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SUSTAINABILITY, DISTRIBUTIVE JUSTICE, AND LAW: A PHILOSOPHICAL INQUIRY INTO THE COMPATIBILITY OF ENVIRONMENTAL AND SOCIAL GOALS

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Abstract

This essay aims at addressing the legal philosophy's uptake on whether environmental sustainability can be integrated with distributive justice. After an analysis of the European legal framework, where the notion of sustainable development has been built, concepts such as the veil of ignorance, the capability approach, and human flourishing will be examined, arguing that sustainability and distributive justice are necessarily linked, as mutually reinforcing goals to human development. However, a transformational change is still necessary in the way we think about sustainability, to work towards a direction that should be holistic and inclusive of the needs of both people and the planet.

Keywords: sustainability, European law, environment, distributive justice, capabilities

JEL: K32, O1, Q56

Introduction

This essay will analyze the interplay between sustainability and distributive justice, specifically in the context of European law, observing that a holistic conception of sustainability, comprising both the environmental and the social dimension, is already present in the legal context of the EU, but that it is not very efficient at the practical level. Consequently, this essay will propose a cultural adjustment of the notion of sustainable development according to some of the most relevant philosophical theories of justice, arguing that the law should be the starting point of such an approach.

In order to achieve this aim, this essay will thus consider: in sec. 1, the relationship between environmental sustainability and distributive justice in the European legal framework; in sec. 2, the CJEU's most relevant case law regarding the social objectives of the Union; in sec. 3, a proposal to transform the conception of sustainable development, by examining Rawles' theory of justice, Sen's and Nussbaum's capability approach and human flourishing.

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Defining the issue: the legal notion of sustainable development

'Sustainability', today, is a term that has not got much to do with law. It is mostly understood in sciences such as geology, physics and climate science. It comes from the expression 'sustainable harvest', which describes harvest which could be carried out repeatedly without damaging the crops or the land (Senatore, 2013). 'Development', instead, has always characterized the field of Economics. It is also linked to the idea that the human history is directed towards the future, and that the economic activity should lead to several sorts of advancement[2]. The idea that these two terms might go together, as strange as it may seem, comes from the UN Brundtland Commission, which in 1987, in the famous report "*Our common future*", defined sustainable development as "*development that meets the needs of the present, without compromising the ability of future generations to meet their own needs*". And it is precisely that concept, and not simply the concept of 'sustainability' which today guides the law in the environmental field, not only at UN level – where the definition as such was created – but also at European level.

A – too – theoretical approach?

Firstly, everytime the word "sustainability" occurs in the European Treaties, it is matched with the term – and the meaning of – "development". This happens in: the TEU Preamble; art. 3.3 TEU; art. 3.5 TEU; art. 21.2(d) and (f) TEU; art. 11 TFEU. It also appears in the EU Charter of Human Rights, where the principle of sustainable development (art. 37) has been introduced in the context of Chapter IV on "*Solidarity*", giving rise to a systematic interpretation of sustainable development which considers it as a part of – and, maybe, subject to – the social pillar of the European Union (Syryt and Klimska, 2019). The situation evolved similarly for the politics of the UN: Resolution 70/1 of the General Assembly (Agenda 2030) is focused on sustainable development, and not simply on sustainability, and the Paris Agreement (2016) mentions sustainable development too, particularly in articles 2 and 7 – probably not as its main objective, but for sure as a light to guide the politics of the member states.

The observations we have made are confirmed by the most ambitious document issued by the EU Commission on the subject matter: the European Green Deal. However, in this regard very few operations, such as the adoption of the European Industrial Strategy and REPowerEU, have been posed at stake to render sustainability not only actuable, but also economically sustainable – and this, mostly with regard to companies or public entities, and not to individuals (Fleming

[2] This is particulary true for the positivistic theories of economics.

and Mauger, 2021). Relevant exceptions are the Just Transition Mechanism[3] (JTM), the Fit for 55 legislative package (the plan for reducing emissions in 2030 of at least 55% of 1990 levels) and especially the Social Climate Fund, which will be part of the Union balance for the period 2027 – 2032, up to a sum of 65 billions of euros. Nonetheless, even these mechanisms have got their flaws[4]. The Social Climate Fund under the Fit for 55 package is yet to be enacted, and we do not know if it will be sufficient for reaching the aim – even more because part of it, precisely the 25%, will be co-financed by member States themselves. On the other hand, under the Just Transition Mechanism: workers will have to rely on national social security nets during the transition, and there are no hard guarantees about their formal representation or powers regarding the approval or rejection of plans and proposals, meaning it does not appear to be completely democratic; furthermore, its limited geographical focus does not regard the fact that even in areas where the general economic situation is good, sometimes other forms of social injustice may arise. And similar problems pertain to the Scientific Advisory Board on Climate Change of Regulation 2021/1119.

