




Ecosystem restoration and EU Law: an introduction to the symposium

Edoardo Chiti 

Sant'Anna School of Advanced Studies, Pisa, Italy
Email: edoardo.chiti@santannapisa.it

(Received 6 January 2024; accepted 1 April 2024)

Abstract

This short Introduction outlines the purpose and structure of the Symposium on *Ecosystem Restoration and EU Law*. It opens by highlighting the potential relevance of the ecological move taken by the EU political institutions in the framework of the Green Deal. It then presents the issues addressed in the Symposium and the main overall argument emerging from its four contributions: whilst the EU ecological policy reflects the intention to shift from the traditional understanding of environmental protection as social regulation to a genuinely ecological and holistic vision, the functional rationale of such a move remains, for the moment, elusive and under-specified. Clarifying such rationale is an inescapable but complex task, as it requires a fresh discussion on the relationship between law and ecology, as well as a true understanding of the implications of ecosystem restoration for the evolving features of the EU polity.

Keywords: EU environmental law; EU ecological law; ecological transition; Green Deal

1. Four interconnected issues

The restoration of ecosystems is one of the core goals of the European Green Deal. It is expected to contribute to the reduction of greenhouse gases in the atmosphere by allowing forests, soils, and other ecosystems to operate as carbon sinks, storage and substitution. Ecosystem recovery and nature-based solutions, in other terms, are supposed to assist ‘in maintaining, managing and enhancing natural sinks and promote biodiversity while fighting climate change’, to use the European Climate Law’s wording.¹ In order to achieve the overarching objective of climate neutrality – the ultimate goal of the Green Deal – they are as important as technological innovation.

In line with such an overall approach, the Commission has first elaborated on a number of ecological strategies, namely, the Biodiversity Strategy, the Soil Strategy and the New Forest Strategy,² all presented in the somehow rhetorical language of visionary politics. Then, it has presented several legislative proposals aimed at translating those policy documents into rules and practices. This is the case, in particular, of the proposals for a ‘Nature Restoration Law’,³ a ‘Soil

¹Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) 401/2009 and (EU) 2018/1999 (European Climate Law), O.J. 2021, L 243/1, Whereas 23.

²See, respectively, EU Biodiversity Strategy for 2030, COM (2020) 380; EU Soil Strategy for 2030, COM (2021) 699; and New EU Forest Strategy for 2030, COM (2020) 572. The ecological component of the Green Deal has been recently reasserted in the Commission Communication on Managing climate risks - protecting people and prosperity, COM (2024) 91, at § 4.1.

³Proposal for a Regulation of the European Parliament and of the Council on nature restoration (COM (2022) 304 final), 22.6.2022.

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Monitoring Law⁴ and a Monitoring Framework for Resilient European Forests.⁵ These legislations do not represent an absolute novelty in the history of European Union (EU) law: EU legislation relating to nature dates back to the early 1990s, when the Habitats Directive was adopted,⁶ followed in the 2000s by legislation such as the Birds Directive⁷ and the Regulation on Invasive Alien Species.⁸ Yet, the proposals stemming from the Green Deal rely on the partially new ecological vocabulary of ecosystem ecology, establish a direct link between ecosystem restoration and climate neutrality, and are clearly oriented to relaunch the ecological ambitions of the EU. They aim at becoming ‘a cornerstone of Europe’s ambitions to restore biodiversity and ecosystem services for decades to come’ and demonstrating ‘global leadership in addressing ongoing environmental crises’.⁹

The Commission’s ecological move deserves our attention. It is a development potentially capable of changing the legal apparatus of the EU, at both the conceptual and instrumental levels. It brings with itself the promise of a new understanding of the relationship between human beings and the multitude of ecosystems which we now name ‘nature’, well beyond the rationale of environmental law as social regulation consolidated since the 1980s. Moreover, it poses a number of uneasy regulatory issues, ranging from the difficulties to properly translate ecological propositions into legal rules and practices, particularly in a legal order which is overall committed to growth through economic freedoms, to the need to envisage effective and sound implementing arrangements.

This Symposium aims at taking a first step in this novel and clearly under-researched area. Its purpose is to discuss four interconnected questions raised by the emergence of a new body of EU ecological law within the Green Deal.

First, is the new body of EU ecological law just a way to rationalise and re-order the already existing ecological legislation, concerning habitats and species, or does it imply a more profound regrouping of the EU legal order? We pose this question in relation to soil, the ‘magic carpet’ of few centimetres which makes life on land possible.¹⁰ Are we witnessing the making of a new legal order grounded in the relations between under- and overground ecosystem processes that are critical for the maintenance of liveable conditions?

Second, is the ecological move of the Commission articulating a new type of sustainability, beyond the traditional and totalising construction of sustainability as sustainable development? In particular, is an ecological understanding of sustainability in the process of emerging? If so, how does it differ from – and coexist with – sustainable development?

