RIVISTA QUADRIMESTRALE
DI
DIRITTO DELL'AMBIENTE

NUMERO 1 - 2021

ROBERTA DE PAOLIS

Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism

G. Giappichelli editore

ISSN 2239-964X

RIVISTA QUADRIMESTRALE DI DIRITTO DELL'AMBIENTE
- SAGGI -
ANNO 2021 / NUMERO 1

ROBERTA DE PAOLIS[*]

Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism

TABLE OF CONTENTS: 1. *The Unclear Relationship Between the EGD and the Basic Principles of EU Environmental Protection.* – 2. *Reframing the European Constitutional Discourse?* – 3. *Foundational v. Freestanding: Two Perspectives and Their Limitations.* - 4. *An Alternative Understanding: Political Constitutionalism and the European Green Deal.*

1. *The Unclear Relationship Between the EGD and the Basic Principles of EU Environmental Protection*

In 1971, the European Commission gave a holistic definition of "environment", meant as all the elements which, interacting in a complex fashion, shape the world in which we live and move and have our being[1]. The scope and elasticity of such definition contribute to explain how environmental protection developed from a sectoral policy into a horizontal aspect of the EU law by taking roots within the principles of integration and sustainable development[2].

In the environmental law scholarship, several stages of such a historical development have been identified, each of which characterized by a distinct governance regime: first, the 1972 "environmental regime"; then, the 1982 "internal market regime", combined with the "integration regime" initiated in 1992; at last, the "sustainable development regime" which dates back to 1998[3]. More specifically, such an identification of the four regimes is based on the empirical observation

[*] Ph.D. candidate in Law, Sant'Anna School of Advanced Studies, Pisa, Italy. Email: roberta.depaolis@santannapisa.it

[1] First Communication of the Commission about the Community's policy on the environment, SEC (71) 2616 final, Brussels 22.7.1971.

[2] G. WINTER, *Perspectives For Environmental Law - Entering The Fourth Phase*, in *Environ. Law*, 1989, pp. 38–47.

[3] I. VON HOMEYER, *The evolution of EU environmental governance*, in J. SCOTT (ed.), *Environmental Protection: European Law and Governance*, Oxford University Press, Oxford, 2009, pp. 1-26.

concerning the rising number of legislative acts adopted from the foundation of the Environment and Consumer Protection Service (ECPS—the predecessor of the Commission's Directorate General (DG) for Environment)[4] until now.

As for the basic principles, within the system of European Treaties, the high level of environmental protection has transited from an EU objective enshrined in Article 3 of the Treaty on European Union (TEU), as well as a fundamental principle of the EU environmental law, to the slanting concept of the EU legal order interpreted under the light of the combined provisions of Article 3 TEU, Article 191(2) of the Treaty of the Functioning of the European Union (TFEU) and Article 37 of the Charter of Fundamental Rights. Environmental protection has turned into a new legal avenue for the EU legal order's environmental reorientation:[5] as Advocate General Sharpston observed, «following the entry into force of the Treaty of Lisbon (...) the "principle of a high level of environmental protection and improvement of the quality of the environment" set out in Article 3(3) TEU and Article 37 of the Charter has become a guiding objective of EU law»[6].

The Court of Justice of the European Union (CJEU) has also played a significant role in the recognition and consolidation of environmental protection as a permanent and influential element of EU law. Indeed, without any explicit legal basis – and in a context of a Treaty mainly oriented to eliminating of trade barriers – the CJEU declared «environmental protection to be one of the essential objectives of the Community (...). Contrary to the recognition of fundamental rights as a general principle of Community law, the Court did not deem it necessary to justify the introduction of such an essential objective (…) by reference to any external source or support (such as national constitutional traditions or international law)».[7] More recently, the Court ruled that the EU legislation on environmental protection put into

[4] A. JORDAN*, Editorial introduction: the construction of a multi-level environmental governance system*, in *Environment and Planning C: Government and Policy*, 1999, p. 4.
[5] A. SIKORA, *Constitutionalisation*, cit., p. 60 ss.
[6] See Opinion of AG Sharpston in Case C-557/15 *Commission v Malta*, EU:C:2017:613, point 44; and in Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, EU:C:2017:760, point 68.
[7] F. JACOBS, *The Role Of The European Court of Justice in The Protection On Environment*, in *Environ. Law*, 2006, pp. 185-205.

concrete terms the EU's obligations concerning environmental protection and protection of public health, which stem, inter alia, from Article 3(3) TEU and Article 191(1) and (2) TFEU[8].