From remedies to aim

The JTM also appears to be remedial in substance, without addressing whether the entire concept of sustainable development is just or not[5]. This is evidenced by the system of the Territorial Just Transition Plans: if a member State does not seriously aim to reach climate neutrality by 2050, its plan will not be validated by the Commission and no project will be financed. This somehow means that a decision on the balance between environmental and social goals has already been taken, without any use of participatory democracy instruments.

A notable exception of the remedial principle is constituted by the Next Generation EU instrument (2021 – 2027). Its "*do no significant harm*" condition, borrowed by the Green Deal, actually provides for the evaluation of social and economic effects, through public consultation, *before* legislation on environmental matters is enacted. However, since the Green Deal is mostly configured as a 'strategy to growth', the "*do no significant harm*" principle should still be considered a conditional measure, and not, instead, an end in itself (Fleming and Mauger, 2021). We argue, on contrary, that social justice should act as the aim

[3] Mobilising 55 billions over the period 2021-2027 in the most affected regions.

[4] The following datas and evaluations, supported by the opinions of the author of this essay, are taken from the report 'Making the Great Turnaround work. Economic policy for a green and just transition', Volume 27 of the publication series *Economic + social issues* edited by the Heinrich Bool Foundation, ZOE – Institute for Future-Fit Economies, and Finanzwende Recherche, in 2022.

[5] *Supra*.

of sustainable development, also according to the several provisions we have mentioned above, and not simply as its limit. This should probably become part of a renewed notion of sustainable development.

For the sake of this discussion, the directive for this renewed notion would be the Aristotelian concept of human flourishing – now also largely recalled in the theoret(h)ical study of innovations.

Building Sustainable Development: the CJEU perspective

Up until now, we have only analyzed the static dimension of European law, in regard to sustainable development. However, to be honest, the most relevant actor in the European scenario dealing with legal issues is the one which does not reside in Strasbourg: the Court of Justice of the European Union (CJEU) (Azoulai, 2008), which, in the absence of the legislator – which, at the European level, often operates as a 'decisor of last instance' – has laid down the very outlines of current Social Market Economy (SME) in cases such as *Viking* and *Laval* (2007). Therefore, we shall first delve into the definition of SME, in order to understand how sustainable development might reconcile with it.

The egg cell

Viking and *Laval* cases happened before the Lisbon Treaty, which has been regarded as the legal document establishing the SME. In both cases, the balancing addressed the economic freedoms protected under art. 56 TFEU and the right to collective action protected under art. 49 TFEU. The decisions of the Court in regard to these articles were relevant for having established not a hierarchy between those two principles, but rather a sort of reconciliation. In *Viking*, for instance, the Court imposed the constraints of economic freedom on a trade union, effectively not granting the union the same freedom in establishing public order as the Court did in the prior case law concerning the State. The constraints, thus, are not absolute, but relative to the actors who are involved in the specific dispute (Morgenbrodt, 2019).

The subordination of the social right of the union under the economic freedom, however, is not devoid of problems (Azoulai, 2008). In fact, even though the constraints are not absolute, and there is no clear hierarchy between economic and social rights by of the CJEU, still the Court has almost dominantly applied economic rights as more prominent than the social ones. Some have argued that this can be solved, leading to a true European SME, only if one reinterprets the internal market rules as social rules. This objective can be reached through the means of interpreting the relevant Treaty provisions on the economic rights according to the Charter of Fundamental Rights, aiming at building a

"*constitutionally conditioned social market*" (Schiek, 2017). According to such an approach, social rights would indeed be considered hierarchically superior to economic rights, because the latter are only guaranteed with inherent limitations.

