ROUTLEDGE ENVIRONMENT AND SUSTAINABILITY HANDBOOKS

Routledge Handbook of Private Law and Sustainability

Edited by Marta Santos Silva, Andrea Nicolussi, Christiane Wendehorst, Pablo Salvador Coderch, Marc Clément and Fryderyk Zoll

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ROUTLEDGE HANDBOOK OF PRIVATE LAW AND SUSTAINABILITY

The *Routledge Handbook of Private Law and Sustainability* reflects on how the law can help tackle the current environmental challenges and make our societies more resilient to future crises.

Sustainability has been high on the political agenda since the approval of the Sustainable Development Goals in 2015 and the EU Green Deal in 2019. The Green Agenda aims at making Europe the first climate-neutral continent by 2050, but humanity persists in an ecological overshoot that puts at risk the survival of species, including that of our own. Drawing together a selection of leading thinkers in the field, this Handbook provides a curated overview of the most recent and relevant discussions for private lawyers related to environmental and sustainability concerns. The authors delve into case study examples from 20 countries in Europe and beyond and discuss a wide range of issues, including new property law and consumer law paradigms, the use of legal tech for promoting sustainable property management, strategies for fighting planned obsolescence, eco-design, the servitisation economy, advances on corporate climate litigation and mandated green private sludges. Overall, the volume is designed to empower new generations of legal scholars to take an active role in the transition to a more sustainable future. It will also assist policymakers in producing better policy, through pinpointing the main legal issues that need to be addressed and offering a comparative overview of legal solutions and best practices.

Divided into six key parts and overseen by a team of internationally recognised expert editors, this Handbook will be an essential resource for students, scholars, private lawyers and policymakers who wish to have a comprehensive, fundamental overview of how environmental sustainability concerns reflect on private law.

Marta Santos Silva is a Postdoctoral Researcher at the Research Center for Justice and Governance at the University of Minho, and an Affiliated Researcher at the Maastricht European Private Law Institute and the Centre for European Law and Politics at the University of Bremen. Prior to her current role, she worked at Maastricht University and as an Affiliated Senior Researcher at KU Leuven researching at the intersection between private law and sustainability studies. She gained experience working in Brussels for a consultancy working with the European institutions. She was appointed a member of the European Commission's Expert Group on Liability and New Technologies (Product Liability Formation) and is an elected European Law Institute Council member.

Andrea Nicolussi is a Full Professor of Civil Law at the Law Faculty of the Catholic University of Milan, where he teaches comparative private law and family law. His published works focus on unjustified enrichment, contract law and tort law, as well as biolaw and family law. He has taken part in international collaborations such as the Study Group on a European Civil Code and the Eusoco project and was a member of the National Bioethics Committee.

Christiane Wendehorst is a Professor of Law at the University of Vienna. She is a member of the Academia Europaea, the Austrian Academy of Sciences, the International Academy of Comparative Law, the American Law Institute and numerous international research groups and advisory bodies. Before going to Vienna, she held full professorships in Germany and served as the Managing Director of the Sino-German Institute for Legal Studies. Professor Wendehorst was the President of the ELI, was one of its Founding Members and is today the ELI's Scientific Director.

Pablo Salvador Coderch studied law and economics at the University of Barcelona. He is a Cofounder of and Emeritus Professor at the Pompeu Fabra University, Barcelona. Since 1995, he is of counsel at Cuatrecasas Abogados. He is a member of the ALI, the ELI and the International Academy of Comparative Law and founder of InDret. He writes and teaches civil law, civil constitutional law, legislative drafting and comparative law of torts and contracts.

Marc Clément is, since September 2018, the presiding judge at the Administrative Tribunal of Lyon (France). In addition, he is, since 2014, a member of the French Environmental Authority. He has experience working as a lawyer at the DG Environment of the European Commission and as a legal adviser of the European Environment Agency. He published in 2010 the book *Environment European Law* and contributed extensively to books in the field of environmental law.

Fryderyk Zoll is a Doctor Honoris Causa by the West-Ukrainian National University in Ternopil, Professor at the Chair of Civil Law at Jagiellonian University in Kraków and the European Legal Studies Institute, University of Osnabrück. He is the leading researcher of numerous Polish, German and EU grants, a member of numerous academic associations and a vice-chairperson of the Committee for the Defence of Democracy (KOD) regional board in Lesser Poland. He is a former member of the European Law Institute's Executive Committee, the Common Frame of Reference and the Committee of the Acquis Group drafting teams, as well as the Codification Commission at the Polish Ministry of Justice. He has authored more than 200 scientific publications in European private law, ecologisation of private law, consumer law, comparative law, legal education and judicial independence.

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CONTRIBUTORS

Lucila de Almeida holds the Abreu Chair in ESG Impact and is the Director of the NOVA Green Lab at NOVA School of Law, CEDIS – R&D Centre on Law and Society, NOVA University of Lisbon. She is also a Part-time Assistant Professor at the European University Institute (EUI) and a member of the Coordination Committee at the Florence School of Regulation. Her research fields are energy, environmental and climate law. She holds a PhD in European Law (EUI), an LLM in Comparative, European and International Law (EUI), and a Master in Law and Development from FGV, São Paulo, Brazil. Before joining the faculty, she was an Edmond J. Safra Research Fellow at the Center for Ethics at Tel Aviv University (2019–2020), a Postdoctoral Researcher at the Faculty of Law, University of Helsinki (2017–2019), and a Research Associate at the Law Department of the EUI (2013–2016).

Guido Alpa is a Lawyer and Full Professor of Civil Law at the Università di Roma 'La Sapienza' and currently serves as the Director of the Master di Diritto privato europeo at the same university, a position that he has been holding since 2004. He is a Visiting Professor at the School of Law of the Universities of Oregon, California (Berkeley), London, Mannheim, Trento, Coimbra, Barcelona, Granada, Oxford, Malta, and King's College London, as well as at the Institute of Advance Legal Studies (London). He has been awarded an honorary degree by the Universidad Complutense de Madrid, the Universidad Nacional Mayor de San Marcos de Lima y la Universidad de Buenos Aires. His research interests include civil law (contract and liability law), commercial law, banking law and comparative law.

Wojciech Bańczyk is a PhD in law with distinction at the Jagiellonian University in Kraków, UJ, Assistant at the Chair of Civil Law UJ, Director of the American Law Program (The Catholic University of America in Washington DC and UJ) and Attorney at Law in Kraków. He is the winner of the first prize in the contest of the General Counsel to the Republic of Poland for the best master thesis in court law and the Z. Radwański competition for the best PhD thesis on Polish private law. He is a member of the European Society of Comparative Legal History and the ELI. He was awarded scholarships by the DAAD, the Foundation of Polish Science and the Ministry of Science and Higher Education. He is a Co-investigator and principal investigator of grants of the

National Science Centre and a Co-investigator of the Polish-German Academic Foundation and the German Federal Bank.

Maciej Bujalski is a PhD candidate at the Doctoral School in the Social Sciences, Jagiellonian University in Kraków, collaborating with the Civil Law Chair at the Jagiellonian University. He completed with distinction a Master's degree in Law at the Jagiellonian University in Poland and a Master 2 in Private law (Master 2 Droit privé) at the University of Orleans in France. He is a member of the editorial team at the 'Transformacje Prawa Prywatnego' (*Transformation of Private Law*) Journal and publishes in the fields of contract law, ecologisation of private law, consumer and banking law, as well as comparative law.

Roberta Calvano is a Full Professor of Constitutional Law at Unitelma Sapienza University. Roberta Calvano has a PhD in Constitutional Law and Public Law. A Lecturer since 2002 in Constitutional Law at the Faculty of Law, University of Rome 'La Sapienza', she is a member of the editorial board of several Italian scientific journals, among which are Giurisprudenza Costituzionale and Democrazia e diritto, where she also published. She is the author of four books concerning constitutional problems of European integration and constitutional issues implied in University and School legislation. Professor Calvano is a member of the teaching board of the PhD program in Constitutional Law and Public Law at the Faculty of Law, University of Rome 'La Sapienza' and she has been teaching undergraduate and post-graduate courses of Constitutional and Public Law and EU Constitutional Law at several Italian universities. She was audited twice as an expert by the Italian Parliament in 2023, and she was a member of a ministerial committee on Regionalism in 2019/2020.

Jorge Morais Carvalho is an Associate Professor and Vice Dean of the NOVA School of Law, where he also serves as a Coordinator of the Undergraduate Programme. He is a Researcher at CEDIS – Centre for Research on Law and Society and Director of the NOVA Consumer Lab. He has authored or co-authored approximately 140 books and scientific articles spanning a wide array of legal disciplines, including private law, commercial law, consumer law, civil procedural law, alternative dispute resolution, and comparative law. He has been invited to share his expertise at numerous events, having participated in over 160 seminars, conferences, webinars, congresses, scientific colloquia, and training sessions, spanning more than a dozen countries. He is also one of the editors of the *EuCML – Journal of European Consumer and Market Law*.

Marc Clément is, since September 2018, the presiding judge at the Administrative Tribunal of Lyon (France). In addition, he is, since 2014, a member of the French Environmental Authority. He is the Vice-chair of the Compliance Committee of the Aarhus Convention. He has experience working as a lawyer at the DG Environment of the European Commission and as a legal adviser of the European Environment Agency. He published in 2010 the book *Environment European Law* (fourth edition in 2021) and contributed extensively to books in the field of environmental law.

Carl Dalhammar is an Associate Professor at IIIEE, Lund University in Sweden. In his research, he has analysed numerous environmental laws and policies, including the Ecodesign Directive, Circular Economy policies, right-to-repair policies, planned obsolescence, EU energy efficiency laws, government procurement programs, and product destruction. He has led several research projects related to circular economy developments in the industry. Carl Dalhammar teaches

environmental law and politics in several European and Swedish master's and undergraduate programs. He is a member of the Research Council at the Swedish Competition Authority (*Konkurrensverket*), and a board member of the Swedish national innovation program 'Re:Source'.

Fabrizio Esposito is a Bocconi and EUI alumnus (2018) and Assistant Professor of Private at the NOVA School of Law, Lisbon. In his scholarship, doctrinal analysis, especially of EU consumer and regulatory law, is enriched by insights from economics, psychology, and other social sciences. Fabrizio has more than 40 publications, including three co-edited volumes (*Research Methods in Consumer Law*, *Economics in Legal Reasoning*, and *The Cambridge Handbook on Algorithmic Price Personalization and the Law*). His book *The Consumer Welfare Hypothesis in Law and Economics* opens a new path in the economic approach to law, where consumer welfare and sovereignty are the cornerstone of market law.