In the historical evolution of EU environmental protection, the relevance of environmental principles in the meaning of Article 191(2) TFEU should be underlined. Those principles perform a pivotal role in overcoming those multidimensional and scientifically complex environmental problems by stressing the legal commitment to environmental protection and sustainability[9]. The just mentioned principles are those of integration, protection, precaution, prevention, rectification at source and the polluter-pays principle which must be followed when adopting EU secondary law. More specifically, the principle of integration states that environmental protection requirements must be integrated into other EU policies; the principles of protection and precaution state that shall be pursued a high level of environmental protection even in those cases where the dangers to the environment are uncertain; at last, the prevention criterion suggests of acting in advance to avoid damage to the environment. In addition to such principles, the importance of solidarity should also be emphasized: considered in a wide sense, solidarity constitutes a sort of quintessence of what is both the raison d'être and the objective of the European project[10] and is operationalized in some legislations such as the so called "Effort Sharing Regulation"[11].

While obviously building on such a consolidated context, the European Green Deal fails to firmly anchor its geopolitical objective in the abovementioned concepts of sustainable development, high level of environmental protection, and solidarity. The European Green Deal does not refer to any of the classical environmental principles. The Commission's Communication on the EGD seems to

[8] Judgement in Case C-723/17 *Craeynest and Others*, EU:C:2019:533, para 33; judgement in Case C-129/16, *Túrkevei Tejtermelo˝Kft*., EU:C:2017:547, para 33.
[9] N. de SADELEER, *Environmental Principles*, Oxford University Press, Oxford, 2008.
[10] Opinion of AG Bot in joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, EU:C:2017:618, point 17.
[11] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, (OJ L 156, 19.6.2018, p. 26–42).

recall only the sustainability concept, but giving relevance exclusively to its economic potential. Likewise, the EGD Communication introduces a new policy principle – «green oath: do no harm»[12] – somewhat ambiguous and far too programmatic to grab any substantial potential contribution within the constitutional dimension of environmental protection in the EU legal order. More specifically, the scope of the "green oath" seems to be more comprehensible under the perspective of the EU funding, with particular attention on the recent taxonomy regulation[13]; likewise, according to the European Council conclusions of July 2021, «EU expenditure should be consistent with Paris Agreement objectives and the "do no harm" principle of the European Green Deal»[14].

Admittedly, one might argue that the EGD has a limited legal relevance, as it has been intended by the Commission essentially as a «roadmap, a strategy (…) and a framework of regulation and legislation setting clear overarching targets»[15]. Under the light of such an approach, the Commission has fostered a policy perspective by using mainly soft-law tools. This is one of the legal techniques available to the Commission, which may publish acts such as guidelines, notices or communications in order to ensure transparency, equal treatment and legal certainty[16] by offering policy evaluations, commentaries, explanations of programs or outlines on future policies.[17] In the light of this, it could be argued that the EGD represents more a contribution to the existing Global Legal Complex on Climate change than a transformation of the EU substantive constitution.

However, the relevance of soft law measures should not be under-evaluated. In the EU legal order, soft law measures may produce certain legal effects under the duty of sincere cooperation enshrined in Article 4(3) TEU which are to be taken into

[12] COM (2019) 640 final, point 2.2.5.
[13] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.
[14] https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf.
[15] COM (2019) 640 final.
[16] Judgments in joined Cases C-75/05 P and C-80/05 P, *Germany and Others v Kronofrance*, EU:C:2008:482, paras 60 and 61 and C-387/97, *Commission v Greece*, EU:C:2000:356, para 87.
[17] Cailles, Ruffert, Art. 288 (ex-Art. 249 EGV) [Rechtsakte des Unionsrechts] Ruffert in Calliess/Ruffert | AEUV Art. 288 Rn. 1-108 | 5. Auflage 2016, beckonline.de.

due account by the Member States' authorities[18]. Although such a duty of cooperation cannot be understood as making those rules binding, on penalty of eluding the legislative procedure set out in the FEU Treaty,[19] soft law measures can produce, particularly in the field of environmental protection, some legal effects and a practical impact to the extent that they fruitfully interact with binding legal sources such as the classical sources of EU environmental law[20].

