven phenomenon. I am therefore not interested in "other" theories that put into question this clear affirmation. Furthermore, in these pages I would not much delve into whether and to what extent climate change law (see, for example, Bodansky *et al*. 2017), starting from the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC") and subsequent agreements including the most recent Paris one, is implemented by States and whether these treaties are effective or not given the vague formulation of their provisions.

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[2] Petition No. P-1413-05.

[3] After dismissing the complaint, the Inter-American Commission on Human Rights held a hearing to "address matters relating to Global Warming and Human Rights" on 1 March 2007.

[4] See at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25003&LangID=E.

My scope here is to support the argument that climate change must be addressed as an international human rights issue and that a shift of paradigm is required from a mere anthropocentric to a more eco-centric approach, through which it is possible to acknowledge the consolidation of a right to healthy environment in the context of the rights of the nature. Healthy environment is meant for the purpose of this article also as "healthy" ecosystems.

2. Environmental law-human rights law or both? Towards the 'Greening' of human rights law through courts

The starting point of the analysis is to understand whether climate change is or might be appropriately addressed as a human rights issue. Mary Robinson, former UN High Commissioner for human rights, emphasised how climate change raises an issue of justice, since poor communities are the ones that suffer the most from the effects of climate change. She was convinced that the human rights framework provided the legal and normative ground for empowering the poor to seek redress (Robinson 2006).

Environmental rights are human – and non-human – rights (Daly and May 2018: 43). Nonetheless, despite being aware of the impact climate change might have on human rights, environmental and human rights law have always appeared as two separate fields of law, surely connected, but not really intertwined. The courses that are offered at the university mirror this approach.

A reference to human rights is nonetheless explicit in the preamble (only) to the Paris Agreement, adopted during the Climate Conference (COP 21) in December 2015 and entered into force on 4 November 2016, which has reached a significant number of ratifications (185 at the time of writing), and which addressed the impact of climate change on human rights in the following recital: «Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity».

It is well known that international climate change law has quite a "technical character", being focused on the emission reduction commitments first encapsulated in the United Nations Framework Convention on Climate Change of 1992, then set out as internationally binding emission reduction provisions in the Kyoto Protocol of 1997, later amended in Doha in 2012, and eventual-

ly transformed into the aforementioned Paris Agreement of 2015, which has raised much controversy due to the vagueness of its provisions, but which has convinced the most reluctant States to ratify it[5]. With the adoption of the Paris Agreement in 2015, governments agreed to limit global warming to below 2 degrees Celsius and to pursue efforts to limit it to 1.5 degrees Celsius; to increase the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development; and to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development (Article 2 of the Paris Agreement). Human rights were not addressed in Article 2 of the Paris Agreement, despite some States' proposal in that respect (Knox and Pejan 2018: 14).

Yet, if not achieved in treaty law, owing to the reluctance of States in the negotiation process, the interconnection between environmental law and human rights has clearly emerged at the international level, urged by civil society and endorsed by national courts in a growing number of cases. A plurality of cases have been filed with national courts (in some cases regional courts) in which both the interests of human beings *and* of the environment, together, as part of an important evolution in international law, have been taken into account. As it was argued, "faced with inadequate regulatory incentives and a lack of available tort claims, plaintiffs in the US and across the globe have employed a creative new tactic: suing their governments for failing to take sufficient measures to reduce greenhouse gas emissions" (HLR 2019: 2090). The number of cases, combined with a widespread activism, is stunning. According to the *climatecasechart*, a US-based database, the following cases have been filed: 684 federal statutory claims concerning federal acts such as the Clean air and the Clean Water acts; 26 constitutional cases, concerning, among others, the First Amendment clause; and 310 State law claims, including, inter alia environmental lawsuits[6]. As for non-US climate change litigation: 281 applications against governments and 24 against corporations and individuals have been started. Hence, for example, in March 2019 the Massachussets Federal Court declined to dismiss claims proceed against Exxon for allegedly violating a marine terminal's Clean Water Act permit by failing to consider the impacts of climate change. The Court contended that the complaint included new allegations of imminent harm "sufficient to allege standing"[7].

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[5] See, with regard to the United States, Bodansky (2015: 1): «The success of the Paris outcome will depend crucially on the participation of the world's major economies, including the United States».

[6] See http://climatecasechart.com/ (last accessed on 26 September 2019).

[7] See http://climatecasechart.com/case/conservation-law-foundation-v-exxonmobil-corp/.

2.1. *Urgenda v. The State of the Netherlands – what the greening of human rights means in court*

In Europe, *Urgenda v. the State of the Netherlands*, filed with Dutch courts, has been the most famous and debated case. The applicants – the environmental group Urgenda Foundation and 900 Dutch citizens – filed a complaint against the Dutch government to oblige it to do more to prevent global climate change. The District Court in the Hague, which rendered the judgment in 2015, ordered the government «to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25 percent at the end of 2020 compared to the level of the year 1990» (Rechtbank Den Haag 2015: 5.1). The Court concluded that the State violated its duty of care under the Dutch civil code, and that it has a duty to take climate change mitigation measures.

The decision was hence based on Dutch private law (Stein and Castermans 2017: 306). Several legal instruments at both the international and regional level were mentioned, including the Dutch Constitution, the principles of the 1992 UNFCCC, the European Convention on Human Rights (ECHR), and the Treaty on the Functioning of the European Union (TFEU), plus the general no-harm principle in international law. The Court did not argue that these legal instruments directly applied in this case. Nonetheless, it drew from these provisions a framework of analysis and a set of principles (Stein and Castermans 2017: 311). With regard to the European Convention on Human Rights, the Dutch Court argued that Urgenda, as legal person, could not be considered in itself as a victim of human rights abuse within the meaning of the Convention. Nonetheless, it used the Convention as a source of interpretation of private law standards of care. The Court did not specify how the government should meet the reduction mandate, but offered several suggestions, including emissions trading or tax measures. The decision is surely groundbreaking because it «lays the basis for broader recognition of the application of human rights norms to the global climate change crisis» (Stein and Castermans 2017: 318).

The government appealed. The Hague Court of Appeal upheld the judgment but on different grounds, arguing that Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention on Human Rights were applicable. The appellate court held that the "victim" requirement of Article 34 of the European Convention did not prevent Urgenda from having access to Dutch courts complaining about the violation of one of the rights enshrined in the Convention itself. The Court contended that the rights recognised in the Convention placed a "positive obligation" on the State «to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates

the obligation to protect the right to home and private life», and that this obligation applies to all activities which «could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous» (The Hague Court of Appeal 2018: 43). The Court then added that if the government «knows that there is a real and imminent threat», the State must take «precautionary measures to prevent infringement as far as possible» (The Hague Court of Appeal 2018: 43). The Court relied on reports prepared by the IPCC and decisions adopted by the conference of the parties to identify the "real and imminent threat" which would have triggered the obligation the State was abide by. The Court found that the State violated Articles 2 and 8 of the European Convention by not reducing its emissions by at least 25 per cent by the end of 2020.

As it was pointed out by an author, «the judgment seems to replace the duty of care under the Dutch Civil Code with the duty of care under Articles 2 and 8 ECHR, thus essentially turning the Urgenda case into a human rights case» (Verschuuren 2019: 96). The Court of Appeal also rejected the objections of the government claiming that the District Court jeopardised the principle of balance of power and pointed out that the State retained "complete freedom" to determine how to comply with the order. The legal reasoning led the Court to emphasise the role of the precautionary principle in climate change matters and to clarify the issue of casual link. With regard to the latter, the Court explained that the matter of the dispute is not the award of damages, but rather the obligation of States to adopt measures to address the issue of climate change (Verschuuren 2019: 96). The Dutch government filed a further appeal in front of the Netherlands' Supreme Court, which held a hearing on 24 May 2019. On 13 September, independent judicial officers recommended that the Supreme Court uphold the decision. The awaited decision was rendered on 20 December 2019, upholding the decision under Articles 2 and 8 of the European Convention on Human Rights[8].

From a legal point of view, the merits of the judgments of the Court of Appeal and the Supreme Court deserve attention, because human rights instruments played a key role in the Courts' affirmation of the States' positive obligation to protect the individuals' rights to life and to respect for private and family life. These groundbreaking decisions will constitute a model for further judgments on climate change measures.

Would the legal argument be different with the consolidation of a right to a healthy environment at the international level?

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[8] http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191220__2015-HAZA-C0900456689__judgment.pdf (in Dutch).

Before delving into the affirmation of a right to a healthy environment in customary international law, we will reflect in more detail on another aspect stressed in the preamble of the Paris Agreement: «climate change is a common concern of humankind». This concept mirrors the preamble of the first UNFCCC of 1992 and the previous UN General Assembly Resolution No. 43/53 of 1988, which, for the first time, held unanimously that climate change is a common concern of humankind (mankind at that time in a not very gender-neutral language), since «climate change is an essential condition which sustains life on earth». The loss of biodiversity has also been considered as a common concern of humankind in the UN Convention on Biodiversity of 1992.

The concept of "common concern" has been object of considerable scholarship. It has never been formally defined and focuses on protecting the resources or environmental systems of concern to humankind (Brown Weiss 2013: 71). It means that the necessary action should be taken in order to preserve the variability among living organisms from all sources, in a sustainable way, according to an intra-generational and inter-generational approach (Brunnée 2007). Despite being without normative content, the notion of common concern of humankind legitimises, an author argues, an international interest in the conservation and use of biological resources otherwise within the territorial sovereignty of other State (Boyle 1996: 40). The "common concern of humankind" has been described as a principle of international environmental law (see, extensively, Soltau 2016). More than twenty years ago, an author suggested that certain forms of massive or very hazardous pollution of the atmosphere amount to a violation of a jus cogens norm, producing «international environmental solidarity duties» (Biermann 1996: 472, 480).

The idea of common concern of humankind might seem, at least at first sight, to contradict the well consolidated principle of «permanent sovereignty in classic international law» (Scholtz 2013: 201). Nonetheless, this principle has been eroded since the affirmation of international law itself, because international cooperation presupposes a form of restriction of sovereignty necessary to achieve common goals. The evolution of human rights law has also determined an erosion of the absolute power of States to treat their nationals without constraints. Other principles have gradually consolidated in international environmental law, including good neighbourliness and the obligation to notify cases of pollution to neighbouring countries, following the findings of the award in the *Trail Smelter* arbitration of 1938/1941.

It can be argued that the notion of common concern of humankind determined a first change of paradigm: from the interest of one (or more) neighbour-

ing States to the interests of all States of the international community, to the point of affirming a legal interest of micro-States to challenge measures adopted hundreds of thousands kilometers from them owing to the harmful consequences of climate change for low lying islands (De Vido 2017: 120 f.). As it was interestingly argued, the concept of common concern "changes" the right of the State to freely dispose of the resources to respond to the challenges of the climate change (Scholtz 2013: 205). The notion of common concern goes beyond the obligation for a State not to cause harm in the territory of a neighbouring country, it implies a fair and equitable burden sharing, the protection of the interests of present and future generations, and the affirmation of a new steering element in terms of State cooperation (Scholtz 2013: 207). It means, in other words, to entitle a State of a "custodial element" and consider that it has *due diligence obligations* – which means that these are not obligations of result but obligations of taking steps – even in cases in which it is not an activity of the State – or of one of its *de jure* or *de facto* organs – that has determined the pollution, e.g. a fire in the forest.

This first change of paradigm is far from being far-fetched and has legal consequences in State practice. As posited by the International Court of Justice in the opinion of the legality of the use of nuclear weapons in 1996, there is a "common conviction of the States concerned – is that an international custom? The International Court of Justice is not explicit in that respect – that they have a duty 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*" (ICJ 1996: 27). Furthermore, the Court acknowledged in its opinion that the environment «is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognised that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is *now part of the corpus of international law relating to the environment*»(emphasis added; see ICJ 1996: 29).

3.1. *The "Common Concern" of humankind: The response to the fires in the Brazilian Amazon as case study*

The argument elaborated in these pages can be appreciated through the analysis of recent State practice. During and after what happened in Brazil in the summer of 2019, with the Amazon forest being irreversibly damaged by fire, Latin American Countries, including Brazil itself, signed, on 6 September 2019, the

Pacto de Leticia por la Amazonía, an act of soft law[9]. The meeting was convened in Leticia at the border of Colombia with Peru and Brazil. The heads of States of Bolivia, Colombia, Ecuador and Peru were present, along with the Minister of external relations of Brazil, the vice-President of Suriname and the Minister of the Environment of Guyana. The meeting followed the severe diplomatic crisis caused by the late Brazilian response to the fires in the Amazon, whose gravity shocked the public opinion (we will not delve here into the issue of whether or not coercion would be legal in international law; see in that respect Gilley and Kinsella 2015). The text reproduces several obligations States must abide by according to the Amazon Cooperation Treaty of 1987 and hence does not seem quite innovative in light of what we have called in these pages as "environmental human rights law" (Boeglin 2019). Even though human rights are not explicitly mentioned, the *Pacto* refers to education, participation of and information to civil society, indigenous rights. It encourages new forms of regional cooperation, which indeed might constitute a very practical and effective response to climate change threats. States where the Amazon is present should work on the establishment of a permanent regional mechanism of response to the fires.

4. The need of a new paradigm

What is lacking in the analysis conducted so far, despite the undeniable positive attempts to face current threat through the national jurisprudence and the application of the notion of common concern of humankind is a shift in the paradigm with the affirmation of a human right to a healthy environment in the context of the rights of the nature (Ito and Montini 2019: 231). It means, in other words, to conceive a human right to a healthy environment which, at least but not only in the field of climate change, does not conflict with the rights of the nature. The former cannot exist without the latter. Without the affirmation of the rights of the nature even absent a direct and immediate consequence for the humans, the human right to a healthy environment would be irreparably jeopardised. This conclusion can be reached conceiving the "us" as humans, non-humans and the environment in a holistic and less anthropocentric approach.

Affirming that climate change consists in a common concern of humankind is not devoid of legal consequences as we could appreciate in the precedent paragraph, but it is still a vague and contradictory notion, which is very difficult to bring in front of the court. To the contrary, a human right to a healthy environment could be invoked as justiciable right in front of (mainly regional) human

[9] See the text here: https://www.gob.pe/institucion/rree/noticias/50579-pacto-de-leticia-por-la-amazonia.

rights and domestic courts, with the consequence of being affirmed as self-standing right which does not need to rely on other rights to be indirectly protected. It means, in other words, that individuals or groups – where this is possible according to the system in force – could bring cases in front of courts to have this right recognised. As alternative, as we could see in the *Urgenda* case, the right could be used to interpret the obligation of States to protect the lives of its own citizens under other sources of (mainly national) law. In any case, as stressed by Boyd, a right to a healthy environment leads to «stronger environmental laws» and to «courts decisions defending the rights from the violation» (Boyd 2018: 26).

The consolidation of a right to a healthy environment in international customary law does not seem thus far to be achieved. The Special Rapporteur on human rights and the environment acknowledged, in its most recent report of 2019, that the right to a healthy environment is already recognised by a majority of States in their constitutions, legislations and various regional treaties to which they are parties. He also recognised that, in spite of this, «the right to a healthy environment has not yet been recognised as such at the global level»[10] and elaborated States' obligations with regard to a specific aspect of this right, namely the right to breathe clean air. How to reconcile these two affirmations? If it is true, on the one hand, that States have proved to be extremely reluctant in accepting international legal obligations in the field of climate change measures, on the other hand courts and national parliaments, urged by civil society, have marked significant steps forward.

Outstanding authors have commented on the possibility of conceptualising a right to a decent environment and of locating it within the corpus of economic, social, and cultural rights. According to Boyle, «clarifying the existence of such a right would entail giving greater weight to the global public interest in protecting the environment and promoting sustainable development» and «the further elaboration of procedural rights […] would facilitate the implementation of such a right» (Boyle 2015: 221). Boyle further argued that «a right to a decent environment has to address the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights, a catalogue which for good reasons there is great reluctance to expand» (Boyle 2015: 221).

[10] It is possible to find reference to the right to a healthy environment in the 1972 Stockholm Declaration, in the African Charter of human and peoples' rights (Article 24, right to a satisfactory environment), in Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, Article 11: right to live in a healthy environment), and in the Convention on Access to information, public information, public participation in decision-making and access to justice in environmental matters (preamble, right to a "healthy environment").

The Inter-American Court of Human Rights, in its Advisory opinion of 15 November 2017, recognised the existence of a right to a healthy environment as autonomous right, which presents an individual and a collective dimension. In its collective dimension, it constitutes an "universal interest", which must be granted to both present and future generations. In its individual dimension, its violation might directly or indirectly impact on other rights, such as the rights to health, to personal integrity, to life, among others. The Court acknowledged that the degradation of the environment can cause irreparable damages to all human beings, with the consequence that the right to a healthy environment is fundamental for the existence of humankind (IACHR 2017: 59; Peña Chacón 2019). The opinion is groundbreaking and does constitute State practice. The approach followed by the Inter-American Court of Human Rights drives a further shift of paradigm, from a mere anthropocentric to a more eco-centric approach. If we consider the *human* right to a healthy environment, the lens through which we see it is strictly anthropocentric. It is a right belonging to *human beings*. However, climate change affects the environment, human and non-human beings, to the point that the existence of human beings depends on the existence of the flora and the environment. Even though legal scholarship does not seem ready enough, the shift of paradigm from a mere anthropocentric to a more eco-centric approach would imply the consideration of the so-called "rights of nature", or, in a more practical way at least for the time being, it would lead to the consolidation of a right to a healthy environment *in the context of the rights of the nature*.

Accordingly, we are not interested here in whether and to what extent natural elements or non-human beings are subjects of law. The debate dates back to the 70s when Christopher Stone wrote an article entitled "Should trees have standing?" (Stone 1972: 450)[11] and has developed thanks to the jurisprudence of mainly Latin American courts and the constitutional recognition of the rights of nature (Ecuador being illustrative example)[12]. I will not discuss here whether non-human animals or rivers, seas and oceans should have legal personality, whose rights can be represented in court (see Cano Pecharroman 2018; Gazzola and Turchetto 2015). What we want to stress here is that the reduction of gases in the atmosphere does not only benefit humans, but also the environment itself. Far from being one against the other, the rights of nature and the human right to a healthy environment converge, and they should be conceived as strictly intertwined in order to overcome a pure sterile anthropocentric approach.

[11] See also his book, Stone 1973/2010.

[12] Chapter 7 of the Constitution: «Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution».

As anticipated by Boyle, a right to a satisfactory decent environment «would be less anthropocentric that the present law. It would benefit society as a whole» (Boyle 2007). It would do so because the status of environmental degradation has deteriorated so fast in recent years that the protection of the rights of the nature is fundamental for the respect of human rights, first and foremost the right to life. It is clear that there might be cases in which the interests of the nature conflict with human interest – consider the cases of biodiversity for example, where a human infrastructure might collide with the safeguard of protected areas (De Vido 2016) – but, paraphrasing a decision of a court in Ecuador, the two interests do not collide when the realisation of one interest can be achieved while respecting the other interest[13]. This is the case of the actions against climate change.

Even though international environmental law, at least for the time being, basically remains anthropocentric, there are non-anthropocentric developments that reveal a growing recognition of the environment as a public interest. Anthropocentrism and non-anthropocentrism can be reconciled in environmental ethics, which examines human beings' relationship with the natural environment. The reduction of emissions in the atmosphere has value both inherently and as benefits for present and future generations of human beings. As Stone argued even before environmental law had started to develop at the international level, «because the health and well-being of [human]kind depend upon the health of the environment, these goals will often be so mutually supportive that one can avoid deciding whether our rationale is to advance "us" or a new "us" that includes the environment» (Stone 1972: 489). This was precisely the point caught by the Inter-American Court of Human Rights in the aforementioned opinion, which emphasised how, compared to other human rights, the right to a healthy environment protects nature, even absent evidence of possible risks for human beings, because of its importance for the rest of living beings, deserving protection (IACHR 2017: 180). It is precisely the "us" including the environment envisaged by Stone; an environment which must be conceived as including both flora and fauna. It follows that human beings bear the responsibility to protect this value and, through their actions, to develop an environmental consciousness (Iovino 2008: 83).

Francioni contended that a «more advanced jurisprudence in the field of human rights which recognises the collective dimension of the right to a decent and sustainable environment as an indispensable condition of human security and human welfare» is necessary, and that «it does not make much sense to engage human rights language to combat environmental degradation only when

[13] Ruling by the Ecuadorian Sala Penal de la Corte Provincial. Protection Action. Ruling Number No. 11121-2011-0010. Casillero N0. 826. 30 March 2011. Available at http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf.

such degradation affects the rights to life, property, and the privacy of certain directly affected individuals» (Francioni 2010: 44, 55). The affirmation of a right to a healthy environment opening to the "rights of the nature" – which might in the future lead to the *locus standi* of elements of the nature – is the response to the limited political commitments of States, and could be reached through the jurisprudence of regional and domestic courts, that have already started to pave the way. This consideration is valid for climate change as well as for biodiversity loss. As stressed by the Special Rapporteur Boyd, «the loss of global biodiversity is having and will continue to have devastating effects on a wide range of human rights for decades to come. This report is a stark reminder that we can simply not enjoy our basic human rights to life, health, food and safe water without a healthy environment»[14]. Michele Carducci posited that legal scholarship should open to the concept of "rights of nature" in order not to be tempted to compare human balances on one hand, and ecological balances on the other, and to overcome "systemic blindness" which is no longer sustainable by the entire human species (Carducci 2017: 521).

It is not an easy task, we are all aware of this. The lack of political will towards the protection of the environment is striking (some declarations made by heads of State over 2019 questioning climate change demonstrate this trend). Nonetheless, we are experiencing a moment in which citizens and NGOs are pushing courts to recognise States' obligations for the protection of the environment and for countering climate change. Individuals and groups cannot produce State practice useful to consolidate an international custom[15] recognising the right to a healthy environment, but national and regional jurisprudence, stimulated by individual or collective complaints, surely can.

5. The future: the need for a change of paradigm starting from regional organisations

As demonstrated by the "activism" in the jurisprudence and the legislation of Latin American countries, the paradigm can more easily change working within regional contexts.

In the European Union, the action to protect biodiversity has been remarkable (for a reflection on the Habitat Directive and the Natura 2000 network, see De Vido 2016), as it will be the action to reduce and partly eliminate single-use

[14] See https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24738&LangID=E.

[15] An international custom is composed, as it is well known, of State practice and *opinio juris sive necessitatis*.

plastics. With regard to the latter, the European Strategy for Plastics was adopted by the European Commission in January 2018 (see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Strategy for Plastics in a Circular Economy* {SWD(2018) 16 final}), followed by Directive No. 2019/904 on the reduction of the impact of certain plastic products on the environment, also known as "Single-Use Plastics Directive", which was adopted on 5 June 2019 and published one week later (Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019, 1-19).

The new strategy and Directive on single-use plastics have no precedent in the world (De Vido 2020). The Directive was approved during the first reading by both the European Parliament and the Council. The Council approved it by unanimity with the only abstention of Hungary. In the preamble, it is recalled that single-use plastic products and fishing gear containing plastic are «a particularly serious problem in the context of marine litter and pose a severe risk to marine ecosystems, biodiversity and, potentially, to human health and are damaging activities such as tourism, fisheries and shipping» (Directive 2019/904, preamble, recital no. 5). This is the closest reference we can find in the Directive on human rights concerns related to the pollution of the environment through plastics and to the precautionary principle (the adverb "potentially"). The preamble also acknowledges that «marine litter is transboundary in nature and is recognised as a growing global problem» (*ivi*, recital no. 3), and that the legal instrument locates into the more general debate on circular economy. The Directive clearly responds to a necessity, which consists in the reduction of single-use plastics found on beaches in the Union: «To focus efforts where they are most needed, this Directive should cover only those single-use plastic products that are found the most on beaches in the Union as well as fishing gear containing plastic and products made from oxo-degradable plastic. The single-use plastic products covered by measures under this Directive are estimated to represent around 86 % of the single-use plastics found, in counts, on beaches in the Union. Glass and metal beverage containers should not be covered by this Directive as they are not among the single-use plastic products that are found the most on beaches in the Union» (*ivi*, recital no. 7).

However, the approach of the Commission with regard to environmental matters has been oriented by economic interests. The Directive is based on the five Rs: Reduction, Restrictions, Requirements, Responsibility, Recycling (De Vido 2020). Despite the innovative approach embraced by the Strategy and the Directive, the European Union was not capable of advancing its environmental governance to the point of overcoming the limited anthropocentric approach

of its legislation. As we argued, the approach should be guided by the right to a healthy environment as conceived in these pages: a right that, despite having consolidated as "human" right should be open to the "rights of the nature" which are not in opposition but rather reinforce each other. Unfortunately, the words human rights are completely absent from the text of the Directive on single use plastics[16], and even the right to participation was removed from the final text[17].

In March 2019, plaintiffs from five European Member States, including Romania, Ireland, Slovakia, France and Estonia, plus from the United States, filed a complaint in front of the Court of Justice of the European Union, arguing that the European Union's 2018 Renewable Energy Directive (RED II) would devastate forests and increase greenhouse gas emissions by promoting burning forest wood as renewable and carbon neutral (http://eubiomasscase.org/the-case/). The applicants contend that the inclusion of forest biomass as a potential fuel violates Article 191 of the Treaty on the Functioning of the European Union and several rights under the Charter of Fundamental Rights of the European Union. This lawsuit proves our argument on the need to conceive the "us" as including the environment, human and non-human beings and encourages an action by the courts which would constitute important State practice.