Irene-marié Esser is a Professor of Corporate Law and Governance in the School of Law at the University of Glasgow and Dean of the Graduate School, College of Social Sciences. Since 2020, she is an Extraordinary Professor at Stellenbosch University, South Africa, and also a Visiting Professor at the National Law University Jodhpur, India. She was admitted as an Attorney of the High Court of South Africa in 2005. She currently teaches Corporate Governance, Corporate Social Responsibility and Company Law at the University of Glasgow and supervises postgraduate research students in the United Kingdom and South Africa. Her research spans doctrinal and empirical approaches, covering the UK, EU and South Africa in the field of corporate governance, company law and corporate social responsibility. Prof. Esser is part of the Corporate and Financial Law research group.

Michael Faure has studied law (1982) and criminology (1983) and has a master of laws from the University of Chicago Law School (1985) and a doctorate from the Albert Ludwigs Universität in Freiburg im Breisgau (Germany, 1989). Since 1991, he has been the director of the Maastricht European Institute for Transnational Legal Research at the Faculty of Law of Maastricht University. He still holds that position today, but in February 2008, he joined the Erasmus School of Law in Rotterdam halftime. There, he is the director of the Rotterdam Institute of Law and Economics and of the European Doctorate in Law and Economics (EDLE). He specializes in environmental law and policy, accident law and the economic analysis of law. Within the field of energy law, he worked on liability and insurance issues related *inter alia* to nuclear power, marine oil pollution, offshore oil drilling and carbon capture and gas.

Tomàs Gabriel García-Micó holds a PhD in Law, currently a SECTI postdoctoral researcher at the Universitat de Barcelona since December 2022. From September 2023 to January 2024, he was a visiting postdoctoral researcher at the Centro de Investigação em Justiça e Governação (JusGov) at the Escola de Direito, Universidade do Minho. He is a member of the Consultive Committee of the ELI project on Guiding Principles and Model Rules on Algorithmic Contracts. In July 2022, he was awarded a PhD in Law with the distinction of Excellent Cum Laude. His dissertation titled 'Surgical Robots and Tort Law' explored the intersections between law and new surgical technologies, specifically surgical robots and medical artificial intelligence, from a comparative law perspective. During his PhD, he was a visiting researcher at the China-EU School of Law (Beijing, September 2019) and the Dickson Poon School of Law at King's College London (London, January–April 2020).

Rosa M. Garcia-Teruel is an Assistant Professor of Civil Law at the University of Barcelona in Spain. She holds a master's degree in Business and Contract Law and, since 2018, an international PhD from Rovira i Virgili University in Tarragona, Spain. She has been a researcher in several competitive research projects and has carried out research stays at the University of Bremen, the University of Leiden and the University of Groningen. Her fields of research are real estate law (from the point of view of obligations, contracts and property law), tort law, inheritance law and the law of new technologies.

Mireia Artigot Golobardes is a Ramon y Cajal Researcher at Pompeu Fabra Law School and a teaching fellow of the Europaeum Program (Oxford). She focuses on contracts, with particular interest in consumer contracts and the disruption resulting from the digital economy, AI and ADM in consumer markets and justice systems. Her research of the law draws from the inputs provided by microeconomics and macroeconomics. She has been a visiting professor of Brooklyn Law School, the Institut für Wirtschaftsrecht at Kassel Universität, the Montenegro University Economics Department and Law School, the University of Trento Law School and the Center for South African Studies of the University of Western Cape. She is the coordinator of the European project Justice Fundamental rights and Artificial Intelligence (JuLIA)(https://www.julia-project.eu/) and the principal investigator of AlgorithmLaw and iConsumers funded by the Spanish Research Agency.

Maria Raquel Guimarães is a tenured Associate Professor of Law at the Faculty of Law, University of Porto, Portugal, teaching Civil Law (General Part) and Contract Law on the grade course, and Contracts & Consumer's Law on the master course. She obtained her PhD in Civil Law at the University of Porto and a Master in Banking and Corporate Law at University of Coimbra, Portugal. She is a researcher at CIJ—Centre for Legal Research, and General Editor of RED—Revista Electrónica de Direito. She has conducted research in the areas of civil and contract law, and her main research fields of interest are consumer contracts, payment services, personality rights and digital law. She has authored and co-edited several books on electronic banking, contract and civil law plus contributed chapters in Portuguese and European law books and has published widely on payments services issues in leading Portuguese and European law journals.

Janja Hojnik is a Full Law Professor of the University of Maribor (Slovenia), Vice-Dean for Research (2015–2018, 2023–2027) and Head of the European Legal Studies Programme (since 2019). She is a former Vice-Rector of University of Maribor (2018–2022) and a Global Law Professor at KU Leuven Faculty of Law and Criminology (holding a course on Regulatory Aspects of Servitization in the EU) in 2023. She is a member of an international and interdisciplinary experts group dealing with new technologies (Brown Bag Lunch Group). She is an Advisory Board member of the Common Market Law Review. She teaches and researches in the field of EU Law (internal market law, focusing on goods and services, price regulation, servitization, international trade, digital economy). She is also interested in topics of legal research assessment, integrity in research and conflicts of interests in academia. Up to date, she is a holder of three Jean Monnet projects. Between 2011 and 2023, she has been voted seven times among ten most influential lawyers in Slovenia.

Björn Hoops is Full Professor and holds the Chair of Private Law and Sustainability at the University of Groningen. He read German and Dutch law as well as economics at the universities of Bremen, Groningen, Hagen, and Oldenburg. He obtained a PhD with distinction from the

University of Groningen in 2017. His research focuses on land law and governance in the energy transition. From April 2022 to March 2024, Björn was an EU-funded Marie Curie Fellow at the University of Turin, conducting the research project 'Private Law and the Energy Commons' on the private-law aspects of citizen initiatives in the energy sector. Björn has been a visiting scholar at the Max-Planck-Institute of Comparative and International Private Law, Columbia Law School, and the universities of Cape Town, Cologne, Leuven, Monterrey, Stellenbosch and York. Björn has been serving as a legal advisor to the Notaries' Office 'Olenz Notarissen' in Veenendaal, the Netherlands.

Dario Hug earned his Bachelor's degree at the University of Neuchâtel (2010) and his Master's degree at the University of Lausanne (2012). He wrote his PhD thesis on 'The formation of the Consumer Contract under Swiss Law' (2019). He was a PostDoc at KU Leuven (2021–2022) and the University of Zurich (2023). His favourite research topics are Obligation and Contract Law, Consumer Law and the Circular Economy. He is the author and co-author of various scientific papers in these research fields. Additionally, Dario was *Dozent* in Obligation Law at the University of Zurich (2023) and is a lecturer in Consumer and Contract Law at the University of Neuchâtel. He is currently also working at the Institute of Civil Law of the University of Bern. He also has practical working experience as an independent attorney-at-law in Switzerland and as a law clerk at the Swiss Administrative Federal Court.

Tatjana Josipović is a tenured Professor of Civil Law at the Faculty of Law, University of Zagreb. She has written many scholarly and professional papers and several books on civil law, property law, land registration law and European private law. She was a visiting professor at many European universities. Professor Josipović is a fellow of the Academy of Legal Sciences of Croatia, an associate member of the International Academy of Comparative Law, a member of the ELI, the Academia Europea, the Croatian Society for Civil Law Science and Practice and SECOLA. She has also held several offices within the higher education system in Croatia, in the Academic community and staff services of different state bodies. She is a recipient of the Croatian Academy of Arts and Sciences award (1990) and the State Award for Social Sciences (2018). She is a researcher on several EU e-justice projects.

Miha Juhart is a Professor of Civil and Commercial Law at the Faculty of Law at the University of Ljubljana in Slovenia. His research interests include dealing primarily with the right to property, registration of real estate, and transfer of claims and contracts. He was a Vice-Rector for Research at the University of Ljubljana and Dean of the Faculty of Law. His scientific *oeuvre* comprises more than 100 scientific articles, articles in monographs and international research conferences. He is the president of the Association of Slovenian Lawyers' Associations. He is one of the most cited authors in court case law in Slovenia.

Candida Leone is an Associate Professor of Private Law at the University of Amsterdam, The Netherlands. Her PhD dissertation, written at the University of Amsterdam (UvA) in 2020, studied judicial and statutory responses to unfair terms in consumer and employment contracts against the discussion on the so-called 'instrumentalisation' of European private law. Her most recent work discusses sustainable legal education and private law theory, flexibilization terms and commodification, as well as the protection of consumer debtors (in particular against aggressive debt collection). She teaches EU and Dutch consumer law and an introduction to legal research for LLM students at the University of Amsterdam.

Carlos Gómez Ligüerre is a Professor of private law at the Universitat Pompeu Fabra in Barcelona, Spain. He holds a degree in law (1996) and a degree in business administration (2006) and a doctorate in law (2005) from Universitat Pompeu Fabra University. He is a specialist in contract law and civil liability. He has developed his research work at the Max-Planck-Institut für ausländisches und internationales Privatrecht (Germany) and at the University of Pennsylvania School of Law (United States). He has been a visiting professor at Universidad Nacional del Sur (Argentina), at the IDC-School of Law (Israel) and at the University of Illinois (United States). He is a regular speaker at conferences and courses organized by universities, professional associations and research centres. He has been a fellow of the Alexander von Humboldt Stiftung and his research has focused on the interaction between contract law and tort liability rules.

Iain MacNeil is the Alexander Stone Professor of Commercial Law at the University of Glasgow. He began his academic career after a decade working in investment banking in the City of London. He has undertaken research and collaborated with colleagues in Australia, Canada, China, Hong Kong and the United States. He is a Trustee of the British Institute of International and Comparative Law and Chair of the International Securities Regulation Committee of the International Law Association. He was the Deputy Chair of the Hong Kong RAE Law Panel in 2020 and of the UK REF Law Panel in 2021. He has acted as a Senior Adviser on several projects examining national compliance with EU financial sector directives.

Eléonore Maitre-Ekern dr. juris is a postdoctoral researcher in Sustainability Law and the Circular Economy. Eléonore's PhD thesis, which she wrote at the Department of Public and International Law, University of Oslo, is entitled 'Towards a Circular Economy for Products: A legal analysis of Europe's policy and regulatory framework from an ecological perspective'. She successfully defended her PhD thesis in 2019. At the time of publication, she is finishing her postdoctoral fellowship with the research group Futuring Sustainable Nordic Business Models at the Law Faculty, University of Oslo. Eléonore has published several articles on various aspects of the circular transition in the EU and Norway, notably on premature obsolescence, sustainable consumption, durability and the right to repair. As of 2024, she will be working as a Researcher at NIVA, the Norwegian Research Institute for Water and the Environment.

