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Lessons on Sustainable Development in EU Law

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Gioacchino Onorati editore S.r.l. – unipersonale

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ISBN 978-88-255-3482-5

1st edition: july 2020

Dedicated to the memory of my father Luciano. A genuine and honest man; although at times irritable and cantankerous. He knew how to make himself understood; unequivocally. Using clear words. Above all by uncomplicated people, who adored him. He had a rare quality today: he knew how to listen. He was a man of few words. But he didn't need many. His face had the expressive power of a mask. The interpretation of his thoughts left no room for doubt. He had a desire to live and a controlled irony which accompanied him to the end; even when he was fighting an invisible but relentless enemy. His loss has left an unfillable void. And for me it will always be like this. Forever.

The great killers of the Roman empire were spawns of nature. They were exotic, deadly intruders from beyond the empire. For this reason, a parochial history of the Roman Empire is a kind of a tunnel vision. The story of Rome's rise and fall is entwined with global environmental history.

K. Harper, *The Fate of Rome. Climate, Disease & the End of an Empire*, Princeton University Press, Princeton, New Jersey 2017, p. 18

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Foreword

I have a habit of writing lessons. Always. Sometimes, these are simple notes; sometimes, however, I try to organize my thoughts; sometimes, finally, I get carried away and talk at length: but, in any case, I always think about what students would like to find in their textbooks. And I hope that I have succeeded as much as possible.

When I was a student, the textbooks in use were quite different. At least as far as I recall. Some college books were very complex; others were poor in content due to sloppiness; others, finally, were renowned for being difficult to read. Times have changed a lot.

An attempt to summarise inevitably requires compromise. My idea was to reconcile two requirements: firstly, simplifying the arguments by smoothing the edges as far as possible; secondly, to capture the attention of students, who are always looking to satisfy their curiosity.

For the past two years, I have taught a course in Environmental Sustainability at the University of Milan, after having taught a course in Environmental Law for many years at the Bicocca University. The drafts of my last lessons have been amended accordingly so that they can be merged into this volume as a collection.

The aim of my work is to offer students of this course a tool for approaching and testing their knowledge of the topics dealt with in Environmental Law, paying particular attention to Sustainable Development: surprisingly, this topic has been practically ignored, at least up until a few years ago, but in recent times especially, it appears to have become a real «mantra».

This is probably a sign of the times. What is certain is that the environment represents an essential premise that has been ignored in the past, leading to confusion in many aspects of our understanding. One example of this is how climate changes, which form part of the concept of the environment, have recently been used to explain, extremely convincingly, the decline of a millenary civilization like that of Rome[1].

This text does not claim to be complete: therefore, I do rec-

1. K. HARPER, *The Fate of Rome. Climate, Disease & the End of an Empire*, Princeton University Press, Princeton and Oxford, 2017. Alongside climate change, the author identifies the pandemics

ommend that students also make recourse to more organic and complete tools of knowledge.

The one constant in study and knowledge is the «law of change», according to the teaching of Heraclitus (πάντα ῥεῖ). The study of the environment is not an exception, its law requires continuous updates, more than normally occurs in other branches of legal studies. The risk is that the weaving of a warp turns into «Penelope's shroud». There must be fixed points. Solidity requires pillars to which the structure is anchored.

Many of the topics covered are now fixed points for environmental law. This occurs in subjects that have achieved a high degree of complexity, such as for example, the waste policy and environmental damage liability. However, since I discovered that one of the major sources of pollution is the so–called «fashion system», I have dedicated a few pages to the topic, also considering the impact that this system has on the economy of many countries.

My aim is to link the legal institutions dealt with in this book with the most debated environmental issues and take into account the main conclusions which scholars of the Environmental Economy have reached. Moreover, environmental literature is fully convinced that this is an interdisciplinary area and as such it requires an approach that takes into account interaction between all components.

On this basis, in the last few pages I have outlined the «Green New Deal» which forms the basis for action that the European Commission, the «engine room» of the EU, intends to carry out in the coming years.

