Global Warming and European Private Law. Remarks at the Opening Session of the 22d Common Core General Meeting, Lecce, 2016.

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It is more and more difficult that in the near future Governments will enter top down agreements such as Cop 21. The election of Trump in the US, a man with a sympathy for revisionist claims concerning the human nature of global warming, pierces a veil of corporate hypocrisy. Capitalism is in front of us without gloves. To be sure, the government agreement such as Cop 21, requiring action to begin in 2020 was corporate-sponsored in the literal sense. Mega-corporations like Volkswagen, together with other corporate giants of extractive capitalism such as Chevron or BP, on the one end claim to invest on a cleaner future, while on the other cheat even on the existing minimalist policies as witnessed by the recent scandals.

The plummeted level of expectation on the contribution of the US in the global effort to reach sustainability even on those that still believe in the corporate rhetoric on the gradual conversion to the green economy championed by former President Barack Obama, is paradoxically good news. To be sure, believing in a top-down lead conversion in the current ratio of power between corporations and Governments is simply absurd.

The only possible political force in the direction of an Ecology of law is from the bottom up, in a sort of Archimedean push determined by the sinking of global capitalism. In the law, this means that the institutional transformation that can "change everything" can only be in the horizontal, diffused, domain of private law. Finally, private law has to carry directly its responsibility outside of the alibi produced by the fantasy that public law can do the trick.

The questions are: what kind of private law can carry the very heavy burden of an ecological transformation? What does an ecological transformation in law really mean?

First, I would like to claim that at the common core we have long been used to a bottom up approach. Since the very early phase of our collective endeavor, now in its twenty-fourth year, in a European climate deeply different from the one culminated in Brexit, we were skeptical of any top down attempt to unify private law. We deployed the metaphor of *cartography* rather than *city-planning* precisely to convey that idea[1]. Sure, the Common Core Project, standing on the shoulders of Schlesinger[2] has a deep positivistic DNA. Not of course, in the sense of legal positivism but certainly in that of a kind of scientific positivism rooted in a Cold War effort to make law part of social sciences, i.e. a noon-political artifact[3]. It is certainly true that we started our endeavor as an attempt to offer a scientific description of what the common core "is" in Europe, in the sense of knowing what analogies and what differences are already in place in the European landscape of private law. However, our process of learning by doing brought us quite significantly away from the initial orthodoxy. First, the theoretical critique of the scientific positivism of our methodology emerged quite early in the international discussion that followed the launching of the common core[4]. Moreover and perhaps even more significantly, the praxis and the different sensitivities of the

[1] See Bussani & Mattei, The Common Core Approach to European Private Law, in 3 Columbia J. European Law, 1997, 339.
[2] See Vivian Curran, On The Shoulders of Schlesinger. The Trento Common Core of European Private law Project 11, European Review of Private Law, 66, 2003.
[3] See my forthcoming. The Cold War and Comparative Law, in 47 Am. J. Comp. Law, 2017
[4] See Frankenberg and Kennedy among others.

questionnaire respondents made it very clear that the ontological distinction between the subject and the object is a Cartesian assumption empty of realism in the law. It appeared very clearly that the respondents do *interpret how* the law of their respective jurisdiction is. They make a choice on how it applies to the facts that the questionnaire offers to them. By being professional scholars (part of the doctrinal formant to use our lingo) they are at the same time the subject and the object of the inquiry both as individual respondents and as part of the intellectual community that produces the questionnaire.

This methodological observation, more a product of the praxis than of rational theorizing, became extremely influential in my own intellectual path when I started to work with Fritjof Capra on the project of applying to the law the most advanced systemic thought that has generated the 2015 book *The Ecology of Law. Toward a legal system in tune with nature and community*.[5] While in the last 22 years we have seen very clearly that any purely descriptive claim in the law is simply impossible (and claiming its possibility is consequently ideological), the hypothesis advanced in the *Ecology of law* is that the very presence of a professional interpreter (a jurist) that thinks the way it does is an accident of history. Consequently granting to him/her a special role is a form of reductionism, itself the historical heir of mechanistic thought.