Victor Mehnert studied law at the Universities of Mainz and Cologne. He then worked for a law firm and the University of Cologne before taking up a position as a research assistant at the Chair of Civil Law, Law of Data Economy, Data Protection, Digitalisation and Artificial Intelligence (Prof. Dr. Louisa Specht-Riemenschneider). There, he is involved in the research project 'From Smart Laws to Smart Technologies to Smart Laws: Comparative Perspectives from Germany and the United Kingdom', funded by the DFG and the AHRC. Among other publications, he is a co-author of the policy brief Right to Repair published in 2022 by the German Advisory Council for Consumer Affairs. He is writing his dissertation on the right to repair.

Lela Mélon, an expert in law and economics, specializes in EU law, corporate conduct, and sustainability. A former Marie Curie Research Fellow at Pompeu Fabra University, she received the 2021 Emerging Sustainability Leader Award. She served as the Executive Director of the Planetary Wellbeing Institutional Framework at Pompeu Fabra University. Currently, she directs the postgraduate program Sustainability Transition Management and Climate Emergency at ESCI-UPF. Her publications include 'Shareholder Primacy and Global Business' (Routledge 2018) and 'Sustainability in Public Procurement, Corporate Law and Higher Education' (Routledge 2023).

Presently, her research centers on policy coherence for sustainability at the EU level, emphasizing corporate law policies. Dr. Mélon's influence extends to reshaping academic curricula with sustainable corporate law courses and collaborating with industry as a senior sustainability consultant at msg global solutions and CER Slovenia, demonstrating a commitment to positive change in law, economics, and sustainability.

Ralf Michaels is the Director at the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany, Chair of Global Law at Queen Mary University in London (UK), and Professor of Law at Hamburg University, in Germany. Until 2019, he was the Arthur Larson Professor at Duke University School of Law (Durham, North Carolina, USA). Ralf Michaels is a widely published scholar of private international law, comparative law, and legal theory. His current research focuses on decolonial comparative law, theoretical foundations of private international law and global legal plurality, sustainability in private and private international law, and the law of combatting antisemitism.

Hans-W. Micklitz was a Professor at the Department of Law at the European University Institute (EUI) in Florence until 2019, currently a part-time professor at the Robert Schuman Centre for Advanced Studies. He was also the Head of the Advisory Board of the Max Planck Institute for Innovation and Competition, Jean Monnet Chair of European Economic Law at the University of Bamberg/Erlangen for Civil and Commercial Law, Head of the Institute for European and Consumer Law in Bamberg and Professor at the Berlin School of Economics, in addition to multiple visiting professorships and advisory positions at institutions across Europe and the USA, he was a member of the German Advisory Council for Consumer Affairs until 2022. He was elected a member of the Academia Europaea in 2016. His research focuses on European and transnational economic and private law and legal theory.

Maria Miguel Oliveira da Silva is currently a PhD candidate in Law and a teaching assistant at NOVA School of Law in Lisbon, Portugal. She is the legal advisor of the NOVA Consumer Lab, a research associate at NOVA Business, Human Rights and the Environment and a researcher at CEDIS – Centre for Research on Law and Society. She is also the author of a dozen published works on consumer law, criminal law, sustainability, and human rights. Her doctoral research is funded by the FCT – Fundação para a Ciência e a Tecnologia. In the past, she was a conflict mediator at the National Center for Information and Arbitration of Consumer Conflicts in Portugal.

Sandra Passinhas is a PhD from the European University Institute (2010) and the University of Coimbra (2016). She is a Professor of Civil and Consumer Law at the University of Coimbra and Executive Director of the Legal Research Center on Consumer Law of the Faculty of Law of the University of Coimbra. She is a Portuguese Member of the DSA Committee and the DSA Expert Group and a member of the General Council of the Portuguese Judiciary School. She is a researcher at the University of Coimbra Institute for Legal Research and coordinator of the UC Team on JuLIA Justice, Fundamental Rights and Artificial Intelligence. She is a member of the Portuguese Medico-Legal Council and a former researcher on the judicial training project FRICoRE (Project on Fundamental Rights in Courts and Regulation), the training and research project GoInEU (Governing Inheritance Statutes after the Entry into Force of EU Succession Regulation) and GoInEUplus (Integration, migration, transnational relationships, Governing Inheritance Statutes after the entry into force of EU Succession Regulations).

Denis Philippe is a Professor at the University of Louvain and a Visiting Professor at the University of Paris Ouest and the Vrije Universiteit Brussel. He is a lawyer at the Brussels and Luxemburg bar and managing partner of Philippe & Partners. He is one of the ELI's founding members. His research and professional interests encompass Banking and Financial Law, Commercial Law, Contract Law, Corporate and M&A Law, European Law, Insurance Law, Real Estate, Torts and Liability and Energy. He is the Editor-in-Chief of Revue de Droit des Affaires, member of the Editorial Committee Revue de Jurisprudence Liège, série Handelscontract of Groupe Larcier, Revue Générale de Droit civil (Contrats et Obligations) and member of the Scientific Committee of Businesslawtele.net.

Katarzyna Południak-Gierz is an Assistant Professor at the Jagiellonian University's Civil Law Chair. She defended her PhD thesis 'The usefulness of the regulation of defects of consent to contracts concluded on the consumer online market' with distinction in 2019. Dr Południak-Gierz's academic interests focus on the interplay between private law and technology. She researches private law reactions toward personalization techniques in consumer contracts and the possibility of using granularity to increase the ecological efficiency of sales law. She is a member of the editorial team at the 'Transformacje Prawa Prywatnego' (*Transformation of Private Law*) Journal.

Barbara Pozzo is a Full Professor of Private Comparative Law at the Law School of the University of Insubria (Como) and President of the Italian Society for Research in Comparative Law. She holds a JD from the University of Milan and a PhD from the University of Florence. She completed her education in France (Faculté Internationale de Droit Comparé, Strasbourg), Germany (Max-Planck-Institut, Hamburg), United States (UC Berkeley School of Law). She is a Titular Member of the International Academy of Comparative Law, a Member of the Board of the European Law Faculties Association and of the European Law Institute. Her main fields include the private aspects of environmental law, the evolution of legal systems and the construction of European private law, with a focus on legal translation problems in the context of European multilingualism. In 2019, she was awarded the UNESCO Chair on Gender Equality and Women's Rights in the Multicultural Society.

Rebecca Ravalli has a PhD in law from the European University Institute (EUI), which followed a Master of Laws at the International University College of Turin, a study visit at the Centre for Transnational Legal Studies (Georgetown University), and a Master of Laws in EU Law at the EUI. Her research focuses on the contractual structure of global value chains and the related implications for consumers and sustainability objectives. Since 2022, she has been working in the private sector as a law and sustainability specialist with a particular focus on the textile sector and the financial sector. She also works *pro bono* at Rén Collective and Torino Stratosferica.

Maria Regina Redinha undertook graduate and post-graduate studies at the University of Coimbra and obtained her PhD in Labour Law at Porto University, Portugal. She is currently a tenured professor at the University of Porto, for Labour and Civil Law as well as a senior researcher for CIJ (Centre for Legal Research, University of Porto). She has conducted research in the areas of civil, employment and labour law, and her main research fields of interest are atypical employment, employment contract qualification, the digital workplace, workers' fundamental and personal rights. Professor Redinha serves as the Portuguese labour law review editor ('Questões Laborais'), as an editorial board member of RED—Revista Electrónica de Direito and as a vice-president of the Portuguese Labour Law Society. She has authored and edited several books on Portuguese

labour law, co-authored a book on Angolan labour law, plus contributed chapters in Portuguese and European law books and law reviews.

Ewa Rott-Pietrzyk, prof. dr hab., is employed at the Institute of Legal Sciences, Faculty of Law and Administration, University of Silesia in Katowice (Poland). She is a lecturer in private law and an expert in contract law, as well as an arbitrator. She is the coordinator and member of many national and international projects, namely coordinator of projects financed by the DPWS (Deutsch-Polnische Wissenschaftsstiftung). She has authored several studies on private law and private international law (mainly in general private law institutions, contract law, including commercial intermediary agreements), Chinese law, and comparative law, publishing both in Polish and in foreign outlets.

Hugo-Maria Schally holds a doctorate of law from the University of Graz/Austria and is a graduate of the Vienna Diplomatic Academy. He worked for the United Nations Development Programme, the Austrian Ministry for Foreign Affairs and the Organisation for Security and Cooperation in Europe before joining the European Commission in 1998, where he has held positions in the Directorates General for External Relations, Development and Environment. Since 1990, he has been involved in policy making and legislative work, in particular on environment policy and related bilateral and multilateral international negotiations. More recently, he was responsible, in the Directorate General for the Environment, for the development and implementation of the EU Circular Economy Action Plans and related policies and legislation. Currently, he serves as the EU lead negotiator for the Convention on Biological Diversity and for a new Global Agreement on Plastic Pollution.

Kristina Siig is a Professor of Transport Law and Law of the Sea at the University of Southern Denmark and Professor II at the Scandinavian Institute of Maritime Law at the University of Oslo in Norway. She obtained the degree of Doctor Juris from the Scandinavian Institute of Maritime Law in Oslo in 2003 with a thesis on international commercial arbitration.

She specializes in the interaction between private and public international laws, focusing particularly on how the private actor and private law-making, including contractual practices and standards, interact with international public law rules. She chairs the interdisciplinary maritime and marine network BlueSDU at the University of Southern Denmark, as well as the Parliamentary Investigation Task Force on the Scandinavian Star ferry disaster.

Marta Santos Silva is a Postdoctoral Researcher at the Research Center for Justice and Governance at the University of Minho, and an Affiliated Researcher at the Maastricht European Private Law Institute and the Centre for European Law and Politics at the University of Bremen. Prior to her current role, she worked at Maastricht University and as an affiliated senior researcher at KU Leuven researching at the intersection between private law and sustainability studies. She provided legal advice for a Brussels-based consultancy working with the European institutions. She was appointed a member of the European Commission's Expert Group on Liability and New Technologies (Product Liability Formation) and is an elected European Law Institute Council member.

Verica Trstenjak is a former Advocate General of the European Court of Justice in Luxembourg, a former judge at the General Court of the EU and a professor of EU law. She teaches in Austria (University of Vienna, Sigmund Freud Private University Vienna) and Slovenia (University of Ljubljana). Since 2019, she has been a member of the Permanent Court of Arbitration in The Hague and an arbiter at the ICSID-International Centre for Settlement of Investment Disputes.

She is an external scientific member of the Max Planck Institute Luxembourg for International and European Procedural Law. Since 2020, she has been a substitute member of the Venice Commission (Council of Europe). She has published several books and more than 300 articles and has been a lecturer at universities worldwide and international conferences. She is a member of the editorial boards of several important legal journals, e.g. the European Law Review.

