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*Bad Moon Rising: the Green Deals in the Globalization Era*



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1. *Introduction*

Often when studying the colonization process of the Americas one will stumble upon an interesting event that happened to Christopher Columbus. He and his crew were stranded in Central America, in Jamaica, for around six months when the natives grew weary and decided to cease the furnishing of food to the “guests”. Worried with the situation and not knowing when would have been possible to leave the island and get back to Europe, Columbus came up with a solution. After consulting his navigation materials, the Italian discovered that a lunar eclipse would happen in three days, that is, on March 1<sup>st</sup> of 1504, and gathered the native leaders to say that his God was not pleased with their attitude and because of it He would inflame the moon with wrath. The day arrived and with it the lunar eclipse. When the natives saw the moon changing and becoming red, they fearfully urged Columbus to do something for they would from then on cooperate and restart feeding him and his crew. The Italian then went back in his cabin (to supposedly reason with his God) and calculated how much more time the eclipse would last, exiting the room right before it ended only to announce that his God had agreed to change the moon back to normal for He was pleased

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with the natives' decision. And so Columbus and his men were nourished by the natives for another six months until a Spanish fleet came to their rescue<sup>1</sup>.

This story exemplifies, among many other things, that the dominion of technologies<sup>2</sup> brings great advantages to whom possesses them. So when different parties are at dispute for something, technology will most likely play a definitive role on the outcome of it. Especially if, like in the case at hand, one of the parties enjoys a lopsided control over the main important technologies of the time<sup>3</sup>.

The analysis and analogies that can be extracted from the Columbus tale in Jamaica are innumerable, but I would like to abstract from it and focus mainly on the aspects related to *i)* the dominion of techniques and technologies and on *ii)* the benefits that derive from it. I will do so in order to account for some of the contexts in which the so called European Union's Green Deal is arising from and to analyze one specific set of impacts it might have on the globalized legal space.

## *2. The globalization era, families of techniques and the frontrunners' benefits*

More than five hundred years passed since Columbus combined sagacity and practical knowledge to obtain what he needed at the beginning of the sixteenth century. History has seen the development of innumerable other "techniques" throughout the centuries and in the last three hundred years three

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<sup>1</sup> The tale is available from different historical sources. For the purpose of this article, I used the following: <<<https://www.space.com/2729-lunar-eclipse-saved-columbus.html>>> Last seen on 15<sup>th</sup> February, 2021.

<sup>2</sup> I am for now referring to "technology" in its most wide and common sense usage, as in the employing of scientific discoveries for practical purposes. I will specify and distinguish it from "technique" in a more philosophical sense throughout the article. On the common usage of "technology" as done for now, see: <<<https://dictionary.cambridge.org/us/dictionary/english/technology>>> Last seen on 15<sup>th</sup> of February, 2021.

<sup>3</sup> From the mentioned story we can assert the obvious facts that Columbus dominated sea navigation and astronomy techniques, without which he wouldn't have been able to arrive in the Americas in the first place and therefore wouldn't have been stranded in Jamaica. His astronomy knowledge was precisely what gave him the power to "convince" the Jamaican natives that his God wanted them to feed him and his crew. Such power, for instance, derived from the fact that the natives did not know how to predict (or for that matter, what was) a lunar eclipse. Simply put, said power was sustained by the disproportionate dominance of a very particular set of techniques by one of the parties of the story.

different – though continuous – *industrial revolutions* took place, each of them being characterized by the emergence of different techniques.

It is possible to summarize these revolutions by stating that the first saw the emergence of the mechanization of production through the use of steam power (i.e. water and coal); the second, the emergence of electricity and petroleum (oil) as an enhancement of the mechanized production; the third, the rise of technology of information and its countless implications on daily social and political life.

### 2.1 *Families of techniques*

In other words, each of these so called industrial revolutions saw the emergence of different techniques (water sourced power, electricity based power and the technology of information, respectively). The great late Brazilian geographer Milton Santos, in his studies on globalization stated that «[n]owhere in the history of humankind does a technique appear in isolation; what is installed is a group of techniques», that is, «true systems»<sup>4</sup>. This means the three mentioned revolutions saw, each at their time, the development of a combination of different techniques accounting for a unified “system” (or a family) of techniques, which can be said to characterize each period of our history. Or, in the words of Santos, «each technical system represents an epoch»<sup>5</sup>.

The second half of the last century was strongly marked by the fast developments of the family of techniques related to the technology of information that spread on a worldwide scale the means of mass communication like the television, computers, the internet and electronic systems of automate processing. The global reach of such family of techniques, especially in the final two decades of the twentieth century, served «as a link between the others [systems of techniques], uniting them and ensuring that the new technical system would be present all across the planet»<sup>6</sup>.

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<sup>4</sup> M. SANTOS, *Toward an Other Globalization: From the Single Thought to Universal Conscience*, Translated and edited by Lucas Melgaço and Tim Clarke, Springer International Publishing, 2017, p. 6. Santos goes further and gives a «trivial example», like «the sickle, the hoe, and the rake, which constitute, at a given moment, a family of techniques». ID., *ibidem*.

<sup>5</sup> ID., *ibidem*.

<sup>6</sup> ID., *op. ult. cit.*, p. 5.