The *third question* deals with the conflicts inevitably arising from the interplay between the new ecological goals and other objectives of the Green Deal. We focus on a specific set of conflicts, those involving the ecological and energy transition goals, and ask how they can be composed. Does regulation itself provide any effective way to manage those conflicts? If not, is it possible to identify alternative legal options, relying on the principles at work in the EU legal system? Can the new ecological objectives be reconciled with the functional pattern of the EU?

⁴Proposal for a Directive of the European Parliament and of the Council on Soil Monitoring and Resilience (COM (2023) 416 final), 5.7.2023.

⁵Proposal for a Regulation of the European Parliament and of the Council on a monitoring framework for resilient European forests (COM (2023) 728 final), 22.11.2023.

⁶Directive 1992/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. 1992, L 206/7.

⁷Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, O.J. 2010, L 20/7.

⁸Regulation (EU) 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species, O.J. 2014, L 317/35.

⁹See D Hering et al, ‘Securing success for the Nature Restoration Law’ 382 (2023) *Science* 1248, at 1248.

¹⁰EU Soil Strategy for 2030 (n 2) at 1.

Fourth and finally, moving from the regulatory rationale to the available instruments, how should those instruments be designed in order to ensure that the ecological goals of the emerging legislation are actually achieved? Carbon removals, and in particular those based on nature-based approaches such as forestation, soil carbon sequestration and wetland restoration, provide a telling example of the difficulties faced by the EU legislator. Nature-based carbon removal strategies are clearly gaining an ever-increasing significance in the Green Deal. But *how* should such removals be carried out? And *why*, *where* and *by whom*?

2. The ecological mission of the EU: inherent tensions

The analyses presented in this Symposium provide some insights on the ways in which ecological concerns are taken into account in the Green Deal. Interestingly, they tell an ambivalent story. Whilst the ecological move taken by the Commission reflects the intention to shift from the traditional understanding of environmental protection as social regulation to a genuinely ecological and holistic vision, such a move brings with it a number of inherent tensions.

The emerging discipline of soils is a case at point. On the one hand, the Green Deal promises to re-order EU environmental laws and policies through a holistic framework aimed at restoring soils. On the other hand, the relevant EU policy documents and legislation re-produce the traditional vision of soil monitoring based on procedural data accumulation on soil quality, instead of creating a new paradigm. In Petersmann's words, the legal 'reordering' of the European ground through the adoption of the EU Soil Strategy for 2030 and the proposed Soil Monitoring Directive is not accompanied by a 'regrounding' of the European legal order.

The evolution of the legal construction of sustainability encapsulates a further tension. Ecological sustainability is emerging as a new EU policy and legal objective, distinct and autonomous from sustainable development. This is a potentially remarkable development, as argued by Chiti. Yet, it is not at all clear that the EU legislator will be actually able to exploit its regulatory potentialities and develop the Green Deal as a double engine project, relying on two different sustainability rationales – sustainable development and ecological sustainability.

The discussion of the conflicts between climate-related renewable energy goals and ecological concerns illustrates a slightly different dynamic. Montini stresses the many difficulties met by the EU legislator in anticipating and managing such conflicts at the regulatory level. The legal system, however, provides a possible way forward, based on a prospective interpretation of the principle of integration, in connection with an ecological sustainability reading of the principle of sustainable development.

Finally, nature-based carbon removals certainly represent a factor of ambiguity in the EU ecological action, as pointed out by Bogojevic. Indeed, they are destined to play a crucial role under the European Climate Law, which requires the EU to achieve 'a balance between anthropogenic economy-wide emissions by sources and removals by sinks of greenhouse gases domestically within the Union by 2050'. Moreover, it is hard to deny their potentialities in relation both to climate change and ecosystem restoration. It is much more difficult, however, to properly design nature-based approaches. This implies careful consideration of legal dilemmas regarding how carbon removals are to be carried out, why, where and by whom, each raising issues of participation, transparency and the purpose of carbon removal.

While the Symposium is obviously not intended to provide a comprehensive discussion of the various issues of the EU ecological move, the points made in its four pieces suggest that its rationale remains, for the moment, elusive and under-specified. Such a rationale is based on ecosystem recovery through ecosystem restoration, an endeavour fully shared by most ecological literature and certainly functional to climate neutrality. Yet, the Commission neither articulates the precise contents of that endeavour, nor does it clarify the place that ecosystem restoration occupies in the EU legal system. This last point is of particular importance: ecosystem restoration

cannot be easily accommodated in the traditional EU construction of sustainability and environmental protection, as it encapsulates a number of ecological propositions which simply abandon the logic of environmental protection as a way to correct market externalities; at the same, it is difficult to argue that it establishes a coherent and fully accomplished paradigm of ecological protection, based on ecosystem integrity and a new prioritisation of ecological interests over economic concerns. The ecological legislation stemming from the Green Deal triggers a process of change of the EU legal system, but the relevance and direction of the ongoing evolution remain unclear.