Willemijn van Doorn-Hoekveld currently works as a Researcher/Consultant at Deltares. She is engaged in the fields of water safety, water quality, soil and climate adaptation. Previously, she worked as an Assistant Professor at Utrecht University. She taught courses in the fields of environmental law, state liability law and public and constitutional law. Willemijn completed a doctoral dissertation on distributional justice and flood risk management in the Netherlands, Flanders and France. She is a guest researcher at Utrecht University (Utrecht University Centre for Water, Oceans and Sustainability Law). Her research focus is on distributive issues, particularly in the context of climate adaptation and transition management.

Marleen van Rijswick is a Professor of European and Dutch Water Law and is the Director of the Utrecht University Centre for Water, Oceans and Sustainability Law (see http://ucwosl.rebo.uu.nl/). She researches the question of how law can contribute to sustainable and equitable use of water based on shared responsibilities. She was a visiting professor of European environmental law at the Université Panthéon-Assas (Paris II) in Paris and in the Master Energy, Environmental and Climate Law at the University of Leuven and Malta. In 2015, she was a visiting professor of international and European environmental law at the Research Institute of Environmental Law of Wuhan University, China and in 2018 at the Sun Yat-Sen University, Guangzhou, China. She published in many international and national journals and books. She is a substitute judge at the district court of Oost-Brabant.

Tim van Zuijlen is a Lecturer and a PhD candidate at the Faculty of Law of the University of Groningen in The Netherlands. He is currently preparing a dissertation on a comparative legal analysis of consumer law in cases of planned obsolescence. He is a member of the board of IT Law (portfolio education), of the Alumni committee of the Faculty of Law of the University of Groningen in The Netherlands and also a member of the editorial board of the IT law paper series. His research interests include IT law, technology in a legal context (particularly legal knowledge-based systems, artificial intelligence and legal tech), and private law (particularly sustainability and consumer law).

Radosveta Vassileva is a Visiting Research Fellow at Middlesex University in the UK. She holds a PhD in Law from University College London in the UK, a Master's degree in Economic Law from Sciences Po Paris in France, a Master's degree in Global Business Law from Université de Paris 1 Panthéon-Sorbonne in France) and a BA in International Relations from Tufts University in the USA. She publishes extensively in the areas of comparative private law, international commercial law, and the rule of law, and she has recently authored *Bulgarian Private Law at Crossroads*, which was published by Intersentia in 2022. In addition to being a legal scholar, Dr Vassileva is also a social advocate. She runs a blog on the rule of law and human rights and on occasion publishes articles in various media, such as the *Verfassungsblog*, *New Eastern Europe*, the *EUobserver*, *Euronews*, and *The Brussels Times*.

Jasper Verstappen is an Assistant Professor in Technology Law at the University of Groningen in The Netherlands. He holds a PhD from the Maastricht University in The Netherlands. Before joining the University of Groningen, he worked as a senior financial services consultant for a large international advisory firm. His research interests include the interaction between emerging technologies and private laws, shifting power balances through new technology and protection of consumers in European law, and digital assets in European systems of property law. Jasper's expertise includes European systems of property law, European systems of contract law, consumer law, and comparative law.

Petra Weingerl is an Associate Professor at the Faculty of Law, University of Maribor. Petra completed her doctorate and Magister Juris at the University of Oxford. Before commencing her DPhil, she worked at the Court of Justice of the EU in Luxembourg and the Appellate Court in Ljubljana. She was a visiting researcher at the European University Institute in Florence and the Max Planck Institute in Hamburg. As an adjunct professor, she taught EU Law and Policy courses at the University of Trieste. She is a PI in two projects: the module holder of Jean Monnet Module on Fundamental Rights in EU Business Law and Policy (FURBUS) and the PI of ARIS (Slovene Research Agency) postdoctoral research project entitled 'Deterrence as a concept in private enforcement of EU law'.

Yayun Shen holds a PhD in Law and Economics from Erasmus University Rotterdam, the Netherlands. She defended her thesis in 2019, and it was entitled 'Green Building in the US and China: A Law and Economics Perspective'. Yayun Shen has been working on several research projects concerning smart instrument mixes for environmental governance, with a particular focus on the impact of nudges on pro-environmental/green behaviours. She is a recognised expert in environmental standardisation and private standards, as well as smart mixes to promote green buildings in China. She has published extensively and her academic works have been cited in China, Europe and beyond.

Francesco Zecchin graduated in Law from Università Cattolica del Sacro Cuore (Milano), then he earned a PhD in Civil Law at the International Doctoral School of Law and Economics 'Tullio Ascarelli'-Università Roma TRE. In 2011, he was a Visiting Scholar for one term at the Law School of the University of East Anglia (Norwich – UK). He was Research Fellow in Private Law at the Faculty of Economics and Law of the Università Cattolica (Piacenza), and he is currently Assistant Professor in the same scientific-disciplinary sector. He is a member of the teaching staff of the PhD programme in Persona e Ordinamenti giuridici at the Università Cattolica del Sacro Cuore (Milano). He serves on the editorial board of the journals *JusOnline* and *Europa e diritto privato*. He is a member of the Unione dei Privatisti, of the ELI (European Law Institute), and of the SISDiC (Società Italiana Studiosi del Diritto Civile).

Samuel Zeh studied law from 2011 to 2017 at the University of Heidelberg and King's College London. During his period of study, he was a student assistant at the Institute for Comparative Law, Conflicts of Law and International Business Law in Heidelberg. In 2017, he sat for the first state examination in law. From 2017 to 2019, he completed his legal traineeship at the Higher Regional Court of Hamburg. He was a research associate at the Max Planck Institute for Comparative and International Private Law from 2018 to 2023 and is currently a doctoral student at the University of Hamburg.

Fryderyk Zoll is a doctor honoris causa by the West-Ukrainian National University in Ternopil, Professor at the Chair of Civil Law at Jagiellonian University in Kraków and the European Legal Studies Institute, University of Osnabrück. He is the leading researcher of numerous Polish, German, and EU grants, a member of numerous academic associations. He is a former vice-chairperson of the Committee for the Defence of Democracy (KOD) regional board in Lesser Poland and a former member of the European Law Institute's Executive Committee, the Common Frame of Reference and the Committee of the Acquis Group drafting teams, as well as the Codification Commission at the Polish Ministry of Justice. He has authored more than 200 scientific publications in European private law, ecologisation of private law, consumer law, comparative law, legal education and judicial independence.

Jakub Błażej Zwierzchowski, Master of Laws, Jakub is currently LLM Comparative Law student at China University of Political Science and Law and a PhD candidate at the University of Silesia in Katowice, where he prepares his dissertation on environmental solutions within the Chinese Civil Code. Between 2023 and 2024, he was a visiting scholar at the Max Planck Institute for Comparative and International Private Law, supported by the DAAD (Deutscher Akademischer Austauschdienst) PhD scholarship grant. Jakub was also NAWA (Polish National Agency for Academic Exchange) scholarship holder, for a one-year study at Beijing Foreign Studies University. His research centers on exploring the possibilities of implementation of environmental sustainability into private law, with a focus on the law of obligations.

PREFACE: FORGING A PATH TO ENVIRONMENTAL SUSTAINABILITY IN EUROPEAN PRIVATE LAW

It is with great pleasure and gratitude that I introduce this compelling and comprehensive volume, *Routledge Handbook on Private Law and Sustainability*.

As we delve into its pages, we embark on a journey through the challenges, complexities, and potential solutions at the intricate intersection of private law and environmental sustainability—a journey made possible by the collective efforts of a remarkable group of editors, authors, assistants, and reviewers.

The chapters within this volume, contributed by a distinguished cadre of academics, judges and policymakers, are a testament to the dedication that each author has poured into their work.

Behind the scenes, our journey has been shaped by a dedicated team, without whose invaluable contributions this book would not have been possible.

I would like to start by thanking our Publisher Routledge, for their exceptional support and collaboration throughout the creation of this handbook, as well as our sponsors, the Manuel António da Mota Foundation, whose generosity and commitment have not only facilitated the publication of this volume but also underscored the theoretical and practical importance of the diverse perspectives presented within.

A special word of thanks goes to my co-editors, whose wisdom and collaborative spirit have guided this project from its inception: Marc Clément, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst and Fryderyk Zoll. Their shared passion for this subject and the camaraderie that we have forged have made the editing process both enjoyable and enlightening.

I extend my heartfelt gratitude to the esteemed members of our Advisory Board, Ewoud Hondius (Chair), Verica Trstenjak, Christoph Busch, Christian Twigg-Flesner and Ignacio Herrera Anchustegui, whose guidance has played a pivotal role in ensuring the success and scholarly quality of this collaborative effort.

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diligence, meticulous attention to detail and exceptional teamwork have been invaluable in bringing this endeavour to fruition.

Equally deserving of our gratitude are the external peer-reviewers who dedicated their time and expertise to thoroughly evaluate and comment on our manuscript during the double-blind peer review process: Alberto De Franceschi, Alberto Quintavalla, Aleš Ferčič, Anaïs Michel, Anna Beckers, Antonio Davola, Antonis Karampatzos, Bert Keirsbilck, Berte-Elen R. Konow, Bonnie Holligan, Bram Akkermans, Brigitta Lurger, Carlos Nóbrega, Caroline Cauffman, Christian Twigg-Flesner, Christiana Galvão Ferreira de Freitas, Cristina Poncibò, Daniela Caruso, Daniela Farto Baptista, David Markworth, Dimitar Stoimenov, Emilia Mišćenić, Eric Tjong Tjin Tai, Esther Arroyo Amayuelas, Eva Micheler, Sónia Moreira, Eve Truilhé, Eveline Ramaekers, Evelyne Terryn, Fabrizio Cafaggi, Fátima Castro Moreira, Felix Ekardt, Felix Pflücke, Filippo Valguarnera, Geraint Howells, Harry Slachmuylders, Henrique Sousa Antunes, Ivano Alogna, Joana Campos Carvalho, Karin Sein, Katarzyna Kryla-Cudna, Kurt Xerri, Laura Valle, Leonie Reins, Lorena Bachmaier, Luisa Antoniolli, Lydia Velliscig, Maria Irene da Silva Ferreira Gomes, Marie Jull Sørensen, Martin Schmidt-Kessel, Mateja Durovic, Mateusz Grochowski, Matija Damjan, Michele Graziadei, Monica Navarro-Michel, Niko Soininen, Olaf Meyer, Paola Iamiceli, Patrícia Jerónimo, Paul Craig, Pedro Coutinho, Per Norberg, Piotr Machnikowski, Prashant Sabharwal, Przemysław Pałka, Riccardo Omodei Salè, Rosa Milà Rafel, Rui Miguel Prista Patrício Cascão, Sergio Nasarre-Aznar, Sjef van Erp, Taina Pihlajarinne, Tamas Szabados, Thalia Kruger, Teresa Rodriguez de las Heras Ballell, Tom Bouwman, Ulrich G. Schroeter, Vanessa Mak, Vibe Ulfbeck and Virginie Rouas. Their insightful feedback and constructive criticism have improved the quality and rigour of our work.