6. What's next?

We are experiencing an evolution in international law, which is determined in particular by courts in response to the civil society's increasing interest in environmental matters. Courts are organs of the State, and their action is therefore State practice, capable of consolidating a right to a healthy environment in cus-

[16] In the preamble and in Article 1, the Directive contradicts, to a certain extent, its innovative environmental vision, by only mentioning the impact of plastics on "human health". It should be stressed that the language used is precisely "health" and not "human right to health", which is far from being a mere technicality. Health is a status, whereas a right can be invoked by individuals in front of courts.

[17] It is interesting to note that in the proposal presented by the European Commission, there was a reference to access to justice. According to Article 12 of the proposal: «Member States shall ensure that natural or legal persons or their associations, organisations or groups, in accordance with national legislation or practice, have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, actions or omissions related to the implementation of Articles 5, 6, 7 and 8 when one of the following conditions is fulfilled: (a) they have a sufficient interest; (b) they maintain the impairment of a right, where the administrative procedural law of the relevant Member State requires this as a precondition». This article, as explained by the Commission, was aimed at «implement[ing] the Aarhus Convention with regard to access to justice and [wa]s in line with Article 47 of the Charter of Fundamental Rights».

tomary international law, a right that, as we argued, combines the "human" right to live in a healthy environment with the interests of the nature that States must protect. The State as subject of international law does not prove to be a monolith, but rather experiences a fracture between the judiciary (sometimes along with the legislative) on the one hand and the executive power on the other. The push coming from civil society cannot be disregarded and the hundreds of cases that started to appear at the international level demonstrates that not only climate change is a common concern of humankind, but that a human right to a healthy environment is gradually emerging, combined and not conflicting with the rights of the nature. The devasting effects of climate change should make the environment and the "us" – meaning human and non-human beings – at the centre of any political debate.

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Climate stability as a common good: a strategy for the European Union

ROBERTO LOUVIN

1. Climate as a common good

The climate system, as a complex of meteorological conditions of its five major components – the atmosphere, the hydrosphere, the cryosphere, the land surface and the biosphere – and the interactions between them characterise a place or a region during the year averaged over a long period of time. Climate effects are usually only locally perceived but they actually are a systemic fact as to their average values and their variability. This is why climate stabilisation policies cannot be sectoral policies, but must themselves be systemic.

The special value of the climate stability, on which depends the possibility itself for the human race to live in appropriate conditions, is of a total evidence: a very high value, absolutely irreplaceable. The harmful consequences of a sudden and uncontrolled change, compared to the conditions that made possible the evolution of our species on Earth, can, as it nowadays appears to be evident, affect us at all levels and in different ways.

We are facing desertification, land degradation, food insecurity, dryland water scarcity, vegetation loss, wildfire damage, soil erosion, permafrost degradation, tropical crop yield decline .... Nobody may be safe if climate change can too rapidly, amplifying migrations, both inside countries and across borders,

destabilising by domino effect institutions, societies and economies of all our countries.

Scholars do not hesitate to qualify climate as a "common good" (Mercalli and Gorla 2013). Pope Francis stated himself, with all his moral authority, that «the climate is a common good, belonging to all and meant for all» (Francis I 2015) because it is, at a global level, a complex system in relation to many essential conditions for human life. The definition of common good given in some other documents by the Catholic Church – such as in the Pastoral Constitution on the Church in the Modern World Gaudium et Spes of the Second Vatican Ecumenical Council, 26. – as «the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfilment» (Paul VI, 1965). And the Encyclical goes so far as to affirm that «What is needed, in effect, is an agreement on systems of governance for the whole range of so-called global commons» (Francis I 2015).

At the international level, the United Nations Conference on Environment and Development (UNCED), which took place in Rio de Janeiro in June 1992, clearly expressed, by its United Nations Framework Convention on Climate Change (UNFCCC), the conviction of the whole international community that «the global dimension of climate change requires the widest possible cooperation of all countries and their participation in adequate and effective international action in relation to their common but differentiated responsibilities, their respective capabilities and their economic and social conditions».

From that moment on, the danger of global warming induced by human action became increasingly probable and is now certain. The impoverishment of ecosystems and the loss of biodiversity are triggering new environmental strategies and the emergence of a new kind of law. Issues as global climate change, biological diversity, deforestation, and desertification are no longer considered as isolated fields, but require the strong global policies.

2. The impact of the notion of common goods on law

The first approach kick-started and constitutes the backbone of the debate over the commons. It originates from the famous article by Garret Hardin (1968), about the "tragedy of the commons". Point of reference is the extensive theoretical and empirical work carried out by Elinor Ostrom and her group, which from a disciplinary perspective belongs to institutional economy.

The notion of common goods as defined above is absolutely in harmony with the notion taken by the jurists, even in some attempts to include this concept in modern laws, as the Italian draft of law by the "Rodotà Commission" for the

reform of public goods and for the inclusion of a new classification of common goods in the Italian Civil Code.

Using the well-known specific categories of law, we can stipulate that climate (*rectius*, climate stability) is rapidly acquiring, in is formal meaning, the status of "global common good" as most countries in the world agree on the prospect of a climate common governance with a shared responsibility. The progress made in this direction in 2015 at the Cop21 in Paris, although followed by the announced withdrawal of the United States under the Trump Presidency, does not leave much doubts about that.

International agreements identified the implementation of some fundamental rights directly linked to the care of environment as common goods. Despite the solemnity of these declarations, the efficacy of this protections is still weak; this reference does not nevertheless deny those who maintain that the consistency of international and constitutional protections with regard to the right to life and health already make climate stability an absolute and conditioning good for the whole of humanity. A good that therefore can and must be configured as a 'world common good', which are given a general fruition and a shared responsibility.

The Paris Climate Agreement (COP21) of December 2015, endorsed by 195 countries as the first universal and legally binding agreement on the world climate, is an historic turning point: it makes climate neutrality and collective action to mitigate the effects and to promote adaptation to climate change targets for which all countries are jointly responsible.

A "good" means a value, a resource, a relationship, a material or immaterial object legally protected. We can therefore qualify it as 'common' when its ownership or responsibility belongs to a large or even indeterminate number of people.

We can so far agree on the definition of the common good as a good whose enjoyment is equally due to all members of the community and whose regime of use and protection must is of common responsibility. This concept is well described in the Paris Agreement, where it is recalled, in the Preamble, that the action of the Parties within the United Nations Framework Convention on Climate Change is "guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

The same concept is also expressed in the Paris Agreement, where it is recognised that «climate change is a *common issue for humanity*» so that countries, in addressing it, must «respect, promote and consider their obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, people with disabilities, those in vulnerable situations and

the right to development, as well as gender equality, women's empowerment and equity between generations».

The formal qualification of climate change as *res communis*, i.e. as a "common question", is decisive: in Roman law, *res* does not mean only a "thing", but rather a "question". And this is, in fact, a "question" of common interest concerning the whole humanity, as evidenced by the intergenerational perspective adopted int the international agreements that explicitly identify a responsibility towards future generations.

On these assumptions, in our opinion, the definition of climate stability and sustainability as "common good" is firmly grounded.

3. Climate change: a new object for European policy making

The need for unitary management and coordination quickly persuaded the Member States of the European Union to assign it a specific task in this field. The growing concern about this phenomenon and the impotence of the individual states in front of the magnitude of the problem led to willingly delegate to the European Union a leading role on this matter, entrusting it with the explicit objective of «the promotion at international level of measures aimed at resolving regional or global environmental problems and, in particular, at *combating climate change*» (Art. 191, para. 1, TFEU).

EU institutions have taken very seriously the task of promoting the EU countries' reaction to climate change (Chalmers *et al.* 2014; Schutze 2015), starting with the Emissions Trading Directive of the European Union, the first and largest emissions trading system in the world (EU ETS), adopted in 2005 in the direction indicated by Kyoto Protocol in 1997 ratified by the EU (Council Decision 2002/35/EC).

The area of responsibility on which this action is wholly based on the EU's environmental policy authority ruled by Articles 11, 191, 192 and 193 TFEU. These articles allow the EU to formulate and implement climate policies and strategies, to lead international climate negotiations and to commit to a successful implementation of the Paris Agreement (Cini and Pérez-Solórzano Borragán 2019).

The European action develops across the board and «Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development» (Art. 11 TFEU). In concrete terms, the EU has already declined several possible response options.

First of all, many are actions based on land use management increasing food productivity and agro-forestry; improving cropland management and livestock

management; driving agricultural diversification and pasture management; integrating water management; reducing the conversion of pastures into cropland; promoting forest management; reducing deforestation and forest degradation; increasing soil organic carbon content; reducing soil erosion, soil salinisation and soil compaction; Managing fires; reducing landslides and natural hazards as well as pollution, including acidification; restoring and reducing coastal wetland conversion; restoring and reducing peatland conversion.

Other interventions concerned value chain management, such as reducing post-harvest losses; reducing food waste (by consumers or retailers); favouring sustainable sourcing; improving food processing and retailing. Improving energy use in food systems has also been considered.

Finally, some social risk management interventions have been considered: diversification of livelihoods, urban sprawl management and risk sharing tools.

If we focus our attention on climate risks, we find that climate targets were set by the EU through the "Climate and Energy Package" adopted by the European Parliament on 17 December 2008, a clear framework of European energy and climate policies for 2030, viewing to gradually reduce greenhouse gas emissions up to 2050.

Looking beyond formal acts, it is of particular interest to highlight the strategy of the European Union to guide member states towards the common goal. This strategy essentially focuses on the promotion of eco-technology (Louvin 2017), i.e. on the search for technical and industrial solutions from which everyone can benefit: on the one hand, industry and research and, on the other, the environment in the long term.

The highest summary of these objectives is set out in the Commission Communication of 28 November 2018 (COM(2018) 773, A clean planet for all). It proposes a long-term European strategic vision for a prosperous, modern, competitive and climate-neutral economy, urged by the other European institutions: first of all the European Council, with its commitment in June 2017 to implement the Paris Accord rapidly and in March 2018 and its invitation to the European Commission to put forward a new proposal for a long-term EU strategy to reduce greenhouse gas emissions. In October 2017 the European Parliament for its part called on the European Commission to «develop, by COP24, an EU strategy for zeroing emissions by the middle of the century».

The new vision of the European Commission does not aim to launch new policies or revise the targets already set for 2030, but just to set the course for EU climate and energy policies, while at the same time boosting the modernisation of the European economy and sustainable economic growth, with related social and environmental benefits for all EU citizens. A very ambitious goal, a real squaring of the circle.

The seven strategic components of this option towards a zero net emissions economy are identified as follows:

1. Making the most of the benefits of energy efficiency, including zero-emission buildings
2. Spreading renewable energies and the use of electricity as much as possible to fully decarbonise Europe's energy supply
3. Embracing clean, safe and connected mobility
4. A competitive European industry and the circular economy as a key factor in reducing greenhouse gas emissions
5. Developing appropriate and intelligent network infrastructure and interconnections
6. Reaping the full benefits of the bio economy and creating essential carbonium absorption wells
7. Addressing residual CO_2 emissions through carbon capture and storage.

All these objectives are pursued by focusing on the active role of citizens and local authorities, and especially on the involvement of cities through collaborative platforms for the search for sustainable and transformative solutions such as the EU Covenant of Mayors, URBIS (a joint initiative of the European Commission and the European Investment Bank) and the Urban Agenda for the EU.

The EU is therefore convinced that modernisation and decarbonisation of the EU economy can stimulate significant additional investment, while at the same time allowing significant savings in social and health expenditure for situations that can lead to serious illness and premature death.

Europe is therefore proposing itself as a global leader in the fight against climate change in the international arena – especially after the uncertainties and fluctuations of US policy on this issue and the failure of the European eco-tax project carried out by Commissioner Carlo Ripa di Meana at the time of the Delors Commission – operating as a driving force in international climate law. The European institutions expect now a strong push for their legitimacy in the outputs, to compensate for their weak democratic legitimacy: climate change actually opens in this sense a window of opportunity in their search of a new global political role (EU Climate Action Progress Report 2019).

By abandoning their usual central regulatory role, European institutions are accentuating their role as facilitators of negotiation and stimulators of research and technological innovation.

In short, it is the proposal for a "Europe-model", as guardian of the integrity of the environment equipped with epistemic leadership in the climate arena

discursively registered since the time of the EEC in the paradigm of sustainable development. The first signs of this orientation in explicitly accepting the environmental imperative date back to the time of the European Council of Dublin in 1990 and of the communications, Green Papers and White Papers by which the Commission developed its strategies and made clear its environmental action programs, starting from the fifth – "Towards sustainability" – of 1993.

The Sustainable Development discourse is however a difficult exercise for the European Commission, a sort of balancing of its strategic ambitions. The current profile of its strategy is clear and can be summed up in the application of the theory of "ecological modernisation", a kind of high-tech ecology dominated by economic rationality (Harvey 1996).

4. An approach to be verified with some caution

The whole debate on the advent of the green economy highlights the limits of the European eco-modernist approach.

Confidence in the market and technological optimism are the distinguishing features of this approach, and it is clearly readable as well in other areas of EU environmental policies, such in policies related to the conservation of water resources.

Technology and economic investments are either envisaged as necessary and sufficient medicine – a real *pharmakon* in the sense of poison and environmental remedy (Béal 2016) – to get out of the crisis. By the way, it is very dangerous for scientists and political decision-makers to accept this approach fideistically without taking all necessary precautions and to consider automatically acquired positive results for this operation. Nature is not always a "rational" partner in the sense in which modern economists interpret it.

While the activism of the Union's institutions is to be warmly welcomed as a positive result, the imprint of their policies has yet to be examined critically by both the sciences and public opinion. Optimism in the use of technology as an absolute panacea could prevent our critical sense from grasping once again the really systemic implications of the climate crisis we are currently experiencing.

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The Right2Water Initiative: the human right to water in the EU among social sustainability, vulnerable groups and exclusion of management benefits

JUAN JOSÉ RUIZ RUIZ

1. The European citizens initiative

The Lisbon Treaty introduced the innovative institution of European Citizens' Initiative (ECI), as an instrument to strengthen participatory democracy in the Union. The rules and procedures concerning this mechanism were set out in the Regulation 211/2011, which is applicable from 1 April 2012.

The only initiative, registered on 10 May 2012, which received the necessary number of signatures (by the closing date of the collection set for 1 November 2013) to be submitted to the European Commission was the initiative entitled Right2Water: "Drinking water and sanitation: a universal human right! Water is a common good, not a commodity!" (registered on 10 May 2012 and submitted after the signatures collection process on 20 December 2013), which was followed by the initiatives "One of us" and "Stop vivisection". According to AquaFed Press release «it is significant to note that close to 80% of signatories (1.3 million) are from Germany, while citizens from other parts of Europe that are the most-exposed to private management of public water services, i.e. England, Spain, France and the Czech Republic have never been very interested in this Initiative and the number of signatures in these countries is still very small. Therefore, this Citizens' Initiative is obviously filed by German lobbies. It cannot be considered

as representative of European citizens and not justify the exclusion of water from the Concessions directive». As Parks notes, a decisive boost was given in January 2013 when «a German comedian and satirist featured material about the right to water and the privatisation of water supplies on his television programme, ending the piece with information about the ECI and how it could contribute to safeguard publicly-owned water supplies in the country. This led to a significant jump in the numbers of signatures from Germany and Austria, with 84% of signatures coming from Germany by early February» (Parks 2014: 10).

The Right2Water Initiative aimed to propose to the European legislative institutions (the Council and the European Parliament) legislation that establishes the universal human right to drinking water and sanitation and promotes the provision of water and sanitation services as essential public services for all. In particular, the initiative recalls the obligations imposed by the respect of the human right to water, as outlined in the General Comment no. 15 of the Economic and Social Committee of the United Nations, distinguishable in the three categories of obligations "to respect", "to protect" and "to fulfil", in order to demonstrate the incompatibility with respect to them of the liberalisation practices of water services implemented by the States. Nevertheless, this is very far from being the case because, as Williams recalls, General Comment no. 15 «contemplates and accounts for the eventuality that water services may be provided by private companies or other third parties. Thus, it is difficult to contend that privatization of water systems and supplies in itself violates human rights» (Williams 2007 : 486). It is true that General Comment no. 15 defines a universal entitlement to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use. According to Tully, «most notable among the several omissions from General Comment no. 15 is the increasingly prominent role and responsibilities of the private sector. It is argued that unreflective resort to the General Comment template for addressing individual interests will render such instruments, outdated or unhelpful as normative guides» (Tully 2005).

The legislative initiative underlines how the liberalisation of *de facto* water services represents a limitation to this equal access (as some scholars argue, «at stake, therefore, with a neo-liberal water governance regime is the disproportionate influence and control that corporations and associated institutions can hold, potentially producing scenarios where water and wastewater services are based on financial capability rather than need»; see Melo Zurita M.L. *et al*. 2015: 173). According to the citizens' initiative, the obligation to protect requires that States prevent third parties (individuals, groups, companies and other entities, as well as agents operating under their authority) from interfering in any way with the enjoyment of the right to water. The initiative urges the European institutions to

ensure that the European water policy includes the following claims: a) «To use the Human Right to Water and Sanitation in all communications on Water and/or Sanitation»; b) «To refrain from turning water services into commercial services by excluding water from internal market rules», as stated by the European Parliament in a resolution of 2004; and therefore «not to liberalise water and sanitation services»; c) « To enshrine the "water is not a commodity" principle of the Water Framework Directive in all EU water and water-related policies»; d) Additional objectives have to do with EU competences in international development cooperation: «to increase access to water and sanitation worldwide, by making the achievement of universal access to water and sanitation part of EU development policy; to promote Public-public partnerships (Water Operator Partnerships) based on not-for-profit principles and solidarity between water operators and workers in different countries».

As noted by Melo Zurita M.L. *et al*. (2015: 173) «the defining of water subsequently became a key issue with the Commission rejecting the Council's amendment to the EU Water Framework Directive, that stated "water is not a commercial product like any other but instead is a part of Europe's heritage which belongs to the peoples of the EU and ought, therefore to be protected"». However, the European Commission claimed that the amendment was purely rhetorical and added nothing to a legal text. According to Kaita and Page (2006: 320), the European Commission position was «indicative of the shift within the Commission towards giving high priority to the idea of water as an economic good, and subsequently to water pricing as a key tool for environmental protection». Accordingly, the ultimate goal of the ECI was «to shift the European Commission's from their market orientation to a rights-based, people-oriented water-policy approach» (Van den Berge, Boelens and Vos 2018: 226).

Other measures proposed by the initiative are the promotion of public-public partnerships; the affirmation in all European policies concerning water resources of the principle «water is not a commodity» stated in the 2000 Water Framework Directive (WFD); to specify that the protection of our waters will prevail over trade policies; and to activate support programs for those who are not able to pay the bills for water supply, with the aim to prevent disconnections of users. Critics have suggested that «partnerships with only two partners (private and public) should be abandoned, and replaced by modes of negotiation, decision-making, management and multi-actor control by integrating users, investment funds, experts and excluded from water» (see Hugon 2005: 31). As highlighted by Williams (2007: 495), «no formal contradiction between the human right to water and privatization exists, since human rights documents do not specify the mechanisms for water delivery. Indeed, General Comment 15 and the Special Rapporteur's Report on the Right to Water explicitly recognize the

possibility of privatisation, and General Comment 15 lays out particular state obligations that must be met under privatization».

2. The reply of the European Commission

The Communication of the European Commission of 19 March 2014 is divided into several parts, opened by an introduction that preludes to a conclusion of «not full acceptance» (in the sense of not proposing a legislative act). The second part of the Communication opens with the recognition of the "indissoluble" link between access to drinking water and sanitation and the right to life and human dignity. The relevant provisions of the Charter of Fundamental Rights are also referred to, which, as the Commission points out, applies to Member States only when they implement EU legislation. In the absence of an express mention of the right to water within the Charter of Fundamental Rights, the (indirect) guarantee of the right is derived from articles protecting such as right to life (art. 2), right to human health (art. 35) and right to environment (art. 37) (see Bluemel 2004: 963). On 22 March 2013, AquaFed proposed to the EU Commission and Parliament to amend the European Charter on Fundamental Rights «in order that this human right is included in EU legislation».

The European Commission «is committed to ensuring that the human rights dimension of access to safe drinking water and sanitation, which must be of high quality available, physically accessible, and affordable, will continue to guide its future action». The European Economic and Social Committee's (EESC) opinion of 11th June 2014 recalls that «the Community approach is based on two views of an affordable price: one with a universal dimension, the other restricted to groups that have low incomes, are disadvantaged or vulnerable, such as people with disabilities or specific social needs. The second is meaningless unless it seeks, in keeping with Protocol No 26, "the promotion of universal access"». See EESC 2014: C 177/26). On the other hand, there is no room for a legislative proposal on one of the crucial points of the Right2Water legislative initiative, namely the aim of excluding water and sanitation from the "logic of the single market" and, also, water services from any form of liberalisation (see Sen 2005). Indeed, the Commission stresses that «water prices are set nationally and the EU has no say in the matter». Therefore, from this point of view, the Commission does not consider the proposition of a legislative act at European level, because «the EU has no role in the setting of water prices, which are determined at national level». Despite this, the European Commission notes that European legislation already partially fulfil the ECI claims, because in pursuing the objective of encouraging the sustainable use of limited water resources, the Water Framework

Directive (WFD) «requires Member States to ensure that the price charged to water consumers reflects the true costs of water use». It should be noted that Art. 10 of Regulation 211/2011 establishes that the European Commission only has an obligation «to set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action».

The European Commission recalls that «Article 345 of the Treaty on the Functioning of the EU clearly establishes a principle of neutrality in relation to the rules governing the system of property ownership in the Member States. The EU cannot, therefore, adopt legal acts affecting the rules governing the system of property ownership, including those affecting the ownership of undertakings providing a public service, such as the provision of water». Therefore, also from this point of view, the Right2Water initiative cannot translate into the proposition of an act, given that the Commission must respect the rules of the treaty.

In identifying concretely the services that fall into the various categories, the European Commission believes that in the context of «services of general economic interest» both large network industries (transport, postal services, energy, telecommunications) and all those economic activities subject to public service obligations, not yet (entirely) harmonised, other than network services, including water services (Gallo 2006: 246). In 2012 the European Commission established an blueprint for water founded on an economic and market-based vision that water should be used in sectors where it provides higher economic value (i.e. in agriculture, industries and for electricity production (Van den Berge, Boelens and Vos, 2018: 228).

The European Union «respects this diversity and the role of national, regional and local authorities» in ensuring the well-being of their citizens and the democratic choices concerning, among other things, the level of service quality. On the basis of this approach, the attribution to a service of the quality of «service of general interest» does not imply the automatic censorship of liberalisation systems; moreover, although the application of the principle of accessibility of tariffs contributes to economic and social cohesion in the Member States, the accessibility criteria are left to the Member States and not included in the competences of the Union (the EESC notes that «the Union recognises and respects access to services of general economic interest […] in accordance with the Treaties, as specified in the Charter of Fundamental Rights attached to the Treaty of Lisbon, which expressly refers to national laws and practices as the basis. Many Member States associate this right of access with the requirement to provide a service under conditions economically acceptable to all and, for this purpose, apply individual and collective social assistance programs, to different degrees. In practice however, many citizens in the EU experience severe difficulty in accessing essential

services, especially in the fields of housing, energy, electronic communications, transport, water, health care and social services»; see EESC 2014: C 177/25).

The result was the commitment by the Commission to set «its own future action by continuing to consider drinking water and sanitation in their human right dimension», and therefore universally accessible on the EU territory, of high quality and at affordable prices.

According to the Commission reply, «concerning affordability of water, it is important to recall that, when setting water tariffs in accordance with the principle of recovery of costs set out in Directive 2000/60/EC, Member States may have regard to the variation in the economic and social conditions of the population and may therefore adopt social tariffs or take measures safeguarding populations at a socio-economic disadvantage» (according to the EESC «there is no single, EU-level definition of or uniform approach to the affordability or economic accessibility of SGEIs, just as there is no instrument with which to measure it. Affordability often depends on the subjective perception of the user of what it costs and what it provides in terms of the individual's well-being. In general terms, an affordable service is one which citizens "can readily afford" (Green Paper on the Development of the Single Market for Postal Services). A service is entirely affordable if it is provided free of charge to citizens, as in the example of certain cities or regions that provide free urban public transport»; EESC 2014: C 177/26).

3. The reply of the Parliament

The European Parliament in its Resolution of 2015 has regretted the Commission communication accepting the initiative, in which it did not announce any new legal proposal, stressing that «the response given by the commission to the Right2Water ECI is insufficient, as it does not make any fresh contribution and does not introduce all the measures that might help to achieve the goals» (Resolution of 8 September 2015 on the follow-up to the European Citizens' Initiative Right2Water (2014/2239(INI)), para. 6). This poor outcome has raised considerable criticism, as Espaliú remarks in stressing that «this result is of course very poor and says little in favor of the scope of the European citizen's initiative in the European law making» (Espaliú Berdud 2016: 201).

In fact, in the view of the European Parliament the recognition of water as a fundamental right of the human person, entails «that, as stated in the Water Framework Directive (WFD), water is not a commodity but a public good that is vital to human life and dignity» and the exclusion of water supply from liberalisation processes to the qualification of water as a common good of humanity,

arguing that require the EU to remain neutral in relation to national decisions governing the ownership regime of water undertakings, therefore it should by no means promote the privatisation of water undertakings in the context of an economic adjustment program or any other EU procedure of economic policy coordination[1].

