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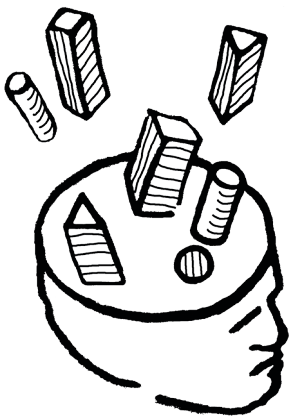

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Environmental Sustainability in the European Union: Socio-Legal Perspectives

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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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