An ecological vision of private law considers the law as an interpretive praxis not just of jurists (in whatsoever capacity) but of the "users"[6] of the legal systems that are also its "makers", i.e. the individuals and the groups in society. In this vision, the law does not exist as a sort of "out there" but only appears and emerges as existing when actually interpreted by obeying or resisting it. Consequently, everybody in society whose behavior is determined by the law among the many other factors ecologically connected to it, shares the very same nature of subject and object of the law that we can see in the respondent to the common core questionnaire. Clearly in this perspective the legal system ceased to exist as a "furniture of the world" to emerge quite probabilistically, according to "laws of nature" or "ecological principles" that as scholars we might be able to observe.

Such laws of nature (or ecological laws) are as strict and binding as every other scientific law (such as for example the law of gravity) and its systematic ignorance carries the same dramatic consequences of forgetting about gravity while climbing a mountain. In a sense there is an intrinsic normativity it the laws of ecology that are dramatically violated by our extractive pattern of development. The human law, must be made in tune with the laws of ecology to avoid destruction and disaster such as that generated by global warming.

The bad news is that the hijacking of the legal system by corporate power that is the essence of the current phase of capitalist extraction makes the *Lex* (*Gesetz*, *Loi*, *Legge, Ley*) impossible to deploy in this area. The good news is that changes in general cultural attitudes make it possible and likely that *Ius* (*Derecho, Recht, Droit*) if filled by such attitudes and ecological literacy do the trick.

If that is the case, the jurist, in those legal systems that have granted to him/her a special role has a special responsibility and a quite clear receipt for his action. He cannot consider private law as a branch of the official law of the state whose most important epiphany is contained in some form of *lex* (be it the Code or some special statute) but he must see it as the law of the private organizations, stemming from social action. He must then look to the kind of social action that rather than being determined by capital intensive, artificial forms (corporations, technology, algorithms) is actually capable to interpret the needs of ecological regeneration rather than resource extraction.

Once such actions are identified (mostly in the so-called sharing economy) he has to filter out those that are mere cosmetic narratives on the same pattern of unsustainable short term rent seeking or profit making (Air B&B or Huber) from genuinely motivated patterns of behavioral transformation. He has to offer

[5] See Capra & Mattei, The Ecology of Law, 2015
[6] See L. Nader, The Life of the Law, 2005

interpretations of the existing law that facilitate such sustainable behaviors mainly through counter-hegemonic strategies. Nothing less than changing the default rules of the game is required to the jurist today.

This dialectic between the felt needs of society as emerging by the most advanced exercises of collective subjectivities (think about co-working, time banks, new currencies, co-housing etc.) and the law representing it must get rid of much of the path dependency determined by two and a half centuries of individualization, alienation and commodification of the commons. The transformation of commons into capital determined by the all-expanding imperatives of capitalist short-term extraction has been the default purpose of private law for much too long of a time.

Just to stay in the three macro-areas that we explore at the common core, individualistic idiosyncratic property cannot be the default rule any more. It might be at most the exception in a legal landscape that puts trust in the interest of social generation and equality of distribution its default rule. The abuse of right cannot be a shrinking doctrine, the duty must conquer the center of the scene, relationality must be focused on, access rather than exclusion must govern, non-property rather than property should be theorized[7].

In contract law, the capitalist expansion of contractual freedom has generated the quite paradoxical transformation of the citizen into consumer and currently into commodity. Sure, technological transformations are responsible of much of this, but technology is not neutral and the fundamental legal rules of the game in property, contracts and tort made its evolution possible by allowing the accumulation of massive capital. Here contractual freedom as a tool to standardize and make measurable the unmeasurable should be the exception rather than the rule. Causa, short from being abandoned as in recent French reforms, should be rescued and expanded. Motives should become legally relevant, because they determine the difference for instance between genuine ecologically literate subjectivities and mimetic extraction.

In tort law the challenge is if at all possible even more acute. It is in this domain that the expansion of fault has sheltered the most ecologically unsustainable practices dubbed efficient. It is there where the law gives up most of its ex ante capacity to bite (think about ideas of precaution) limiting itself to structurally ineffective efforts to transfer ex\post losses that are ultimately sustained and subsidized by the environment increasing the ecological debt of future generations.

Changing the default rules in the law is not as simple and immediate as changing them in our computer tablets. It is a matter of interpretation, requiring intelligence, creativity and hard work. The good news is that we must not wait for the legislator. We can start now in our work as scholars or as citizens moving together in changing the way we think and operate.

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[7] See A. Quarta, Non-proprietà. Teoria e prassi dell'accesso ai beni, 2016