## 2.2 *The fourfold pillar of globalization*

Observing the hegemonic nature of the techniques of technology of information, which has fasten the pace for the unfolding of globalization – that allowed «the emergence of the so-called global market» as we experience it –, Milton Santos explains such phenomena through a fourfold pillar: «the unicity of techniques, the convergence of moments, the knowability of the planet, and the existence of a single motor of history, represented by globalized surplus value»<sup>7</sup>.

The four are intrinsically related to one another and together they account for the architecture of globalization, according to Santos. In a nutshell, the unicity of techniques refers to the hegemonic nature of the systems of technology of information that allows the various techniques at hand to communicate between themselves, involving the planet as a whole and making its presence felt globally<sup>8</sup>; at the same time, said unicity of techniques creates the unicity of time for it allows the simultaneity of actions and accelerates the historical process<sup>9</sup>, which means that not only different places (worldwide) have the same “clock time” but that there is a “confluence of moments” through different spaces<sup>10</sup>;

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<sup>7</sup> ID., *ibidem*. Santos goes further and affirms that «a global market utilizing such a system of advanced techniques results in this perverse globalization» (p. 5). “Perverse globalization” is how the brazilian thinker described the process of naturalization of the ill effects of the transforming of the world into a global market, as if this were to cause a beneficial homogenization of the planet, when, instead, it deepens even further the local inequalities and social differences, for such “homogenization” benefits mostly the hegemonic actors that are able to profit from the “shortening of the distances” worldwide precisely because they are hegemonic (p. 2). Said naturalization is conceptualized by Santos as “globalization as a fable”, that is, the make-believe that said ill effects are actually beneficial. Santos is aware that such situation «could be different if the political use of these techniques were other than it is» and states that it is precisely this possibility of a different usage of them that allows «us to have hope of utilizing the contemporary technical system through other forms of action» (p. 5-6). The author’s effort to understand what this “different usage” could be is concentrated on the last three parts of the book and give meaning to its title, i.e., «Toward an Other Globalization».

<sup>8</sup> M. SANTOS, *Toward an Other Globalization*, cit., p. 6.

<sup>9</sup> ID., *ibidem*.

<sup>10</sup> Santos’ take on such matter explains with great clarity the «planet-wide operation of large global companies» that «revolutionized the financial world, allowing its respective market to function in various places 24 h a day» (ID., *op. ult. cit.*, p. 8). A note for clarity here is needed: Santos was a geographer and his main study object was the impact of globalization on local spaces, that is, the influences and impacts of the “global”, supra-national, on the territories that receive the flow of changes imposed by the former. So his referring to “different places” and “different spaces” are to be understood as synonymous of “territories”, because “places” and “spaces” in Portuguese, in the way Santos uses them, have all the same meaning. For more of Milton Santos’ works on “spaces”,

these two pillars set the foundation for «the possibility of knowing the planet in an extensive and deep manner»<sup>11</sup>, not just within Earth's places/territories but also of Earth herself, from the outside, the space, rendering possible the «knowing of the world taken as a whole and knowing the particularity of places, which includes physical, natural and artificial characteristics and political conditions»<sup>12</sup>.

Finally, the “single motor” of our time, the universal surplus value, which has become possible since production processes are «being made on a universal scale»<sup>13</sup> by (private or state) companies that are present globally and that «function in a fragmented way, since a portion of their production can be made in Tunisia, another in Malaysia and another even in Paraguay» to be «put together at a later moment and articulated through the “intelligence” of the company»<sup>14</sup>. The “transnationalization” of production is only conceivable through the «mundialization of products, money, credit, debt, consumption, and information»<sup>15</sup>, which are a characteristic of our present epoch. So the universal surplus value is not just something that could be quantified, that is «precisely measurable»<sup>16</sup>, but instead the form by which the competitiveness between companies in the global market is exercised<sup>17</sup>.

### 2.3 Frontrunner's benefits

This is, according to Milton Santos, the main characteristics of our epoch. And as argued so far, it is all due to the massive hegemonic nature of the family of techniques that emerged from the third industrial revolution, which have set in one way or another, the main hegemonic global actors of the twentieth century “on the same page” when it comes to the understanding of the need of the

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see: M. SANTOS, *A natureza do espaço: técnica e tempo, razão e emoção*, 4ª ed, Editora da Universidade de São Paulo, São Paulo, 2006.

<sup>11</sup> M. SANTOS, *Toward an Other Globalization*, p. 10.

<sup>12</sup> ID., *ibidem*.

<sup>13</sup> ID., *op. ult. cit.*, p. 9.

<sup>14</sup> ID., *op. ult. cit.*, p. 7.

<sup>15</sup> ID., *op. ult. cit.*, p. 9. Santos uses the neologism “mundialization” (*mundialização*, in Portuguese) to counterpose “internationalization” and “globalization”. In his writing, internationalization and globalization, even though not having a strictly equal meaning, can be understood as the process of going beyond the local frontiers and having ties with other places/spaces. “Mundialization”, instead, seems to refer to the *being* already “globalized”, “internationalized”, in a unified process that renders it natural to the world (*mun*do in Portuguese).

<sup>16</sup> ID., *ibidem*.

<sup>17</sup> ID., *op. ult. cit.*, p. 10.

dominion of the new emerging family of techniques, as a way to avoid falling behind on the competition to hold a position as a hegemonic global actor.