In the Resolution on the Green Paper on services of general interest of 14 January 2004, Parliament declared that «the supply of water [...] should not be subject to liberalisation» (para. 47). In a subsequent Resolution of 15 March 2006, the European Parliament stated «that water is a shared resource of mankind and that, as such, access to water constitutes a fundamental human right» (European Parliament Resolution on the Fourth World Water Forum in Mexico City, 16-22 March 2006). The latter Resolution standardises water into the category of "global commons", which entails intrinsic difficulty of protecting it, since as Stern notes «the appropriators of global commons come from all cultures, all countries, all political-economic systems, all political ideologies, and so forth, this fact makes it difficult to arrive at common understandings, either of the resource system or of the options for managing» (Stern 2011: 217).

European Parliament in Resolution of 8 September 2015 notes that countries across the EU, including Spain, Portugal, Greece, Ireland, Germany and Italy, have seen the potential or actual loss of public ownership of water services become a major issue of concern to citizens; recalls that the choice of method of water management is based on the subsidiarity principle, as laid down in Article 14 TFUE and in Protocol (no. 26) on services of general interest, which highlights the special importance of public services for social and territorial cohesion in the Union; recalls that water supply and sewerage enterprises are services of general interest and have the general mission of ensuring that the entire population is provided with high quality water at socially acceptable prices and minimising the negative environmental impacts of waste water.

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[1] In its Resolution of 8 September 2015 on the follow-up to the European citizens' initiative Right2Water (2014/2239(INI)), the European Parliament recognises «the importance of the human right to water and sanitation and of water as a public good and a fundamental value for all EU citizens and not as a commodity; expresses its concern that since 2008, due to the financial and economic crisis and to the austerity policies which have increased poverty in Europe and the number of low-income households, an increasing number of people have been facing difficulties in paying their water bills and that affordability is becoming a matter of growing concern; rejects water cut-offs and the enforced switching-off of the water supply, and asks Member States to put an immediate end to these situations when they are due to socioeconomic factors in low-income households» (para. 18). However, under claims of a fundamental right to water lies a number of legal layers very different in nature. As Thielbörger argues, right to water is a hybrid right: «often, the right to water has been considered either the one or the other: either socio-economic or civil-political. However, the truth lies somewhat in the middle: it is a bit of both»; see Thielbörger 2014: 115.

Nevertheless European Parliament stresses that, in line with the principle of subsidiarity, the Commission should remain neutral regarding Member States' decisions relating to the ownership of water services and should not promote the privatisation of water services either through legislation or in any other way (on the resistance to privatise water see Barlow and Clarke 2002).

In addition, European Parliament recalls that the option of re-municipalising water services should continue to be ensured in the future without any restriction, and may be kept under local management if so chosen by the competent public authorities[2]; recalls that water is a basic human right that should be accessible and affordable to all; highlights that Member States have a duty to ensure that water is guaranteed to all regardless of the operator, while making sure that the operators provide safe drinking water and improved sanitation. European Parliament recalls that for this purpose it crucial the role of national regulatory authorities «in ensuring fair and open competition between service suppliers, facilitating faster implementation of innovative solutions and technical progress, promoting efficiency and quality of water services, and ensuring the protection of consumers' interests».

Even more interesting is the explicit reference to the commitment taken under U.N. Sustainable Development Goal 6, contained in Art. 13 of the proposal to modify Directive 98/83/EC, which foresees to «achieve universal and equitable access to safe and affordable drinking water for all». Art. 2 of the proposal amending Directive 98/83/EC enshrines two kinds of obligations. The first obligation for Member States is «to improve access to and promote use of drinking water via a number of measures, some of which are included in the Article (assessing the share of people without access to drinking water, informing them about connection possibilities, encouraging the use of tap water in public buildings and restaurants, ensuring that equipment to freely access tap water is available in most cities, etc.)». The second obligation for Member States is «to take all measures necessary to ensure access to drinking water for vulnerable and marginalised groups. When those groups do not have access to water intended for human consumption in the sense of this Directive, Member States should swiftly inform them of the quality of the water available to them and give the necessary related health advice».

The European Parliament, in its resolution on the follow-up to the initiative of European citizens Right2Water, has noted that «Member States should pay special attention to the needs of vulnerable groups in society and also to ensuring that those in need have access to affordable quality water» (no. 62). Without

[2] As Tornos Mas (2016: 42) recalls for the Spanish case, Article 85.2 of the Spanish Act of Local Entities (after modifications introduced by Act 27/2013), constrains municipalities to have to seek the formula not only the more efficient but also the more financially sustainable.

prejudice to the right of the Member States to define those groups, they should at least include refugees, nomadic communities, homeless people and minority cultures, whether sedentary or not.

Indeed, Art. 9, para. 1, of the EU Water Framework Directive is drafted in a flexible and non-binding way since it stipulates that the Member States must take into account the principle of recovering the costs of services linked to the use of water. The user is required to pay according to the quantity taken, which involves a measurement of the volume consumed, and taking account of the polluter pays principle. A derogation from the principle of cost recovery from the user is possible for social, environmental and economic reasons or to take into account the geographical and climatic conditions of the region. The EESC recalls that «there are no official EU criteria for calculating the economic accessibility of SGEIs. EU texts focus more on principles and harmonised rules for setting "cost-oriented" or "more cost-oriented" prices, or on the "recovery of costs" (as required under the Water Framework Directive), while ensuring the supply of services to the population as a whole. Cost-oriented tariffs, however, even without a profit margin for the supplier, are not the same thing as economic accessibility and nor do they guarantee access for all to services at affordable prices». However, more recently, this issue has been clarified by the CJEU in *European Commission v Federal Republic of Germany*[3] arguing that «it cannot be inferred therefrom that, in any event, the absence of pricing for such activities will necessarily jeopardise the attainment» of WFD objectives (Recital 56). The CJEU stresses that «Article 9(4) of Directive 2000/60 provides that the Member States may, subject to certain conditions, opt not to proceed with the recovery of costs for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of that directive» (Recital 57) and so «it follows that the objectives pursued by Directive 2000/60 do not necessarily imply that Article 2(38)(a) thereof must be interpreted as meaning that they all subject all activities to which they refer to the principle of recovery of costs, as maintained in essence by the Commission» (Recital 58). Thus, as Delimatsis points out, the CJEU agrees with the European Commission that «the concept of water services is to be interpreted broadly to cover the supply of water (upstream) as well as the treatment of waste water (downstream)», but does not share the Commission's view «that water prices is as pervasive», since as the Commission argued, not all of the water services to which Article 2(38) WFD refers are subject to the principle of the recovery of costs, as CJUE has founded by looking at the WFD drafters' intent (Delimatsis 2017: 280).

[3] Case C-525/12, Judgment of the Court (Second Chamber) of 11 September 2014.

4. The European Economic and Social Committee position

In the opinion of the European Economic and Social Committee, entitled «For better implementation of the European pillar of social rights and the promotion of essential services», issued on 19 June 2019, the Committee argues that «in order to give effect to the stated principle that "everyone has the right to access essential services of good quality", it must be backed up by tangible measures in relation to sustainable development and social cohesion, while also ensuring that: a) the principle is guaranteed through legislative or regulatory provisions that define it and establish how it will be applied in each area; b) it is specified what compensation people can claim if the principle is not respected; c) legal redress, appeals or complaints are possible if the principle is breached».

The EESC asks for the concept of universal access to SGEIs to be clarified, and for legislative measures to be introduced obliging Member States to establish universal access indicators for each SGEI (density of service access points, maximum distance to an access point, service regularity, etc.)

As Committee points out, «given that affordable access is, increasingly, no longer guaranteed by means of a "reasonable" social tariff»[4], but through social assistance which is exclusively reserved for the poorest people, and given that the poorest are not the only ones who have serious financial difficulty in accessing SGEIs, the EESC reiterates its call for affordability to be determined by identifying a basket of services considered essential. The financial contribution of a household for each of these services should be set as an acceptable proportion of the social wage/minimum income, above which prices are deemed to be inflated and require regulatory measures or should confer an entitlement to public aid. After Lisbon Treaty it is clear that accessibility and affordability of certain essential services. In this regard, as Delimatsis (2017: 275) points out, the CJEU has identified in Almelo[5] «the main elements that constitute a SGEI, such as continuity (uninterrupted supply of the service), universality (benefitting the consumers throughout a given territory) and equality (supply with uniform tariffs […] regardless profitability)».

The fundamental principle no. 20 of the European pillar of social rights, concerning «Access to essential services», proclaims that «every person has the right to access essential quality services, including water, sanitation, energy, transpor-

[4] As regards the social tariffs, the EESC recalls that «normally the tariff would involve a fixed fee to cover fixed fee to cover fixed costs and a variable element to account for the volume of water consumed». Although direct subsidies by public authorities are forbidden, social tariffs are envisageable; see Correljé *et al*. 2007: 153.

[5] Municipality of Almelo and Others, 1994, C-393/92, para. 48.

tation, financial services and digital communications. Support for access to these services is available for people in need».

The concept of "essential services" does not appear in the Treaties, which deal only with public services (transport) and services of general interest (economic, not economic). The aforementioned 20th pillar principle offers no definition of what is meant by "essential services", merely listing a series of examples of such services without drawing up an exhaustive list. The concept of "essential services" is currently used in the context of the United Nations sustainable development goals.

In the absence of any definition, and given the examples of services listed in principle no. 20, it is clear that this is the case of "services of general economic interest", subject to universal service obligations or public service obligations referred to in Art. 36 of the EU Charter of Fundamental Rights and Art. 14 TFEU, as well as the Protocol (no. 26) on services of general interest. Simmonds (2003: 6) argues that political uses of terms has caused some confusion beause «in the EU context the concept of universal service was in origin market-related, and no necessarily a result of deliberate social policy».

However, according to the EESC it should be noted that interpretative provisions of Protocol no. 26 on SGIs, annexed to the TFEU, go beyond the framework of a simple guarantee of "quality access" and provide for a high level of quality, safety and affordability, equal treatment and the promotion of universal access and user rights. The EESC (2014: C 177/26) recalls that «according to the 2003 Green Paper on Services of General Interest, the Member States must define certain of the criteria to be applied in determining the affordability of a service. They must ensure that the criteria established uphold a series of consumer and user rights, such as accessibility to SGEIs for people with disabilities, while putting in place a price control mechanism and/or by distributing subsidies to the persons concerned. Such criteria could be linked for example to the price of a basket of basic services, to be defined by the Member States, the maximum price of which (the effort rate) is set as an acceptable proportion of the disposable income of the most vulnerable people».

In the evaluation of the application of Protocol no. 26, the EESC stresses that «No overall assessment has been made of the positive effects (price reduction, diversification of supply) and negative effects (price increases, creation of oligopolies, market skimming, job insecurity, social dumping) of the policy of liberalising SGEIs» while admitting that in the case of some services, the introduction of competition has led to an increase in tariffs and/or a weakening of the tasks of public service. It should be remembered that Protocol no. 26 TFUE calls on the Member States to guarantee a high level of quality of SGEIs, while the pillar is limited to a simple and essential "quality" service.

In the opinion of 21 January 2014, the EESC stressed that «A high level of affordability in respect of services of general economic interest (SGEIs) is nevertheless one of the shared values, i.e. values embraced by all EU Member States, set out in Protocol no. 26 on Services of General Interest (appended to the Treaties) which must be fully taken into account by the EU and the Member States, within their respective competences, when implementing all their relevant policies».

In addition, the EESC proposed in the same opinion that the European Union must firstly clarify the concept of affordability of SGEIs for all and adapt it in line with the requirements of the Treaty of Lisbon (the aforementioned Protocol no. 26) and on the other hand that Member States must adopt legislation based on secondary legislation which obliges them to: a) define indicators to determine the affordability of a service, together with an independent SGEI performance evaluation mechanism, covering compliance with economic accessibility; b) establish a basket of basic services, the household effort rate of which is set as an acceptable proportion of disposable income. An expenditure ceiling for these services should provide an objective basis for quantifying the concept of affordability and determining the overall percentage of household expenditure above which constitutes excessive cost entitling people, where appropriate, to public assistance; c) define the concept of "vulnerable persons" and "disadvantaged groups" more precisely. In this regard, the European Commission should review the way it makes decisions when checking obvious errors in determining State aid.

In the deeds (of soft law) that have specified the Union's competences in the field of general interest services, there are different categories – not expressly foreseen by the Treaties – not easy to distinguish one from the other: for example, Services of General Interest (SGI), Services of General Economic Interest (SGEI), services that constitute activities of overriding general interest, Services of Public Utility, Social Services of General Interest[6].

The Member States have wide discretion to define, organise and finance SGIs that meet users' needs, on the basis of and with reference to social and civic action. As Simmonds (2003: 61) has highlighted, Public services for European Commission «do not necessarily have to be provided by the public sector, nor does the term imply public ownership of the service infrastructure». As for

[6] According to Camenen (1996: 23), although the expression of public service «is used in particular by the continental European countries, where the legal tradition is characterised by a pronounced difference between public and private law. However […] it will be found under other designations, even in legal systems based on the Anglo-Saxon tradition which themselves also have the concept of public interest or general interest, under the name, for example of 'public utility' or public interest'. It can therefore be assumed that this concept exists in all member States». See European Parliament, Directorate-General for Research, *Public undertakings and public services in the European Union*, *Economic Affairs Series*, Working document 21.

SGEIs, they follow a commercial approach and subject to EU competition and single market rules, unless such rules prevent them from carrying out their missions. Non-economic services of general interest are by definition not bound by a market-based approach and are the exclusive competence of the Member States, on the basis of Art. 2 of Protocol no. 26.

Protocol no. 26 to the Lisbon Treaty, although it does not outline a single and all-encompassing notion of service of general interest, states that the "common values" referred to in Art. 14 TFEU include in particular «a high level of quality, safety and accessibility economic, equal treatment and the promotion of universal access and user rights» (Art. 1, para. c, Protocol).

5. Confusions regarding water as a right

Has water become "a commodity", instead of a gift that we receive gratuitously from nature? Water seems to have a double nature, it is seen either as a good of social interest, sometimes or an economic good. European law embraces the first facet, retaining that the water resource should not be understood as a commercial product but as a common good.

Because of this, most of national legislations establish that drinking water supply is a "service of general interest", therefore removed from the logic of the market[7], provided by companies subject to public regulation, which determines tariffs, investments, performance levels, with the aim to guarantee the service offered to citizens. As Berg (2013: 11) argues «on the one hand higher prices are politically unpopular, but on the other hand government transfers to the utility enable it to make investments that improve service delivery, although government funds have substantial opportunity costs». But often it is said that "public water" implies "free water", which is a colossal misunderstanding, suggesting that tariffs increase to allow private companies to make a profit from the supply of essential goods. Therefore, it is argued that from the common good of the water service supply follows the duty to finance other than through tariffs, through general taxation, but there is a strong criticism about this choice. Berg (2013: 9) in fact argues that «excessive political involvement in utility operations is almost certain to lead to inefficiencies: excessively low tariffs that starve the utility for cash needed for maintenance and network expansion. Furthermore, political objectives for the water and sanitation sector are seldom prioritised: low tariffs,

[7] See Rastello and Sipalla 2007: 77. According to Subramaniam (2018: 49), the neoliberal agenda promoted by WTO has pushed for privatisation pressures which both has woken the role of State in allocating water and has created a framework of rules that promote the mobilisation of water as a marketable commodity.

network expansion, and service quality are reasonable objectives, but they are mutually inconsistent».

It must be observed that in the name of an alleged «ontological inclination towards benefits» (Massarutto 2019: 3) of private companies[8], a sort of financial franchise that claims to turn them into public entities is usually invoked for future new municipalisation[9], but even if what is intended is that these municipalised societies must not be subject to the limits of public financing and therefore not subject to the rules of the economic-financial balance, it would imply that private companies will be barred from obtain benefits but not from incurring losses, which usually results in a financial black hole (Massarutto 2019: 3). In some countries much more effective measures have already been activated such as the social water bonus[10]: this is a measure that can be improved, although it has already given good results in terms of containing water poverty.

But really water as a human right means free water? Water, as a good, has characteristics such as liquidity, fluidity and an ability to renew itself, thus it is impossible to determine borders and therefore its appropriability. Because of this «the problem of the lack of appropriability is especially pertinent to water resources, since water is a publicly held resource. Although private firms and individuals may enjoy the right to use water, they rarely have title to the corpus or body of the resource» (National Research Council 2004: 23). Some scholars have pointed out that the problem of the lack of appropriability of water results in the lack of tradable property rights to water and thus in the impossibility of considering water as a tradable commodity[11].

Nevertheless, as Cullet (2001: 238) has highlighted, reforms over the past decades «have tended to strengthen individual appropriation of water resources», to the extent that «one of the landmark developments in water law in recent years has been the development of tradable water rights».

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[8] For some scholars water privatisation clashes with fundamental rights, see Naegele (2004).

[9] As Barlow and Clarke (2005: 185) point out, «one of the more significant kinds of water fightback [...] taking place in recent years has to do with communities that have struggled to regain public control of their municipal water services after they have been privatized».

[10] Indeed, as a report of Aqua Publica Europea (2016: 5) points out, «it is now widely acknowledged that low tariffs are not an appropriate response to affordability issues: under-financed water utilities will provide low quality services, which will hamper their capacity to ensure universal access, thus ultimately harming lower-income households and marginalized groups».

[11] Nevertheless, there are two schools of thought on the interpretation of water as an economic good due to a considerable misunderstanding of Dublin Principles (ICWE, 1992). The first one «maintains that water should be priced through the market». The second one interprets economic value of water as «the allocation of scarce resources, which does not necessarily involve financial transactions»; see van der Zaag and Savenije (2006: 7).

Conversely, the approach focused largely on right to water interpreted as a fundamental right[12], aims to consider water as a non-tradable good, and therefore not subject to rules relating to contractual services (formal dimension of the effective recognition of the right to water)[13], as well as the right to access to water for primary needs related to healthy living and eating aims to exclude the logic of profit (i.e. right to access the drinking water in economically acceptable conditions by all[14], and effective dimension allowing the right to be guaranteed), (see Lucarelli 2010: 91).

In line with this conception, the human right to water, as recognised by the United Nations, is modelled around sufficiency, wholesome, acceptable, physically accessible and convenient. Precisely as regards this last feature, the United Nations stated that water and access services and facilities must be available to everyone, so the United Nations Development Program (UNDP) suggested that the water cost should not exceed 3% of family income.

Nevertheless, it is important to underline at this point that in no case the fact of being recognised as a human right implies the free supply of water. The United Nations itself in June 2011 corrected the misconception of free water and sanitation in a press briefing stating that "water and sanitation services need to be affordable for all. People are expected to contribute financially or otherwise to the extent that they can do so». The only two constraints applicable on water costs imposed by General Comment 15 are affordability and equity. Under Covenant on Economic, Social and Cultural Rights (CESCR) General Comment 15 «equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households». As Hugon (2005: 32) notes, «taxation can target efficiency, equity and sustainability objectives. It must not have negative redistributive effects. Thus, in poor countries, the mea-

[12] Neverheless, as Cullet (2001: 238) has pointed out, «human rights cannot provide the specific content of a right in its implementation on the ground and thus require the existence of more specific laws to ensure the realization of such rights. On the other hand, water laws need to be integrated into constitutional frameworks», otherwise «water law run the risk of remaining simply a set of technical and economic prescriptions».

[13] However some authors makes a strong criticism of the tendency of most legal framework in the modern era to emphasise sovereign and individual access to and control over water because this emphasis «has neither fostered equitable access to water nor sustainable use of water»; Cullet (2001: 242).

[14] In the view of some scholars, «water is a special good for which there is no substitute, that therefore its allocation is a societal question that cannot be left to market forces alone and hence that the price of water should not be determined by the market, and finally that, notwithstanding the foregoing, water should have a price in order to achieve two objectives, namely recovering the cost of providing the particular water service and giving a clear signal to the users that water is indeed a scarce good that should be used wisely»; van der Zaag and Savenije (2006: 7).

sures favoring well-served consumers are in fact effects of worsening inequalities among low-income or unserved section of the population». In para. 12.c, ii) of General Comment no. 15, affordability is understood in the following sense: «direct and indirect costs of water must not compromise or threaten the realization of other Covenant rights» (thus, equity relates to the comparative burden of a pricing structure on economic classes, while affordability relates to the price of water in relation to individuals' ability to afford the other necessities of life). This second requirement implies that the state must protect the most vulnerable members of society. In terms of para. 15 of the General Comment, «states parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities». It is interesting to note that this right of vulnerable population «appears to be linked to, but somewhat distinct from the concept of non-discrimination», because «the full text of paragraph 15 juxtaposes provision of water for the poorest members of society with non-discrimination»; Williams 2007: 499).

The evidence of several studies is the lack of relevance of the ownership of public undertaking: both private and public sectors have advantages and disadvantages. As Bakker (2010: 6) has pointed out, it is wrong categorically «refute private sector involvement in water supply, nor simplistically defend government provision» given that there are well run public and private water supply as well as poorly run public and private supply. Public ownership of goods does not necessarily imply the public management of services, nor their public financing through general taxation, while the ability to invest and ensure an efficient industrial management of the service is essential (critics blame private operators for tariff increases but according to some scholars in this case causes and effects are confounded). According to Smith (2003: 212), regulatory agencies must prioritise service expansion and cost minimisation in order to be sensitive to the affordability of the poorest. The investment levels necessary in the long term must be guaranteed to ensure the proper functioning of the water system, avoiding the risks of opportunistic over-investment by private or under-investment by the public for reasons of political consensus (containment of tariffs) and resource / debt limits. Not surprisingly, the vast majority of OECD countries present water sector regulators with considerable independence from the government.

Another issue is to confuse public financial and full cost recovery mechanisms. Financial sustainability for water utilities depends less on public finance than on user tariffs. As noted by Baietti and Curiel (2005: 2), financial sustainability should thus entail: «a) lessening the dependence on governmental subsidy transfers, b) increasing reliance on user tariffs as the main source of internally generated financing, and c) gaining financial independence to source external private financing based on the enterprise's own creditworthiness». As pointed

out by Correljé *et al.* (2007: 153), «in principle, delegated contracts plus strong regulation will reduce pressures upon the public budget, through private funding and the principle of cost recovery»).

6. The road of right to water as a fundamental right

In light of the European Social Pillar, which defines the right to access water in the framework of social protection and social inclusion[15], in order to ensure the right to water as a fundamental right, national legislation should pay a strong attention to the social sustainability of tariffs paid by end users; and should induce operators to make progressive improvements with a view to the financial sustainability of the utilities managed.

In some countries minimum requirement per capita is a light expense, entirely covered by general taxation. As Aqua Publica Europea (2016: 23) reports, «the city of Paris decided to give away, free of charge, a certain amount of water, equal to the amount considered necessary to satisfy the basic needs, as defined by the World Health Organization (that is to say, 20l/capita/day of drinking water). Only the drinking water part of the invoice (that is, around 1/3 of the invoice) is targeted».

In the drinking water sector, in addition to directly investing public funds, the State therefore offers huge sums to guarantee investments in the water sector, thus allowing new resources to be released to improve and enhance the service, but with direct impact on user tariffs. As Baietti and Curiel (2005: 2) argue «the dilemma for policy-makers is that [...] the shift from subsidies to user charges and from donor grants and concessional loans to more commercial financing terms increases the amount that consumers are expected to pay through user tariffs». Policy makers must make a choice, «either adopt cost recovery guidelines for setting tariffs and move up the levels of financial sustainability or keep the utility in the lower thresholds of financial sustainability and perpetually reliant on unpredictable sources of public sector financing».

The fact remains, however, that the trend of increased corporatisation has resulted in the emergence of regulatory oversight at the national level in the sector of water supply (Casullo *et al.* 2019: 9). The need of a regulator is justified in order to achieve the following purposes: i) to advice on tariff regulation or to set tariffs in the case of regulators with statutory powers; ii) to provide high quality water

[15] Moreover, as Jakab and Mélypataki (2019: 20) argue, the Social Pillar aligns the right to water not just as a fundamental right, but a social fundamental right as well, which implies that this right is not directly enforceable in court, but the State must seek the conditions for an effective access to water for all.

service at the lowest possible cost; iii) to ensure the efficient future provision and review of utilities' investment plans to suit the water needs of urban and rural development; however powers to set quality standards for drinking water usually fall within the scope of ministries of health or environment; iv) the enforcement of compliance with quality standars, informing customers and collaborating in educational programs; v) to respond to customer complaints by articulating mediation or arbitrage systems; vi) to monitor compliance with sanitary and environmental regulations. As outlined by the OECD, «water regulators routinely resort to consultation and cost/benefit analysis to ensure the quality of the regulatory process. By contrast, systematic ex post evaluation of regulatory decisions remains the exception». Therefore, most of the regulators prepare an economic assessment on tariff settings, terms and conditions of market access and service standards (see OECD 2014. See also Tamames and Aurín 2015: 35.)

7. Conclusions

It must be observed, first, that nothing in the Directive 2014/24 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts. Moreover, Art. 1(4) of that directive provides that it «does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with State aid rules, and which specific obligations they should be subject to».

Having said that, the fact remains that in many countries there is a lack of transparency induced by a decentralised regulation involving thousands of independent municipal agencies, which implies a heterogeneous and highly variable situation, in which the powers in the urban water cycle are very fragmented and without coordination. This lack of transparency is greater in direct management municipal services than in public and private companies. This is why a national regulator could establish the appropriate mechanism in a normative way based on the per capita income of families and their objective water needs to avoid the populist use made of these very few situations[16]. The independence of political

[16] For instance in Ireland parties like Sinn Féin has committed on April 2015 to abolish domestic water charges in Government, and has proclaimed its engagement to not pursue arrears for these same charges. Sinn Féin has published two pieces of legislation to both abolish water charges and enshrine in the Constitution the right of the people to the retention of water services and infrastructure in public ownership. The Water Services Repeal 2014 was ruled out

power in water management avoids populist temptations about tariffs and normalises the financial sustainability of the service.