At present, it appears to be an «embryo» still in gestation, on which to build trust and aspirations. Therefore, all that is left is the hope that it will not become a source of future frustrations, as has sometimes happened, with the empty and solemn proclamations celebrated in support of the environment, ecosystems and their protection.

As a result, the «Green New Deal», envisaged by the European Commission, concludes this volume, the recurring theme of which is in fact European Union law and its principles.

that have affected the empire since the second and, above all, the third century after Christ. A line of development aligned with the «Coronavirus» of our time. In this context, the revolution is «Copernican», if we consider how, until the recent past, students were presented with history as a succession of war events, ignoring their preconditions and, among these, in addition to economics, technical–scientific knowledge, social organization, institutions and customs, the environment and health. *"Our story, and the story of the planet, are inseparable . . . The primacy of natural environment in the fate of this civilization draws us closer to the Romans. . . "* (K. HARPER, *cited,* pp. 292–293).

I am grateful to patient readers for any suggestions, so that the next edition of this volume can be better than the current one, which will be suitably amended.

Pietrasanta, March 2020

Chapter I

An Introduction and an Overview

1.1. Environmental Law: Starting Points (and the "Keeling Curve")

Before we launch into a description of environmental law and its starting points, I would like to touch upon the environment, as a relational concept[1].

Ultimately, it is clear that the environment is one of the biggest contemporary issues that we face. I mean issues such as climate change[2], deforestation, rising waste production, water and air pollution (quantity and quality): 16 out of the 17 hottest years have been the hottest of all since 2001.

Gases act like a greenhouse, capturing solar energy in the atmosphere and gradually the earth warms up. Glaciers and the polar ice caps melt, ocean currents change, and ocean levels rise. The polar ice cap will be gone within 70 years.

1. *"L'environnement est l'expression des interactions et des relations des êtres vivants (dont l'homme), entre eux et leur milieu"* (M. PRIEUR, *Droit de l'environnement*, VIII ed., Dalloz, Paris, 2019, p. 6) See also J. VERNIER, *L'environnement, Que sais–je?*, PUF, 10me ed., 2011; Ch. COURNIL–L. VARISON, *Les procès climatiques. Entre le national et l'international*, Editions Pedone, 2018.

2. N. STERN, *The Economics of Climate Change: The Stern Review*, Cambridge University Press, 2007; W. NORDHAUS, *A Question of Balance: Weighing the Options on Global Warming Policies*, Yale University Press, 2008; M. MASLIN, *Global Warming: A Very Short Introduction*, 2nd ed., Oxford University Press, 2009; Ch. COURNIL–L. VARISON, *Le procès climatiques*, Pedone, 2018.

A graph of the accumulation of carbon dioxide is based on continuous measurements taken from 1958 until the present day. The curve is named the *"Keeling Curve"* after the scientist Charles David Keeling who died in 2005.

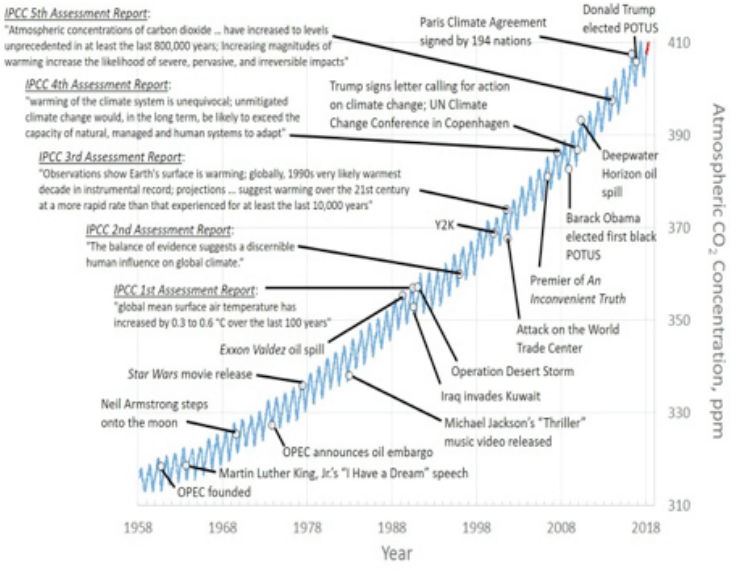

Figure 1.1.