Ultimately, even though the European Green Deal represents the "Europe's man on the moon moment"[21], it seems like it has failed to addressing and exploring its constitutional entrenchment within environmental protection. In other terms, as things currently appear to stand, the European Green Deal risks remaining a mere program, literally a roadmap of new legislative and political initiatives outlining ambitious climate targets without however clarifying their relationships with the basic principles of environmental protection under the existing Treaty framework[22].

2. *Reframing the European Constitutional Discourse?*

In spite of its unclear relationship with the Treaty framework, we may wonder whether the EGD can anyhow promote and feed a constitutional discourse detached from the analysis of positive laws, constitutional texts, institutional arrangements. Indeed, the EGD, with its powerful will to make great steps toward the future, may be interpreted as the symptom of the persistency of problems and disputes entrenched in the past, namely the issue of how the European community is constituted:[23] the EGD seems to recall that, regardless the failure of the Lisbon

[18] Judgment in Case C-322/88, *Grimaldi*, EU:C:1989:646, paras 18 and 19; and Opinion of AG Kokott in Case C-226/11, *Expedia*, EU:C:2012:544, point 38.
[19] Opinion of AG Wahl in case C-526/14 *Kotnik*, EU:C:2016:102, point 38.
[20] A. EPINEY, *EU environmental law: sources, instruments, enforcement*. in *Maastrich*, in *Eur. Comp. Law*, 2013, pp. 403–422.
[21] Ursula von der Leyen, "Press Remarks by President von der Leyen on the Occasion of the Adoption of the European Green Deal Communication," European Commission, press release, December 10, 2019, https://ec.europa.eu/commission/presscorner/detail/en/speech_19_6749.
[22] P. ALLOT, *The Crisis of European Constitutionalism: Reflections on the Revolution in Europe*, in *CML Rev.*, 1997, p. 489.
[23] M.A. WILKINSON, *Political Constitutionalism and the European Union*, in *The Modern Law Review*, 2013, p. 192.

Treaty's constitutional project[24], the constitutional question remains open and urgent because equally open and urgent is the need for responses concerning how the European community is constituted, what Europeans have in common and are willing to decide terms of shape and substance of their legal, political and social system. In other words, it is a matter of what sort of polity the European Union is becoming[25].

In order to verify whether the EGD can eventually contribute to the European constitutional discourse, it is appropriate to briefly outline and overcome the two main approaches that attempt to answer the question concerning what kind of constitution is emerging and should emerge in Europe. While the nation-state paradigm strictly inspires the first theory, the second approach presupposes a set of universal moral-legal values or basic principles. Once outpointed their limitations, the political constitutional approach will be introduced as a third way capable to better understand the current process of constitutionalization in Europe.

3. *Foundational v Freestanding: Two Perspectives and Their Limitations*

The first approach is the one called "foundational" and lies on the assumption that the constitutional discourse can be held only within a community capable of exercising collective self-rules. In essence, it refers to the nation-state as the exclusive authority allowed to exercise its authority in the name of "we, the people"[26]. The application of such foundationalist mindset to the European constitution consists in a clear-cut denial of its plausibility because there is any "we, the people" of Europe. So, in light of this, European Union is considered a derivative body, i.e. an international organism - in place of a supranational entity- and an administrative organism, rather than constitutional.[27]

---

[24] The European Council announced the abandonment of the constitutional 'concept' in the summer of 2007, see the German Presidency Conclusions: European Council, Brussels, 21–22 June 2007.
[25] J. BOHMAN, *Reflexive Constitution-Making and Transnational Governanc*e in E. ERIKSEN (ed.), *Making the European Polity: Reflexive Integration in the EU*, Routledge, London, 2005.
[26] S. CHAMBERS, *Democracy, Popular Sovereignty and Constitutional Legitimacy*, in *Constellations*, 2004, p. 153.
[27] P. LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford University Press, Oxford, 2010.

The second approach is the one called "freestanding". It theorizes that the constitutional authority must be founded on the will of the people as a collective entity engaging in a set of universal moral-legal values of basic principles deemed essential to humanity. Essentially, a phenomenon of cosmopolitan constitutionalism emerges, one in which - contrasting the sharp dichotomy between domestic constitutional state and the international legal order supported by the foundationalism approach - it is privileged the quality of the relationship between rulers and ruled. In other words, such an approach conceives a distinct cosmopolitan framework for the construction of a coherently principled, yet pluralist world of public law[28].