Last but not least, my deepest appreciation goes to the authors themselves. It was their research and commitment to advancing private law and its role in sustainability that have brought this book to life. Their willingness to share their knowledge and expertise has enriched the discourse on this vital topic, and I am honoured to have had the privilege of collaborating with each of them.

This volume stands as a testament to the power of collective endeavour, intellectual exploration and shared dedication to addressing one of the most pressing challenges of our time.

In closing, I would like to express my wish that this book will inspire further research, policy development and informed decision-making aimed at achieving environmental sustainability in Europe and beyond.

Marta Santos Silva,
Lead Editor *Routledge Handbook on Private Law and Sustainability*

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PART 1

Greening Private Law and in Particular the Law of Obligations

1

PRIVATE LAW AND ENVIRONMENTAL SUSTAINABILITY

Barbara Pozzo

1.1 Introduction

At a time when sustainability seems to have become the watchword in any post-pandemic policy, we might wonder what contribution private law can make in setting up an efficient system of environmental protection.[1]

The comparatist's gaze goes beyond the national horizon and analyses the evolution of the law in different contexts, considering the challenges that environmental protection and climate change pose compared to classical canons of intervention, where dialogue with the social sciences is increasingly present and the overlapping of international, European and national sources punctuates the work of the interpreter.[2]

The idea of sustainable development is deeply connected with the debate around the concept of well-being that our society acknowledges. If the idea of social well-being was strongly linked with the ideology of 'development' as economic growth in the first part of the 20th century, since the end of World War II that ideology began to fade away and leave space to a more complex vision of the world, where respect of the environment gained a central place.

While the debate around the possibility of reconciling the needs of development with the protection of the environment is not new, however, it is only in recent times that the concept of sustainable development started to be elaborated in its actual form, assuming an increasingly important role in the development of various policies at the EU and international levels.

Sustainable development also relies on a commitment to equity towards future generations. The idea to leave future generations at least the same level of opportunities as we ourselves have, although simple in theory, seems much more difficult to reach in practice: what legislative measures should be adopted to achieve this magical point of equilibrium between the needs of today and those of tomorrow? This question leads us to investigate which legal tools allow us to implement sustainable development goals in an effective way.

From a private law perspective, the revisiting of traditional remedies to cope with the new demands arising from increased sensitivity to environmental issues has been the focus of an experience common to both *civil law* and *common law* systems.

To overcome the bottlenecks of tradition, interpreters have sought to free the structure of traditional institutions to adapt it to new requirements. Experience shows the presence of a common

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effort to extend as far as possible the scope of traditional norms, generally placed to protect traditional goods, to provide at least indirect protection for the environment.

1.2 The Adaptability of the Private Law System to New Environmental Issues

As is well known, torts are for private parties among the richest instruments in terms of social planning. It should come as no surprise that precisely in this area, scholars and courts have engaged in elaborations taking in consideration new cases of environmental risk within the framework of traditional torts, developing innovative theories about standing, causation, proof of damage and damage assessment.

In common law systems, courts resorted to revisiting traditional doctrines that were based on the torts[3] system. The question about the adaptability of the traditional common law system to the new requirements arising from the so-called *environmental risk* has not only concerned the American courts, causing no small amount of ink to flow in academia as well.

Between the 1970s and early 1990s, a whole series of articles appearing in major American law reviews identified the advantages and disadvantages of the 'traditional tort system', resulting in a 'private law v. public law' debate on the regulation of new environmental issues.[4]

Proponents of the private law approach have argued that private, rather than public, action would be best suited to deal with the problems of risks arising from the new scientific activities of modern society. Courts, rather than other institutions, would have the advantage of being able to apply particularly ductile methods for determining the defendant's liability.

In contrast, those who argued for the substantial inapplicability of the *tort system* invoked in particular its weaknesses with respect to the specific peculiarities of environmental damage: the fact that environmental damage can come to light long after the occurrence of the harmful action, challenging the requirement of the *remoteness of damage* and the traditional criteria for causation; the super-individual nature of environmental interests, which undermine the common rules on standing and finally, the fact that pollution phenomena can occur as *mass torts*, in which neither all the injurers nor all the injured parties can be easily identified.[5]

In civil law systems, a similar debate can be found about the possibility of extending the rules governing civil liability to new cases of environmental damage.

In France, the development of the theory of *troubles de voisinage* considers environmental issues within a discipline initially anchored in the legal status of land ownership. In the course of many years of development since the 1970s, case law and scholars[6] have affirmed that in *troubles de voisinage*, a relationship of liability existed not only between owners of different plots of land, but – also – between the victim of a tort and a polluting activity.[7]

Also in Germany, §823 BGB on tort liability and §906 BGB on nuisances were used as a basis for developing environmental protection.

As early as the 1980s, German scholars debated how to extend liability rules to new tort cases arising from environmental damage.[8] §823 BGB establishes an obligation to pay damages in cases where one of the goods specifically mentioned, namely life, health, body, liberty, property or another right ('*ein sonstiges Recht*'), is harmed with intention or negligence and in an unlawful way.[9]

In this perspective, part of German scholars argued that the first paragraph of §823 BGB could apply to pollution phenomena, considering the right to a clean environment as a personality right – as a *Persönlichkeitsrecht*[10] – interpreting the phrase *another right* ('*sonstiges Recht*') extensively and including in this rather broad term the concept of environment.[11]

Other German scholars focused on the possible reinterpretation of §906 BGB related to nuisances[12] to deal with environmental pollution. In this case, a provision that was originally conceived at the end of the 19th century, when the German BGB was promulgated, to foster the development of industry, was reinterpreted to meet new environmental protection requirements.

Specifically, §906 BGB originally stated:

> The owner of a plot of land may not prohibit the introduction of gases, steam, smells, smoke, soot, warmth, noise, vibrations and similar influences emanating from another plot of land to the extent that the influence does not interfere with the use of his plot of land or interferes with it only to an insignificant extent.

The 1900 version of the rule further provided that the owner would still have to bear the nuisance even if 'significant', if it resulted from the customary use of the other property, having regard to the situation of the area ('*ortsübliche Benutzung des anderen Grundstücks*').

Over the years, the provision was reworked by both case law and legislation. The fact that a landowner had to put up with all nuisances that did not, or did in a nonessential way, impair the use of the land, and in any case all nuisances that, even if essential, were deemed customary in the situation of those places, led to grave injustices, especially where *significant* but *customary* nuisances prejudiced the owners of neighbouring land in their economic activity. This was especially the case when entire agricultural areas bordered on industrial areas, where it was effectively impossible to decide which of the two activities was more usual for the respective area.

To solve such conflicts, German courts, in the late 1950s, developed the principle of *nachbarliches Gemeinschaftsverhältnis*, or *neighbourhood community relationship*,[13] according to which if in a given area both industry and agriculture could be considered *customary* activities for those places, unavoidable damages would have to be compensated according to equity.

This case law elaboration was later incorporated by legislation, which in 1960 introduced a reform of the text of §906 BGB,[14] so that today the text of the rule reads

> The same applies to the extent that a material interference is caused by use of the other plot of land that is customary in the location and cannot be prevented by measures that are financially reasonable for users of this kind. Where the owner is obliged to tolerate an influence under these provisions, he may require from the user of the other plot of land reasonable compensation in money if the influence impairs the use of the owner's plot of land that is customary in the location or its income beyond the degree that the owner can be expected to tolerate.

In conclusion, one can observe a reversal in the interpretation in favour of a greater focus on the protection of the environment of certain terms and concepts that the German legislator of 1900 had certainly intended in favour of industrial development.

Similarly, in Italy, Article 844 of the Civil Code,[15] which regulates nuisances, and Article 2043 on tortious liability[16] have been reinterpreted by both doctrine and case law to achieve better environmental protection.

Italian Courts, when applying Article 844 of the Civil Code, began to consider Article 32 of the 1948 Constitution,[17] which protects the right to health, establishing that nuisances harmful to health should be considered as in any case intolerable, excluding the possibility of continuing the harmful activity in exchange for compensation and granting the pollution victim an injunction.[18]

Since the 1970s, the Italian Court of Cassation had ruled that physical health is a subjective right

> which the system specifically protects against dangerous and harassing nuisances (Article 844 of the Civil Code) and where appropriate through the rule of Article 2043 of the Civil Code against injuries that are caused to it through intentional or negligent conduct of others.[19]

More generally, we can see that also in the Italian context the debate concerning the task of private law in the protection of the environment[20] led to a reinterpretation of some Civil Code provisions, especially of Article 844,[21] where case law extended the availability of an injunction to parties other than the owner.[22]

Further, the issue of the possible extension of the code provisions to situations other than those originally envisaged by legislation came to the fore when Article 844 was submitted to the Constitutional Court by a first instance Court of Bologna in the now distant 1972.[23] The reasons that the Bologna Court put forward for submitting Article 844 of the Civil Code to the Constitutional Court were, first, that the provision violated the principle of equality of citizens affected by nuisances, as it protected only owners, and second, that the provision did not sufficiently protect the fundamental right to health. The Constitutional Court rejected the plea of unconstitutionality in 1974, for, while admitting that through Article 844 of the Civil Code it was not possible to arrive at a broader protection of those parties affected than those who were to be considered neighbouring owners, it brought the applicability of Article 844 of the Civil Code back into the realm of proprietary discipline.[24] According to what the Court said, the protection of health and the environment would be entrusted to the relevant criminal and administrative legislation, 'without prejudice in any case to the application of Article 2043'.[25] This ruling practically marked a turning point in the history of the interpretation of Article 844 of the Civil Code, which was definitively placed in a proprietary dimension, thus difficult to extend to other cases not directly covered by the rule itself.

Finally, in all the legal systems mentioned, after the attempt to adapt private rules to new environmental problems, with the gradual development of specific legislation on the subject, new problems arose concerning the relationship between public and private laws.

1.3 The Emergence of Environmental Legislation and the Focus on Administrative Law Instruments

Since the 1970s, administrative law has become the core of environmental policy and natural resource management.[26] Administrative law instruments are considered effective in the prevention of environmental impairments and therefore particularly appropriate in the environmental sector, where there is great concern for preventing damage, rather than curing it.

This occurred in different contexts at different times.