But even though it is possible to describe with moderate accuracy the main characteristics of our epoch by way of pointing the current or the new, the emerging, system of techniques, this does not mean that the previous systems disappear or cease to exist. «They persist», Santos explain, «but the new ensemble of instruments comes to be used by the new hegemonic actors», which causes a setback in importance for those actors that do «not meet the conditions necessary to mobilize those techniques considered to be more advanced» at the present time<sup>18</sup>. The first few to take the lead and dominate the new systems of techniques, before they are homogenized, benefit from such leverage. They have a sort of frontrunner's benefit.

So a new family of techniques does not necessarily substitute the existing ones. History shows that an emerging system of techniques is most likely to be accumulated along with the ones already in play instead of causing an abrupt discontinuation of these. This is the context in which Santos' words about the mobilization of new techniques are to be understood in the present investigation.

Our current epoch, heiress of the aforementioned industrial revolutions, greatly exemplifies said accumulation of families of techniques *i)* for its paradigm (globalization) is defined by the aforementioned systems of technology of information and its structural impacts on the world (the unicity of techniques, the convergence of moments, the single motor and the knowability of the planet), which play a keen role in the way we interact daily in the public sphere and on how contemporary economies are sustained; *ii)* all aspects of said paradigm (the globalization epoch and the aforementioned "mundialization" of the market) depend upon the energy (re)sources that arose from the first two industrial revolutions, that is, mainly by coal and oil (petroleum), respectively. And as we now know, said (re)sources are not only not renewable but also harmful to the sustainability of the planet and to human life because of its carbon emissions, which produce the greenhouse effect that is responsible for climate change and its ever-worsening effects worldwide.

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<sup>18</sup> ID., *op. ult. cit.*, p. 6.

### 3. Contexts in which the EU Green Deal is arising in/from

The reason why Milton Santos' assessment on globalization was chosen to lead this essay's propaedeutical part can be funneled down to *i*) the key role attributed to (the family of) techniques as a guiding concept on the observation of historical developments, especially because it offers an important tool to distinguish one epoch from the other, that is, to distinguish relatively long periods of time on the basis of their "epochal systems of techniques" and *ii*) because *Toward an Other Globalization* was published in the year 2000, at the changing of centuries, or even, on a poetic note, at the beginning of the new millennium.

Said assessment painted the figure of the state of the art of globalization then, therefore providing fundamental tools to understand its developments on the first two decades of the twentieth first century. And that leads us to our *now*. Even though our present reveals itself to still be at the same *epoch*<sup>19</sup> described by the Brazilian thinker, though clearly with a further intensification of the aforementioned paradigm, it might be already possible to begin to wonder if our present is preparing a historical tipping point, for there might be subtle indications of such.

Before deepening on what such tipping point might be, I would like to offer what I believe to be an important backdrop of the current *epoch*. Though related to globalization, it should not be confused as strictly originated by its fourfold pillar. I am referring to the Law as a specific technique<sup>20</sup>. But first, a digression regarding the delicate – though important – distinction between technique and technology is needed.

#### 3.1 *The context of the Law: technique and technology*

The philosophical considerations on the questions concerning technique and technology<sup>21</sup> have been developing since the end of the nineteenth century

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<sup>19</sup> In the meaning attributed by Santos to such expression.

<sup>20</sup> I am using a slightly different meaning than that attributed to the Law by Kelsen, who defined it as a specific "social" technique. Cfr. H. KELSEN, *The Law as a specific social technique*, University of Chicago Law Review, n° 75, 1941. See also R. SUMMERS, *The technique element in Law*, 59 California Law Review, 733, 1971.

<sup>21</sup> I am here referring not only to Heidegger's «The questions concerning technology» (*Die Frage nach der Technik*), but to the myriad of reflections that have been made since Ernst Kapp's «Elements of a philosophy of technology» (*Grundlinien einer Philosophie der Technik*).

and by mid-twentieth century had already generated a profuse debate on what came to be known as “philosophy of technology”, especially, for instance, between the minds of Ernst Junger and Martin Heidegger. In it, there is a constant – though subtle – distinction between “technique” (or sometimes “technicity”) and “technology”, being the former the philosophical sense of the “epochal principle” identified by the mentioned authors, while the latter refers to the material manifestation of the developments of the first. That is, the “entification”, the concretization of said developments into material things.

Though mainly intended to reflect upon the advancements of techniques-technologies as scientific results and/or discoveries, such a distinction might be very much positive if transplanted into the world of the Law. Based on the aforementioned terms of the debate I would like to propose the possibility of considering a more abstract sense of the Law as technique, as the rationale, which sustains the general sense of law in its regulatory function of societal life, i.e. civil law, criminal law, procedural law and so on. In this sense, from now on, I will use *Law* when referring to it as *technique* in the terms so far developed and whenever needed to refer to the normative production, as in a civil code, or a specific content-oriented type of law, I will refer to it as *law*.

In parameterization with the philosophical debate above mentioned, the *Law* is equivalent to the technique, the rationale<sup>22</sup> that guides the developments of the *law*, which is a form of technology<sup>23</sup>, for it is used with a practical purpose. In other words, the *law* is the “entification”, the embodiment, of a fraction of a certain rationale always susceptible of further developments and enhancements throughout the long course of human legal reasoning, i.e., the more abstract sense of *Law* as previously specified.

So when I mentioned above «an important backdrop of the current epoch that though related to globalization was not originated by its fourfold pillar», I was implying the current hegemonic aspect that the *Law* acquired throughout the

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<sup>22</sup> In this sense, the *Law*, as technique, would be the object of legal Jurisprudence – understood in its broader sense, as Philosophy of Law or Legal Theory.