It is also argued that such an interpretation would reconcile cases decided by the CJEU such as *Kadi*[29] and *Costa v ENEL* with judgments of the constitutional or supreme courts in the Member States, such as the Maastricht and Lisbon decisions[30]. Indeed, since constitutionalism is intended just like a freestanding set of legal-moral norms, it would be possible to overcome all those incommensurable situations that deem just one legal source as the supreme law. However, the *Kadi* case itself proves the freestanding approach wrong. The words of the Advocate General Maduro are clear: the Treaty «is not merely an agreement between states but an agreement between the peoples of Europe» creating a municipal legal order of transnational dimensions, of which it forms the basic constitutional charter[31] under which the process of the constitutionalization in the EU is revealed. In other words, from the *Kadi* judgment it emerges that the matter it is not merely about identifying freestanding individual rights and upholding a transnational rule of law, however it rather concerns the defense of a certain polity legitimacy. Ultimately, the *Kadi* case seems to strongly assert a particular constitutional identity with significant polity-building implications in place of representing a light freestanding claim of principled

[28] M. KUMM, *How Does European Union Law Fit into the World of Public Law*, in *Political Theory of the European Union*, Oxford, 2010, p. 135.
[29] See Joined Cases C-402/05 P and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities* [2008] ECR I- 6351 (*Kadi*).
[30] B. BRYDE, *The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational* Constitutionalism, in M.P. MADURO-L. AZOULAI (eds.), *The Past and the Future of EU Law*, Oxford University Press, Oxford, 2010.
[31] Opinion of Advocate General Poiares Maduro in *Kadi ibid*, delivered 16 January 2008 at [21].

openness around a cosmopolitan order of law beyond the state[32]. Similarly, the *Kadi* case also proves the inadequacy of Foundational Constitutionalism which cannot be reduced to a political *will*[33]. In substance, the contemporary age is going to be increasingly connected to the (written) texts or (unwritten) principles of the constitution itself[34], rather than based on the stark alternative between a political or cultural foundation: these are not stationary and separable phenomena because the constitution architecture is made up of the interactions between politics and law, power and authority, materialism and idealism, fact and norm. In short, in place of any political *will* or moral *right*, constitutionalism evolves in a dialectic that involves the so-called *political right*[35].

4. *An Alternative Understanding: Political Constitutionalism and the European Green Deal*

After ascertaining the limitations inherent within the two traditional approaches, we may now turn to a different approach, one capable of referring to the dynamic relationship between rulers and ruled, and between the ruled themselves in their public capacity as citizens, also taking into consideration all of those contingent and haphazard series of relatively idealistic political struggles that frame the constitution over time[36].

Such a perspective takes the name of "Political Constitutionalism"[37], here intended as a prospective aimed at seeking to detect the historical-political 'laws' behind governmental development, or «all those rules, principles, practices and

[32] M.A. WILKINSON, *Political,* cit., 206.
[33] This understanding of political constitutionalism builds upon Martin Loughlin's notion of public law as political jurisprudence or *droit politique*: M. LOUGHLIN, *Foundations of Public Law*, Oxford University Press, Oxford, 2010.
[34] M.A. WILKINSON, *Political,* cit., p. 207.
[35] M. LOUGHLIN, *Foundations,* cit.
[36] For a different, radical take on the idea of constituent power which refuses its absorption by the constituted power, see A. NEGRI, *Insurgencies: Constituent Power and the Modern State*, University of Minnesota Press, Minneapolis, 1999.
[37] M.A. WILKINSON, *Political,* cit., p. 206.

maxims that establish, sustain and regulate the activity of governing the state».[38] Indeed, polity formation keeps representing a ceaseless, uneven and disputed process particularly within the integration and constitutionalization of Europe. Against such a background, the political constitutionalism approach replaces the concept of *State* or *the People* with the concept of the "public sphere", as to better accounts that constitutional developments derive from the interactions between rulers and ruled[39] that cannot be understood in any other way than primarily through historical and political terms[40]. Ultimately, the foundational and freestanding theories fail to display constitutionalization in Europe as a dynamic, proactive and "constituting" phenomenon. Rather, they present a sort of passive "juridification"[41] of an otherwise inactive authority structure. Consequently, the challenges lie in the field of ideas, practices and principles that have held the EU as a constitutional project of polity-building and attempted to shape the people(s) of Europe in a certain way.[42]