In the United States, awareness of environmental problems has been developing since the 1960s, beginning with the publication of Rachel Carson's *Silent Spring* in 1962, and leading to the celebration of the first Earth Day in 1970 with the participation of more than 20 million American citizens.[27] A highly committed environmental movement and a Democratic-dominated Congress led President Nixon and his successor Gerald Ford to enact a series of environmental statutes between 1969 and 1976 that were vital to the subsequent development of U.S. environmental law: the *National Environmental Policy Act* in 1969, the *Clean Air Act Amendments* in 1970, the Federal *Environmental Pesticide Control Act* and the *Marine Mammal Protection Act* in 1972, the

Endangered Species Act in 1972, the *Toxic Substance Control Act* in 1976 and the *Resource Conservation and Recovery Acts* in 1976.[28]

To complement this important legislative system, the *Environmental Protection Agency (EPA)*[29] was established in 1970, which had a lasting influence on the development of environmental law.

Subsequently, Democratic President Jimmy Carter, supported by a Democratic majority in Congress, succeeded in enacting major amendments to the *Clean Air Act* and the *Clean Water Act in 1977*, and enacted the *Comprehensive Environmental Response Compensation and Liability Act (CERCLA)* in 1980, which became the backbone of the entire environmental liability system.

With Reagan's election in 1980, the new President initially sought to mitigate environmental burdens on American industries. However, public interest in environmental issues remained stable throughout the 1980s, so, although regulation of the sector did not expand at the rates of the past, Congress' further environmental protection was promoted by the *Solid Waste Amendments* of 1984, a reform of the *Resource Conservation and Recovery Act*, strengthening CERCLA in 1986 with the *Superfund Amendments and Reauthorization Act (SARA)*, and finally enacting the *Global Climate Protection Act* in 1987 and the *Ocean Dumping Ban* in 1988.

With attention to environmental issues remaining high until the late 1980s, Republican candidate George Bush ran his campaign in 1988 based on a hard-hitting environmental programme and – once elected – collaborated with the Democratic Congress to enact amendments to the *Clean Air Act* of 1990, which addressed two important issues that were also hotly debated internationally at the time: the ban on Chlorofluorocarbons (CFCs), which had long been used as refrigerants in refrigerators and in air conditioning systems, believed to be responsible for the ozone hole, which had been made the subject of the Montreal Protocol that the United States had already ratified in 1987,[30] the solution to acid rain problems that had been the source of a long conflict with Canada.[31]

Between the 1960s and late 1980s, the United States were an enthusiastic promoter of international environmental agreements,[32] playing a leading role in the development of international environmental law.[33]

However, from 1992 onwards, the U.S. role in the environmental field began a downward parabola. In the absence of effective support from environmentalists and in the face of numerous criticisms from the industrial world, President Bush took a much more detached attitude towards environmental issues and was the only major leader not to participate in this initiative the 1992 *Earth Summit* in Rio.[34]

The different positions of environmental *lobbyists* became even clearer after the election of President Clinton. Clinton proposed a package of environmental reforms and signed the Convention on Biological Diversity adopted in Rio but failed to secure Senate ratification or the adoption of any specific environmental legislation.[35] In 1997, when the Kyoto Protocol was opened for signature, Clinton signed the international commitment, but it was never ratified by the Senate.

Later, President George Bush Jr. distanced himself from the international climate change negotiations, preferring not to impose new environmental burdens on American industries.

In Europe, with the provision of a specific environmental competence in the Single European Act in 1986, there is a whole series of measures aimed at protecting the environment in all its forms.

In less than 20 years, more than 200 measures in the environmental field have been enacted, based on command-and-control.

However, command-and-control standards, while an effective tool in preventing risks, do not always provide efficient incentives for potential polluters, who tend to comply with the standard, with no valid incentive to introduce cleaner technologies.[36]

Moreover, the effectiveness of command-control regulations depends largely on the quality of control, which in the environmental sector is delegated to bodies that are not always equipped with the necessary expertise for this purpose.[37]

As a result, controls do not take place at all or only with considerable delay; sometimes, this is due to the lack of adequate technical tools, not to mention cases in which even the financial resources to improve the bureaucratic apparatus itself are lacking.

1.4 The New Instruments of Environmental Policy

In a context characterized by an awareness of these limitations, and in the face of the recognition of major new challenges, such as those posed by climate change, there has been a renewed discussion on the most appropriate means of tackling environmental problems.[38]

In recent decades, environmental policy objectives have led to the development of new instruments to cope with new ecological demands.[39] The discussion of tools to be adopted in this area has distant roots. The debate arose in the United States as early as the 1980s, highlighting how *market-based* instruments could offer a viable alternative to the centralized regulatory system.[40]

In the following years, the focus was on formulating a 'new generation' of market-based instruments, which would have to cope with a sector now characterized by new phenomena,[41] including the evolution of a global environmental law and the rapid circulation of legal models.[42]

If the debate on new instruments in the environmental field in the United States has been guided by scholars and courts,[43] in Europe it was the EU Commission that marked the stages of a new approach to the subject.

This development emerged clearly from the Fifth Environmental Action Program adopted by the Commission in 1992.[44]

To drive a change in the approach to environmental issues, the Commission was advocating a broader range of instruments that would make the business community part of a process of raising awareness and consciousness of environmental issues.[45]

Alongside the traditional environmental policy instruments, market instruments were introduced, including taxes, tariffs, specific environmental incentives, allowances trading systems, eco-labelling and environmental budgeting systems, the regulation environmental of liability and, finally, environmental agreements.[46]

Subsequently, with the Sixth Environmental Action Program,[47] the Commission indicated that one of the objectives of environmental policy should be to induce the market to work for the environment through better collaboration with the business community, by introducing reward programmes for companies with the best environmental performance, by promoting a switch to greener products and processes, and by encouraging the adoption of eco-labels that allow consumers to compare similar products on the basis of their environmental performance.[48]

In the latest Seventh Environmental Action Program,[49] the Commission combines the reasons of the environment with those of the market, within the framework of a conception of well-being, in which the economic prosperity and well-being of the Union are closely dependent on its natural capital.[50]

This reflects the Union's commitment to transforming into an inclusive green economy that fosters growth and development, protects people's health and well-being, creates decent jobs, reduces inequalities and invests in biodiversity.[51]

To achieve these ambitious goals, the Commission emphasized that an '*appropriate mix of policy instruments*' is needed,[52] aimed at enabling economic actors and consumers to gain a better understanding of the environmental impact of their activities and to manage it. This approach

encompasses public law and private law instruments, including economic incentives, market-based instruments, information obligations and voluntary measures and instruments that engage stakeholders at various levels, complementing those imposed by legislation.[53]

1.5 Reviewing Private Law Instruments for Environmental Protection

The current trend in countries with advanced economies is to promote consumption and production models that internalize environmental impacts through a combination of various instruments, such as civil liability for environmental damage, proprietary mechanisms used in the regulation of tradable emission allowances and reform of contractual regulation.

As in other fields, environmental law is experiencing the reallocation of regulatory powers to other actors, giving rise to a phenomenon of co-regulation or self-regulation by stakeholders,[54] which contributes to the development of the phenomenon known as *transnational private regulation* (TPR), i.e. that set of rules created by private actors in areas where regulation by national or international public actors is lacking, or supplementing, or even replacing, the latter.[55]

The appearance of a private regulator alongside a public regulator implies a mixture of different logics and categories that makes the instruments used in this context characterized by a certain degree of 'hybridisation' between private and public elements.[56]

1.5.1 Liability for Environmental Harm

Since the 1960s, a debate has developed on the introduction of liability to cope with the consequences of industrialization.[57] Environmental liability has been presented as a useful tool to guide corporate behaviour as a deterrent[58] against environmentally harmful activities, as well as an effective means to achieve the internalization of environmental diseconomies.

Comparative law analysis revealed that liability can indeed be a valuable tool in this area[59] and that the rapid circulation of models has spread this idea almost everywhere.[60]

In 1980, the United States Congress passed the *Comprehensive Environmental Response Compensation and Liability Act* (CERCLA),[61] introducing federal legislation that provided a specific definition of *environmental damage*, of the liable parties, of the standing issues and the strict liability regime, while introducing detailed criteria for repairing environmental damage that should facilitate the insurability of environmental risk.[62]

During the 1980s and 1990s, the idea that civil liability could be a useful tool to prevent environmental damage spread throughout Europe: in 1986, an Italian law (no. 349/86)[63] was enacted, in 1987 a Portuguese law,[64] in 1990 a German law,[65] to providing specific regulation in this field.

This fragmentation prompted the European Commission to develop several initiatives aimed at harmonizing the different regimes in force at the national level in this area, first publishing a Green Paper in 1993[66] and then a White Paper,[67] which regularly took American legislation as a model for comparison. Finally, in 2004, Directive 2004/35 on environmental liability[68] was enacted, providing a concept of environmental damage that covers only selected environmental resources,[69] excluding the compensability of private parties.[70]

The spread of environmental liability does not stop at the *Western Legal Tradition*, as the circulation of the model appears successful in other contexts as well.

China has introduced specific rules on liability for environmental damage since 1986, when the *General Principles of Civil Law* were promulgated,[71] which provided in Article 124 a general principle that 'Whoever pollutes the environment and causes damage to third parties in violation of state regulations designed to protect the environment and prevent pollution, shall be held liable

in accordance with the law'.[72] An interesting form of model circulation can be noted here, as the 1986 *General Principles* were drafted following the German model contained in the General Part (*Allgemeiner Teil*) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).[73] However, the provision in Article 124, which introduces a specific provision on pollution liability, is not found in the German archetype and must be considered a novelty introduced by the Chinese legislature.[74]

On July 1, 2010, China's new law on *civil liability* came into force, which devoted a specific *Chapter VIII* to the problem of environmental liability,[75] containing four norms (Articles 65–68) of paramount importance for the problem of civil liability in this context, where again it is possible to note a clear focus on the model introduced by the German legislature in 1990.[76]

In India, the system inherited from the English common *law of torts* is developed in an original way by introducing *public interest litigation* on the one hand and, on the other, by introducing the *National Green Tribunal* as a specialized court in this area.[77]

In Japan, the notion of environmental damage appears to focus on the human being as a victim, where therefore – unlike in other contexts – the environment is not seen as an entity but acquires value only insofar as there are human subjects capable of interacting with it.[78]

The civil liability model is also spreading in Central and South America,[79] where some jurisdictions consider the model of the 2004 European directive to innovate national legislation, as in the case of the Mexican federal law of 2013,[80] while others take up the example of the French legislation and introduce specific provisions in the Civil Code in this regard, as in the case of Peru.[81]

1.5.2 Property Rights and Environmental Protection

Property is at the centre of a similar debate regarding its functions in the environmental sphere.

On the one hand, it has been pointed out that in certain cases, property becomes a source of obligations if it is found to be polluted,[82] as in the case of the U.S. *Comprehensive Environmental Response Compensation and Liability Act*, and later partly taken up in Europe.[83]

On the other hand, the idea of property has been used to develop special instruments to deal with pollution, as in the case of *tradable pollution rights*.[84]

Tradable pollution allowances seek to curb pollution by setting an industry limit and then allowing industry players to determine how much they are willing to pay to pollute. What is traded in the market consists of portions of the pollution allowed in each area, requiring a clear allocation of the portion itself, which is often done in terms of 'property of the portion'. This policy gives flexibility to the industry to regulate its own pollution, by making them compete for the right to pollute.[85]

Although they have also been used in areas such as water pollution, the most widespread field of application of transferable pollution rights is air pollution, for the control of which the location of sources is often negligible.