<sup>23</sup> I am using the expression («law is a form of technology») in a very similar way, I believe, as Jorge E. Viñuales did («[l]aw can to some extent be analyzed as a technology») in his article *Law and the Anthropocene*. Though the Argentinian author does not provide the philosophical-based distinction I am trying to put forward here, I believe our usage of the mentioned expressions are coherent and point at the same direction. Cfr. J. E. VIÑUALES, *Law and the Anthropocene*. In: C-EENRG *Working paper*, 2016-5 (August 1, 2016), p. 42. Available at SSRN: <<<https://ssrn.com/abstract=2842546>>>. Last seen on 15<sup>th</sup> of February, 2021.

twentieth century, having international *law* (in its broadest meaning) and the regulations put forward by international bodies and organizations as the “technology” produced under such a “technique” to regulate the international sphere. And by “hegemonic aspect of the *Law*” I am explicitly referring to Santos’ “technical unicity”, that is, what allows the various existent techniques (systems of Law) to communicate between themselves, involving the planet as a whole and making its presence felt globally, hence making it possible the global market (and therefore the international sphere) as we experience it today. So the fourfold pillar put forward by Santos, takes place not simply having *Law as a technique* as its backdrop, but also having it as the terrain where it – the fourfold pillar – lays its roots and in which it has been spreading and nourishing from.

### 3.2 *A tipping point for our epoch?*

As brought up by the end of the second chapter, our current epoch depends upon the energy sources and resources that arose from the previous two industrial revolutions, especially fossil fuels (coal and petroleum), despite being non-renewable and harmful to the sustainability of the planet and to human life in it for they are responsible for the greenhouse effect and climate change. And since humanity started consistently burning coal in the first industrial revolution (two and half centuries ago) and oil on the second (around a century afterwards), their usage has nothing but increased, the Earth is closer than ever to reaching a “tipping point”, that is, a point from where the damages caused by climate change will be irreversible<sup>24</sup>.

Along with the ever-increasing worries on global warming and with the growing scientific consensus about it being caused by our current mode of existence and production, the international sphere started to put forward regulations as means to try to contain the worsening of Earth’s conditions. Said regulations have come in the form of, for example, the Montreal Protocol, the United Nations Framework Convention on Climate Change, the Kyoto Protocol

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<sup>24</sup> O. HOEGH-GULDBER-D. JACOB, M. TAYLOR, *et al.* *Impacts of 1.5°C Global Warming on Natural and Human Systems*. In: *Global Warming of 1.5°C. An IPCC Special Report on the Impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, 2018, pp. 175-311. p. 262 Available at <<[https://www.ipcc.ch/site/assets/uploads/sites/2/2019/02/SR15\\_Chapter3\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/02/SR15_Chapter3_Low_Res.pdf)>> Last seen on 5<sup>th</sup> of January, 2021.

and its Doha Amendment and the Paris Agreement – along with national regulations trying to account for emissions and environmental pollution within national borders.

When the European Commission, on December 11<sup>th</sup> of 2019, proposed the so called the European Green Deal it did so within the contexts that I have so far tried to illuminate. Strictly speaking, the EU Green Deal represents the emergence of a new rationale within the realm of the *Law*, for it puts forward the ambition for robust changes on the regulation of all aspects related to the activities that have an impact (direct or indirectly) on climate change (from the extraction of raw material and its transportation in all spheres of production, farming, consumption, etc). Such rationale ought to be – speaking in the terms aforementioned – *embodied* in a yet-to-be-produced far-reaching regulatory framework. In other words, it still has to be “entified” into the broad sense of *law*.

But these “robust changes” will not be sufficient if they are limited within the territorial area of the European Union, since the deleterious impacts of global warming are, as the concept itself shows, globally felt. And also because its causes are produced worldwide.

Alongside the EU Green Deal, other countries such as the United Kingdom and China have also taken some initial steps in the same direction, although the EU Green Deal seems to be more ambitious and further developed for it is an overarching plan to restructure all spheres of life in the EU. The UK, for instance, amended its 2008 Climate Change Act<sup>25</sup>, on the 27<sup>th</sup> of June of 2019, to reduce 100% of its greenhouse emissions by 2050, to what it’s being called the «net zero target»<sup>26</sup>. China, on the other hand, recently announced<sup>27</sup> it has its own “net zero” plan to be achieved by 2060, with the peak emissions of carbon dioxide to arrive by 2030. These efforts seem to be – themselves – a tipping point on the trials to contain global warming for they begin to show the possible start of

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<sup>25</sup> Said amendment is available at <<<https://www.legislation.gov.uk/uksi/2019/1056/contents/made>>> The Climate Change Act can be seen at <<<https://www.legislation.gov.uk/ukpga/2008/27/contents>>> Last seen on 15<sup>th</sup> of February, 2021.

<sup>26</sup> Expression found at: UNITED KINGDOM, *House of Commons Library: Net Zero in the UK*. Available at <<<https://commonslibrary.parliament.uk/research-briefings/cbp-8590/>>> Last seen on 15<sup>th</sup> of February, 2021.