3. Ecology, EU law and the Green Deal

Clarifying the rationale of the new ecological legislation is an inescapable task for the EU political institutions. Without such clarification, it will be impossible to properly design and implement this fundamental component of the Green Deal. One should acknowledge, however, the complexity of such a task.

Ecology – and particularly ecosystem ecology – is knocking at the EU legislator's doors. Its foundational concepts and key propositions require to be translated not only in public policies and economic strategies, such as the management approaches designed to support the recovery of degraded ecosystems, but also in regulatory arrangements. For some, ecology has its own normativity, represented by a set of 'laws of nature' and constitutive of law itself; this is the perspective taken by part of the 'eco-law' scholarship.¹¹ Against this point of view, however, one may observe that ecological principles are not laws of nature in the same sense as those established by physics and other natural sciences. Instead, ecology relies on a complex architecture of regulatory metaphors, ecological propositions and indicators, a rich and malleable material that does not ordinate specific and clear actions, but it provides the rule-makers with a number of options and possibilities. According to such a perspective, rule-makers have the primary responsibility of selecting and formalising the appropriate ecological options. Crucially, however, managing the interaction between ecology and law is not a purely regulatory task. It is a wider and more profound issue, requiring reflection about the regulatory force of ecology, the prescriptive nature of many of its key propositions, the role played by law, which is not necessarily a purely instrumental one, and the ordering capacity of policy making. Any attempt to clarify the rationale of the EU ecological legislation should first of all structure and orientate the relationship between law and ecology.

Moreover, one should be fully aware of the implications of ecosystem restoration for the development of the Green Deal and, more generally, for the evolving features of the EU polity. When considered in the context of the somehow polarised discussion about the EU strategy for climate neutrality, ecosystem restoration may appear as a neutral and self-sufficient objective. But it is not.

In the intense debate surrounding the Green Deal two radically diverging views confront each other. According to the first, the European strategy for climate neutrality is an exercise in self-deception by EU political institutions, if not an intentional misrepresentation by the market through complacent public authorities. The Green Deal as the new 'opiate of the masses', as Japanese philosopher Kōhei Saitō put it:¹² an unrealistic green Keynesianism, a good intention on the road to extinction. The opposing view, instead, considers the Green Deal as a transformative strategy, capable of turning the EU into a 'fair and prosperous society', based on a resource-efficient economy as well as on a more harmonious relationship between human beings and nature. This is the position of the Commission, presented in the messianic language of some of the foundational texts of the European integration process. The fundamental point of

¹¹See eg M Davies, *EcoLaw: Legality, Life, and the Normativity of Nature* (Routledge 2022).

¹²K Saitō, *Slow Down: The Degrowth Manifesto* (Astra House 2024).

disagreement between the two views is, of course, the promise of a green economic growth, to be achieved through technological innovation, a renewed industrial policy, and an expansionary fiscal policy. From the point of view of radical critics, the goal of absolute decoupling of economic growth from resource use, that is the reducing of absolute emissions of carbon dioxide while attempting to grow economically, is not unrealistic as such. It is, however, impossible in the temporal horizon imagined by the Commission: by 2050, economic growth will inevitably lead to further emissions; and slowing down the economy is the only viable option. Quite on the contrary, absolute decoupling is destined, in the Commission's view, to keep its promises through instruments such as technological innovation, renewable energy and digitalisation.

In spite of their fundamental opposition, in any case, the two views tend to converge on the importance of ecosystem restoration. Whatever our judgement of the Green Deal, ecosystem restoration is a worthwhile objective and a fundamental component of the political agenda of any contemporary polity. This does not imply, however, that it is also a self-serving goal. Quite on the contrary, the way in which ecosystem restoration is actually designed and operationalised will certainly affect other pillars of the Green Deal, starting with the energy, economic and digital transitions. It will also influence the dynamics and features of the EU political and legal order. For example, ecological law might work as a force correcting 'market constitutionalism', to use Emiliós Christodoulidis' words,¹³ and opening the way to a return to 'political constitutionalism'. But it might also operate in the opposite way, as a legal technology further weakening the legal mediation of democratic power. Clarifying the rationale of EU ecological legislation also implies governing its implications on the European integration process.

The penetration of ecology in the EU political, institutional and legal discourse has just begun. It is a challenging process, one which raises problems that are not simply regulatory in nature and do not have simple solutions. The European legal scholarship should do its part to rationalise, sustain and drive this process.

Data availability statement. This article relies on publicly available sources, such as case law and public documents, as well as on secondary literature. It does not include any other data.

Funding statement. This work received no specific grant from any funding agency, commercial or not-for-profit sectors.

Competing interests. The author has no conflicts of interest to declare.

¹³See E Christodoulidis, *The Redress of Law* (Cambridge University Press 2021), as well as the discussion presented in the Symposium published in this Journal, Volume 2, Issue 1, with contributions by AJ Menéndez, S Steininger, A Skrbic, FG Nicola, A Jr Golia, A Somek and E Christodoulidis.