The concerns expressed by the ECI Right2Water that water supply and management of water resources should not be subject to "internal market rules" and that water services should be excluded from liberalisation, has been upheld in the Directive on the award of concession contracts that provides: «concessions in the water sector are often subject to specific and complex arrangements which require a particular consideration given the importance of water as a public good of fundamental value to all Union citizens. The special features of those arrangements justify exclusions in the field of water from the scope of that Directive» (recital 40, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts).

Nonetheless, according to an EPSU (European Public Service Union) press release of 8 February 2018, the European Commission commissioned in 2015 the "Study on water services in selected Member States" from the consultancy Ramboll, «with the aim of seeking proof that there are negative economic effects on the internal market of the exclusion of water/wastewater concessions from the directive». However, the study founded that there is no proof that market processes result in extra benefits for consumers. Indeed, as the study stresses, «WFD does not allow governments to profit from water charges, but the directive recommends two policies which will push water charges upward. First, governments are directed to price water at a sufficiently high level so as that users will be motivated to reduce their water usage. Second, governments are encouraged to take a long-term economic view» (Blagoeva and Rossing 2015:35).

From this picture it emerges that it is up to the States and not to the Union to identify services of general economic interest and the decision «on the need to burden them with public service obligations and possibly organize them as a universal service». The attribution to a service of the quality of "service of general interest" does not imply the automatic censorship of liberalisation systems.

In addition, the accentuated national diversity that the European Union is committed to respecting, as well as the "neutrality" that the European Union deserves to national decisions governing the ownership regime of services suppliers (Palladino 2014: 31), remains an obstacle for improving the quality of life of all citizens and for overcoming social exclusion. A positive signal can be found in the provision of an *ad excludendum* clause contained in the aforementioned directive on the awarding of concession contracts precisely with reference to the

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of order as it did not comply with the Standing Order 156, which prohibits the initiation of a Bill by a private member which «involves the appropriation of revenue» other than incidental expenses. In fact, according to Dáil Standing Orders opposition parties are prevented from tabling laws that involve the spending of exchequer funds.

issue of water (Palladino 2014: 32). As pointed out by Salacuse (2013: 227), «a water concession contract has a dual nature of both a contract and act of the sovereign». As a result as Miranda (2007: 532) has highlighted, water concessions should be treated as public policy mechanisms rather than merely as private contracts, therefore they should be subject to the scrutiny of the public.

Likewise, the Right2Water outcome raises the question of whether the EU is committed more to strengthening the high level of quality and safety of SGEI and less to ensure economic accessibility. A further step in the direction of a gradual framework of sanitation and right to water has been the amendment of the drinking water directive, intended for human consumption. The text proposes to tighten the maximum limits for some pollutants such as lead (to be halved) and harmful bacteria, and to introduce new limits for the most polluting substances (Press release from Parliament dated on 23 October 2018). It also supports the principle of universal access to drinking water, securing it for vulnerable groups with zero or limited access. It provides for Member States to take measures to «improve access to water in cities and public places, by creating free fountains, where technically feasible and proportionate», and to encourage «the supply of tap water for free or at low cost in restaurants, in canteens and catering services».

Turning to the framing of a fundamental right to water, it must be recalled that the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which entered into force in 2013, created a complaint mechanism allowing individuals or groups to file formal complaints on violations of the human right to water and sanitation, but other elements must be defined in order to ensure the right to water. For example, it is important to draw a distinction between availability and affordability. According to European Parliament, these two concepts are present both in Art. 14 TFUE and in Protocol no. 26 on services of general interest, in according with which «water supply and sewerage enterprises are services of general interest and have the general mission of ensuring that the entire population is provided with high quality water at socially acceptable prices»[17]. As U.N. Special Rapporteur Catarina de Albuquerque explains, on the one hand, «availability requires that water and sanitation facilities meet people's needs now and in the future: Water supply must be sufficient and continuous for personal and domestic uses, which ordinarily include drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene» (de Albuquerque 2014: 33). On the other hand, affordability means that «people must be able to afford to pay for their water and sanitation services and associated hygiene. This means that the price paid to meet all these needs must not limit people's capacity to buy other basic goods and services, in-

[17] European Parliament resolution of 8 September 2015 on the follow-up to the European Citizens' Initiative Right2Water (2014/2239(INI)), para. 44.

cluding food, housing, health and education, guaranteed by other human rights» (de Albuquerque 2014: 35). Both of them must be part of legal framework of right to water. The right to water has a compound nature but above all it is a right of highest complexity. It depends on the climate but also depends on different interpretations varying the expectations from country to country and entails different technically water supply technologies (see Thielbörger 2014: 124, 130). The intertwined of numerous interrelated and complementary factors can become an additional obstacle in order to attend the need for greater precision in the framing of rights as entitlements, provided that rights must be framed as explicit as possible for their assessment and feasibility in judicial terms. Notwithstanding this, CJEU's case law on WFD (along with EESC opinions) should be welcomed as a major contribution to specify what is meant by the right to water.

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Recent trends in environmental issues

The democratic principle and the exceptions to the right of access to information held by EU bodies in the environmental matter

FRANCESCO DEANA

I. Introduction

The European Union (hereinafter EU) is a legal order funded by an association of States, with an atypical constitutional structure, grounded on the devolution of national sovereign powers and in constant need of democratic legitimation. The 1992 Treaty on the European Union (TEU) – signed in Maastricht in February 1992, which came into force on 1 November 1993 – represented the shift from an economic Community towards a Union and marked «[…] a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen» (Barth and Bijsmans 2018). Participation, accessibility and transparency in the decision-making process thus became priorities to strengthen «the democratic nature of the institutions and the public's confidence in the administration» (see the Declaration No 17 on the right of access to information, in OJ 1992, C 191. For an analysis on the evolution of participation and transparency in the European Community/European Union see respectively Bignami (2004) and Bradley (1999). On how the principle of transparency is used by the Court of Justice of the European Union – hereinafter CJEU – to enhance the democratic legitimacy of the EU, see Lenaerts 2013).

The democratisation of the EU had a boost fifteen years later, when the Lisbon Treaty enhanced democracy and better protection of fundamental rights, both mentioned among the values upon which the European Union is founded (see Article 2 TEU). The Treaty on European Union now includes relevant provisions on democratic principles as Articles 10(3) and 11(2), which respectively state that citizens have the right to participate in the democratic life of the Union, that decisions shall be taken as openly and as closely as possible to the citizen and that EU institutions shall dialogue, openly, transparently and regularly, with representative associations and civil society.

Therefore, it is no surprise that the EU primary and secondary law (see par. 2) has recognised that citizens have a fundamental right of access to documents held by all EU institutions, offices, bodies and agencies (Rossi and Vinagre e Silva 2017) and that this is necessary for the democratic functioning of the EU, including (*rectius*: notably) in the environmental matter.

The 'environmental democracy' (Mason 1999 and Parola 2013. See also principle no. 10 of the 1992 Rio de Janeiro Declaration on environment and development, available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf) of a legal order depends on the citizen's right to freely access information on environmental quality and problems and the right to meaningfully participate in decision-making process. This paper aims to analyse how the EU legal order protects these rights to promote equity and fairness in the field of sustainable development. Without effective rights grounded on a strong legal foundation, the exchange of information between governments and the public is stifled and decisions that harm communities and the environment cannot be challenged or remedied. Therefore, this paper will measure the extent to which EU law establishes and recognises environmental democracy rights, notably determining the breadth of the right of access to environmental information. An analysis of the CJEU and General Court (GC) case-law will help in tracing the enforcement of the democratic principle in the matter.

2. The (fundamental) right of access to documents held by the EU

Notwithstanding the 'democratic revolution' brought about by the Treaty of Maastricht, prior to 1997 the Treaties did not contain any provision conferring on the Community (or the Union) competence to adopt general rules on access to documents. The only reference was the above-mentioned Declaration No 17 on the right of access to information. Therefore, just after the entry into force of the Maastricht treaty and notably in 1993 and 1995, the EC Commission and the

Council adopted a common self-regulation document on public access to documents (a Code of conduct, published in the OJ 1993, L 340/41) and specific decisions that implemented it (Decision of the Council of 20 December 1993, no. 93/731 and Decision of the Commission of 8 February 1994, no. 94/90). Because of the very nature of those documents, at this stage we cannot mention a proper "right" of access. Instead, we should refer to a sort of concession to citizens, purely discretionary, freely amendable or revocable by the EU institutions (Salvadori 2010: 1).

A legal basis for the adoption of binding rules granting a right of access was only created by the Treaty of Amsterdam, which introduced Article 255 in the EC Treaty. Here, "access" qualifies as the right for any «natural or legal person residing or having its registered office in a Member State» to access European Parliament, Council and Commission documents. Article 255 EC then refers to secondary EC law the determination of general principles and limits (on the grounds of public or private interest) governing the right of access.

Article 255 EC marked the transition from a system of completely discretional internal regulation and – possibly – of absolute secrecy to a system «where the general and fundamental principle is of the "greatest possible" level of openness» (Curtin 2000: 37; see also Harden 2009: 193). However, only Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001, L 141/43, hereinafter the Access Regulation. See S. Peers 2002: 385 ff.) translates this right into an obligation that now applies to all institutions, bodies, offices and agencies of the EU (the Regulation directly applies only to institutions mentioned in Article 225 EC. However, specific provisions in their respective founding acts extended its application to EU agencies. Other institutions and bodies have adopted voluntary acts laying down rules on access to their documents on the basis of the Access Regulation). The same regulation defines what a "document" is, namely (Article 3) «any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility». The right to access must concern (Article 2) any documents held by the EU, either drawn up or received by it and in its possession (e.g. official documents, historical archives, meeting minutes and agendas, etcetera), "in all areas of activity of the European Union."

After some twenty years of evolution within the EU legal order and since the entry into force of the Lisbon Treaty, a «right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium», is enshrined in both the Treaty on the Functioning of the European Union (TFEU) and the EU Charter of Fundamental Rights. Both the norms have contributed to

further extending the scope of the right of access. On the one hand, Article 15 (3) TFEU slightly amended Article 255 EC, notably stating that also the Court of Justice of the European Union (Amalfitano 2013), the European Central Bank and the European Investment Bank shall be subject to the right of access, even though this only applies when exercising their administrative tasks. On the other hand, Article 42 of the EU Charter – which is legally binding anytime the EU or its Member States operate within the scope of EU law – has given the fundamental right of access a universal dimension, as it belongs to EU citizens, to Third Country nationals (if resident in a Member State) and to any legal person having its registered office in a Member State. In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) TFEU. However, as Article 15 (3) TFEU in turn refers to the general principles and limitations applicable to the right of access established by EU secondary legislation, in order to determine the specific scope of the right of access, reference should then be made to the Access Regulation and to a lex specialis (Regulation no. 1367/2006. See par. 3) adopted in the environmental matter.

That right now benefits from a twofold status: that of fundamental right and that of general principle of EU law (see Prechal and de Leeuw 2008; Broberg 2002).

3. The right of access to *information* held by the EU in environmental matters

Undoubtedly, this may seem like a broad right. However, such a right of access to *documents* may look narrower than a right of access to *information*, which is something including, for example, the right to ask open questions as opposed to simply obtaining access to pre-existing documents. Access to information is provided for by the EU in the environmental matter, thanks to pieces of legislation devoted to implement environmental democracy in the shape of an *erga omnes* right of access. The rules implementing the right of access to documents held by the Union are therefore not limited to Regulation No 1049/2001 alone. The international obligations assumed by the EU – together with its Member States – have in fact imposed the adoption of ad hoc legislation in the environmental matter.

The Access Regulation implemented Article 255 EC in 2001. In the same year, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention), which was adopted by the then European Community, its Member States and 19 other States on 25 June 1998, entered into force.

The Aarhus Convention rests on three "pillars": citizens must have access to information (not only to documents!), be entitled to participate in decision-making processes and have access to justice in environmental matters. According to the first pillar rules, the general public should be entitled to access information related to the state of the environment, public health and other factors affecting the environment in the possession of administrative authorities and (in certain circumstances) of private entities that exercise public responsibility falling within the scope of the very broad definition of "authority". The EU implemented the first pillar of the Aarhus Convention by way of Directive 2003/4 on public access to environmental information in EU Member States (OJ 2003, L 41/26), but only with a view to harmonising national legislation to guarantee the right of access to environmental information held by Member States' authorities (and not therefore by the EU). However, by ratifying the Aarhus Convention in 2005 (Council Decision 2005/370/EC of 17 Feb. 2005, OJ 2005, L 124/1), the European Union explicitly also committed itself to guaranteeing the right to access in environmental matters. The EU had to apply the Aarhus Convention to its own institutions and administrative bodies too, as far as they are considered "public authorities". The Access Regulation lays down rules for EU institutions that already complied to a great extent with the rules laid down in the Aarhus Convention, but not fully. Therefore, where the Aarhus Convention contains provisions that were not, in whole or in part, to be found also in the Access Regulation, it was necessary to address those, in particular with regard to the collection and dissemination of environmental information. Thus, the Aarhus Convention was further implemented in EU law by EC Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ 2006, L 264/13), known as the "Aarhus Regulation".

The two regulations perfectly coexist and complement each other. They share a common core of rules that the Aarhus Regulation, depending on the case, broadens or specifies. First, the Aarhus Regulation (Articles 2 and 3) extends the scope *ratione personae* of the Access Regulation, applying it to any request by an applicant for access to environmental information held, received or processed by any public institution, body, office or agency established by, or on the basis of, the Treaty (except when acting in a judicial or legislative capacity) without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities. As stated by the General Court (judgment of 27 February 2018, *CEE Bankwatch Network v Commission*, T-307/16, EU:T:2018:97, para 48-50), the Aarhus Regulation, which is purported to apply the Aarhus Convention to the

institutions and bodies of the European Union, does not apply in the framework of the European Atomic Energy Community.

Then, the Aarhus Regulation extends what it can be the object of the access request, as the it takes into consideration access to *information* rather than a mere right of access to *documents*. The General Court (then Court of First Instance) in case *WWF European Policy Programme v Council* (judgment of 25 April 2007, T-264/04, EU:T:2007:114) held (par. 76) that «case-law provides that the concept of a document must be distinguished from that of information» and that «[t]he public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word». However, Article 3(a) of the Access Regulation defines "documents" extremely widely, as «any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility»), so that the notions of document and information (the latter is defined under Article 2(1)(d) of the Aarhus regulation as «any information in written, visual, aural, electronic or any other *material form* (the emphasis is mine)») almost coincide. Therefore, access to information in non-environmental matters may be granted *de facto* only if that information is contained within documents.

Finally, the Aarhus Regulation extends the application of the derogatory rules provided for by the Access Regulation to the environmental matter, whilst it specifies those rules by narrowing the scope of the existing one.

4. Exceptions to the right of access to documents

In principle, indeed, all information held in any recorded form by the EU institutions, bodies, offices and agencies should be accessible, irrespectively of a justified interest of the applicant to access that specific information (i.e., the motive is irrelevant). Nonetheless, EU institutions can answer in several ways to an access request of this sort: they can answer positively, negatively or partially.

An answer can represent a pathologic response even where there is no formal unjustified refusal. Institutions can provide an "incomplete answer" or a "wrong answer", respectively when they give the applicant only part of the documents he/she asked for or when the documents the applicant is given do not quite correspond to his/her request. A legitimate fully negative response could occur where that EU institution or body does not hold the requested document or refuses access to it. You might also not get any reply at all, which is called "administrative silence" and is equivalent to a (mute) refusal.

Despite the right of access enshrined in EU law, under certain circumstances EU institutions and bodies can withhold some information; however, they are obliged to ground any total or partial refusals to provide access to documents on the exceptions to the right of access provided for in the EU law. Therefore, when an access to documents request results in a (full or partial) denial, the burden falls on the EU official to give a reasoned and detailed explanation. Rules on derogation result from the combination of the general rule (the Access Regulation) and, in the environmental matter, the *lex specialis* (the Aarhus Regulation). The key notion around which the discipline in question is built is that of public interest. In fact, depending on the case, public interest operates as a limit to the right of access or as a counter-limit to the right of institutions to deny access to interested applicants. Nonetheless, EU law has also placed specific private interests at the basis of similar exceptions.

An analysis of the various relevant provisions will allow to better understand the concept and to assess how the balance between the democratic principle of full access to information and the interest in withholding some kind of information is struck. However, before examining the content of the derogatory rules, it must be highlighted that as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (see CJEU, 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, par. 63; 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, par. 36; 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, par. 30), with the result that the mere fact that a document concerns an interest protected by an exception is not in itself sufficient to justify application of the exception (see CJEU, 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, par. 64; GC, 13 April 2005, *Verein für Konsumenteninformation v Commission*, T-2/03, EU:T:2005:125, par. 69, and 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, par. 29).

5. The general regime established under Regulation No 1049/2001

First, we must take into consideration Article 4 of the Access Regulation, which establishes a general regime providing for exceptions to the right of access to any kind of documents held by EU bodies. That rule limits the right of access on the grounds of either general or private interests. At par. 1(a), on the one hand, it allows institutions to refuse access to a document where disclosure would undermine the protection of a *public* interest as regards public security, defence and military matters, international relations, the financial, monetary or economic

policy of the Community or a Member State. On the other hand, private and specific interests can justify a derogation only:

a) Where disclosure would undermine the protection of fundamental aspects (*rectius*: rights) of someone's life, as privacy and integrity (par. 1(b)) or;

b) Where it would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings (to be interpreted as meaning that it may precludes disclosure only of documents drawn up solely for the purposes of specific court proceedings, in order to avoid the risk of upsetting the vital balance between the parties to a dispute. See GC, 6 July 2006, *Franchet and Byk v Commission*, T-391/03 and T-70/04, EU:T:2006:190, para 88-90) and legal advice («to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice». See General Court, 7 February 2018, T-852/16, *Access Info Europe v European commission*, EU:T:2018:71, par. 82), the purpose of inspections, investigations and audits (par. 2), such as the functions of political control exercised by the European parliament or inspections and investigation carried out by the European Commission before or during an infringement procedure.

The interests mentioned at par. 1 (a) and (b) are considered to be of such importance that there is no need to balance them against the interest of public disclosure and the Court has repeatedly held that no consideration of a possible public interest in disclosure is needed (see Adamski 2009). However, it is worth highlighting that quite recently the EU Legislator itself has ruled in a completely different way as regards privacy. Article 86 of the GDPR (Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016, L 119/1) allows disclosure of «[p]ersonal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest […] in order to reconcile public access to official documents with the right to the protection of personal data […]».

Unlike those ruled at par. 1, derogations grounded on private interest ruled by par. 2, even when founded and justifiable, may be counter-limited by the existence of an overriding public interest in a disclosure that must prevail. Proof of an overriding public interest can be hard to demonstrate for the applicant, restricting the right of access. Indeed, general considerations such as «an interest in building the confidence of citizens in their governmental institutions», or «the right of the public to be informed about the work of the institutions» cannot, by themselves, substantiate the existence of an overriding public interest (see GC,

judgment of 11 December 2018, *Arca Capital Bohemia a.s. v Commission*, T-440/17, EU:T:2018:898, par. 76; of 5 December 2018, *Liam Campbell v Commission*, T-312/17, EU:T:2018:876, par. 64 and *Sumner v Commission*, T-152/17, EU:T:2018:875, par. 64). Nevertheless, the General Court acknowledged that applicants could rely upon the principle of transparency to substantiate the existence of an overriding public interest, provided that they demonstrate how "especially pressing" it is in the cases at stake (judgment of 9 October 2018, *Éva Erdősi Galcsikné v Commission*, T-632/17, EU:T:2018:664, par. 44).

Thus, the applicant has to prove a) the existence of a public interest in disclosing the document, b) how disclosure of the requested documents would contribute to the protection of such an interest in the case at hand and c) the prevalence of that interest on the opposing private ones.

Instead, it is for the institution to weigh the particular interest to be protected through the non-disclosure of the concerned document against the interest in the document being made accessible. Equally, the burden of proving how access to that document could actually and effectively undermine the interest protected by Article 4 (2) rests instead on the institution that refuses access on that ground. Indeed, the mere fact that a document concerns an interest protected by an exception set by Article 4 is not enough in itself. It is rather necessary «that the institution in question must explain how disclosure of the document in question could […] specifically and actually compromise the interest protected by the exception» (Opinion of Advocate General Hogan delivered on 11 September 2019 in Case C-175/18 P, *PTC Therapeutics International Ltd v European Medicines Agency (EMA)*, EU:C:2019:709, par. 39. The AG here cites CJEU judgments in *Commission v EnBW*, cit., par. 64, and of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486, par. 68).

In striking that balance, the institution must have regard to the advantages of increased openness, as described in recital 2 of the Access Regulation, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (see again the landmark ruling in *Sweden and Turco v Council*, par. 45 and judgment of 3 July 2014, *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, par. 53).

According to Article 4 (1), (2), the risk of the "non-disclosure interest" being undermined must not, in order to be capable of being relied on, be necessarily «serious» nor «actually found to exist», as was instead proposed during the legislative procedure that led to the adoption of the Regulation. Nonetheless, the GC recently held that the commercial confidentiality exception would only come into play if it could be shown that the disclosure of the specific document could "seriously" compromise the commercial interests of the appellant

(Judgment of 5 February 2018, *PTC Therapeutics International* v *EMA*, T-718/15, EU:T:2018:66, par. 80 to 85). Besides that, both the GC and the CJEU held that such risk must be reasonably foreseeable and not purely hypothetical (CJEU, *Sweden and Turco v Council*, cit., par. 43, and GC, *PTC Therapeutics International* v *EMA*, cit.).

The same goes for derogations provided for by Article 4 (3), which are meant to protect the institution's decision-making process, except that here derogations expressly only operate where the disclosure of a document would *seriously* undermine the process (see GC, judgment of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15, EU:T:2018:167, para 61-64) and that the document relates to a matter where the decision has not been taken by the institution or contains opinions for internal use as part of deliberations and preliminary consultations within the institution concerned (the so-called "space to think exception". See Hillebrandt and Novak 2016). The institution must ground its decision taking into consideration all of the circumstances of the case including, *inter alia*, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question (GC, 9 September 2014, *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, par. 62). However, the institution is not required to submit evidence to establish the existence of such a risk, being sufficient in that regard the existence of "tangible elements" and "objective reasons" on the basis of which it can be inferred that the risk of the decision-making process being undermined if the documents were disclosed was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical (see GC, 7 June 2011, *Toland v Parliament*, cit., para 78 and 79).

The complex and delicate nature of such assessment, weighing and balancing required by Article 4, together with the particularly sensitive and essential nature of the interests protected, calls for the exercise of particular care and requires a margin of appreciation in favour of the institutions. A potential review by the GC of the legality of a decision either granting or refusing the access to a document is limited to "verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers" (CJEU, in *Jose Maria Sison v Council*, cit., par. 35 and 64). Nonetheless, in making their decisions, EU bodies benefit from two presumptive regimes, one provided for by the combination of the Access and the Aarhus Regulations (see § 6) and the other one developed in the case-law of the CJEU and the GC (see § 7).

6. Exceptions to the right of access in environmental matters (or How does the Aarhus Regulation interact with the Access Regulation?)

Article 3 of the Aarhus Regulation universalises the Access regulation when its application concerns environmental matters. Regulation No 1049/2001 shall apply to *any* request by *any* applicant (without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities) for access to environmental *information* (not document) held by Community institutions *and bodies*.

The extension also concerns the application to the right of access to environmental information of the two mandatory exceptions set in Article 4(1) and the several discretionary exceptions set in articles 4(2) and 4(3). However, Article 6 of the Aarhus Regulation complements the general regime of exemption.

First, where the information requested relates to emissions into the environment, Article 6(1) first sentence establishes a presumption of prevalence of a public interest in disclosure over commercial interests (of a natural or legal person, including intellectual property) and the purpose of inspections and audits, respectively mentioned at Article 4(2), first and third indents, of the Access Regulation. The purpose of investigation, which Article 4(2) mentions as well, is not affected by this legal presumption, therefore the EU body can always demonstrate the prevalence of the interests protected against disclosure. The presumption set by Article 6(1) first sentence is irrebuttable. This meant that the relevant institution to which an application for access to a document was submitted would disclose the document even if such disclosure were liable to undermine the protection of interests otherwise protected by EU law (GC, 8 October 2013, *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v Commission*, T-545/11, EU:T:2013:523, par. 38).

Secondly, as regards the other exceptions set out in Article 4 of the Access Regulation, Article 6(1) second sentence states that the grounds for refusal shall be interpreted in a restrictive way (which is nothing new under EU case-law), *taking into account* the public interest served by disclosure and whether the information requested relates to emissions into the environment. There isn't thus a presumption anymore, but a hermeneutical weighing factor that qualifies that kind of information as of peculiar public interest.

Finally, Article 6(2) sets a specific exception in addition to those set out in Article 4 of the Access Regulation, as it provides that «[EU] institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species».

6.1. *When does an information relate to emissions into the environment?*

A pivotal role in the application of Article 6 is played by the notion of «information which relates to emissions into the environment». The broader the notion, the wider the scope of the public interest clause. The notion of «emissions into the environment» within the meaning of Art. 6(1) sentence 1 Aarhus Regulation is neither defined in the Aarhus Regulation nor in the Aarhus Convention. Thus, the main features of the issue are to define the link that relates the information to the emissions and to define the concept of emissions itself.