<sup>27</sup> The Chinese President Xi Jinping made such announcement during a United Nations virtual meeting on the 22 of September of 2020, without providing further details of the steps it plans to take. Available at <<<https://www.independent.co.uk/environment/china-xi-jinping-carbon-emissions-net-zero-2060-climate-change-b534004.html>>> Last seen on 15<sup>th</sup> of February, 2021.

structural changes on important hegemonic global actors<sup>28</sup>. By “tipping-point” I am referring to «the point at which an issue, idea, product, etc., crosses a certain threshold and gains significant momentum, triggered by some minor factor or change»<sup>29</sup>.

And even though said tipping point might probably have as result the emergence of new techniques and technologies (for example, green and renewable energy (re)sources, non-emitting carbon dioxide fuels and means of transportation, etc.), which can be described as a sort of “green” industrial revolution, it seems this will be the first time that the regulatory framework regarding the impact of new technologies will be laid down (globally) either before the arrival (or the “hegemonization”) of said new technologies or as they start to appear.

So recalling Milton Santos’ lessons on our *epoch*, the main hegemonic actors of the beginning of this century are “on the same page” regarding the need for dominance of the new emerging family of techniques – in order not to lose space as hegemonic global actors.

So if the language used by the European Union Commission’s Vice President, Mr. Frans Timmermans, are not to be ignored, we are on the brink of a new industrial revolution<sup>30</sup>. A green and planned one. And both the *Law* and the *law* will play a definitive role in its development alongside the new scientific techniques and technologies. They will also be decisive on defining the frontrunners and so the advantages and benefits to be reaped by those who can better mobilize said *techniques*<sup>31</sup>.

#### 4. *Key-concepts and characteristics of the EU Green Deal*

Leaving the United Kingdom and the Chinese’s initial steps aside, I would like to focus on what seems to be the most significant aspects of the so called EU Green Deal – and will do so while trying to stay within the borders of the contexts above mentioned.

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<sup>28</sup> Such a tipping point crowns the long list of efforts that have emerged on the international sphere on the last forty years – some of which were mentioned above in this chapter.

<sup>29</sup> Available at <<<https://www.dictionary.com/browse/tipping-point?s=t>>> Last seen on 15<sup>th</sup> of February, 2021.

<sup>30</sup> F. TIMMERMANS, *On the European Green Deal as a growth strategy at the Bruegel Annual Meetings*. Brussels, 1 September 2020.

<sup>31</sup> See above, note 18.

When Mrs. Ursula von der Leyen was elected as the European Commission President, on June 2019, she had established as a political priority to work toward transforming Europe into «the first climate-neutral continent» and had committed to propose a European Green Deal in her first 100 days in office<sup>32</sup>. In order to achieve so, her political agenda had also established the goal to reduce in 55% the EU's emissions by 2030, securing that said goal would be «based on social, economic and environmental impact assessments that ensure a level playing field and stimulate innovation, competitiveness and jobs»<sup>33</sup>.

On December 11<sup>th</sup>, 2019, the Commission proposed the European Green Deal, presenting it as «a new growth strategy that aims to **transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy**», with zero greenhouse gases emissions by 2050 and «**where economic growth is decoupled from resource use**»<sup>34</sup>. The proposal opens up with a statement on the Commission's commitment to tackle «climate and environmental-related challenges» for it recognizes that the «atmosphere is warming and the climate is changing with each passing year», with forests and oceans being polluted and destroyed<sup>35</sup>.

Aware of the risks of dangerously simplifying such a broad political intent, the EU Green Deal can be said to aggregate the United Nation's Sustainable Development Goals with the above mentioned ambition to transform the EU into a fair and prosperous society, having as its unnegotiable pillar the decoupling of economic growth from non-renewable (re)source use. The steps so far taken have further developed the idea of a planned transformation of the current state of affairs of energy sources usage and of the current mode of production, alongside with the Commission's concern in not allowing the industrial (and therefore economical) developments to detach from its social ambitions<sup>36</sup>. Said steps have been thus far taken mainly through regulation.

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<sup>32</sup> U. V. LEYEN, *A Union that strive for more: my agenda for Europe*, Political guidelines for the next European Commission 2019-2024, p. 5.

<sup>33</sup> *Id.*, *op. ult. cit.*, p. 6. The 55% reduction goal was accepted by the European Council on the night between the 10 and 11<sup>th</sup> of December, 2020. Available at <<[<sup>34</sup> EU COMMISSION, \*The European Green Deal\*, Brussels, 11.12.2019, COM\(2019\) 640 final, p. 2, bold evidence on the original.](https://www.consilium.europa.eu/en/meetings/european-council/2020/12/10-11/#>> Last seen on 15<sup>th</sup> of February, 2021.</a></p></div><div data-bbox=)

<sup>35</sup> *Id.*, *ibidem*.

<sup>36</sup> In this context, the Commission has already proposed, for instance, the new Circular Economy Action Plan for a cleaner and more competitive Europe (substituting the one proposed in 2015), the

In a nutshell, the EU Green Deal is the political<sup>37</sup> intent to *i*) decouple economic growth from non-renewable (re)sources use (through the restructuring of its industries and its mode of production), all the while *ii*) without allowing the detachment of industrial and economic developments from the Commission's social concerns.