In other terms, it is possible to develop a constitutional discourse from the starting and basic assumption that no substantive constitution exists in a political or social vacuum. In this latter sense, the approach of political constitutionalism can represent a useful tool to treat the dynamic that reproduces and produces the European people thanks to the public sphere's mediation pursued by political and juridical forces. Indeed, political constitutionalism stresses the various juridical, political and social tensions in play. In so doing, it contributes to the understanding and the articulation of the various problems and complexities coping with the construction of Europe and the European constitution. Ultimately, the matter is not only who wields power in the society and for whom[43], but also, and above all, which political goods the EU is responsible for.

---

[38]M. LOUGHLIN, *The Nature of Public Law*, in C. MAC AMHLAIGH- C. MICHELON- N. WALKER (eds.), *After Public Law. Oxford constitutional theory*, Oxford University Press, Oxford, 2013, pp. 11-24.
[39] L. FULLER, *The Morality of Law*, in J. T. LEVY (ed.), *The Oxford Handbook of Classics in Contemporary Political Theory*, Oxford University Press, Oxford, 1969, p. 210.
[40] A. G. GRIFFITH, *The Political Constitution*, in *The Modern Law Review*, 1979, p. 42 ss.
[41] M.A. WILKINSON, *Political,* cit., p. 208.
[42] G. FRANKENBERG, *Tocqueville's Question: The Role of a Constitution in the Process of Integration*, in *Ratio Juris*, 2000, pp. 1-30.
[43] R. GEUSS, *Philosophy and Real Politics*, Princeton University Press, Princeton2008, p. 25: or as the

When situated within this context, the EGD appears as a process capable of contributing to the identification of the legal goods for which the EU is responsible. The political momentum behind the low-carbon economy transition is strong not only because the clear majority of Europeans feel a sense of urgency concerning this matter, but also, and above all, because the EGD has the ambition to overcome Member States' clashing interests, the lobbies' concerns about international competitiveness, the still opened fracture between Eastern and Western Europe and Northern and Southern Europe. The EGD might represent the Trojan Horse which outweighs the traditional methods of decision-making relying on the politicians' willingness to compromise and seek consensus; on protracted and meticulous negotiations; turning political issues into technocratic topics. In other words, such an initiative might not only be oriented to tackle the climate challenge, but might also have the effect of portraying a framework in which is possible to give common (and communitarian) responses to transnational problems.

Therefore, the EGD not only embodies a political roadmap on climate change, but it fits into a specific constitutional framework committed to responding to specific and crucial questions: which are the political goods for the sake of European Union is established? What sort of community is the European Union becoming? The European Green Deal calls the European leaders to deal with a task that is not just about the specific policy measures needed to mitigate climate change, but also how to negotiate them within an EU political system designed for a different political-constitutional age.

Author puts it *who does what to whom for whose benefit*?; P. ANDERSON, *The New Old World*, Verso, London, 2009, 510, the Author quotes Alan Milward's approach to the question of Europe: «In whose interests will the brutal power of the state continue to exist? Who will run it? And for whom? It is the answers to these questions which will determine the future of the European Union».

RIVISTA QUADRIMESTRALE DI DIRITTO DELL'AMBIENTE
- SAGGI -
ANNO 2021 / NUMERO 1

ABSTRACT

Roberta De Paolis – *Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism*

This paper aims to discuss some of the possible constitutional implications of the European Green Deal (EGD). In particular, it will first ask whether the geopolitical actions envisaged by the EGD can be anchored to the basic principles of environmental protection under the current Treaty framework (§ 1); secondly, it will examine whether the EGD can eventually contribute to the European discourse on the constitution that is emerging and should emerge in Europe (§§ 2-4). It argues that the EGD has not yet established a clear connection with the existing principles of EU environmental protection, while it is potentially capable of feeding and enriching the ongoing constitutional discourse on the EU polity, in particular in the perspective of "Political Constitutionalism".

KEY WORDS: *Green Deal; Constitutionalism; Europe; Principles.*