Chasing the hierarchy

It might be argued that such an approach has been followed by the CJEU case law post-Lisbon. However, this is rather dubious. Even in a famous decision *AGET Iraklis* (2016), regarding the application of art. 3.3 TEU, where the Court stated the EU is interested in protecting the "*sustainable development of Europe*" on the basis of a "*highly competitive SME aiming at full employment and social progress*", it all looks perfect, but probably is not. Even in this case, in fact, the Court simply reiterated where the provisions on social protection can be found – art. 9 and 147 TFEU (Morgenbrodt, 2019) – without saying anything about their hierarchy. If anything, it actually reinforces the status of the economic rights – in that case, the employer's right, defended via art. 16 of the Charter. An actual hierarchical approach which places the social dimension over the economic dimension, therefore, does not appear to be present yet in the European legal framework. The situation, for sustainable development, is nothing different. In very few cases the CJEU has analyzed meaningly the notion of sustainable development, and in most of them it has simply reiterated the environmental dimension of it[6].

Some final points can thus be drawn:

1) sustainable development is a legal principle, at EU law level. It is anthropocentric – development is always human development, and sustainability is always referred to human generations – and very flexible in its definition;

2) there is still a "*social deficit of the EU*" (de Witte, 2015), which happens to be more practical than ethical;

3) it seems not promising to wait for the CJEU to enable art. 3.3 TEU. The European legislator should instead be addressed. This is due to several reasons, mainly the almost dominant application of the economic freedoms rather than the social rights, by the CJEU, and the fact that we should put political decisions back where they belong – i.e., to the legislator.

In conclusion, we should now analyze the ethical and philosophical theories that might constitute, in our view, the framework for a renewed European notion of sustainable development: which axiological order is at stake?

[6] See C-371/98; C-513/99; C-284-95; Raffinerie Mediterranee (2008).

The role of philosophy

One of the roles of the philosophy of law is that of returning a value-related outlook on legal matters. In the case of sustainable development, this appears of outmost importance to spur a cultural transformation over such a concept. One which, for the sake of this essay, we will link to a rejuvenated notion of Aristotelian 'human flourishing'.

First of all, what does flourishing mean? It essentially refers to the development of the abilities of individuals, by, for instance: supporting and cultivating environments that form our capabilities; believing in ourselves and our abilities; promoting health; establishing resources at the community level, aiming at wider stages of collaboration (Rasmussen, 2012). Human flourishing might also be opposed to the classic notion of Utilitarianism, which reads development as just a means to a specific end. For human flourishing, instead, human integral development is an end in itself (Kant, 1785). Shifting to a more tangible dimension of the issue, social and political development should be evaluated not only *ex post*, with remedial actions and correctives, but *ex ante*, whenever legal actions in sustainability matters are taken at EU level. The question then arises: how can the EU institutions take it into consideration?

A Theory of Justice

The solution proposed in this essay is to look at John Rawls' "*A Theory of Justice*" (1971) and "*Political Liberalism*" (1993), in order to build a notion of sustainable development which is compatible with the aim of human flourishing, instantiating it in our real political life through the means of Amartya Sen's and Martha Nussbaum's capabilities approach.

John Rawls' reflection distinguishes between two main principles of justice: liberty and equality. The equal liberty principle requires an "*equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all*". The second principle, instead, divides into the equal opportunity principle, requiring "*conditions of fair equality of opportunity*", and the difference principle, aiming at reaching the "*greatest benefit of the least advantaged*" (Rawls, 1971, p. 266). If we apply these principles to the European legal framework, it appears that most of the action plan of the EU in sustainability matters seems to follow the difference principle. However, according to Rawls, there is another principle to apply in order to reach distributive justice. A principle which is even more important than the difference principle, but which, actually, is followed only by a few measures at EU level: the fair equality of opportunity principle. Since this, for Rawls, has got precedence over the difference principle

in order to reach distributive justice[7], we must conclude that, under the Rawlsian model, distributive justice is not present in the European legal framework at the moment.

Furthermore, the principles of justice should be chosen by parties in the so-called "*original position*" (Rawls, 1971, p. 11). We can thus try to answer the question: are the EU institutions in the original position? The original position is a peculiar state of mind characterised by a "*veil of ignorance*", depriving participants of information about their particular subjective characteristics. It does seem, however, that the EU institutions are not currently in such a neutral state of mind. Too often they are accused of being technocratic in their decisions and policies, and even though it is not the aim of this essay to discuss whether these critiques are true or not, it is still evident that these institutions are not devoid of biases and it is rather dubious whether they can actually represent the European citizens. A different question might therefore be: can the EU institutions reach the original position?