The key-concepts, or macro areas, found on the EU Green Deal proposal can be delineated as *i*) "regulation policy"; *ii*) "ecological transition" and "just transition"; *iii*) "climate change" and "biodiversity loss"; *iv*) "sustainable development" and "sustainable finance"; *v*) "global transition, global trade and trade policy" and "international cooperation". These are basically the fields where the EU will focus its regulation concerns in order to transform the EU, to use Mrs. Ursula von der Leyen terms, into «a fair and prosperous society, with a modern, resource-efficient and competitive economy»<sup>38</sup>. All depends upon the regulation policies that are to be taken regarding the mentioned key-concepts.

Some of these macro areas heavily rely upon researches on new technologies, as for example, to innovate on transport, batteries, clean hydrogen and low-carbon steel making, and on all of the already accessible topnotch data-driven and digital innovations<sup>39</sup>. And here lies an apparent virtuous circle that is at the same time an apparent paradox of the essentially strong regulatory aspect of the EU Green Deal.

As the EU starts to rule out (the Green Deal refers to "phasing out"<sup>40</sup>) fossil fuels, carbon dioxide and methane emissions, it relies on its replacement by new technologies (not all yet possible to be implemented, i.e. clean hydrogen energy) and on the possibility it will be cost-accessible in large scale, in order to substitute its energetic demands. While ruling out, I mean, regulating the discontinuing of the current greenhouse-emitting energy sources, the EU will try to "rule in" new technologies that, as mentioned, are not all yet (as for now) ready to be utilized in large scale.

The virtuousness of said circle seems to lie precisely on the circularity of the mentioned regulatory process, for it seems to function as a revolving door: as

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Biodiversity Strategy for 2030 and the Farm to Fork Strategy (for a fair, healthy and environmentally-friendly food system), all of which try to tie social, economic and environmental beneficial aspects to the industrial developments that are (for the most part) yet to come.

<sup>37</sup> More on the matter on the sixth chapter.

<sup>38</sup> See above, note 34.

<sup>39</sup> EU COMMISSION, *The European Green Deal*, cit., p. 18.

<sup>40</sup> *Id.*, *op. ult. cit.*, p. 6.

it circles, it allows what is *in* to exit and what is out to enter. The apparent paradox depends on whether or not there is something on the outside and on the brink of getting in. So the EU is trying to rule out the use of non-renewable energy sources in order to decouple economic growth from it while, at the same time, regulating “in”, as in “ruling in”, the new technologies that ought to fulfill the goal of transforming the EU into a carbon-neutral continent.

As so far seen, this “revolving door characteristic” of the EU Green Deal’s regulatory policy has at its basis the aforementioned «social, economic and environmental impact assessments»<sup>41</sup>, mentioned at Mrs. von der Leyen’s political guidelines. I would like to concentrate on the latter of the three.

While advancing the regulatory framework of the EU Green Deal, the EU Institutions are bound to take into account scientific assessments on the current status of the objects it is regulating and on the impact of what is yet to be regulated (new technologies, new standards for carbon emission, pollution, etc.). Said scientific assessments are responsible for the rotation of the “regulatory revolving door”.

As a matter of fact, the awareness itself of the need for a “European Green Deal” is based on the scientific assessments that planet Earth cannot keep being polluted with greenhouse gases as it currently is, for it is at the brink of a temperature rise that greatly endangers human life in it.

Recalling the above distinction between *Law* and *law*, as in *technique* and *technology*, it seems that the current diverse “Green Deals” (UK, UE and China’s), even though they might differ in innumerable ways, all have in common the broadening of the *Law*’s scope of rationality to include – and therefore take into account – scientific evidence and assessments on *i)* what should be “ruled out” and *ii)* what can/might be “ruled in”. This seems to indicate that in our current *epoch*, three decades into this century, *Law*’s rationality is being enlarged to give rise to a science-oriented fact-based policymaking – which seems to be already in a process of homogenization. If so, this might as well be a (new) landmark of our *epoch*. Or, to be coherent with the language above used, a tipping point in it<sup>42</sup>.

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<sup>41</sup> See above, note 32. U. v. LEYEN, *op. cit.*, p. 6.

<sup>42</sup> I am not suggesting that said “enlargement” of *Law*’s rationality has begun just now or that it is a consequence of our epoch. What I am trying to illustrate is that it seems to be a gradually rising enlargement that, just now, began to gain momentum and therefore has begun to be homogenized by the global actors of our time. For such reason I suggest it might be a “tipping point”, that is,

### 5. *Battle fields, lines of action and regulatory framework*

The aforementioned five macro areas of the EU Green Deal proposal can be immediately identified along three main courses of actions, which are directly connected to the challenges the EU will face with its regulatory framework. They cover all its major areas and are in constant intersection with each other. Said courses of action can be circumscribed as *i)* within the EU area, *ii)* to the relationship with its neighbors and partners and *iii)* to the international sphere.

As indicated above, the desire for robust changes of the different Green Deals depend on a worldwide implementation, otherwise they will have very limited to no effect on global scale. The EU Green Deal shows that the Commission is aware of such need and it shows in a rather clear manner what needs to be done so the desired changes may take place.

For instance, the first of the three lines of action, is delimited to the territorial extension of the EU, which means the regulatory framework may have a direct impact in the EU's area of authority. In this case, the EU can regulate, for example, a schedule on the reduction of carbon emissions, the use of hazardous chemicals and how to better preserve and restore its ecosystems and biodiversity. This is the case of the Farm to Fork Strategy<sup>43</sup>, a far-reaching plan on how to enhance the European food-chain, transforming it into a sustainable production system that works both for the community and the environment.