At the international level, tradable pollution rights have received great attention since the Kyoto Protocol[86] provided – among others – the introduction of an *international emissions trading scheme*.[87]

In 2000, the Commission adopted a *Green Paper on Greenhouse Gas Emissions Trading in the EU*,[88] which was followed by the adoption of Directive 2003/87/EC, establishing a scheme for greenhouse gas emission allowances trading within the Community, the first European implementation of one of the mechanisms under the Kyoto Protocol.[89]

Directive 2003/87/EC thus introduces a new concept of property, with the aim of regulating emissions trading to implement emission reductions throughout the community where it costs less.

1.5.3 Contracts

To increasingly involve businesses in the dynamics of ecological policies, the so-called *voluntary agreements* have been developed in recent times, which are concluded between businesses and the public administration aimed at achieving specific objectives in the field of environmental protection which have developed in recent times.[90] These are instruments that innovate from the classic *top-down* approach to environmental regulation and aim to find common ground between business and the regulator, to improve environmental protection through a shared approach.

In the United States, the *Environmental Protection Agency (EPA)* launched in 1991 a specific programme aimed at involving businesses in reducing pollution.[91] At that time, the concept of a voluntary agreement was relatively new to industry, although when the programme ended in 1996, more than 1,300 companies that had joined recognized the success of the EPA's initiative for establishing government-industry partnerships to reduce pollution and promote the development of innovative pollution reduction techniques.[92]

At the European level, as early as 1996, the Commission adopted a Communication to the Council and the European Parliament on environmental agreements,[93] which were recognized as a new policy tool to complement regulatory measures.

The Communication recognized that environmental agreements could have several potential advantages over mandatory regulation, including encouraging a more participatory attitude on the part of industry, the possibility of arriving at tailor-made and cost-effective solutions, and finally a more rapid achievement of environmental objectives.[94]

Among the agreements that have been developed in environmental matters are those of the European, Japanese and Korean automobile manufacturers' associations on the reduction of CO_2 emissions of passenger cars, which were recognized in some of the Commission's recommendations[95] and were later supplemented by the European Parliament and Council Decision establishing a system for monitoring the average specific CO_2 emissions of new passenger cars.[96]

An extensive survey of the use of this instrument was carried out by the Organization for Economic Cooperation and Development (OECD) and published in 1999,[97] where it was concluded that environmental agreements are most effective when used as part of a *policy mix*, in combination with economic and legislative instruments.

In 2002, the Commission published a new Communication on environmental agreements,[98] in which 'voluntary environmental agreement' was presented as instruments that could best respond to new environmental policy needs as outlined by the Fifth Environmental Action Program onwards.

The logic of consensus underlying these agreements appears successful in various contexts because it allows overcoming the conflicting view of the relationship between the environment and economic development, and thus also facilitates a change in the way industry is conceived, from the cause of the problem to the protagonist of its solution. This approach has been incorporated in Italy[99] and other national legal systems.[100] In China, too, the role of environmental agreements has recently come to the fore.[101]

Contracts have further developed in the environmental context in other respects. In fact, environment and sustainability have long penetrated the realm of contracts between private parties and particularly contracts between businesses.

In recent decades, *statutes of associations* of economic operators have spread that establish as requirements for acquiring and maintaining membership the observance of environmentally

sustainable behaviour or, again, that provide for the awarding of 'prizes' for members who achieve certain levels of environmental sustainability.[102]

Further, the adoption of *codes of conduct*, as a part of the broader phenomenon of corporate social responsibility that began in the United States in the 1960s–1970s and then moved to Europe from the 1980s to 1990s, is spreading now all over the world, mainly in response to campaigns denouncing the violation of workers' rights, relocation policies and environmental impacts of multinational companies operating in a wide range of sectors, from chemicals to clothing.[103] These codes are voluntary instruments of self-regulation by which companies, in addition to setting their own reference values, establish a whole series of behavioural rules that often have the purpose of managing the impact that the activity of companies may have on the environment.[104] These rules of conduct can refer both to internal company relations and to relations with external parties – *business-to-business* and *business-to-consumer* – as well as with categories of stakeholders, particularly environmental and social.

Codes of conduct are expressed at different levels of regulation, as they can be corporate codes, category codes and even codes developed by public and private bodies or institutions of international standing to which companies can voluntarily adhere. In fact, since one of the major limitations of corporate codes of conduct is the lack of an independent monitoring system to ensure that they are not mere image management tools, but actual attempts to improve corporate sustainability, NGOs and trade associations have long since started to develop 'model codes' that involve the simultaneous participation of various stakeholders and include appropriate independent monitoring and verification procedures.[105]

However, in multinational companies, which are often characterized by a very small direct operational structure and carry out their activities through subsidiaries or outsourcing, codes are drawn up by the parent company and are not only disseminated within the legal sphere of the parent company and its subsidiaries, but also have an impact in the context of relations with third parties, producer-suppliers, who do not formally belong to the company, but whom the company asks to respect the rules contained in the codes, thus affecting the entire value chain.[106]

Although it may happen that codes of conduct partly overlap with what is already provided for in legislation at the national or supranational level, most of the standards they contain are voluntary commitments that go beyond pre-existing obligations, enabling companies to operate in different national contexts. Codes of conduct thus become a source of private production of environmental and social standards, taking on a role of supplementing and replacing public regulation, especially where the latter is lacking for various reasons, so much that through them multinational companies have become part of the process of defining global issues, such as the protection of human rights and the environment.

The phenomenon is interesting from the point of view of legal transplants, in that, given the supranational nature of companies and their global dimension, the production of codes of conduct and their dissemination within the network of business relations necessarily produces a circulation of principles and values from the 'central' company to the entire network, albeit with varying intensity. In this case, however, the circulation takes on different contours from the traditional ones, leading to the creation of a kind of private sub-regime within the different orders in which the enterprise value chain operates.[107]

Precisely for this reason, interest in this area has increased. With respect to international business contracts, the United Nations Global Compact (UNGC) expressly requests companies to exert their influence in the area of environmental protection throughout their supply chains.[108] The UNGC practical guide on supply chain sustainability advises companies to clearly formulate their expectations towards their suppliers in a code of conduct and subsequently implement the

principles of Code through their 'integration (…) into supplier contracts'. In 2011, the UN Special Representative of the Secretary General for Business and Human Rights presented the '*Principles for Responsible Contracts*': a guide for negotiators and others on how to ensure the management of human rights and environmental risks is integrated into State-investor contract negotiations.

The increasing use of contractual instruments in the environmental field entails, on the one hand, an evolution of environmental law, which becomes more flexible, negotiated and the result of the consensus of the addressees of the rules themselves, and, on the other hand, a transformation also of contract law, which takes into account not only the interest of the contracting parties, but also the general interest in environmental protection, acquiring a new 'solidaristic' dimension.

Moreover, the involvement of a plurality of actors and an increasing expansion of the scope of contractual instruments in the environmental field are evident. In this regard, we can observe on the one hand a tendency towards the contractualization of environmental law by public authorities to implement a more flexible and at the same time more effective environmental protection policy, resorting to the contract either as a direct substitute for public regulation or as an accessory function of the latter to supplement it or enforce it. On the other hand, private actors also play an increasingly important role in environmental protection, either as parties involved in contracting by public authorities or as producers of their own contractual mechanisms with a direct or indirect environmental protection function.

In 2002, the OECD adopted a *Recommendation on Green Public Procurement* (GPP) that recognizes that well-designed public procurement systems can contribute to achieving policy goals such as environmental protection,[109] followed by a collection of good practices in 2015.[110] Within the EU, the potential of GPP was first highlighted in the 2003 *Commission Communication on Integrated Product Policy*, where Member States were recommended to adopt national action plans for GPP by the end of 2006, followed in 2008 by a new *Communication on Green Public Procurement*,[111] where the Commission identifies 'greener' goods on the ground of a life-cycle approach that affects the whole supply chain, ranging from the use of raw materials and production methods to the types of packaging used and the respect of certain take-back conditions, suggesting that these criteria can equally inform private procurement practices.

With regard to the broadening of the scope of application of contractual instruments in the environmental field, it should be emphasized that the contractualization of environmental law is deeply influenced by the goal of sustainable development, which ends up affecting a multitude of economic activities that may have an impact on the environment, such as public procurement, supply and subcontracting contracts, consumer contracts and even contracts in the real estate and construction sectors.[112]

For example, Directive 2012/27/EU, on energy efficiency, provides at Art. 7 (c) that

> Member States shall encourage public bodies, including at regional and local level, and social housing bodies governed by public law, with due regard for their respective competences and administrative set-up to use, where appropriate, energy service companies, and energy performance contracting to finance renovations and implement plans to maintain or improve energy efficiency in the long term.[113]

However, *consumer contract law* is and will be increasingly also influenced by sustainability issues. Consumer contract law has always had the objective of protecting consumers by allowing them a right of withdrawal if they have purchased goods at a distance. This rule, combined with the widespread free-return policy, whereby not even the only costs that may possibly be charged to the consumer – those of (re)shipping the goods back to the sender – are borne by the latter, determines

a result that, by facilitating the transport, production and consumption of goods, is 'regrettable' from the point of view of sustainability. More generally, it could be argued that the discipline aimed at satisfying the interest of those who purchase goods or services is conflicting with that aimed at a use of resources commensurate with the needs of the environment or of future generations.[114]

Nonetheless, it appears that these divergencies must be reconciled, as sustainability is 'one of the founding principles of consumer law'.[115] In the new Circular Economy Action Plan of 2020,[116] the Commission proposes a revision of EU consumer law to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan and on the availability of repair services, spare parts and repair manuals. The Commission is also considering further strengthening consumer protection against greenwashing and premature obsolescence, setting minimum requirements for sustainability labels/logos and for information tools.[117] The EU Parliament Resolution of November 25, 2020 *Towards a more sustainable single market for business and consumers* goes in the same direction,[118] focusing on consumer rights and the reduction of planned obsolescence, facilitating repair and reuse.