The term emission has been defined in EU law by the Industrial Emissions Directive (directive 2010/75/EU) as a «direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land» (Article 3(4)). However, despite what the other EU institutions have submitted, the CJEU and GC case-law denied that the notion of emissions was to be interpreted restrictively and pointed out that only exceptions to the access to documents had to be interpreted restrictively. Presumption of an overriding public interest in disclosure provided for by Article 6(1) sentence 1 is not an exception, but a specific implementation of the general principle of the widest possible access to documents. Therefore, according to recital 15 of the Aarhus Regulation (only the grounds for refusal as regards access to environmental information should be interpreted in a restrictive way), the notion of emissions relevant for the Aarhus Regulation is not equivalent to pollution and it is not restricted to emissions emanating from industrial installations, being the source irrelevant. Furthermore, it also embeds (not purely) hypothetical emissions insofar as they are foreseeable under normal or realistic conditions of use of the product in question (CJEU, 23 November 2016, *Commission v Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe)*, C-673/13 P, EU:C:2016:889).

As concerns what is the link that relates an information to emissions in the environment, the GC applied the non-restrictive interpretation principle and stated that «in order for the disclosure to be lawful, it suffices that the information requested relate in *a sufficiently direct manner* to emissions into the environment». However, the CJEU handed down the GC's judgment in appeal (in the above-cited case C-673/13 P), where it refused the criterion of a "sufficiently direct link" between the information and the emissions into the environment, as it has no basis in law (par. 78). The Court held that a notion which is so broad to include information containing any kind of link, even direct, to emissions into the environment «would deprive of any practical effect the possibility […] for the institutions to refuse to disclose environmental information» when disclosure would have an adverse effect on the protection of the mentioned interest.

Therefore, in case C-673/13, the CJEU set aside the judgment of the GC and refer the case back to it. Nonetheless, it gave some empirical hints for a correct assessment of when an information «relates to emissions into the environment». Notably, it holds that the concept must be understood to include, *inter alia*, «data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question» (par. 79) and «information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct, and the data relating to the effects of those emissions on the environment» (par. 80). On the contrary, information on carbon efficiency of manufactured products, whilst having a link with emissions into the environment, has not been deemed as information relating to emissions into the environment as it does not enable the public to actually know the total amount of emissions released (or sufficiently foreseeable) by a specific installation, nor their chemical composition and geographic location (GC, 11 July 2018, *Rogesa v Commission*, T-643/17, EU:T:2018:423, para 102-106. See also GC, 21 November 2018, *Stichting Greenpeace Nederland e Pesticide Action Network Europe (PAN Europe) v Commission*, T-545/11 RENV, EU:T:2018:817, par. 90, on information pertaining to the approval of an active substance in products whose conditions of use and composition may be very different in each Member State, and GC, 12 December 2018, *Deutsche Umwelthilfe eV v Commission*, T-498/14, EU:T:2018:913, par. 111, on documents reflecting opinions, appreciations and proposals from car manufacturers in relation to the availability of a given substance without detailing the extent and the period of time of the use of the substance, or how the latter would contribute to an increased risk of environmental emissions).

7. General presumptions in the assessing of an application and their compatibility with the democratic principle

Since derogations set by EU regulations affect the principle of the widest possible access, it has been stated that for each requested document (and information as well) there should be a specific, concrete and individual examination (GC, 13 April 2005, *Verein fur Konsumenteninformation v Commission*, cit., par. 69). Nonetheless, according to the case-law of the CJEU, it is the EU institution concerned that bases its decision on an application for access to a document on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for access relating

to documents belonging to the same category of documents or to documents of the same nature (CJEU, judgments in *Sweden and Turco v Council*, cit., par. 50, and in *Council v Access Info Europe*, cit., par. 72). The documents must belong to a set of documents which was clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings (CJEU, 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, para 12 to 22; 27 February 2014, *Commission v EnBW*, cit., para 69 and 70). The aim is to allow the Commission to reply to a global request for access in a manner which is just as global (CJEU, 14 November 2013, joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, EU:C:2013:738).

So far, five categories were progressively set out in the CJEU case-law. They are: (i) documents on the Commission's administrative file with regard to State aid (see judgment in *Commission v Technische Glaswerke Ilmenau,* cit.), (ii) documents lodged in proceedings before the Courts of the European Union while they are still pending, (judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541), (iii) documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings (judgment of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393), (iv) documents relating to an infringement procedure during its pre-litigation stage (see judgment in *LPN and Finland v Commission*, cit.) including the documents produced during an EU Pilot procedure (until the procedure is closed and there is a definitive decision not to open a formal infringement procedure against the Member State. See judgment of 11 May 2017, *Sweden v Commission*, C-562/14 P, EU:C:2017:356), and (v) documents relating to proceedings under Article 101 TFEU (judgment of 27 February 2014, *Commission v EnBW*, cit.).

It must be stressed that these five categories do not constitute a closed group. In its judgment of 4 September 2018 (*ClientEarth v Commission*, C-57/16, EU:C:2018:660, par. 80), the Court articulated the governing considerations regarding whether a new general presumption should be recognised for a category of documents, stating that recognition of a new general presumption «presupposes that it has first been shown that it is reasonably foreseeable that disclosure of the type of document falling within that category would be liable actually to undermine the interest protected by the exception in question».

The general presumption doctrine freed the institutions from examining the requested documents individually and shifts the burden of proof to the applicant, who must demonstrate that there will be no harm to the interest protected by EU law in giving access to that specific document (CJEU, 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, par. 128). As noted by Curtin and Leino-Sandberg (2016, 10), this is difficult in practice given that the appli-

cant has not seen the document. In case *Daimler AG v Commission* (judgment of 4 October 2018, T-128/14, EU:T:2018:643), the applicant argued that the strict interpretation clause imposed by Article 6(1) of the Aarhus Regulation requires that each relevant document concerning emissions be the subject of an individual examination in order to ascertain whether the public interest in its disclosure prevails over the interest of the confidentiality of the investigation. However, the GC stated that that clause «has no bearing on the question whether the institution concerned is or is not required to carry out a specific and individual examination of the documents or information requested»; thus, the clause does not impose in any case a precise obligation to carry out an individual examination of each document (see para 96-105).

It is of all evidence that the general presumptions doctrine derogates from the two key principles of the right of access to information held by the EU, namely that of individual examination and that of the widest access. Therefore, the use of such presumptions must be founded on reasonable and convincing grounds (GC, 25 September 2014, T-306/12, *Spirlea v Commission*, EU:T:2014:816, par. 52). This is why, for example, a presumption does not cover any documents lodged in court proceedings but has been acknowledged only in respect of the pleadings lodged, and only so long as those proceedings remain pending. Disclosure of pleadings lodged in pending court proceedings was presumed to undermine the protection of those proceedings, because an obligation of transparency imposed only on the institutions concerned would lead «the procedural position of those institutions to be undermined vis-à-vis the principle of equality of arms» – which is «no more than a corollary of the very concept of a fair hearing» – «since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure» (CJEU, 21 September 2010, *Sweden and Others v API and Commission*, cit., para 87-88).

8. Access to environmental impact assessments and similar documents

Access to documents relating to legislative procedures and administrative documents – notably documents relating to infringement and EU Pilot procedures – diverges significantly, as if there were less public interest in openness when it comes to administrative activities. Indeed, on the one hand, the CJEU expressly stated (in cited judgment *Sweden and Turco v Council*) that access to legislative documents can only be denied in exceptional cases, that the refusal needs to be reasoned in detail and that it can only be applied «for the period during which protection is justified on the basis of the content of the document» (para 69-70),

while, on the other hand, its case-law on general presumptions of confidentiality in EU administrative procedures gives its contribution in re-enforcing what some considered "a questionable distinction" (Curtin and Leino-Sandberg 2016: 6).

Access to legislative documents is a precondition for an effective democracy, as it enforces the possibility for citizens to control all the information forming the basis for EU legislative action and partake to the decisions made by the EU institutions within the framework of the legislative process. The European Commission's impact assessment reports are important elements that form part of the basis for of the EU legislative process, as the Commission has a key role in the legislative process due to its right of initiative. This is particularly true in environmental matters. So, must impact assessment reports and similar documents always be accessible under EU law?

In the above-mentioned case *ClientEarth v Commission* (C-57/16 P), the CJEU delivered a key judgment on this issue. In the 2000's, the Commission had conducted impact assessments for two environmental regulatory projects that were to significantly strengthen environmental protection in Europe. Both these regulatory initiatives were abandoned by the Commission and eventually resulted in soft law guidelines that were adopted by the Commission in 2017 and 2018. In 2014, the environmental organisation ClientEarth asked the Commission to have access to two environmental impact assessment reports and an opinion of the Impact Assessment Board relating to both the projects, in order to shed light on the Commission's decision to abandon them.

The Commission refused to grant ClientEarth access to these documents and invoked the "ongoing decision-making process" exception set by article 4(3) first subparagraph of the Access Regulation. It argued that, under Article 17 TEU, it has the specific role to act in an independent manner and exclusively in the general interest, and that disclosure would restrict its room for maneuver and affect its independence and role in pursuing the general interest, thus undermining the decision-making process. Therefore, it would allow the Commission to rely on a general presumption of confidentiality.

In its first-degree judgment, the General Court applied a general presumption of confidentiality to documents drafted in the context of legislative initiatives, thus extending the case-law on general presumptions in favour of the Commission. ClientEarth appealed and the Grand Chamber of the CJEU came to the conclusion that the exception relied upon by the Commission «must be interpreted and applied all the more strictly» in light of the specific context and content, i.e. a still ongoing decision-making process concerning environmental information where citizens can effectively make their views known regarding those choices before they have been definitively adopted. Therefore, not only the

Court stated that the requested documents were drafted when the Commission was acting in a legislative capacity, but it also stated that the Commission's special role under the Treaties cannot add any additional privileges under Regulation 1049/2001 as a general presumption of confidentiality to documents drafted in the context of its right of initiative. To the contrary, this context made gaining wider access even more necessary (see judgment of 4 September, para. 104-109), as to say that an institution does not protect its decision-making process isolating itself from the social fabric, but through dialogue and confrontation.

9. Protection for documents originating from a Member State

Article 4(5) of the Access Regulation reads «A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement». This exception has already been at the centre of several disputes, (starting from CJEU, judgment of 18 December 2007, *Kingdom of Sweden v Commission*, C-64/05 P, EU:C:2007:802 and following with case *IFAW v Commission*, concerning the refusal to grant an NGO access to environmental information supplied by a Member State (GC, judgment of 13 January 2011, T-362/08, and CJEU, judgment of 21 June 2012, C-135/11 P).

In *Sweden v Commission*, the Court gave another relevant contribution to the enforcement of environmental democracy in the EU, as it pointed out (at par. 75. Confirmed in GC, *IFAW v Commission*, cit., par. 73) that Article 4(5) «does not confer on the Member State a general and unconditional right of veto, permitting it arbitrarily to oppose, and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State». Moreover, the CJEU added (para. 76. Confirmed in GC, *IFAW v Commission*, cit., para. 73) that Article 4(5) only resembles «a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present». Thus, before issuing a refusal, it is up to the institution concerned to examine whether this Member State duly justified its position on the basis of the exceptions laid down in the Access Regulation. Therefore, if there is no justification, the institution can override the Member State's refusal.

Article 4(5) «establishes for that purpose a decision-making process within the framework of which [a Member State and an EU institution] are obliged to cooperate in good faith», in order to not restrict the right of access without justification (GC, 14 February 2012, *Federal Republic of Germany v Commission*, T-59/09, para. 45).

Openness and citizen participation are the measure of environmental democracy and they are enforced mostly through the access to documents and information held by public bodies. So, this paper sought to define whether the EU regime on access to documents and information regarding environmental matters is genuinely democratic or not.

In the EU legal order, the implementation of the right of access to documents and information must be assessed through the praxis of EU institutions and the case-law of the CJEU and the GC. In the light of the above, the latter to some extent seems controversial.

It is undeniable that the EU Courts adopted at first (i.e. after the entry into force of the Access Regulation) an activist approach in favour of transparency (Spahiu 2015; Labayle 2013) in an effort to build the "constitutional" grounds of a democratic and widest possible right of access. The general rule of one-by-one examination, the strict interpretation and application of derogative clauses, the fact that the risk of the interests protected by EU legislation being undermined must be reasonably foreseeable and not purely hypothetical – together with the presumption of prevalence of a public interest in disclosure set by the Aarhus regulation – all contribute to limit the circumstances where EU bodies can withhold some information, notably in environmental matters. As a result, in 2018 the General Court handed down 27 judgments involving the European Commission (the addressee of the vast majority of requests for access) in relation to the right of access to documents under the Access Regulation. Out of 27 cases, only four of them involved (partial) refusals of the institution to grant access to certain documents and resulted in the (partial) annulment of the contested institution's decision (data taken from the Report from the Commission on the application in 2018 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 29.7.2019, COM(2019) 356 final).

Nevertheless, a recent increase in presumptions of non-disclosure and still existing difficulties in establishing when there is an overriding public interest (mainly a. because arguing for the existence of an overriding public interest for the purposes of justifying disclosure when the contents of the documents are not known is really hard, and b. because of the lack of clarity on what an information related to emissions in the environment is) seem to favour some secrecy rather than disclosure and openness. Notably, general presumptions now cover nearly all areas of Commission investigations, including procedures that are politically relevant as the procedure against Member States infringing EU law. This is very/quite worrying, since, in practice, such presumptions are quite impossible for

individuals to rebut. All of this affects democratic processes within the EU and is detrimental to accountability.

While admitting in the abstract the possibility of identifying other general presumptions in the future, the 2018 landmark judgment of the CJEU in *ClientEarth v Commission* must be warmly welcomed as it stopped *de facto* the extension of general presumptions of confidentiality, recognising the role of the Aarhus Regulation in doing so and highlighting the relevance of transparency and citizen participation in the EU legislative process. Hopefully, it will become a strong precedent for future EU case-law. However, the CJEU alone may not be able to protect citizens in a systematic and immediate way. Although, it can enhance transparency through clarity and intelligibility of the existing rules, the CJEU's powers are limited, as it deals with all these issues on a case by case basis and only when they are brought before it by single applicants. In a field where «both the Council and Commission share a common reservation, if not a common hostility towards an open interpretation of Regulation (EC) No 1049/2001» (Labayle 2013: 14), a global effort is thus needed within the EU.

The European Council's strategic agenda for 2019-2024 urges all the EU institutions to respect the principles of democracy, rule of law and transparency, and to act in the best way to fulfil their role under the Treaties. Arguably, this could be the right time for a reform of the Access Regulation. A first attempt of amending the Regulation 1049/2001 – a proposal by the Commission dating back to April 2008, COM(2008) 229 final (see Harden 2009) – already came to nothing and so did the Commission's proposal submitted in March 2011 and aimed at extending the institutional scope of the 2001 Regulation in order to adapt it to the Lisbon Treaty requirements (COM(2011) 137 final). The fact that the institution that holds the legislative initiative power in the EU – the Commission – is the one that benefits the most from the presumption regime makes the adoption of new and more citizen-oriented rules on the right of access quite unlikely. The new Commission has finally come into operation in December 2019, but no reference to new legislative intervention on the right of access was mentioned neither by commissioners nor by the President von der Leyen. In an era of great political crisis for the EU, this is regrettable, since the Union risks losing yet another chance to implement greater transparency, which is likely to result in greater interest in it and in more understanding by citizens, both representing conditions for democratic legitimacy within its legal order.

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Environmental Democracy in the Economic Partnership Agreement between the EU and Japan

YUMIKO NAKANISHI

1. Introduction

The European Union (EU) issued a joint press statement with Japan on 28 May 2011, which referred to the possibility of a Free Trade Agreement (FTA) between them. After the European Commission completed its scoping exercise, the EU and Japan began to negotiate on 19 April 2013 and finished on 7 April 2017. On 17 July 2018, during the 25th Japan-EU Summit, they signed the Economic Partnership Agreement (EPA). The EPA entered into force on 1 February 2019. This EPA is the so-called "new generation" FTA. It regulates not only customs issues, but also intellectual property including geographical indications (GI), sustainable development, and other emerging areas. It comprises 23 chapters. The EPA is an EU–only agreement and the first FTA that the EU concluded alone without the participation of its member states because it has exclusive competence over the subject matter of the EPA.

Civil society influenced the EPA throughout the negotiations. The EPA assigns an important role to civil society to complete or reinforce democracy in the EU and in the third countries, this ensures that civil society is involved in a form of participatory democracy. In this article, I investigate environmental democracy in the EPA with a focus on civil society. The article will show how civil society in-

fluenced the EPA and how the EPA regulates civil society. It will also discuss how the EPA can influence non-governmental organisations (NGOs) and the civil society of Japan in the future. I begin by explaining environmental democracy in the EU, and then analyse the EPA because the EU's environmental democracy is reflected in it. Next, I highlight the transparency of the EPA. Third, I analyse "the right to regulate" provision, and finally, I examine Chapter 16 of the EPA, which speaks of Trade and Sustainable Development.

2. Environmental Democracy in the EU

Participatory democracy was first introduced in environmental policy in the EU. The fifth environmental action programme titled "Towards Sustainability" was published in 1993 by the European Commission (OJ of the EU 1993 C 138: 5). According to this document, three *ad hoc* dialogue groups had to be convened by the Commission, namely the General Consultative Forum, the Implementing Network, and the Environmental Policy Review Group. The General Consultative Forum comprises representatives of enterprises, consumers, unions, professional organisations, NGOs, and local and regional authorities (*ibid*.: 17). Economic and social stakeholders are planned to be involved in the Commission's activity. It is said that those groups would serve to promote a greater sense of responsibility among the principal actors in the partenariat, and to ensure effective and transparent application of measures. This role can be also in the EPA, as mentioned later. The Commission's practice of consulting with stakeholders in the environmental context, that is, with economic and social partners, NGOs, and others, was extended to other policy areas through a white paper titled "European Governance" in 2001 (COM (2001) 428, "European Governance-A White Paper", OJ of the EU 2001 C 287). The white paper enumerated five guiding principles: openness, participation, accountability, effectiveness, and coherence. Specifically, openness (transparency) and participation in decision-making are related to participatory democracy.

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, or the Aarhus Convention, was signed in 1998. It entered into force in 2001. The Aarhus Convention lays down three rights: the right to receive environmental information held by public authorities, the right to participate in environmental decision-making, and the right to review procedures to challenge public decisions. The EU ratified the Aarhus Convention and implemented the right to access information and the right to participation in decision-making through Directive 2003/4/EC on public access to environmental

information (OJ of the EU 2003 L 41, pp. 26), and Directive 2003/35/EC providing for participation in respect of the drawing up of certain plans and programmes relating to the environment, in addition to amending Directive 85/337/EEC and Directive 96/61/EC (OJ of the EU 2003 L 156, pp. 17).

The EU has not implemented the right to access justice, although Regulation 1367/2006 (OJ of the EU 2006 L 263, pp. 13) was adopted only for EU institutions to do so. The Commission adopted a Notice on Access to Justice in Environmental Matters (OJ of the EU 2017 C 275, pp. 1) on how to enforce EU environmental law before national courts. Public consultations were launched in December 2018 with the aim of identifying measures for the implementation of the Aarhus Convention to facilitate access to justice.

The Treaty of Lisbon, which entered into force in December 2009, strengthens democracy in the EU. Democracy is one of the EU's values (Article 2 of the Treaty on European Union or TEU). However, democracy in the EU differs from democracy in its Member States. Democracy in the EU is complemented by participatory democracy, which is provided for, particularly under Title II: Provisions on Democratic Principles (Articles 9-12, TEU; see Mendes 2016: 155, 173). Article 10 (3) of the TEU lays down thus: «Every citizen shall have the right to participate in the *democratic life* of the Union. Decisions shall be taken as openly and as closely as possible to the citizens» (emphasis added). Article 11 of the TEU lays down that «1. The Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in *all areas of Union action*. 2. The Institutions shall maintain an open, transparent and regular dialogue with representative associations and *civil society*. 3. The European Commission shall carry out broad *consultations* with parties concerned in order to ensure that the Union's actions are coherent and *transparent*» (emphasis added).

Thus, the practice of participatory democracy in the context of the environment has been extended to include other policy areas, to the extent that participatory democracy is now seen as a general rule in the EU. The transparency, regular dialogues, and/or consultations with representative associations and civil society as mentioned these provisions are also found in the EPA.

Article 21 of the TEU addresses political principles such as democracy, the rule of law, and the universality and indivisibility of human rights, among others, which are also the EU's values (Article 2 TEU). It also lays down that the EU shall develop relations and build partnerships with third countries that share similar principles. The EU applies these values and principles to its FTAs through Article 21 of the TEU (Nakanishi 2014: 11 ff.).

3. Transparency

Transparency is a necessary precondition for participatory democracy. According to Article 11 (3) of the TEU, the Commission is obliged to consult with parties concerned to ensure that the EU's actions are transparent. The principle of transparency enables citizens to participate in decision-making and guarantees the legitimacy, efficiency, and accountability of the government towards citizens in a democratic system (Huber 2018). Transparency is addressed in other articles of the Treaty on the Functioning of the EU (TFEU) and the Charter of the Fundamental Rights of the EU (EU Charter) as well. Article 15 of the TFEU provides that the EU's institutions must conduct their work as openly as possible to ensure the participation of civil society and notes that citizens and natural or legal persons shall have a right of access to the documents of the EU's institutions. Article 42 of the EU Charter guarantees the right of access to documents.

There are some exceptions to the right of access to documents. For example, documents related to international relations can be maintained confidential. Thus, the negotiations of the FTAs between the EU and third countries were not published and access to these documents by citizens and NGOs was limited. The negotiations of the EPA between the EU and Japan were not published either. There is no information on these negotiations on the websites of both the EU and the Japanese Ministry of Foreign Affairs.

There was strong request by NGOs and civil society in Europe to publish relevant documents towards the Commission during the negotiations of the Transatlantic Trade and Investment Partnership (TTIP). Under pressure, the Commission published a communication document titled "Trade for All" in October 2015 (COM (2015) 497, 14.15.2015, "Trade for All: Towards a more responsible trade and investment policy"). In this document, the Commission considered the consumers' concerns pertaining to social and environmental conditions and expressed its view that policymaking needs to be transparent, that the debate needs to be based on facts, and that policymaking must respond to people's concerns with regard to the EU's social model. The Commission produced a new set of guidelines, according to which it publishes documents at all stages of the negotiating process on its website (COM (2015) 497: 13). After these guidelines, some documents from the negotiations with Japan were published on the EU's website, although Japan did not publish any relevant documents on the Japanese website until the EPA was signed.

As a general rule, the Council adopts negotiating directives and instructs the Commission to negotiate on behalf of the EU according to Article 218 of the TFEU. The Council gives the Commission a mandate before it begins negotiations. A mandate refers to requests or guidelines from the EU Member States on

how and what subjects the Commission should negotiate with third countries. The mandate document for the EU's negotiations with Japan was confidential at the time. The EU and Japan concluded their negotiations in April 2017. After this, the European Commissioner, Cecilia Malström requested the Council to disclose the negotiating directive, and referred to the communication document titled "Trade for All", saying, «*transparency* is a *fundamental democratic principle* that enhances the legitimacy of policymaking and the accountability of decision-makers to citizens. It also contributes to a better-informed debate with citizens, business and the *civil society*» (emphasis added; see Ref. Ares (2017)2639445-24/05/2017). In response to this request, the Council published the mandate document 15864/12, dated 29 November 2012, on 14 September 2017. This was done before the EPA was signed in July 2018.

In this mandate document, we can find the following text: «The Agreement will foresee the monitoring of the implementation of these commitments and of the social and environmental impacts of the Agreement through a mechanism involving *civil society*, as well as one to address any disputes» (emphasis added). This idea is reflected in Chapter 16 of the EPA, which addresses Trade and Sustainable Development.

The EPA contains a specific chapter on transparency, namely Chapter 17. Article 17.2 requires the parties to provide for a transparent regulatory environment.

4. The Right to Regulate

NGOs and the civil society in Europe influenced the negotiations of the FTAs and made sure that the relevant documents were published. They influenced the content of the FTAs, too. Their influence led to the introduction of the right to regulate in the EU's FTAs. The Commission responded to their requests to maintain EU standards. The NGOs and civil society were concerned about the deterioration of the EU's standards, particularly in the fields of environmental and labour protection. The EU's FTAs, like the EU-South Korea FTA, EU-Singapore FTA, EU-Vietnam FTA, and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, contain provisions addressing the right to regulate (Nakanishi 2020). The EPA between the EU and Japan also contains a provision to this effect, Article 16.2 Right to regulate and levels of protection: «1. *Recognising the right of each party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations*, consistently with its commitments to the internationally recognised standards and international agreements

to which the Party is party, each Party shall strive to ensure that its law, regulations and related policies provide *high levels of environmental and labour protection* and shall strive to continue to improve those laws and regulations and their underlying levels of protection […]» (emphasis adde).

Each party has the right to regulate the domestic environmental and labour protection standards and has the right to maintain high levels of protection in these fields. Whereas the EU is not obliged to ease its standards, it can definitely strive to improve them. The right to regulate may cause problems in the context of investment such as when a party tries to legitimise the nationalisation of enterprises while relying on environmental protection as the reason. Therefore, Article 16.2 (3) provides that parties shall not use their respective environmental or labour laws and regulations in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other party, or a disguised restriction on international trade.

The right to regulate is often related to investment issues. A typical case is that an enterprise X in State A has invested in a project in State B. Suddenly, State B decides to nationalise or orders that the project be stopped on grounds of environmental protection. The EU and Japan have not concluded any investment protection agreement thus far. If an investment protection agreement were to be concluded in the future, Article 16.2 would gain more importance.