This type of regulation may also have an impact on third countries. That is yet again the case of the Farm to Fork Strategy, because even though its scope is predominantly for the EU's territorial extension (the first line of action) it interferes in its relations with its commercial partners (second line of action), for the EU is the biggest importer of agri-food products in the world<sup>44</sup>. In an imaginative exercise, one may speculate on the need for commodities exporting countries to adapt, up to a certain level, to the EU's regulations at the risk of losing their market shares in EU's territory.

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something that has been quietly on the rise for a while but, since it is now gaining more and more adherence, it might indicate a structural change and/or the beginning or the development of a new phase.

<sup>43</sup> EU COMMISSION, *Farm to Fork Strategy*, Brussels, 20.5.2020, COM(2020) 381 final.

<sup>44</sup> *Id.*, *op. ult. cit.*, p. 5.

Said adaptation would cause, for instance, the commodities exporting countries to internally adapt their regulatory framework up to the standards set by the EU<sup>45</sup>. This could possibly have, in one way or another, a positive impact on moving toward “green” regulations on third countries. At least on the ones that are commercial partners with the EU.

This type of regulatory impact could also play a significant role globally as a “market share reservoir” for green companies, which would mean that the frontrunner companies (private or public ones) on green technologies could push for regulations to have their technological standards set as *the* green standards. This would be precisely what was above mentioned as the reaping of benefits and advantages by those who can better mobilize the new families of techniques. And yet again can be seen the pivotal role that the mentioned “Law’s new rationale” will have on the “entifying” of the *law*<sup>46</sup>.

If these first two lines of action are defined by a sort of direct influence of the EU Green Deal, whether on the EU territory or on its various partners and neighbors, the third course of actions cannot count on to have an impact or influence that can be immediately identified. It is, or so it seems, where the EU’s biggest challenge lies.

The wording of the EU Green Deal and the correlated Commission’s communications, such as the Farm to Fork and the Biodiversity Strategies, provide the understanding that the EU wants to play an active role on speaking up for the importance of the “green transition” in the international legal space. And it seems to be willing to do so by promoting the global transition «in

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<sup>45</sup> This phenomena, I mean, the influence the EU’s internal market regulation has over non-european countries (for the rest of the world, for that matter) was defined by Anu Bradford through the term “the Brussels Effect” – that is, the fact that the EU «can exercise genuine unilateral power» by «fixing the standards of behavior for the rest of the world», while regulating its own territory. A. BRADFORD, *The Brussels Effect: how the European Union rules the world*, Oxford University Press, New York, 2020, p. 24. The author coined said term inspired by David Vogel’s “the California Effect”, which has shown, among other things, that the leading corporations tend to support stricter regulations of their own field of action for they have the ability to adapt to it better than their smaller competitors, therefore advancing over their market-shares and this tends to help spreading new regulatory standards. The term was coined by Vogel having the example of the State of California, which has been a leading State when it comes to environmental protection standards, therefore regulating “up”. Hence the title “trading up”. See D. VOGEL, *Trading up: consumer and environmental regulation in a global economy*, Cambridge, Massachusetts, Harvard University Press, 1995. Most recently, Vogel wrote a comprehensive analysis of California’s historical leading role on environmental protection innovative standards. See D. VOGEL, *California greenin’: how the Golden State became an environmental leader*, Princeton University Press, 2018.

<sup>46</sup> See around note 22, *supra*, §3.1.

international standard setting bodies, relevant multilateral fora and international events», where it «will seek ambitious policy outcomes»<sup>47</sup>. All the while having clear that «[t]rade policy will actively support and be part of the ecological transition»<sup>48</sup>.

This dispute for setting green standards on the international legal space (in other words, the dispute for regulatory frameworks on the green transition) further illustrates the aforementioned image of Milton Santos' globalization's fourfold pillar having *Law as a technique* not simply as its background, but also as the terrain where it spreads its roots and where it nourishes from. This is to say that the five macro areas of the EU Green Deal, which can be divided into three major courses of actions, each represent a different – so to speak – regulatory battle field in the globalized legal space.

The so called EU's «green deal diplomacy»<sup>49</sup> will play an important role by actively working toward the aforementioned enlargement of the *Law's* rationality on the international sphere, as a way of thrusting international *law* into greener frameworks, therefore spreading its green ambitions worldwide.

If it is still allowed a reference to the case in which Columbus combined sagacity and the dominion of techniques, the hegemonic global actors of our epoch when at dispute (at the globalized legal space's multilateral for a) on setting the standards for the green transition, will be all on the same page when saying that there is something about to go wrong. The difference this time being that the ones who will benefit from it will be the ones showing to have the better techniques on how to avoid, and/or to prepare, for the “bad moon rising”<sup>50</sup>. For this time it is real.

#### 6. *A new family of techniques on the brink?*

This essay tried to describe<sup>51</sup> some of the contexts in which the EU Green Deal is arising *in* and *from*. I have tried to account for one specific set of impacts

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<sup>47</sup> EU COMMISSION, *Farm to Fork Strategy*, cit., p. 18.

<sup>48</sup> EU COMMISSION, *Biodiversity Strategy*. Brussels, 20.5.2020. COM(2020) 380 final, p. 21.

<sup>49</sup> EU COMMISSION, *European Green Deal*, cit., p. 20; ID., *Biodiversity Strategy*, cit., p. 19.