The directives that come into play to realize a new sustainable framework for consumer contract law are Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market,[119] Directive 2011/83/EU on consumer rights[120] and Directive 2019/771 on certain aspects concerning contracts for the sale of goods.[121]

As scholars[122] have put forward, the potential of the Sale of Goods Directive to serve as a vehicle for achieving sustainability is evident. Nonetheless, the current version of the Sale of Goods Directive falls short regarding the potential fostering of sustainability, although extensive studies on the possibility of reform have currently been published,[123] including that by the European Law Institute.[124]

A *Proposal for a directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information*[125] was presented in March 2022. On September 23, 2023, the Council and the Parliament have reached a provisional political agreement on this proposal. The text of the document foresees achieving an improved participation of consumers in the circular economy by providing better information on the durability and reparability of certain products to consumers before concluding the contract and stepping up the protection of consumers against unfair commercial practices that prevent sustainable purchases.[126]

1.6 The Greening of Civil Codes

Environmental protection and sustainability issues have not only characterized the interpretation of traditional private law institutions but have also entered civil codes, introducing new paradigms and rules: a tangible sign of the extent to which private law is taking on new characteristics in order to meet the new demands that society now considers fundamental to its survival.[127]

In France, the Law of August 8, 2016[128] has introduced into the *Civil Code*, *le code civil par excellence,* in Articles 1246–1252,[129] provisions aimed at recognizing the notion of *préjudice écologique* and regulating its reparation.[130]

Another notable example can be seen in the provision of Article 603 of the Romanian Civil Code (2009), which specifies the landowner's obligation to operate in an appropriate manner regarding '*environmental protection and to ensure good neighbourly relations*'.[131]

Examples multiply throughout the world, although the presence of verbatim provisions in civil codes does not guarantee their concrete application in practice, as comparative lawyers are aware of the difference between the *law in the books* and the *law in action*.

In this perspective, the example provided by the Chinese Civil Code, which has been identified by some scholars as the 'green civil code', appears interesting, even though China's rapid economic development has put a strain on the environment and natural resources.[132] An emblematic example is the obligation to protect the environment that was incorporated into Chinese civil law by Article 9 of the General Part of the Civil Code of the PRC: 'when engaged in civil activities, all persons shall be aware of the need to save resources and protect the environment'.

On the other side of the world, the new 2014 Argentinian Civil and Commercial Code marks a turning point in sustainable consumption. In particular, Article 1094 of the Argentinian Civil Code states: 'the norms that govern consumer relations must be applied and interpreted according to the principle of consumer protection and that of access to sustainable consumption'.[133]

The Brazilian Civil Code (2002) in regulating property introduces new values, such as that of 'environmental beauty', as well as that of 'ecological balance'. According to Art. 1228:

> The owner has the right to use, enjoy and dispose of the property and the right to recover it from whoever unjustly possesses or detains it. §1 The right of ownership must be exercised in accordance with its economic and social purposes and in such a way that the flora, fauna, natural beauty, ecological balance and historic and artistic heritage are preserved, in accordance with that established by special law, and that air and water pollution is avoided.[134]

In the same line is the Draft of the new Colombian Civil Code (2020),[135] where new values are introduced, such as 'ecological coexistence' (Article 276),[136] or the conservation of the environment and 'social well-being' (Article 268),[137] that will have to be taken into consideration in order to be weighed against 'economic activities and in relationships and development of markets' (Article 38).[138]

This brief review is particularly interesting from the perspective of comparative law, as it shows that in the field of environmental protection, we are witnessing a rapid development in the direction of introducing new environmental values into civil codes.

1.7 Conclusions

The current historical moment seems to highlight some important variables in the evolution of private rules and institutions that have undergone a metamorphosis to meet the new requirements of environmental protection.

Everywhere there is an evident recourse to the instruments offered by private law to solve at least some of the problems that our time imposes on our attention.

In civil law systems, not only does the environment enter the civil codes with specific rules, but it is the civil codes themselves that are reinterpreted from an environmental perspective.[139]

In those belonging to the common law, the law of torts appears to be the area that before others has offered important cues for finding innovative solutions to then leave room for new designs in both the proprietary and contractual fields.

It should be however noted that the concern to give a supranational discipline to problems that cannot be delimited within national boundaries, and which has necessarily led to the evolution of a 'global' discipline of certain aspects of the protection of natural resources, has re-proposed two specific phenomena in this area as well: on the one hand, the consolidation of rules at the supranational level which are strongly affected by the solutions developed in the different national contexts, but which at the same time innovate with respect to national models by creating new taxonomies; on the other hand, the tension between global and local dimensions, since despite the growing number of international standards in the different areas of environmental protection,

it must be remembered that their concrete application is strongly and necessarily affected by the different *legal processes* existing at the local level.

In this context, characterized by a strong push for legal transplants, as well as the imposition of 'global' models of environmental protection, the revision of private law instruments, aimed at involving all stakeholders in the development of environmental protection policies, leads to the blurring of the classic distinction between public and private laws.

In the perspective of overcoming this dichotomy, the evolution of environmental law highlights that hybridization of the instruments employed in environmental policies is currently underway: property, tort and contract share this fate.

The adaptation of classic private law instruments to deal with new ecological issues goes hand in hand with the abandonment of the classic rhetoric about the pre-eminence of public law instruments over private law instruments in environmental policies.

What appears to be at the centre of scholars' attention is the *effectiveness* of environmental policies, often invoking the concept of the *performance* of regulations in this area. The problem is not whether the norms are of public law or private law, but whether in practice they comply with and succeed in changing the behaviour of the consociates in a way that is consistent with environmental goals.

In a comparative law analysis, it is important to complete the study of systemic variables affecting the practical application of the instruments in question, since – as is well known – one and the same formula could give rise to entirely different practical solutions if transplanted in a legal process that does not reflect all the variables of the system of origin.

This analysis appears even more important in a context characterized by rapid legal transplants. This analysis appears even more important in a context characterized by rapid legal transplants. Therefore, it underscores the importance of the systemic variables that in some cases have decreed the success of certain innovative solutions, such as the existence of special courts in India.[140]

Private law in the environmental sector has not yet finished its evolutionary journey, which – necessarily – will also accompany us in the years to come.

Notes

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9 §823 BGB, paragraph 1, reads: 'Liability in damages»: (1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this'.
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13 B. Kleindienst, *Der privatrechtliche Immissionenschutz nach §906 BGB* (Tübingen, J.C.B Mohr (Paul Siebeck), 1964); see further BGH NJW 1959, 97; BGHZ 30, 273.
14 By law of December 22, 1959 (BGBl. I 781) which came into effect on June 1, 1960.
15 Art. 844 Civil Code of Italy: 'The owner of land cannot prevent the emission of smoke, heat, fumes, noises, vibrations or similar propagation from the land of a neighbor unless they exceed normal tolerability, with regard to the condition of the sites. In applying this rule, the court shall reconcile the requirements of production with rights of ownership. It can also take account of the priority of a given use'.
16 Art. 2043 Civil Code of Italy: 'Whatever malicious or negligent misconduct, or negligence, which causes un unfair damage to another person, obliges who committed the fact to pay the compensation'.
17 Art. 32 of the Italian Constitution: 'The Republic safeguards health as a fundamental right of the individual and as a collective interest and guarantees free medical care to the indigent'.
18 Cfr. G. Alpa, M. Bessone, A. Gambaro, 'Aspetti privatistici della tutela dell'ambiente: l'esperienza americana e francese' in A. Gambaro (ed), *La tutela degli interessi diffusi nel diritto comparato* (Milano, Giuffrè 1976) 391. In case law see Cass. July 30, 1984 No. 4523, *Giur.it.,* I, 1 (1985) 1585, where the principle was affirmed that 'if the emissions cause injury to the right to health and tranquility and the right to normal family life within a dwelling house, the solution consisting in the payment of compensation is not applicable'.
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128 Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels.

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130 M. Hautereau-Boutonnet, *Le Code civil, un code pour l'environnement* (Paris, Dalloz 2021) 139.

131 I.A. Duşcă, 'The Civil Code and the Environment' (2013) 17 (1) AGORA International Journal of Juridical Sciences, 24–30 <www.juridicaljournal.univagora.ro> ISSN 1843-570X, E-ISSN 2067-7677.

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133 Art. 1094: 'Las normas que regulan las relaciones de consumo deben ser aplicadas e interpretadas conforme con el principio de protección del consumidor y el de acceso al consumo sustentable'.

134 Art. 1.228. 'O proprietário tem a faculdade de usar, gozar e dispor da coisa, e o direito de reavê-la do poder de quem quer que injustamente a possua ou detenha. § 1º O direito de propriedade deve ser exercido em consonância com as suas finalidades econômicas e sociais e de modo que sejam preservados, de conformidade com o estabelecido em lei especial, a flora, a fauna, as belezas naturais, o equilíbrio ecológico e o patrimônio histórico e artístico, bem como evitada a poluição do ar e das águas'.

135 The draft of the new Civil Code of Colombia is available online: <http://derecho.bogota.unal.edu.co/fileadmin/Codigo_Civil/Proyecto_Codigo_Civil_de_Colombia_Primera_Version_Digital.pdf> accessed 25 June 2023.

136 Artículo 276. La ley establecerá las exigencias en las viviendas, locales, oficinas, centros comerciales, clubes, construcciones y espacios que sean necesarios para el desarrollo urbano y rural pertinente y que garanticen los elementos del ambiente sano, la vecindad y la convivencia ecológica.

137 Artículo 268: 'El propietario debe explotar su derecho conforme a su destinación económica, ecológica, cultural y social e indemnizará los perjuicios concretos o difusos causados en razón de una explotación sin interés para él o para el bienestar social. También debe respetar el derecho de los demás a un ambiente sano, el manejo y aprovechamiento legal de los recursos naturales, la integridad y el uso común del espacio público y el uso debido de los suelos, urbanos, conforme a la ley de ordenamiento territorial, a la regulación urbanística y de servicios públicos domiciliarios. La ley regulará el dominio de los objetos de interés cultural histórico, religioso, y de las minorías étnicas y lingüísticas de la población colombiana'.

138 Art. 38: 'Cada cual tiene libertad e iniciativa para adquirir y gobernar sus derechos en la forma que le plazca dentro de los límites de la ley, el orden público y las buenas costumbres. En consecuencia, en las actividades económicas y en las relaciones y desarrollo de los mercados, todas las personas gozarán, entre otras, de las libertades, derechos y protecciones consiguientes en materia de emprendimiento, empresa, producción, comercialización, competencia, consumo, contratación, importación y exportación de bienes y servicios, dentro de los límites del orden público, las buenas costumbres, el medio ambiente y los compromisos internacionales sobre la materia. Proyecto de Código Civil de Colombia. De igual manera, las personas también tendrán la responsabilidad social pertinente y aquellas que surjan por las actividades que desarrollen y por los daños que ocasionen'.

139 M. Hautereau-Boutonnet, *Le Code civil, un code pour l'environnement* (Paris, 2021) 139.

140 Gitanjali Nain Gill, *Judicial Craftsmanship: Evolving Environmental Tortious Dimensions* (India, Annuario di Diritto Comparato 2021) 59.

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