1.2. The Environment and Global Problems

We have no choice. There is no other planet we can move to. We are stuck here on (the planet) earth. As a matter of fact, protecting the environment is a big challenge in political terms. It is our top priority in the 21st century.

Global environmental problems affect developed and developing countries alike.

That is the reason why it is increasingly the case that environmental decisions are unsatisfactory.

There is also a perception that policies and decision–making procedures are failing.

And the law (environmental law of course) becomes a central tool for the management of the environment (command and control tools), despite the increasing use of voluntary approaches and market mechanisms, such as taxes, subsidies, and instruments that affect the behaviour of consumers (market mechanisms versus command and control tools)[3].

1.3. "Environmental Law" and its Subject–matter

In identifying the subject–matter of this course, it is first necessary to consider whether there is any identifiable subject that could be termed *"environmental law"*.

But it could be argued that the boundaries of environmental law are not well defined or that the subject–matter is not necessarily distinctive.

There is a danger that, in drawing boundaries too wide, the subject–matter may become *"the environment and the law"* rather than *"environmental law"*.

A lack of focus and precision could be a potential reason for rejecting the idea of a branch of the law called (or known as) *"environmental law"*.

This discussion explains the division of this course into different parts.

1.4. "Environmental Law": a Combination of Complex Interrelationships

Environmental Law means the combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and of society, as they are or

3. In *"The Problem of Social Cost"* (*The Journal of Law & Economics*, the University of Chicago, III vol., October 1960), R. COASE challenged the conventional wisdom that pollution problems require regulatory intervention by governments *("Command and Control")*. He assumed that pollution problems and other externalities could be rectified through individual bargaining between the parties involved *("Market Mechanisms")*. According to this perspective, there is no need for any government policy intervention at all. «Coase Theorem» is a legal and economic theory developed by economist Ronald Coase that affirms that where there are complete competitive markets with no transaction costs, an efficient set of inputs and outputs to and from production–optimal distribution will be selected, regardless of how property rights are divided.

as they are felt (EU Law).

I could say in advance that environmental law is often unclear; but I can't accept this, because I have dedicated myself to environmental law.

I can also reveal, in any case, that environmental law has its own sources, principles, institutions (i.e. The European Environment Agency), regulations, policies, standards (i.e. Best Available Techniques), and case law.

One principle (the most successful) is that of *"Sustainable Development"*, which will be dealt with below. The EU also includes an important contribution in the form of economic instruments: its environmental policy has always included the adoption of the *"Polluter Pays Principle"*. Last but not least, we encounter the *"Precautionary Principle"*. All these principles rightly belong to the area of environmental law.

In addition to these underlying principles, it can also be argued that there is a core group of topics (core topics) that might comprise substantive environmental laws. For example, most courses (or textbooks) consider different aspects of pollution control (air, water, land contamination) and waste management[4].

1.5. "Environmental Law" and Economic Concepts (and Tools)

In terms of the knowledge and skills required to understand environmental law, the law is only one element in what is a major cross–disciplinary topic.

Judges and lawyers need some understanding of the scientific, political, social and economic processes involved in environmental degradation[5].

For example, in order to better comprehend sustainability (in the long term) we must deal with economic concepts such as growth,

4. A. VAN LANG, *Droit de l'environnement,* Paris, PUF, 4eme éd., 2016; J. MORAND–DEVILLER, *Le droit de l'environnement*, Paris, PUF, coll. «Que sais–je?», 12eme éd., 2019.

5. *"Le droit de l'environnement est profondément marqué étroite avec les sciences et la technologie. Sa compréhension exige un minimum de connaissance scientifique et toute réflexion critique à son propos impose une approche pluridisciplinaire"* (M. PRIEUR, *Droit de l'environnement*, cited, p. 6). See also: P. JEANJEAN, *"De l'ordre technique à l'ordre public technologique"*, *Rev. adm.*, 1977, p. 568; A. TURCK, *Le droit public et la maîtrise de la technologie à travers l'exemple de l'environnement,* these Lille II, 1984.