<sup>50</sup> Creedence Clearwater Revival, *Green River album*, side two – first track, San Francisco, CA, 1969.

<sup>51</sup> I tried to focus primarily on the second set of impacts, although I recognize sometimes this essay seemed to slide towards a more socio-political interpretation of our time (which I believe was due to the inseparable nature of both sets of impacts).

that I believe it might have on the globalized legal space, i.e., the aforementioned overall enlargement of the *Law's* rationale in order to take into account scientific assessments (at least when it comes to outputting regulation on matters of the health of the Earth). This is what I above defined as the rise of «a science-oriented fact-based policymaking», which I believe it is already being homogenized – in the sense it is becoming the standard rationale for the hegemonic global actors of our epoch. And for such reason, I believe this represents a tipping point both *i)* on the global efforts to preserve the Earth and *ii)* on the development of the *Law*. With this in mind, I would like to conclude my remarks by further clearing my take on said second assortment of effects, the one that regards *Law as technique*.

By the fourth chapter I defined the EU Green Deal as a «broad political intent». And I did so as an effort to reassure, though in a subtle and initial manner, the role of politics in the matter of the possible tipping point we might be living – the one that regards the efforts to take better care of the Earth. At the same time, by attributing to said political intent the quality of a “science-oriented fact-based policymaking”, I am trying to shed a light at the entanglement of science and politics on the outputting of the *law*. Of this new branch of *law*.

This entanglement between politics and science, as a way of establishing a regulatory framework as wide-ranging as the Green Deals ought to be in order for them to work, is precisely what I tried to point out as the «enlargement of the *Law's* rationality», that is, the enlargement of the *technique* that the *Law* is. Such enlargement seems to represent the point of intersection between these three major spheres of contemporary life: Politics, Science and *Law*.

The image of an intersection, of the interweaving, of the three does not necessarily mean they blend together and become a new body of knowledge or something of the sort. At least not if we imagine the intersecting of three different lines of rope that, as they interweave, become one braid made of different ropes. This way each rope, I mean, each sphere of contemporary life, preserves its characteristics all the while contributing to the existence of the newly formed three-roped braid. The point in which they agree on and come together to lay down the above mentioned new branch of *law*, is where the referred “entification” of the *Law's* enlarged rationality takes place. Said entification comes in the form of a knot in the three-roped braid. The question whether or not said knot might

be held to be the possible “retying” of “the Gordian Knot” that Bruno Latour called for in his *We have never been modern*<sup>52</sup> is still to be further investigated.

One last clarification is due. Whenever I have referred to the enlargement of the *Law*'s rationality, there has always been a silent point at the background, for the “enlargement of” implies an addition onto something. In our case, the “something” to which something is added to is the current rationale of the *Law*, which was said to be the object of Jurisprudence<sup>53</sup> – that is, the effort to understand the socio-political phenomenon that the *Law* is.

Generally and broadly speaking, said effort tries to understand the reasons for legal validity, as in why the law can *be* and why it must be obeyed (or not). From this derives the debate between theories of *natural law* and *legal positivism*, which try to account for the conditions for legal validity and whether or not the content of the law plays a role in its validity. This has set the general tone for the current relationship between Politics, Law and Morality.

Said three-faced relationship is what has been dominating the *Law*'s rationality so far. And this is where the said enlargement takes place and purports its impact. In other words, it is the adding of Science to the equation of Politics-Law-Morality. In this sense, if the *Law* has so far been the intermediary of the relationship between Politics and Morality, it might now have to intermedicate, more than ever, the relationship between Politics, Morality and Science.

Though we seem to be at the brink of a green and planned industrial revolution, it is still to be seen if the Green Deals and the new scientific techniques and technologies they depend upon will rise up to the challenge that lies ahead. And if so, if the *Law* will play the significant role it seems to be expected of it.

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<sup>52</sup> B. LATOUR, *Nous n'avons jamais été modernes: essai d'anthropologie symétric*, La Découvert, 1991. In his later works, Latour goes further and instead of thinking in terms of “philosophy of technology” or “philosophy of science”, he pushes forward for the notion of a “political philosophy of nature”, contrasting it also with “political ecology”. The French philosopher's take is to include science in the mix between politics and nature, therefore thinking in terms of “*polis*, *logos* and *phusis*”. B. LATOUR, *Politics of Nature: How to bring the Sciences into Democracy*, Translated by Catherine Porter, Harvard University Press, 2004, p. 231.

<sup>53</sup> See note 22 *supra*, §3.1.

**ABSTRACT**

Guilherme Pratti S. M. – *Bad moon rising: the green deals in the globalization era*

This paper purports the conceptions of *Law* as a *technique* and as a *technology*, while accounting for its role in some of the contexts in which the so called EU Green Deal is arising *in* and *from*. The analysis undertaken focuses on explaining some of the aspects related to *i)* the dominion of *techniques* and *technologies* and on *ii)* the benefits that derive from said dominion; taking into account the fact that the Green Deal depends upon techniques and technologies that have not yet been fully developed; all the while depending on the adaptation of normative frameworks to allow for the substitution of the current technologies for the ones that are still to come. The role of *Law* in this process is hence of fundamental importance and the paper suggests a possible change in its – the *Law's* – rationale due to the challenges posed by the Green Deals in our epoch.

**KEY WORDS:** *EU Green Deal; Globalization; Law; Technique; Technology.*