5. Investment Court

Whereas the EU has not concluded any investment agreement with Japan, it signed the CETA with Canada, which contains a chapter on investment. During the negotiations, the CETA text did not contain provisions for an investment court. However, NGOs and civil society criticised the Investor-State Dispute Settlement (ISDS) mechanism and sought the establishment of an investment court during their negotiations with the USA, citing the lack of transparency and objectivity and no possibility of appeal as reasons. In response, the CETA was amended to incorporate rules for the establishment of an investment court.

The EPA between the EU and Japan does not contain provisions for an investment court, either. The Court of Justice of the EU (CJEU) held in Opinion 2/15 dated May 2017 on the EU-Singapore FTA that the EU has exclusive competence except in the context of non-direct investment and ISDS issues (Case Opinion 2/15, Opinion 16 May 2017, ECLI:EU:C:2017:376). The EPA was separated into two parts, where had no investment issues and the other contained the investment agreement. Japan has preferred the ISDS. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTP), which entered into

force on 30 December 2018, provides for the ISDS, but does not establish an investment court. Whereas the USA did not participate in the CPTPP, 11 other countries continued to negotiate and concluded it (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam).

Japan ratified the CPTPP and is now bound by it.

Japan had been waiting for Opinion 1/17 (Opinion of 30 April 2019, ECLI:EU:C:2019:341) on the CETA, in which the Court examined the compatibility of the CETA with the investment court under EU law. The Court declared that they were compatible. The establishment of the investment court is in line with the autonomy of the EU law. Since the Commission can now negotiate the investment protection agreement with Japan, both parties are in the process of negotiations as of October 2019.

6. Civil Society in the EPA

6.1. *Introduction*

Chapter 16 of the EPA speaks about Trade and Sustainable Development, and comprises 19 articles (16.1 to 16.19). Sustainable development can be understood in the economic, environmental, and social contexts (Article 16.1 (2)). This chapter also lays down the right to regulate (Article 16.2).

The EU and Japan are obliged to ensure that any measure for general application in pursuit of the objectives of Chapter 16 is administered in a transparent manner, in accordance with the laws and regulations prevailing at the time, as well as with Chapter 17. Such measures should be implemented only after giving the public reasonable opportunities and sufficient time to comment on and respond to such measures by publishing them in advance (Article 16.10). Transparency is a precondition for a participatory democracy. It enables NGOs and civil society to participate in decision-making.

Chapter 16 contains provisions addressing civil society participation. It is a characteristic feature of all FTAs that the EU enters. Civil Society refers to independent economic, social, and environmental stakeholders, including employers' and workers' organisations and environmental groups (OJ of the EU 2018 L 330, p. 139, footnote (1)). The Committee on Trade and Sustainable Development is responsible for the effective implementation and operation of Chapter 16 (Article 16.13 (1)). One of the functions of this Committee is to interact with civil society under Articles 16.15, 16.16, and 16.18.

Articles 16.15 and 16.16 are related to consultation with domestic advisory groups (DAG) and joint dialogue with civil society, respectively.

(1) DAG

The EPA rules governing the participation of civil society are explicitly listed under Article 16.15 Domestic Advisory Group (DAG), which says thus: «1. Each Party *shall convene meetings* of its own new or existing *domestic advisory group or groups* on economic, social and environmental issues related to this Chapter and consult with the group or groups in accordance with its laws, regulations and practices. 2. Each Party is responsible for ensuring a balanced representation of *independent* economic, social and environmental stakeholders, including employers' and workers' organisations and environmental groups, in the advisory group or groups […]» (emphasis added).

The EPA obliges the EU and Japan to convene meetings of the DAG and to consult with it. The EU and Japan are obliged to form DAG to ensure a balanced representation of independent economic, social, and environmental stakeholders. Consultations with the DAG is a legal obligation. It is mandatory for the DAG to remain independent throughout the process. The influence of the EU can be found here, as mentioned before.

Civil society participation is part of the EU's system.

According to the explanatory memorandum of a proposal on signing the EPA between the EU and Japan, before concluding negotiations with Japan, stakeholder consultations were carried out (COM (2018) 193, 18.4.2018, "Proposal for a Council Decision on signing on behalf of the European Union, of the Economic Partnership Agreement between the European Union and Japan"). A Trade Sustainability Impact Assessment (TSIA) of the EPA was conducted by an external contractor who consulted with both internal and external experts, organised public consultations, and held bilateral meetings and interviews with civil society. Based on the TSIA, the European Commission Services' Position Paper revealed the following as their policy recommendations for the social pillar: «EU negotiators should seek to use the opportunity of the FTA to obtain greater compliance, implementation and monitoring of the Convention of the International Labour Organisation (ILO). A clear priority is to seek Japan's ratification of two core conventions to which it is not a Party: Convention 111 on non-discrimination and Convention 105 on forced labour. […] provide for enhanced engagement of Civil Society representatives, including employer and trade union bodies, in the monitoring and implementation of labour provisions via a Domestic Advisory Group (DAG) and a Civil Society Forum […]» (European Commission Services' Position

Paper on the Trade Sustainability Impact Assessment in Support of Negotiations of a Free Trade Agreement between the European Union and Japan, February 2017).

This document is proof that there is a practice of consulting with civil society. It also presents the expectations of the role of civil society after the EPA enters into force.

The following mechanisms encourage civil society participation in the EU.

The first is the European Economic and Social Committee (EESC), which is an advisory organ of the EU (Article 13 (4) TEU). The EESC comprises organisations of employers, employees, and other parties who represent civil society, notably in the socio-economic, civic, professional, and cultural areas (Article 300 (2) TFEU). The EESC reported in November 2018 that the EPA would have both social and environmental effects that would be monitored by representatives of civil society from both sides, namely the EESC for the EU and relevant socio-economic stakeholders for Japan (EESC, "Civil society will monitor the environmental and social impact of the EU-Japan trade agreement"). The second mechanism is civil society dialogue (https://trade.ec.europa.eu/civilsoc/). The European Commission established the Directorate General (DG) Trade's Civil Society Dialogue. The EU has a transparency register system to facilitate dialogue with civil society organisations and representatives of interest (OJ of the EU 2011 L 191, pp. 29, Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation; cf. COM (2009) 612, "European Transparency Initiative: the Register of Interest Representatives, one year after"; COM (2016) 627, "Proposal for Interinstitutional Agreement on a Mandatory Transparency Register"). Registered NGOs and other stakeholders can be consulted regularly by the Commission. All civil society organisations and representatives of interest that seek to influence policy formulation and decision-making can register for the dialogue. For example, after the EU and Japan arrived at an agreement in principle on the main elements of the EPA, Civil Society Dialogue on the EPA took place on 18 July 2017. Organisations that registered to participate in this meeting included Association des Constructeurs Européens d'Automobiles, BUSINESSEUROPE, the European Centre of Employers and Enterprises providing Public Services and Services of General Interest, Deutscher Gewerkschaftsbund, Greenpeace (European Unit), Japan Automobile Manufacturers Association, Inc. (European Office), the Japan Business Council in Europe, and other organisations.

After the EPA entered into force, members of the DAG on the side of the EU were and are still called. The Commission published a call for expressions of interest to invite civil society members and representatives of interest to

sign up to be members of the EU Domestic Group under Chapter 16 (European Commission, A.3. Information, Communication and Civil Society, TRADE/A/3/MM/DB/Inb). To become a member of the DAG, the following criteria need to be fulfilled: (1) the organisation should be an independent and not-for-profit establishment, (2) it must represent and promote EU interests, (3) it must be registered on the EU transparency register and in the civil society database of the Directorate General for Trade, and (4) it must have specific expertise or competence on areas covered by the chapter on Trade and Sustainable Development. The DAG will select its core members with the aim of building a balanced composition that represents the economic, environmental, and social pillars, by choosing from, for example, business organisations, trade unions, and NGOs. The EESC will provide room in the Secretariat for the DAG to facilitate the work of the group. In September 2019, the Commission issued a second call for expressions of interest because although it received several applications from business organisations and trade unions, there were only a few applications from NGOs. Article 16.15 (2) of the EPA mandates the balanced representation of independent economic, social, and environmental stakeholders in the DAG (European Commission, A.3 Information, Communication and Civil Society, Ref. Ares(2019)5828772-18/09/2019). In Japan, there is no organ on the lines of the EESC in the EU. There is no register maintaining details of civil society and representatives of interest. The Keidanren (the Federation of Economic Organisations)[1], Keizaidouyukai (Japan Association of Corporate Executives), Nihonshokokaigisho (The Japan Chamber of Commerce and Industry), and Shinkeizairennmei (Japan Association of New Economy) may be considered as constituting an economic interest group. The Japanese Trade Union Confederation (JTUC-RENGO)[2] may be considered a social interest group. The Japan Climate Initiative (JCI) and Kiko Network, Environmental Partnership Council (EPC), Japan Wildlife Conservation Society (JWCS), TRAFFIC for CITES, Greenpeace Japan, and other similar initiatives may be considered as constituting an environmental interest group. The Japan NGO Center for International Cooperation (JANIC) is a non-profit, not-partisan networking NGO that was founded in 1987. One of the missions of the JANIC is to facilitate collective action by mobilising its members and wider Japanese civil society to influence

[1] Keidaren has made recommendations and statements regarding the EPA towards Japanese government. For example, Chairman Nakanishi's comments on the signature of the EPA, https://www.keidanren.or.jp/en/speech/comment/2018/0717.html (last accessed on 7 November 2019).

[2] For example, JTUC-RENGO made a statement on the signing of the EPA, http://www.jtuc-rengo.org/updates/index.cgi?mode=view&no=385&dir=2018/07 (last accessed on 7 November 2019).

the policies and practices of governments and institutions at national and international levels (https://www.janic.org/en/).

The key questions are as follows. How can NGOs and other representatives of interest be made part of the Japanese DAG? How can they contribute to the effective implementation of Chapter 16? Environmental NGOs are not strong enough to influence policies and decision-making when compared with economic and social interest organisations.

The Central Environmental Council was established under the Ministry of the Environment in line with Article 41 of Japanese Basic Environmental Law. The Council is vested with the duty to study and discuss basic and important matters with respect to environmental conservation. It is allowed to submit its opinions to the Prime Minister, the Director General of the Ministry of the Environment, and other relevant ministers concerned.

The Japanese government checks before signing, whether the draft of the agreement complies with Japanese law and whether Japan can comply with the terms of the agreement once it signs it. Therefore, it will be interesting to see how the Japanese government would convene the DAG.

(2) Joint Dialogue with civil society

Article 16.16 governs joint dialogue with civil society of both the EU and Japan. It says: «1. The Parties *shall convene the Joint Dialogue with civil society organisations* situated in their territories, including members of their domestic advisory groups referred to in Article 16.15, to conduct a dialogue on this Chapter. 2. The Parties shall promote in the Joint Dialogue a balanced representation of relevant stakeholders, including independent organisations which are representative of economic, environmental and social interests as well as other relevant organisations as appropriate. 3. *The Joint Dialogue shall be convened no later than one year after the date of entry into force of this Agreement*. Thereafter, *the Joint Dialogue shall be convened regularly*, unless the Parties agree otherwise. The Parties shall agree on the operation of the Joint Dialogue before the first meeting of the Joint Dialogue. Participation in the Joint Dialogue may take place by any appropriate means of communication as agreed by the Parties […]» (emphasis added).

The joint dialogue requires the balanced representation of all relevant stakeholders including members of the Japanese and EU DAGs. The EPA mandates that the EU and Japan should convene a joint dialogue with civil society organisations. This is not only legal binding, but also has to be performed within the given deadline. The joint dialogue must be convened within one year after the date of entry into force of the EPA, that is, within one year of 1 February 2020. Joint dialogues must be carried out regularly thereafter. The EPA is not the end,

but rather marks the beginning of the cooperation between the EU and Japan including civil society on both sides.

7. Involvement of the civil society in implementation

The mandate refers to the involvement of civil society in the implementation of Chapter 16. This means that the involvement of the civil society in the EPA was a request on part of the EU. Following negotiations with Japan, the EPA was drafted to contain provisions on the involvement of civil society in the implementation phase.

Article 16.15 (3) says: «The advisory group or groups of each Party *may meet on its or their own initiative and express its or their opinions on the implementation of this Chapter independently of the Party and submit those opinions to that Party*» (emphasis added). The Japanese DAG can express its opinions on the implementation of Chapter 16 independently and can submit them to the Japanese government. Article 16.16 (4) says: «*The Parties will provide the Joint Dialogue with information on the implementation of this Chapter. The view and opinions of the Joint Dialogue may be submitted to the Committee and may be made publicly available*» (emphasis added). The joint dialogue is equipped with information on the implementation of Chapter 16, so that appropriate views and opinions from the joint dialogue can be submitted to the Committee on Trade and Sustainable Development. The Committee on Trade and Sustainable Development is responsible for the implementation of Chapter 16 (Article 16.13 (1)). One of the functions of the Committee is to interact with civil society on the implementation of Chapter 16 (Article 16.3 (2) (c)). Further, these views and opinions may be made available to the public.

Chapter 16 also provides for the concrete involvement of civil society in the dispute settlement mechanism under the EPA. Article 16.18 governs the dispute settlement mechanism. This mechanism is specific to Chapter 16 and issues therein, while the EPA also has a general dispute settlement mechanism under Chapter 21 for other issues. A panel of experts in the dispute settlement mechanism issues both interim and final reports to the parties, detailing the facts, the interpretation or the applicability of relevant articles, and the rationale behind the findings inferred and suggestions provided after certain procedures.

Article 16.18 (6) says: «Each Party *shall inform* the other Party and its own *domestic advisory group or groups of any follow-up actions or measures no later than three months after the date of issuance of the final report*. The follow-up actions or measures shall be monitored by the Committee. *The domestic advisory group or groups and the Joint Dialogue may submit their observations in this regard to the Committee*» (empha-

sis added). Each party is obliged to inform its own DAG of any follow-up actions or measures after the final report is issued by the panel of experts. Both parties are obliged to equip the joint dialogue with the information it requires for the implementation of Chapter 16 (Article 16.16 (4)). The Committee on Trade and Sustainable Development monitors these follow-up actions and measures. The DAG and the Joint Dialogue can submit their observations to the Committee. Although the DAG and the Joint Dialogue cannot initiate the process involving the panel of experts by themselves, they are involved in the dispute settlement mechanism under Chapter 16.

The EU's FTAs have chapters on trade and sustainable development (Nakanishi 2017). In February 2018, "non-paper" by the Commission Services regarding feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU FTAs was published[3]. It detailed concrete and practicable actions that could be taken to promote the chapter on Trade and Sustainable Development. It also aimed to build on the recommendations received that were categorised under four broad headings, namely working together, enabling civil society including social partners to play greater roles in implementation, delivering, transparency and communication. The Commission is expected to take additional steps to support DAGs in the EU and other partner countries to facilitate the monitoring of the implementation of the FTA by civil society and to enable civil society to perform its advisory role in support of the parties. To this end, a EUR 3 million project supporting civil society is underway and will be launched under the EU's Partnership Instrument. It has also been pointed out that recurring requests were made for clear and transparent rules and procedures for the establishment and functioning of civil society structures (DAGs of both parties and the joint civil society forums (CSFs)).

8. Conclusions

Participatory democracy is gaining importance in the EU. The EU Treaties, especially after the Treaty of Lisbon, generally lay down several rules governing participatory democracy. The concept and practice of environmental democracy in the EU has influenced the EPA between the EU and Japan in many ways, such as through the prioritisation of transparency, the right to regulate, and the enhanced participation of civil society. Transparency has improved both during and after the negotiations. As a result of pressure from civil society in Europe, a new provision on "the right to regulate" was laid down in the EPA, so that envi-

[3] See https://www.borderlex.eu/wp-content/uploads/2018/02/2018-02-26-TSD-non-paper-FINAL.pdf. (last accessed on 7 November 2019).

ronmental and social standards would not be disregarded and parties can work to improve these standards further. The decisive point was the introduction of Chapter 16, which provides a mechanism for the participation of civil society. Relevant provisions cover the legal obligations for this mechanism, which may enable Japanese civil society, especially environmental NGOs, to become more conscious about policy and decision-making processes and to influence them.

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Integrated River Basin Management in the European Union: insights from Water Framework Directive and Flood Directive implementation

EMILIA PELLEGRINI

1. Premise

The European strategy to address the growing concerns regarding water resources protection and flood risk management is centred on the so-called Integrated River Basin Management (IRBM). The latter can be considered as an operational tool to enact the principles of Integrated Water Resources Management (IWRM) that foresee an integrated management of land, water and related resources in order to maximise the economic and social welfare without compromising ecosystems' sustainability (GWP TAC, 2000). IRBM, indeed, recognises the river basin as the space where an integrated and coordinated approach to the planning and management of natural resources should be conducted in order to make stakeholders aware of a wide array of social and environmental interconnections that occur at this hydrographical scale (Hooper 2006).

The European Water Framework Directive (2000/60/CE, WFD hereafter), first, and then the Flood Directive (2007/60/CE, FD hereafter) recognise the river basin as the appropriate spatial scale to improve the quality of water resources and to enhance the capacity of flood risk management. Moreover, both directives promote the active involvement of civil society in the elaboration of river basin

plans. In so doing, both directives represent an outstanding attempt to institutionalise the IRBM approach throughout European countries.

Given the relevance of this topic at European level, this paper aims to provide a framework to understand how IRBM is conceived by European legislation and to discuss some of the relevant implications for national water governance systems derived from implementation of the requirement of river basin planning and management.

To do so, the next section provides a description of WFD and FD, focusing on the instruments and processes established by the European Commission to promote IRBM. The third section sets out the theoretical framework at the basis of river basin management, making reference to the concept of "spatial fit". The fourth section provides some empirical considerations on the implementation of river basin management in Europe, while the fifth section raise and discuss some concluding remarks.

2. EU Water Directives: Instruments and Processes to promote IRBM

2.1. *The Water Framework Directive (WFD)*

The European WFD is a milestone in the European environmental legislation, marking a significant break with previous water laws in Europe. The overall objective of the Directive is to achieve a good water status for all European water bodies and, where this is not possible, it requires Member States to not further deteriorate their water resources. The deadlines established by the Directive are relatively strict: the good status should have been achieved by 2015; however, after this first deadline, the WFD foresees two other cycles of implementation of six years each, going from 2015 to 2021 and from 2021 to 2027.

Following WFD implementation, Member States were required to adopt a river basin approach to improve the protection and management of water resource. More in detail , EU countries had to divide their national territories into River Basin Districts (RBDs) that are defined as «the area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters, which is identified […] as the main unit for management of river basins» (Article 2, WFD). Central to achieve the ambitious objectives of WFD is the planning process that Member States should conduct at river basin level and whose main output are the River Basin Management Plans (RBMPs) (European Commission, 2003a).

The development of RBMPs can be seen as an iterative process composed of four main steps that should be repeated every six years for each implementation cycle: (i) assessment of the current qualitative and quantitative status of water bodies, (ii) setting of specific environmental objective for each water body on the basis of the status assessment, (iii) identification of measures to reach the environmental objectives established on water bodies, (iv) evaluation of advancements in the implementation of measures and of improvements in the status of water bodies through monitoring programs (European Commission, 2003a). Moreover, two cross-cutting activities are required throughout the implementation process. The first concerns the implementation of monitoring programs that are necessary both in the stage of status assessment and at the end of each implementation cycle for the evaluation of the improvements (if any) in the state of water bodies. The second is the requirement of engaging civil society in the development of RBMPs. More in detail, the Article 14 of WFD requires EU countries to ensure that civil society is adequately informed regarding implementation of WFD, and that stakeholders are consulted during the planning process; moreover, the WFD encourages Member States to promote the active involvement of civil society in the development of RBMPs.

2.2. *The Flood Directive (FD)*

The FD is one of the so-called "daughter directives" of WFD. The overall aim of the FD is to establish a framework for the assessment and management of flood risks in order to reduce the negative consequences of flooding on human health, economic activities, the environment and cultural heritage in the European Union (Article 1, FD). Likewise WFD, to achieve this objective EU countries are required to produce specific planning instruments called Flood Risk Management Plans (FRMPs). These plans, however, are only the last step of a three-stage planning process that foresees, first, the elaboration of Preliminary Flood Risk Assessments (in 2011), and second, the production of Flood Hazard and Risk Maps (in 2013) (European Commission, 2019a).

The Preliminary Flood Risk Assessments is needed to assess the areas with significant potential risks of flooding (Arts. 4 and 5); hence the Flood Hazard and Risk Maps have to be produced for those areas identified as "at risk" (Article 6). These maps should contain information on: (i) hydrological aspects (e.g. water depths, flow velocities) under three scenarios of low, medium and high probability of flooding, and (ii) potential adverse consequences on socio-economic activities under the three scenarios. The purpose of FD, indeed, is not only to assess the probability of flooding but also to consider a broad range of possible conse-

quences in order to improve the capacity of flood risk management (Mostert and Junier, 2009). The third output of this planning process, i.e. the FRMPs, should be revised and updated every six years (the first cycle of planning ended in 2015) and should contain "appropriate objectives" for the management of flood risk in the areas considered with significant risk of flooding (Article 7). The plans should also contain measures to achieve the stated objectives, even if the definition of both objectives, measures and prioritisation of measures is left to the discretion of Member States (Mostert and Junier, 2009). One clearly established constraint, instead, concerns the fact that in international river basins measures established in one country cannot increase the risk of flooding in the neighbouring state (Article 7.4).

Overall, implementation of FD should be conducted in coordination with WFD: for instance, the implementation of the FD and the WFD has been synchronised. Furthermore, the requirements of public participation are similar for both directives and the participatory processes conducted for the development of FRMPs can be coordinated with those for the elaboration of RBMPs if deemed "appropriate" (Article 9). Moreover, the unit for flood risk management should be the same of WFD, i.e. the RBD; however, Member States may opt for a different unit of management (e.g. individual river basin). In the same vein, competent authorities may be the same or different from those indicated for WFD implementation.

3. Improving Spatial Fit in Water Management: from Theories to EU Policy

As described in the previous section, the implementation of both directives requires Member States to adopt a river basin approach for water protection and flood risk management. However, the conceptualisation of the river basin as natural spatial unit for water management is certainly not an innovation in Europe. In practice, river basin management gained momentum in Western societies from the second half of 18th century and was strengthened during the industrial revolution; but it is only since the end of the last century, and in particular with diffusion of the IWRM's principles, that the river basin has become central to watershed and ecosystem-management (Molle 2009). From that moment on, indeed, the river basin approach became a mainstream concept in water resources management (Molle 2009) to the point of being institutionalised in the European Union with the formal requirements of the WFD and FD (Moss 2012).

On a conceptual basis, tailoring water resources management on river basin is deemed an optimal solution to consider the ecological externalities that decision-making processes related to the use of natural resources may entail.

Governance scholars have for long-time addressed the issue of how social institutions can improve their capacity to match social and ecological systems and processes being managed (Folke *et al*. 2007). The so-called "Problem of fit" between institutions and ecosystems precisely refers to the query for institutions that are able to consider the interactions and interplay that occur between and within ecological, economic, and socio-cultural systems (Folke *et al*. 2007). As a consequence of this search for an higher fit between institutions and environment, many river basin organisations arose worldwide with the aim of creating jurisdictions and decision-making processes shaped on watershed boundaries (Huitema and Meijerink 2017). However, as Molle (2009) interestingly highlights, the river basin is also "a political and ideological construct". The boundaries of a river basin are indeed not always clear cut, not even natural in some cases, implying taht these are often decided through political decisions that affect who can control and who, instead, loses control over water resources (Huitema and Meijerink 2017). In this sense, some authors challenge the idea that the managing of water at river basin level is normatively superior to achieve a more efficient water use, because this stance disregards the political implications of establishing river basin organisations (Huitema and Meijerink 2017; Molle 2009).

Empirical studies have actually highlighted that a better fit between institutions and natural processes does not necessarily lead to a more efficient use. Roggero and Fritsch (2010), for instance, found that rescaling certain tasks with the aim of improving the matching between institutions and natural processes may entail high transaction costs and, in turn, cannot always be considered as an optimal option. Moreover, ecosystem-based management implies multiple areas of fit, not only that with natural systems, and, in some cases, these other areas of fit can be even more relevant (Lebel *et al*. 2013). Given that, some scholars argue that policy makers and researchers should be pragmatic in the search for institutions that can improve the fit with the ecosystems being managed. More relevant for research should be the investigation on the strategies adopted by water governance systems to work across institutional, sectorial and geographical boundaries in order to provide a more effective environmental governance (Moss 2012 and 2004), rather than chasing the perfect fit between institutions and ecosystems (Ostrom *et al*. 2007).

Going back to the directives, they both make river basin approach binding for Member States with the requirement of defining RBDs where RBMPs and FRMPs have to be developed. However, the directives leave also considerable leeway to countries to adapt river basin approach to national specificities. For instance, neither of the directive requires Member States to set up specific river basin organisations for the implementation and the plans can also be developed

at a smaller scale than the RBD. Nevertheless, the European Commission explicitly requires coordinated implementation of the Directives across the RBD. For instance, the Article 3 of the WFD requires that «Member States shall ensure that the requirements of this Directive for the achievement of the environmental objectives, and in particular all programmes of measures are *coordinated* for the whole of the river basin district» (emphasis added). The Article 8 of FD states that «For river basin districts, or units of management […] which fall entirely within their territory, Member States shall ensure that one single flood risk management plan, or a set of flood risk management plans *coordinated* at the level of the river basin district, is produced» (emphasis added). Moreover, cooperation between competent authorities that share an international river basin district is expected in order to produce one single international FRMP; however, if cooperation is not reached, separate national plans may be developed.