The Republic of capabilities

The opinion supported in this essay is that the original position can well be reached through means of participatory democracy tools, if they are coherent with the five "*formal constraints*" laid down by Rawls: generality, universality in application, ordering conflicting claims, publicity, finality. These constraints have been described by Rawls to judge whether a conception of justice is worthy of being adhered to, or not. In particular, it is relevant to note that at least two of these conditions currently appear problematic at EU level: the publicity condition, which says that the principles of justice shall be publicly known to members of society and recognized by them as the bases for their social cooperation (Rawls, 1993), aiming at eliminating 'informative asymmetry', e.g. between institutions and represented ones; and the principle of universality in application, which requires that everyone should be able to understand the principles of justice and apply them in their deliberations. This can be used as an argument against excessive technicalities of the law (Harel, 2022), especially when it concerns the law of sustainability.

A solution might thus be that of linking the original position to the capabilities approach. In "*The Quality of Life*" (1993) Martha Nussbaum and Amartya Sen formally proposed a theory of 'capabilities' for economic and social development.

[7] In "A Theory of Justice", Rawls arranges the fair equality of opportunity principle and the difference principle in "*lexical priority*", meaning that the principle which is expressed before the other prevails over the application of the second principle. In this case, the fair equality of opportunity principle is expressed before the difference principle, and therefore has got lexical priority over the latter.

Drawing from Aristotel and Marx, personal capabilities – such as the capability to die old, to purchase goods, to take part in the political life – are deemed necessary for the economic development, while poverty is considered a state of *deprivation of development*. Capabilities are the real freedoms that people have: not merely the formal freedom to do or be something, but the substantial opportunity to achieve it.

The capability approach has also been applied to environmental ethics and climate justice[8]. Can we, therefore, convert capabilities into a juridical concept? For the political philosopher Harry Brighouse (2004), we actually must "*think of capabilities as the basis of rights claims*". If we adhere to such an approach, not only does it appear necessary to ensure political participation, but also to do that on consideration of capabilities (Anderson, 1999).

The future: a proposal

For distributive justice to become real at EU level, we could finally propose:

1) that the legislator writes new legislation incorporating the capability principle. The 'subordination' of the environmental dimension of sustainable development to the social dimension, however, already appears to be present at primary law level, so the legislator does not need to modify primary laws – also because having such a flexible and broad notion of sustainable development at that level could be a positive feature for legal evolution. The legislator should thus intervene mostly at secondary level or warranting interpretations of the notion of sustainable development which are respectful of its social dimension (Bundschuh, 2015);

2) the proposal could convert capabilities into rights themselves – being the basic conditions to exercise liberties. Following the categorization of human rights proposed in 1979 by the Czech jurist Karel Vasak, they would configure as First-generation human rights, to the effect that they would constitute the necessary basis for all legal claims;

3) in the field of climate justice this is even more urgent: even Sen (2009) explicitly proposes to configure sustainable development in terms of freedoms, and not needs.

However, a corrective to the idea of Sen is probably needed. As Deneulin (2011) put it, capabilities should not be configured only for individuals, but also – and even more importantly, for practical objectives – for specific social groups or minorities. Injustice, in fact, is structural, and not individualistic. An example is given by Deneulin when speaking about the Copenaghen Summit in December 2009, using the analogy of the flute which Sen expressed in "*The Idea*

[8] Among the many authors who have analyzed the issue: Schlosberg (2012).

of Justice" (2009). Governments, international organizations, NGOs etc. have reasoned together, on that occasion, *but* using competing moral frameworks. This is dangerous when trying to reach a common holistic program on sustainable development.

The corrective proposed in this essay, therefore, is that capability rights should be legally assigned not only to individuals, but to specific social groups, acknowledging the complex anthropology of the real world. In other words, what is sure, in our view, is that the ethicity of sustainable development should be assessed against the justice of the structures it creates. And that a just law on sustainability, or on ecology, must also necessarily be supported by an 'ecology of the law' (Capra and Mattei, 2017).

Conclusion

This essay has delved into the realm of legal philosophy to explore how the environmental and the social dimension of sustainable development might be integrated, in order to build a holistic notion which aims at rendering sustainability compatible with distributive justice. After having shown how the European legal notion of sustainable development not only already comprises the social dimension, but that this dimension is even prominent and probably superordinate to its other profiles, we have also argued how, anyway, such a broad notion might be interpreted – especially by the CJEU – in ways which are not coherent with this approach. A transformative change is thus needed: if we describe development as adhering to the conception of human flourishing, borrowing ideas from Rawls', Nussbaum's and Sen's reflections, we might build a renewed conception of sustainability which looks at the complex effects it brings to the people. The law, in our opinion, can constitute a means to enact this transformation.

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