Consequently, the European Commission is more interested in the effects that the implementation of river basin approach should produce – i.e. more coordinated planning and management of water resources and of flood risk at river basin scale– rather than in the strategies adopted by EU countries to deliver these effects. Hence, the pragmatic approach mentioned above that consider how water governance systems can effectively work across institutional, sectorial and geographical boundaries, seems to be also present in both the EU directives. Following this consideration, the next section reports some empirical considerations on the implementation of the requirement of river basin planning and management in EU countries.

4. Implementing River Basin Management in Europe: some Empirical Considerations

Most of the EU countries complied with the obligations of river basin planning and management in a timely manner. In 2012, European Commission reported that 25 Member States adopted RBMPs related to their national RBDs (European Commission 2012); likewise, 26 Member States were able to produce their national FRMPs by 2015 (European Commission 2019b).

However, formal compliance with the procedural requirements of the directives does not imply that a more coordinated approach to planning and management of water resources at river basin level is achieved. For instance, a study that analysed the implementation of WFD in 13 Member States highlighted that, despite all countries having complied with the obligation of river basin management, "established routines of environmental decision-making" were kept in most of the cases (Jager *et al*. 2016). Similarly, Priest *et al*. (2016) analysed im-

plementation of FD in 6 EU countries and found that, with the exception of few cases, "systematic coordination of actions" in shared international RBDs is not a practice. Analyses of the first cycle of planning processes to comply with WFD and FD highlight that coordination is very often interpreted by Member States as mere collection of actions and measures already established in other planning instruments (European Commission 2015; Priest *et al*. 2016).

These results are not surprising if we consider that governance changes require long period of adaptation to deliver their full effects. The iterative planning process promoted by both directives aims precisely at enhancing institutions' capacity for self-reflection and learning so as to gradually move towards a more integrated river basin planning. Interesting examples of that are the WFD implementation processes occurred in England and Denmark where the first cycles were characterised by very centralised, top-down approaches to implementation, while the second cycles were less centralised and more open to participation (Nielsen *et al*. 2012; Robins *et al*. 2017). In England, for instance, during the second cycle, the government adopted the so-called "Catchment-based approach", re-focusing the scale for water planning from 10 RBDs to 93 individual catchments where the creation of multi-actor groups, called "Catchment Partnerships", was encouraged (Robins *et al*. 2017). Similarly, since 2013 the Danish Ministry of Environment undertook a reform of water governance system establishing 23 new water councils at the sub-RBD level for the elaboration of RBMPs (Graversgaard *et al*. 2017).

The process of adaptation to the requirement of river basin governance obviously had different results depending on whether or not countries had river basin structures already in place before the directives implementation. Where river basin structures already existed, as for example in France, Italy and Spain, the implementation of the directives has usually led to a reconfiguration and strengthening of river basin institutions (Pellegrini *et al*. 2019a). Nevertheless, the fact that domestic water governance systems were already consistent with the requirement of the European Commission has not always implied a smoother adoption of integrated river basin management. Italy provides a good example of that. Despite river basin planning and management being introduced long before WFD (with the Law 183/1989), pre-existing conflicts among government levels for allocation of competences (in particular between central government and regions) hindered a full empowerment of RBD authorities that, in turn, affected their capacity of coordination during the planning processes (Domorenok 2017). Studies conducted on WFD implementation in Italy clearly show that the existence of basin authorities has limited effects on the implementation of IRBM in the absence of a clear legislative framework that enables a coordinated planning and cooperative, rather than competitive, relations between the different

levels of government involved in water resources management and protection (Domorenok 2017; Pellegrini *et al*. 2019b; Rainaldi 2010).

The group of countries where river basin structures were not in place before the directives is probably the most numerous and heterogeneous (Jager *et al*. 2016). Most of the countries opted for what Moss (2012) defines as "a cooperative institutionally soft solution" where specific coordination mechanisms are established among the different authorities involved in the river basin without establishing new river basin authorities. This led to the blossoming of different types of coordination mechanisms among which one of the most evident is the creation of advisory boards aiming to bring together public and private stakeholders for the development of plans (European Commission 2019a; Jager *et al*. 2016). These advisory boards are often established at sub-RBD level where more active engagement of stakeholders for the development of plans could occur, while boards to allow coordination and participation for the whole RBD are less common (Pellegrini *et al*. 2019a).

Interestingly, Sweden represents an exception within the group of countries where river basin structures were not in place. Following WFD, Sweden has greatly reformed national water governance both establishing new authorities at RBD level and creating advisory boards at catchment level. At least in terms of formal compliance with WFD requirements, Sweden can be considered an example to be followed. However, the significant changes that the water governance system has undergone have led to some imbalances in the coordination of other sectors, i.e. between water planning and land-use planning at municipal level (Andersson *et al*. 2012). The possible negative effects related to the establishment of a water governance system based on river basins were also anticipated by European Commission that stated: «By creating a spatial unit for water management, based on river basins, it is likely that spatial conflicts will occur with other policy sectors that have a significant impact on water, but are structured along administrative and political boundaries» (European Commission 2003b).

5. Discussion and Concluding Remarks

The previous section, although not exhaustive, wanted to point out some relevant implications derived from the implementation of the requirement of IRBM formulated by both directives. As first remark, it is important to distinguish between formal implementation of the requirement of river basin planning and management, and the realisation of substantive changes such as a more coordinated decision-making processes related to natural resources. This last aspect, as

said, is often lacking even when full compliance with the directives' requirement was achieved. Both WFD and FD, indeed, belong to a new generation of EU directives whose implementation is mostly based on procedural requirements, rather than on the respect of specific standards, and on a multi-level architecture that involve different government levels and non-state actors. This implementation structure, in particular, makes the effective delivery of policy more problematic as it depends on a long chain of policy actors an on their capacity of coordination (Milio 2010).

Nevertheless, along with procedural requirements, both directives set concrete objectives to be achieved. The achievement of these objectives implies a full consideration of the ecological and social interactions that take place on a river basin scale and, in so doing, the objectives can be considered as the main driver to promote IRBM. Some studies related to FD, however, have highlighted that the significant leeway accorded to EU countries, for instance in defining objectives and measures as well as in the enforceability of FRMPs, may prevent States to really engage in finding more coordinated solutions for flood risk management (Mostert and Junier 2009; Priest *et al*. 2016). Especially for countries where water institutions have not traditionally followed river basin boundaries, the lack of substantive obligations can really make implementation only effective in terms formal aspects – i.e. the fulfilment of river basin planning requirement – while keeping pre-existing management practices (Priest *et al*. 2016).

In the same token, the existence of river basin institution is not, in itself, a guarantee for achieving a greater IRBM, as showed by the Italian case. A recent study on WFD implementation in an Italian RBD has found that more coordinated decision-making was achieved when clear supra-national constraints (e.g. the risk of block of EU funds or of an infringement procedure from European Commission) pushed the different government levels within the RBD to set up more coordinated planning process (Pellegrini *et al*. 2019b).

To conclude, the points raised in this chapter highlight that, even though the requirement of river basin planning issued by the European Commission have undoubtedly made river basin planning binding for all Member States, the full realisation of IRBM depend on several other aspects that go well beyond the formal compliance with EU directives. In this, the existence of binding objectives or constraints for Member States that push for a more integrated and coordinated approach seems to be of a great importance.

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Payments for ecosystem services: a tool to avoid risks due to unsustainable use of water resources

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1. Introduction

The market-based tools for managing landscape and environmental resources including water resources that incentive profit opportunities for ecosystem services (ESs) providers include direct payments (subsidies, tax incentives and payments).

This set of instruments collects the different types of incentives used to maintain or restore the supply of ESs and, among others, those defined as Payments for Ecosystem Services (PES) (Vaissière *et al.* 2020).

PES provides a payment against the provision of an ES, or the use of the natural capital that allows to obtain the service (UNEP/IUNC 2007), which is configured as an externality. They include all direct payments from ESs beneficiaries in favour of landscape-environmental resource managers and, according to some authors (FAO 2007), also indirect payments, such as those deriving from productions with specific certification. According to the fact that taking this last category of transactions into consideration means reaching different conclusions regarding the efficiency, equity and sustainability that accompany the realisation of a PES, we will consider for this article only conventional direct payments.

PES differs from the more traditional forms of incentives, as its financing derives from the voluntary and direct payment by the beneficiaries of the ES and not by the compulsory contribution.

PES seeks to internalise the externalities deriving from the use of landscape-environmental resources (Pagiola and Platais 2007) aiming to apply the Coase Theorem (James and Sills 2018), that is based on the assumption that, given certain conditions, the problems of external effects can be overcome through private negotiation directly between the affected parties regardless of the initial allocation of property rights.

The underlying financial principle of PES is based on the willingness to pay of the beneficiaries for the conservation of the service, or the undertaking of a sustainable practice, according to an inverse logic with respect to the Polluter Pays Principle (PPP), since in this case it is who benefits the payer. According to this logic, PES can be considered a tool within the so-called "Incentive-based instruments" category.

This economic tool represents an opportunity to integrate the income of land managers since they manage, conserve, restore, implement sustainable use of a landscape-environmental resource including water resources (de Lima *et al*. 2019) and, consequently, encourage sustainable management of the ecosystems. In fact, it aims to guarantee the perpetuation of the provision of an ES the most attractive option and to push land managers to adopt it. Consequently, PES becomes one of the tools that can be used to develop a market model aimed at generating income from the supply of ESs (Wegner 2016), as the ES becomes a product. In detail, the producer asserts the right to ask the consumer a price for the ES.

The main reason able to convince the purchaser to spend to obtain the ES is linked to the benefit derived, which can be identified in greater profitability (Perrot-Maitre 2006) rather than in a benefit of another nature. However, the benefit must be linked to the ES provision.

Although the recognition of the importance of services provided by landscape-environmental resources is not recent, the birth of the PES concept can be placed at the end of the Nineties, following the rapid spread of the implementation of this tool at the international level.

Starting from the first application of the formal PES mechanism in Costa Rica in 1997, developed to cope with the negative consequences of deforestation (Pagiola 2008), there are today hundreds of incentive schemes in the world that can be labelled as "PES". Often, however, this definition is used improperly, including other "market-based" instruments among the PES. At the same time, the concept of PES is sometimes used with alternative labels, such as Compensation for Ecosystem Services (CES), or Compensation and Rewards for Environmental Services (CRES) (Swallow *et al*. 2007).

An attempt to restrict and formalise the concept was carried out by identifying a definition. For example, Wunder (2005 and 2015) identified five basic principles for the identification of a PES. In detail, to be faced with a PES it is necessary: i) a voluntary transaction, in which ii) a well-defined ES (or a use of the land to provide it) iii) is purchased by at least one buyer, iv) from at least one supplier (agricultural entrepreneur or manager of a protected area) who effectively controls the supply of the service, v) if and only if the supplier ensures its supply (i.e. conditionality). In addition, Wunder (2015) suggested that the language of service users and service providers seems to be more appropriate than that of buyers and sellers. It is worth underlining that the object of the transaction must be an ES that is realised in the form of an externality, as different is the case of an ES that can be internalised by the supplier and that, consequently, does not generate market failure. In the latter case, in fact, the creation of the PES has no reason.

The aforementioned definition is not unanimously shared in the literature (e.g. Chapman *et al.* 2020; Lliso *et al.* 2020). Muradian *et al.* (2010) argue that it is not able to take into account a number of particular schemes of PES, which operate on the basis of different principles, with not well defined ESs, or with inefficient levels of supply of the same, with imperfect information, rather than with inadequately defined property rights. Examples in this sense are the PES schemes developed in Cambodia (Clements *et al.* 2010), in which other variables intervene with respect to those enunciated in the aforementioned definition of Wunder (2005 and 2015). Moreover, there are several studies that are trying to improve the definition (e.g. Vaissière *et al.* 2020).

According to Ezzine-de-Blas *et al.* (2019) and Yu *et al.* (2020) trying to incorporate all the PES into one definition seems difficult. In fact, the PES that are found in reality often differ considerably from one another, mainly due to the different application context.

The source of financial resources used and the management/administration of the PES tool may be different: financiers can be directly the users of the ES (private scheme), or the Public Administration (PA), as a third party, can act on behalf of the purchasers/beneficiaries of the ES (public scheme). Furthermore, the PA can act as a pure public-private scheme actor, belonging to the private scheme, rather than as a PES administrator, as well as a provider of financial resources, according to the logic of the public scheme (UNECE 2007). Generally, while the case of private financiers is based on schemes of limited geographical areas, in the case of public schemes the intervention has a broader scope, although it is not precluded from the possibility of operating also locally (Engel *et al.* 2008; Ezzine-de-Blas *et al.* 2019). Moreover, the stimulus to participation may be different: while in the case of private financing of PES, participation is mainly voluntary

for both parties, or prompted by the need to adapt to adopted rules, in the case of PES financed by the PA only the suppliers voluntarily join the tool.

PES can foresee the payment of the managers of the landscape-environmental resource for the mere conservation or for the creation of an ES. Consequently, there are different impacts that these two different PES schemes can produce on the economic activities of the interested area (i.e. reduction, rather than increase of the activities).

From the point of view of the beneficiaries it is important that the recipient of the payment has in fact the ability to manage the resource from which the ES derives.

There are different methods of determining the compensation in the transaction. Nevertheless, a number of types of compensation that are more widespread can be identified. In detail, the determination of the contribution based on a predetermined percentage of the beneficiaries' income, or the predetermination of an annual amount. FAO (2007) also points out that the compensation can be either monetary, or in another form (e.g. food, training or employment, better conditions for stipulating contracts).

From the point of view of the duration, firstly it is necessary the PES is sufficiently long to guarantee sustainability and secondly it is fundamental to be sure about the high probability of perpetuation of the good practices that are encouraged with the PES.

To summarise, the development of a PES must follow certain criteria: the PES must be realistic, as the opportunity costs must be covered by the payments, voluntary, and must also respect the principle of conditionality. Finally, it must respect the condition of equity.

2. Payments for Ecosystem Services and Water Resources

As mentioned above, PES is a tool that could be implements in heterogeneous scenarios with the aim to improve natural capital management, including water resources use. It is from the experiences collected by using this tool in real contexts that some of its positive and negative aspects have emerged.

First of all, there are several positive characteristics that can be recognised. PES is attractive as it is able to move additional financial resources, ensuring that the planned payment is bound to the performance of a specific practice involving the landscape-environmental resources, and producing a justification to the transaction.

In addition, PES creates an improvement of benefits compared to the starting situation (additionality). However, in order to satisfy the condition of addition-

ality the identification of the basic reference represents an extremely difficult task, which could have effects on the determination of the efficiency of the tool (Masiero *et al.* 2017).

In favour of PES, it is necessary to remember its flexibility, which allows for the renegotiation of the agreement reached between the parties when the conditions used to stipulate the transaction are modified. Although this feature may be a source of instability and a threat to the continuation of the proposed improvement of ES provision, it constitutes a guarantee of greater effectiveness, since the modified conditions of the context may require a change in the agreement (e.g. entity or duration of payment, objectives to be achieved) in view of a gradual improvement.

Regarding "efficiency", it should be noted that PES approach ensures that the users of ESs provide funding resources to support only anthropic activities they consider beneficial practices to be financed.

The effectiveness of PES is strongly dependent on the socioeconomic context in which they have been implemented. PES can be created in contexts with different levels of socio-economic development and with rather heterogeneous features. However, it seems that in rural areas PES is able to express its potential. In these areas, that according to the OECD methodology occupy 90% of the territorial surface of the European Union, a dominant role is played by anthropic activities that heavily influence the provision of ES. Since agricultural lands represent a large part of the surface used, the consideration of PES takes a role of primary importance among any approach aimed at preserving the services provided by the ecosystem. For this reason, the use of PES schemes seems to be fundamental in these areas (The Katoomba Group 2008).

There are several difficulties in the implementation of PES. The creation of this tool, in fact, is not a simple procedure and requires negotiation processes between the interested parties, which in some cases could be complex and expensive. PES approach is not feasible in contexts where there is a high risk of conflict between resources (Huberman and Shepherd 2010).

Often it is necessary to guarantee the presence of an actor with intermediary functions, or to guarantee the definition of specific rules.

Even the lack of basic information (prices, methods of measuring the ES, etc.) for participants can be an obstacle to PES development. To create a PES, for example, in addition to defining and measuring the ES, it is essential to evaluate the financial value of the service. Referring to this last point, on the one hand, it seems relevant to remember the difficulties of the estimation process of landscape-environmental assets. On the other hand, the underestimation of services deriving from landscape-environmental resources represents a limitation of considerable importance for the optimal definition of a PES scheme.

The existence of a regulatory framework suitable for fostering the creation of a PES, including the definition of property rights, is another basic condition for the implementation of a market for ESs. Sometimes, factors such as risk, price fluctuations, future expectations can represent significant obstacles to the activation of the PES. The involvement of the PA may be relevant in this context.

The identification of the best implementation method of the agreement (payment mechanism, sources of financing, elements of the agreement, etc.) could be a problem due to high transaction costs that could be considered significant obstacles to the creation of this incentive-based tool.

These costs can be very high due to the presence of monitoring and supply controlling structures of the ES. In addition, the relevant and extremely difficult role of evaluating landscape-environmental resources has been mentioned. The problem relating to the ability to monitor and evaluate ESs is fundamental, since it should allow the quantification and the relationship between the ES supply and the type of management of the ecosystem. This capacity is fundamental for the creation of a PES scheme, but is often neglected, in favour of prices determined on the basis of the financial resources of the beneficiaries (Van Halsema 2005).

As already mentioned (Masiero *et al*. 2017; Troiano and Marangon 2010), a central problem in the definition and monitoring of PES is represented by the difficulty in determining the baseline, in terms of services that must be complied with, as well as the definition of improvement qualitative of landscape-environmental resources characteristics. The latter task, which in some cases proves to be anything but simple and requires the preparation of suitable indicators, in particular as regards the landscape resources, means to take into consideration medium-long periods of time (Troiano and Marangon 2010). Consequently, the difficulties in assessing the effectiveness of the application of a PES in favor of the landscape-environmental resources could be considerable.

PES tool is very sensitive to the variations that the context in which they are implemented. For example, the increase of prices of agricultural commodities could induce agricultural entrepreneurs to renounce to participate, opting for activities that can potentially have negative repercussions on the supply of ESs. An exception is the case in which PES compensation increases in line with the price of raw materials (Engel and Palmer 2009). Therefore, it is required that the applied PES scheme has a suitable duration to guarantee the best results in terms of ESs provided, however it is also necessary for the scheme to be flexible and provided with the possibility of making changes in compliance to changes in the reference context. Therefore, the circular and discontinuous logic that the PES instrument must follow should be strongly and necessarily characterised by dynamism.

Although it is a source of additional costs, the control of the areas adjacent to the context where PES market is implemented proves to be strategic. It avoids that the improvement of the initial situation of the area affected by PES could produce detriment of neighbouring areas ("leakage" effect). To try to solve this negative effect interesting opportunities come from collective approaches in managing PES. In fact, it is necessary to emphasise the need to point out in developing PES schemes not exclusively the logic of individual profit but rather the need to act by cooperating to achieve benefits in favour of the whole community (Kolinjivadi *et al*. 2019; Narloch *et al*. 2012).

To guarantee an optimal implementation of PES it is necessary to pay attention to a double approach (Robinson and Keenan 2010): i) a top-down approach produces the necessary coordination in favour of agreements between a number of different stakeholders, the preparation of an adequate regulatory-institutional framework, adequate assistance and technical support for the development of sustainable activities; ii) a bottom-up approach, instead, could create among stakeholders an improved production of ESs. Both approaches have the same sharing vision and ideas that enhance the basis of the PES scheme.

Last not least, PES spontaneously developed by private individuals represents one of the most adequate instruments of intervention to guarantee the supply of ESs.

3. The role of public decision makers

Although the PES are born as a market solution for the management of ESs, with the precise objective of being an alternative to the institutional public management, the role of PA in developing PES schemes has been decisive (Bateman *et al*. 2019). In particular, the role of the PA and of the communities in reducing transaction costs linked to the PES scheme creation seems to be fundamental.

The intervention of the PA aimed at supporting the dissemination of PES is important and can take place with different degrees of involvement. PA role can vary: it can adopt the more traditional role of decision-maker in the institutional framework, can act as intermediary, as well as promoter/financier of the PES, or can play the role of ESs seller. The latter is the case in which PA holds the ownership of the landscape-environmental resources from which the services object of negotiation derive. PES, in this case, becomes a tool to finance the conservation activity carried out by the PA.

By adopting its role of institutional decision-maker, PA can be present in a PES scheme in order to eliminate obstacles, to prevent or avoid difficulties for the start-up of a market between users and suppliers of ESs.

Among these obstacles, the role of PA to reduce the presence of high transaction costs related to the implementation of a PES scheme, as well as to the negotiation of the agreements, is significant. These costs are often due to the presence of supply and demand of ES benefits composed of several individual economic agents. Fundamental is the role that PA could play by connecting sellers and buyers, or by stimulating the market mechanism by providing adequate information, training and raising awareness of the community towards sustainable use of natural capital to avoid negative effects. The role of PA becomes important to increase citizens' awareness of the benefits received from landscape-environmental resources and their sustainable management, inducing them to support their protection, through the payment of an amount of financial resources for the benefit received.

Furthermore, PA has to guarantee to all citizens the right to enjoy the main ESs, even when they do not have enough financial resources to pay for their supply, avoiding looking at ESs as luxury goods. In this condition PA has to intervene by directly financing the creation of a PES, to guarantee an adequate wellbeing of citizens.

There are several examples of PES with the presence of PA as a buyer. The most common example in this context is the agri-environmental payment, which, through the European Union Rural Development Programs (RDPs), encourages agricultural entrepreneurs to persevere in maintaining the landscape-environmental resources and in the provision of ESs in favour of the community.

Pagiola and Platais (2007) noted, however, that the PES financed by the PA (i.e. PA acts as a buyer on behalf of the users), as the aforementioned agri-environmental measures, are less efficient than those financed directly by users/beneficiaries. The inefficiency that characterises this role of PA derives, firstly from the lack of direct information of PA regarding the value perceived by the beneficiaries by using the ES. Secondly, the source of inefficiency is the impossibility of the PA itself to control directly the supply of the service.

Moreover, PES financed by PA are usually founded on the payment of uniform amounts to support the ESs suppliers; furthermore, they are characterised by modest spatial differentiations and lack of specific objectives in favour of the sites in which they are implemented.

In addition, Pagiola and Platais (2007) pointed out that often in PES where PA acts as a buyer on behalf of third parties, payment is linked to quantity of inputs rather than to the actual supply of the ES. The cause of this gap derives from the impossibility of observing the level of supply of ES. Consequently, to facilitate the implementation of PES PA adopts incentives linked to the use of productive factors (e.g. land use, use of water resources), creating potential distortions and decreasing the effectiveness and efficiency of PES.

Furthermore, PES financed by the PA could make citizens less responsible, eroding their sense moral duty towards ESs protection.

Nonetheless, in favour of the efficiency of PES financed by the PA acts the opportunity to realise scale economies in transaction costs, given the considerable dimension of both number of actors and area that characterises this type of PES scheme.

In a number of cases, however, PA direct financing of PES, even if less efficient, remains the best option. For example, when i) there is a significant conflict of interest between beneficiaries and suppliers of the ES; ii) the occurrence of an unexpected increase in transaction costs is a real risk; iii) there are incentives for opportunistic behaviour among users (Wunder *et al.* 2008). In addition, the role of PA direct financial support could be relevant when ESs provision does not currently have a defined buyer on the market and despite this lack of knowledge needs protection to perpetuate the provision of these benefits.

It was also pointed out that often the PES financed by PA are able to emphasise objectives in favour of the whole society compared to those pursued by private citizens. For example, PES financially supported by PA could aim to reduce poverty in developing countries. In these cases, the development of PES could supplement local income. Addressing these additional issues through PES on the one hand confirms the importance of institutional support in order to guarantee to the local population a certain level of well-being, on the other hand it can allow the achievement of the primary objectives of PES scheme, i.e. the maintenance of the supply of ESs.

4. Conclusions

Still relevant are the difficulties to be faced in order to develop optimal PES schemes in favour of the landscape-environmental resources. Firstly, we have mentioned the difficulties related to the monetary evaluation of the ES, which is the first step in determining its price in a PES scheme, as well as the identification of the best type of contract to ensure optimal implementation from a social point of view. In addition, another fundamental step in implementing a PES tool is the need to proceed with the assessment of the positive/negative consequences arising from the application of this instrument. In detail, evaluation requires the ability to have appropriate indicators and to use a sufficiently wide period of time to observe and determine the effects of the PES on the natural capital including water resources. An operation that turns out to be anything but trivial.

The use of a PES also implies an aware implementation because it is not a neutral instrument, as it usually reflects the culture of the society in which it

is implemented (Vatn 2009). Moreover PES should be adapted to the context in which it is inserted. PES was seen by a number of local communities to represent privatisation and natural capital appropriation, but several studies prove its use becomes fundamental in order to support a sustainable development of the natural capital and the maintenance of the ESs provision.

Nonetheless, the positive repercussions that appear to come from a virtuous use of PES instrument in favour of water resources and more broadly of natural capital and its services conservation tends towards a broader future use of this incentive-based tool. According to Farley and Costanza (2010), Van Hecken and Bastiaensen (2010) by using a transdisciplinary approach based on considerations related not only to efficiency, but also to sustainability and equity, PES tool may be able to more effectively capture a number of the abovementioned benefits while avoiding the most problematic effects.

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The European Union and soft tourism for the protection of the natural and cultural landscape: some problems and different approaches

MORENO ZAGO

1. The dimensions of tourism in the European Union: impacts, behaviours and consumption styles

Europe is the world's main tourist destination. Over 50% of international tourists choose one of the European Union countries for leisure, business, health, faith or to visit friends and relatives, generating 407 billion euros across, around 33% of the world total. This represents 577 million tourists, a share that is constantly growing, although the relative weight of the European continent will gradually decrease to the benefit of other destinations: 41% in 2030 (UNWTO 2011, 2019). The growth rate in the last year has been 3%, higher for the Southern and Mediterranean countries and lower for the Northern countries. Just to give an idea of the size of the tourist flows, overnight stays in accommodation facilities in EU countries are about three billion, equally distributed between European residents and non-residents. The most frequented regions are the Canary Islands, Catalonia, Croatia, Ile-de-France, the Balearic Islands and Andalusia. In the first twenty positions, Italy has six regions: Veneto, Tuscany, Emilia Romagna, Lombardy, Lazio and the Autonomous Province of Bolzano. A third of tourists are concentrated in the summer months of July and August (Eurostat 2016). The countries of the European Union are the preferred destination not only for for-

eigners but also for residents themselves. According to the Eurobarometer survey (2016), the main holiday takes place for 44% of respondents within their own country and 29% within another EU country. Sun and beach remain the main reasons for choosing a holiday (39%), followed by visiting family, friends or relatives (38%), exploring nature (31%), visiting the city (27%), seeking out culture (26%), wellness (13%) or doing sports (12%).

These numbers allow you to make some initial reflections and identify three orders of problems. First of all, tourism is confirmed as a phenomenon in constant growth. Despite occasional downturns due to natural, political or economic events (epidemics, environmental disasters, terrorist acts, financial crises, etc.), the sector has never stopped growing and the countries of the European Union continue to perform well. The growth of well-being in other geographical areas (Asian countries *in primis*) will be a reason to push for long journeys, and Europe's major cities and tourist destinations – major and minor ones – will have to address the problem of how to manage these substantial flows of arrivals, especially in terms of environmental sustainability. The UN Agenda 2030 for Sustainable Development recalls the sustainability objectives for the tourism sector in Goals 8 (Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all), 12 (Ensure sustainable consumption and production patterns) and 14 (Conserve and sustainably use the oceans, seas and marine resources for sustainable development). How is the European Union meeting these objectives?

A second issue concerns the object of the tourist's gaze and his travel style. Despite the fact that mass tourism in cultural seaside destinations constitutes and will constitute the main share of tourist flows, the tourist's behaviour has undergone important transformations in recent years. From the search for pre-packaged experiences where the social group defines its contents and values and the ability to blend in with others, we have moved on to a refusal to be treated as an undifferentiated mass and a need for knowledge, relationality, authenticity and slowness. Preferences become more individual and more differentiated in terms of places to visit and activities to do. Tourists prefer to contemplate landscapes, to enter into osmosis with the territory through the activation of all the senses and to recover the centrality of the relationship with the other protagonists of the tourist experience (travellers, operators, residents) in order to explore paths of identity rediscovery and spaces of autonomy (Clancy 2018). The issue is closely linked to the problem of overtourism, which distorts the relational and authenticity dimension of a tourist destination. Will the destinations, now less popular with tourists, benefit from these new styles of consumption and the decline of the most popular destinations, but will they be able to accompany the development of tourism in terms of sustainability and avoid conflicts between guests and hosts?

A third aspect is the increasing attention given to a sustainable lifestyle also in the field of tourism. This term refers to behaviour aimed at ensuring that everything we do, have and use meets our needs and improves our quality of life, minimising the consumption of natural resources, emissions, waste and pollution and ensuring the protection of resources for future generations. Sustainability in lifestyles is a broad concept and includes, in addition to material consumption, activities such as interpersonal and leisure relations, sport and education (Mont 2007). The Ecological Footprint parameter, introduced in the '90s by Mathis Wackernagel and William Rees, measures human demand on ecosystems in terms of area, land and sea, biologically productive and necessary to produce the resources that man consumes and absorb the waste he produces. On a global level, July 29, 2019 was the day on which humanity has exhausted all the resources that the planet is capable of regenerating in a year (World Ecological Debt Day). With regard to European lifestyles, this day occurs early: in May for Italy, France, the United Kingdom, Greece, Portugal, Spain and the Netherlands; in April for Ireland, Norway, Finland, Belgium, Sweden and Denmark; in February for Luxembourg. Locations wishing to invest in tourism will increasingly need tools to monitor and assess the impact of tourism facilities and services, as well as tourists themselves, on local resources. Are local authorities adequately trained to prevent negative impacts and manage the process of participation that actively and constantly involves institutions, operators and citizens?

How the European Union reconciles sustainability with the growth of tourism and the management of overtourism in urban contexts and fragile areas will be the subject of this essay.

2. The European Union and the challenges of sustainable tourism

The European Commission Communication "Europe, the world's No 1 tourist destination – a new political framework for tourism in Europe" (2010) put attention on some important aspects related to the tourism sector. First of all, it highlights the positive impact on economic growth and employment, while contributing «to development and economic and social integration, particularly of rural and mountain areas, coastal regions and islands, outlying and outermost regions or those undergoing convergence». Secondly, tourism is recognised as an instrument to «reinforcing Europe's image in the world, projecting our values and promoting the attractions of the European model, which is the result of centuries of cultural exchanges, linguistic diversity and creativity». Thirdly, it recalls the need to «reconcile economic growth and sustainable development, including an ethical dimension». Finally, the importance of changes in climate

conditions that will lead to a restructuring of travel patterns and affect tourist destinations is underlined.

The climate is one of the greatest resources for tourism as it contributes to its attractiveness. It determines the seasonality of demand, influences operating costs such as heating and air conditioning, artificial snow production, food supplies, irrigation and insurance costs. Studies by the international scientific community on climate change are not encouraging (IPCC 2019). The climate consequences for Europe will be different. For the Central-Southern area there will be large heat waves that will cause forest fires and frequent periods of drought; the Mediterranean, on the other hand, will become an arid location with few and bad harvests. Northern Europe will increase its humidity and, in winter, heavy rainfall will be more and more frequent, while in urban areas, where there is the highest percentage of population density, there will be high increases in temperatures and many floods that will cause the sea level to rise, causing disastrous inconvenience, since cities are not effectively prepared for subsequent events. International tourism will see an important increase for certain countries and more travellers will flow to cold areas. Climate change will cause a doubling of tourism spending in cold countries and a decrease in hot climates (Hamilton *et al.* 2005; Bigano *et al.* 2007; Bizzarri and Pedrana 2018). The climate issue is a very strong problem for European citizens. According to the Eurobarometer survey (2019), almost eight in ten think climate change is a very serious problem and agree that taking action on climate change will lead to innovation that will make EU companies more competitive.

Also through the European funding programmes (Interreg, Horizon, etc.) the European Union, in close cooperation with the Member States and the main operators in the tourism industry, wants to «consolidate the image and profile of Europe as a collection of sustainable and high-quality destinations and promote the development of sustainable, responsible and high-quality tourism».

According to the Communication, the sustainability of tourism covers a number of aspects: the responsible use of natural resources, the environmental impact of activities (production of waste, pressure on water, land and biodiversity, etc.), the use of clean energy, the protection of the heritage and preservation of the natural and cultural integrity of destinations, the quality and sustainability of jobs created, the local economic fallout or customer care.

The new Green Deal launched by Commission President, Ursula von der Leyen, as an integral part of the strategy to implement the UN Agenda for 2030, aims to make Europe the first zero-emission continent by 2050. To achieve this goal, a significant role is given to the tourism sector, which has an impact on the conservation of cultural and natural heritage and which has an obligation to lead the response to the climate emergency and ensure a responsible growth.

Some of the instruments introduced to facilitate the environmental management of businesses and tourist destinations are: a) the European Eco-label which distinguishes products and services with a reduced environmental impact throughout their life cycle; b) the Community eco-management and audit scheme (EMAS) to which organisations (companies, public bodies, etc.) can voluntarily adhere; (c) the EDEN Destinations Network which identifies destinations (especially lesser known destinations) as examples of good practice for sustainable tourism; d) the Tourism and Environment Reporting Mechanism (TOUERM) based on a system of indicators reflecting both environmental impacts (minimum and maximum) and sustainability trends on a European scale; (e) Corporate Social Responsibility (CSR) initiatives, suggesting that companies implement a process that integrates social, ethical, environmental, human rights and consumer requests into their core activities; (f) Community Environmental Action Programmes which recognise tourism as one of the key areas for a sustainable land development strategy with a view to: safeguarding the environment, fostering social cohesion, reducing territorial disparities, upgrading marginal areas.

To this list can also be added the Network of European Regions for Competitive and Sustainable Tourism (NECSTOUR), since 2007 committed to implementing the principles of the "Agenda for Sustainable and Competitive European Tourism" (EC 2007). Not to be forgotten is the Natura 2000 Network, established under the Habitats Directive 92/43/EEC to ensure the long-term maintenance of natural habitats and species of flora and fauna threatened or rare at Community level. The Directive recognises the value of all those areas where the centuries-old presence of man and his traditional activities has allowed the maintenance of a balance between human activities and nature, ensuring the protection of nature also taking into account «economic, social and cultural needs, as well as regional and local particularities» (Art. 2). Among the economic needs is, of course, also included tourism.

Although not an EU initiative, the "European Charter for Sustainable Tourism in Protected Areas (ECST)" should be mentioned which belongs to the Europarc Federation (2000), a pan-European organisation of protected areas. The Charter is a methodological tool and certification that allows a better management of protected areas by institutions and tourism professionals who express the will to promote tourism in accordance with the principles of sustainable development. The Charter commits the contracting parties to using methods based on partnership through precise agreements and cooperation between the authorities of protected areas, tourism businesses and the local population.

The issue of sustainable tourism and recreation is an important area of responsibility of Regional Nature Parks (Köster and Denkinger 2017: 42-45).

Regional Nature Parks are responsible for setting up and maintaining an infrastructure for recreation, such as walking and cycling routes. These activities mean Regional Nature Parks can be relied upon to provide high-quality experiences in nature and sustainable and natural tourism. Regional Nature Parks play an important role as an interface between different interest groups, such as tourism, education, regional development and conservation.

3. The limits of tourist development

The growth of tourism is not always perceived and evaluated positively. Models on the relationship between tourists and residents of Doxey or on the destination life cycle of Butler or on carrying capacity of O'Reilly's remind us that overcrowding from an excess of tourists can cause irritation of residents and tourists and the abandonment of destinations. Over the last few years, there has been a growing resentment towards tourists. In the district of Ciutat Vella in Barcelona live about one hundred thousand people but it is invaded by more than thirty million tourists and commercial activities are dedicated to the use and consumption of tourists. In the face of the disrespectful behaviour of tourists (nocturnal shouting, scenes of nudism, bottles left in the street, etc.), many residents have started anti-tourist campaigns ("Tourist go home", "Tourism kills the city", "Barcelona is not for sale" are some of the proposed slogans). Even Venice suffers from the unsustainable growth of tourists (about 23-25 million per year) with a population of about fifty thousand (constantly decreasing). In Amsterdam, more than eight million tourists are "sinking" the capital by forcing the national tourist board to block the promotion of the most attractive places (museums, canals, red light district, etc.) to encourage visitors to discover lesser known destinations. Tulip fields also suffer from overtourism. During the Easter weekend more than 200,000 visitors invaded the largest Dutch flower garden (Keukenhof). A selfie in a tulip field is an incredible temptation but the damage to the growers is enormous. In Florence, it is almost impossible to think of opening up non-tourism related activities. Dubrovnik has imposed the limit of four thousand accesses per day and installed cameras to monitor the flow and behaviour of tourists. The closed number is also planned on the beaches of Galicia to protect the coast and the marine ecosystem during the high season, especially on the islands of Cíes, Ons, Sálvora and Cortegada. In the Cinque Terre, the relationship between visitors and tourists is becoming conflictual, prompting the administrations to take measures to limit access and to increase transport to regulate the daily chaos for the residents. In the Balearic Islands, the brake has been put on all those promotions that encourage the tourism of *borrachera* (drunkenness) and the stop to

private homes rented to tourists. Iceland is studying how to distribute the more than two million tourists on the island, which has experienced double-digit percentage growth for more than a decade (+344% in the period 2011-17). Finally, the real estate market in the most popular destinations is practically affected by rentals on the platform Airbnb.

These examples bring to light a fundamental point: uncontrolled mass tourism ends up destroying the very things that made a place attractive in the beginning: the unique atmosphere of local culture and beauty. They also highlight two phenomena: *overtourism* as the excessive presence of temporary visitors in certain areas influencing the lifestyle and level of well-being of residents (Milan *et al.* 2019) and *tourism-phobia* to refer to movements of opposition and criticism of the phenomenon of overtourism.

Overtourism produces negative social consequences that often result in conflicts between the resident population and the local administration. These conflicts concern processes of gentrification or the emptying of specific neighbourhoods as a result of the purchase of real estate for the tourist market, the transformation of commercial activities into tourist activities unrelated to the needs of residents, high dependence on the tourist sector (monoculture effect), crowding of roads and transport that make difficult for residents to live their daily lives, high levels of pollution and waste production, uncontrolled exploitation of natural resources and trivialisation of urban and rural environments. There is also a problem of identity and sense of belonging. Tourist monoculture generates gentrification, turning neighbourhoods into trendy places and forcing residents to move to the suburbs. The locals thus feel evicted from the interests of real estate, financial and tourism entrepreneurs.

Anti-gentrification movements have arisen against the choices of local governments and against the tourists themselves. These movements are made up of citizens of different social backgrounds who promote anti-gentrification, anti-speculative practices and against the commodification of spaces for tourist purposes. As is pointed out, there is not only a direct expulsion that takes place through evictions; urban regeneration projects that increase the value of real estate and tourist projects that transform places and local memories into a tourist product to be consumed are also responsible for the abandonment of neighbourhoods. Copenhagen was known to be the city of social assistance; today, it is a green city after the interventions on the harbour, the creation of greenways and green areas, the connections between neighbourhoods, etc. Absolutely "cooler" but with a new social class.

In the '80s, in Barcelona, tourism was identified as one of the main objectives for the urban regeneration of the city. Today, the "Assemblea de Barris per un Turisme Sostenibile", which get together thirty-five neighbourhood associ-

ations, has launched a campaign in favour of a decrease in the tourism sector to reduce the numbers of tourism (visitors, overnight stays, economic activities, etc) as a first step towards a more socially and ecologically equitable city model, through policies of seasonal adjustment, delocalisation and decongestion. Similar movements have sprung up all over Europe, all united by the need to defend a right of residents to their city where they can grow, live and work. This attachment to one's place of origin and participation in a movement of "resistance" can be defined as a form of "restanza" (Teti 2011), meaning the position of those who decide to stay by renouncing to sever the link with their land and community of origin, not out of resignation but with a proactive spirit. The experience of these movements shows that residents are well informed and have a strong awareness of the impact of tourism on local society and how to react; the point is that they do not have the political tools to reach local bodies and policy makers.

In 2018, the Founding Manifesto of the SET Network – Network of Southern European Cities Facing Tourism (*Red de Ciudades del Sur de Europa ante la Turistización*) was made public. Fourteen cities initially joined it (Barcelona, Donostia/San Sebastián, Canary Islands, Camp de Terragona, Girona, Lisbon, Madrid, Malaga, Malta, Palma, Pamplona, Seville, Valencia, Venice), a number that is constantly expanding. The movement is not "against" tourism but aims to spread awareness of the problems caused by the current tourism model and possible alternatives. The Manifesto stresses the importance of imposing limits on the tourism industry and of tourism degrowth accompanied by policies to stimulate other more socially and environmentally equitable economies. Experiences already started include the closed number, the limitation of the number of licenses granted for accommodation facilities and tourism-related activities, the administration of prices in the real estate market, the preference for widespread ownership, the distribution of extra profits of large financial oligopolies and real estate estates, encouraging economic activities with a civic vocation.

Tourism can be a valuable ally for protection and conservation, but it must be properly managed. Administrators and operators must seek the right mix of governance and culture of hospitality. It is important that administrations collaborate with these movements. No one benefits from a destination that collapses because of tourism, not even tourists who do not want to feel overwhelmed by other visitors. But, above all, it is important to have a clear vision of which city to hand over to future generations. This vision must be built in partnership by mapping the needs of communities and building policies aimed at places. The experience of ecomuseums can be a good starting point. Briefly, the ecomuseum focuses on the natural environment and relies on a series of cells formed by the residents of a territory who share the way of life and work and the local culture.

The ecomuseum is built around a shared experience of building a community map that identifies the landscapes and memories, heritage and knowledge that constitute the identity and vision of the future of those who design and live it and wish to pass down it on to future generations (Zago 2018).

4. The cultural construction of the landscape and its measurement

Talking about the landscape, it is natural to start from the European Landscape Convention, adopted by the Committee of Ministers of Culture and Environment of the Council of Europe on July 19, 2000. The aim of the Convention is to promote the protection, management and planning of landscapes in the European territory. The Convention applies to the whole territory, on natural, rural, urban and peri-urban spaces.

In the declination provided by the Convention, the landscape is no longer considered exclusively in its most aesthetic or scenic components, but is understood in a more inclusive way, also taking into account its historical and economic components, giving a new value to the landscapes of everyday life. In this sense, the Convention has offered an innovative perspective on landscape, starting from the definition given in the first Article: «"Landscape" means an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors». The Convention, therefore, in addition to the natural beauty of the landscape, highlights how the interrelation between human and environmental factors generates the peculiar characteristics of the landscape and the role that the local population plays in giving it meaning.

Furthermore, the Convention describes the "Landscape management" as «actions, from a perspective of sustainable development, to ensure the regular upkeep of a landscape, so as to guide and harmonise changes which are brought about by social, economic and environmental processes» and the "Landscape planning" which indicates, instead, «strongly forward-looking actions to enhance, restore or create landscapes». Finally, in Article 5, it states that each party undertakes «to recognise landscapes in law as an essential component of people's surroundings, an expression of the diversity of their shared cultural and natural heritage, and a foundation of their identity».

Recalling what is written in the Preamble, the landscape «constitutes a resource favourable to economic activity and whose protection, management and planning can contribute to job creation» linked to the development of sustainable tourism. Thus, the active participation of the local community becomes crucial. The residents of a territory, therefore, both those who have been established for a long time and those who are newly settled but, one could add, also those

who are passing through (such as tourists and hikers), become responsible for the knowledge, protection and transformation of the landscape.

These definitions well interpret the characteristics of the new tourist offer where the landscape is the place of living and production know-how, capable of promoting tourist development paths (Calzati 2011: 66). This development can only be achieved by increasing collaboration between actors on projects for the implementation of local identities and the networking of excellence, so as to help promote endogenous development of the territories in a perspective of sustainability too. This means that what is offered by a territory must be closely linked to the will of its residents to preserve and promote it because it is felt.

When we talk about landscape and the relationship between the various actors, it is important to analyse their "perception" of it, what are their mental images and the processes with which these images are constructed. The question is less theoretical than it seems following the signing of the Convention that introduces the perceptive aspect as a fundamental element of the definition of landscape. Referring back to Bourassa (1990), one can hypothesise how this perception can be first of all "instinctive", because some responses to the surrounding environment are innate and conditioned by natural selection occurred during human evolution. But since the times of the savannahs, human society has evolved, and with it, human responses to the landscape have also progressed. In addition to the instinctive, primordial responses, there are others that derive from education and processes of socialisation and acculturation, which, being filtered by acquired behaviours tend to differ according to culture, age or past experiences of each individual. In addition to the instinctive one, there is therefore also this "affective" perception of the landscape, derived essentially from the first phase of learning, and therefore subject to change according to the cultural or social context in which an individual grew up. But, as Tempesta (2006) observes, the value of landscape also depends on what is called "cultural perception". This is the ability of people to correctly interpret the historical importance of a given landscape framework or some of its components. The "cultural landscape" can therefore be defined as the history of the territory, everything that that territory has been and now remains written in the profile of places, manifesting itself only to those who pose themselves as culturally prepared observers of a given reality.

From what has just been written, it can be said that the visual quality of the landscape can be traced back to instinctive and affective perceptions, therefore to a type of emotional relationship with the environment, while the historical-cultural one can be traced back to the ability to see in the landscape the typical elements of a territory that constitute its identity basis. These perceptions, these cultural representations of the landscape presuppose in some way an ability to read it, a desire to go beyond the superficiality of the gaze, not only by visitors but

also by residents. The call for a path of development and promotion of the shared territory returns.

To improve the management, information and monitoring of tourist destinations, with particular reference to an environmental sustainability approach, the European Commission (2013, 2016) has proposed the European Tourism Indicators System for sustainable destination management (ETIS). It is not intended to be a certification system but it has been conceived as a process to be formed and conducted at local level for the collection and analysis of data and help destinations to develop and implement plans with a long-term vision. The toolkit consists of forty-three main indicators and a set of additional indicators. The first are divided into four sections (destination management, social and cultural impact, economic value, environmental impact) and the second into three sections (maritime and coastal tourism, accessible tourism, transnational cultural routes). The strong point of the system is a guided process that accompanies destinations to build a process of participation able to implement the indicators. The system suggests how to form an interdisciplinary team, establish priorities, roles and responsibilities among the actors involved in the management process. The phases foreseen for implementation are: raise awareness, create a destination profile, form a stakeholder working group, establish roles and responsibilities, collect and record data, analyse results, enable ongoing development and continuous improvement.

5. Final remarks

From what has been written, let us now try to make some observations by recalling some points analysed. First of all, the way of choosing the trip has partly changed. Alongside mass tourism towards known places, a simpler tourism is emerging, made of relationality, responsibility and ethics. This tourism was born as a reaction to the stress to which people are subjected in everyday life. Industrial and mass-produced products are reacted to by searching for authentic goods; the lack of security and orientation is responded to by interacting with other people more rooted in the community. A "suffocating" urban context is responded to by taking refuge in rural contexts, perceived as more reassuring. The countryside has become a tourist destination, for the services it offers, together with diversified and quality products, also guaranteed by certifications of origin.

With the emergence of the culture of sustainability, tour operators found themselves faced with a tourist concerned about the significant consumption of environmental and territorial resources of mass tourism and less interested in making his further contribution to crowding and, therefore, to the deterioration

of extremely attractive but deeply deteriorated destinations. The Eurobarometer survey already quoted shows that there is a share of European tourists that, in the choice of a destination pay attention if the local destination had introduced sustainable or environmental-friendly practice (17%), if the destination was accessible by means of transport with low impact on the environment (15%) and if the hotel or accommodation had introduced environmental-friendly tourism practices (13%). One in ten respondents were influenced by the fact that the destination or services used was certified with a label indicating sustainable or environmental-friendly practices (10%). Young people in the 14-25 age group (Z generation) are more influenced by at least one of the aspects indicated.

This attention to "green" translates into a growth in the competitiveness of a destination that is so inextricably linked to sustainability, defining the former as illusory in the absence of the latter (Chiarullo *et al.* 2016) and in a benefit for destinations with a high level of tourism (such as cities) that see a reduction in visitors but a risk for fragile areas that risk seeing parks and reserves stormed by new tourists. Just think that in Italy there are about thirty million visitors linked to nature tourism and the potential of nature parks is even greater, representing the heart of nature tourism products. The Park can be, therefore, the subject able to see in culture the opportunity to stimulate coordinated policies of environmental safeguard and to build common projects for a sustainable future (Chiodo and Salvatore 2017).

Soft tourism, therefore, produces numerous advantages: «the development of new high quality products based on natural and cultural resources, with long-term prospects; cost reduction through collaboration with protected areas; the improvement of the company's image; new markets; an increase in income and standards of living; the revitalisation of local culture, the uses and customs of craftsmanship; support for rural infrastructure; the improvement of physical and mental well-being» (Angelini and Giurrandino 2019: 8).

Sustainability management is, however, a delicate process because it involves a number of actors in the tourism system who have different interests and who pursue goals that do not always coincide. Corvo (2007: 73-74) recalls some paradoxes linked to the sustainable management of tourism: the promotion of places and attractions whose costs can only be justified in the presence of substantial tourist flows, while at the same time putting them in danger (paradox of the economy of scale); the risk of transforming the specific elements of local culture into realities that are better suited to the needs of tourists (paradox of the globalisation of the typical); the attribution of a non-priority value to the conservation of the ecosystem and local culture by communities, preferring to access the economic benefits of mass tourism (paradox of good value); the transformation of resources not yet degraded by tourist flows into

attractions and then generating problems in the management of their use (paradox of destructive protection).

In conclusion, this specific planning requires tools based on participation and sharing of programmes and decisions that enhance local skills and knowledge and must also embrace the concept of social eco-compatibility, i.e. the cultural and symbolic code through which a population connote and defend itself and its identity. The protection of the social cultural diversity of a community must be just as important as the protection of the bio-diversity of flora and fauna (Nocifora 2019: 123). Quoting Aime (2005: 64): «We have divinized art (and one could add nature, ed.) to the point of placing it above the parts, of making it superhuman: we are willing to defend the Buddhas from destruction much more than we would be to defend the Buddhists». The point is that places have an intrinsic (non-economic) value, regardless of what can be done with them, so that their alteration or destruction makes a community poorer (Del Bò 2018: 78-79). These natural and cultural places are the common thread that joint generations and transmits identity, and in this sense the list of UNESCO World Heritage Sites that the European Union supports to encourage a slow and careful tourism (https://visitworldheritage.com) should be read.

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