



The Struggle for Law: Legal strategies, environmental struggles and climate actions in Italy

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Abstract

The legal field constitutes both an advantageous and restrictive tool for social struggles. Current movements trust law and litigation as beneficial instruments. Nevertheless, legal strategies are deployed against protestors too. This article stems from processes of criminalization and unsuccessful “struggle for law” towards cases where legal strategies are embraced by social movements to demonstrate the Janus-faced nature of the legal field. The focus is on Italy, and is based on two-year judicial ethnography on the No TAV movement and fieldwork as well as documental analysis on the anti-Trans-Adriatic Pipeline (TAP) mobilization. Hence, the analysis focuses on a “positive” case selection, namely the most relevant climate litigation strategies pursued worldwide, with a special focus on Giudizio Universale, the first Italian action. The goal is to grasp both the conflicting aspects and the resourceful nature of law through empirical cases and case law to evaluate potential successful practices for current social movements.

Key words

Social movements; legal strategy; climate action

Resumen

El campo del derecho constituye una herramienta tanto ventajosa como restrictiva para las luchas sociales. Los movimientos actuales confían en el derecho y el litigio como instrumentos favorables. Sin embargo, las estrategias jurídicas también se despliegan en contra de quienes protestan. Este artículo se origina en procesos de criminalización y “luchas por el derecho” infructuosas en casos en los que movimientos sociales han abrazado estrategias jurídicas para demostrar la naturaleza de Jano bifronte del derecho. El centro de atención es Italia, y nos basamos en la etnografía jurídica de dos años del movimiento en contra del Tren de Alta Velocidad y en trabajo de campo,

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así como en análisis documentales de la movilización contra el Gasoducto Trans-Adriático (TAP, en inglés). Por tanto, el análisis se centra en una selección de casos “positiva”, con especial atención a *Giudizio Universale*, la primera acción en Italia. El objetivo es entender tanto los aspectos en conflicto y los múltiples recursos del derecho a través de casos empíricos y jurisprudencia, a fin de evaluar prácticas de posible éxito para movimientos sociales en vigor.

Palabras clave

Movimientos sociales; estrategia jurídica; acción climática

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1. Introduction

“Using law (which is rarely a single-edged sword)” (Coccoli 2012, p. 123)¹ for social struggles means expanding the potential of their advancement. Current environmental movements are pretty much aware and are therefore striving to find new approaches and practices to confront the various forms of extractivism. For a long time, however, the most radical, and possibly left-wing approaches have considered law as a tool that undermined social struggles. Hence, “historical movements” (Franco Angeli 1987, Della Porta and Diani 2006) have not always made use of legal resources. According to this orientation, collective phenomena demonstrate the strong cultural influence that a certain Marxist vision betrayed. While this vision took hold on social movements until a few decades ago, it has also been gradually overcome. For example, the feminist movement challenges Marxism for the absence of women in its theoretical framework. And, so do studies on race, that is not taken into account in Marx’s work either. To sum up, it can be argued that according to that vision, law and power tend to confuse one another, with the law always ending up being a weapon in the hands of the powerful.

On the contrary, current movements’ practices seem to show that their approach towards law is more complex and manifold. Typically, the “haves” have an advantage over the so-called “repeat players” (Galanter 1974) as social movement actors usually are. However, people – protestors, activists and their lawyers – tend to consider law as a resource to fight injustice (Rajagopal 2005). They value law as a beneficial instrument and consider litigation as “a source of institutional and symbolic leverage against opponents”, that may help to denounce abuses and to achieve media coverage (McCann 2006, pp. 29-31). Even in a less romantic view, current social movements avoid doing away with the legal resource and, in a rather post-ideological manner, tend to exploit every possible means to pursue their fundamental objectives. As Chatterjee (2004) points out with reference to the Indian “political society”, the most exploited classes use every potentially beneficial resource to advance their basic needs and fundamental rights.

Admittedly, as far as a social struggle is concerned, the legal field offers some expectations while shrinking others, being potentially both an advantageous and disadvantageous – if not even restrictive – element. Courts are the quintessence of this relationship between social movements and legal institutions. Legal strategies can be successful and help advance social claims but (criminal and administrative) law can be deployed against people too. As it is easy to understand, a social movement always tends to push the boundaries of the existing legality. Or, to put it better, those organized forms of struggle may oppose a certain legalism, that is a blind application of the law. Legalism is the degeneration of the principle of legality according to which the law would be the final criterion for justice, and no longer a suitable instrument to ensure the equality of individuals (Shklar 1964, Triolo 2004).

Social movement actions are not necessarily grounded on this theoretical awareness. Rather and more frequently, social movements experience a clash with “reality”, and therefore develop an awareness acquired “on the field”. Data, reports, and both empirical and theoretical research on the criminalization of protest show that the criminalization of social movements is a growing social phenomenon (Della Porta and

¹ Author’s translation from Italian.

Reiter 2003, Davenport *et al.* 2005, Fernandez 2008). And, for this reason, it has gained increasing scientific attention.

While in the past carrying out research on policing protest was more likely, a new approach to take into account the legal aspect is now gaining space (Terwindt 2014, 2019, Chiaromonte 2019a).

As Prof. Steven Barkan sharply observes: “Criminal prosecutions and trials are normal events” for social movements “and often have important consequences for the struggle between social movements and their opponents (...). For protesters and their antagonists, what happens after arrest is arguably at least as important, and at least sometimes more important, than arrest itself” (Barkan 2003, p. 3). Barkan seems to invite the reader to look at the complex criminalization processes against activists. In doing so, however, a theoretical approach is needed.

Conflictual and repressive aspects have often been taken into consideration by Marxist theories. Hence, the interpretation of the law as a tool that is intrinsic to power could be endorsed and therefore not questioned. In addition, the Marxist approach usually privileges the theoretical view and does not test concrete social events through fieldwork. On the contrary, it is fieldwork that has turned that single-edged vision of the law into a multifaceted one, by employing an inductive, rather than a deductive, method (Chiaromonte 2019a, Terwindt 2019).

The aim of this article is to demonstrate through a case-by-case approach how law can be seen at least as a Janus-faced tool and how legal strategies might contribute to advance claims spreading and originating from the grassroots. For this reason, the trajectory that this analysis proposes stems from processes of criminalization and unsuccessful “struggle for law” (Jhering 1915) towards cases where, on the contrary, legal strategies are embraced by the movements with potential success.

My focus will be on Italy, where I conducted a two-year ethnographic research into one of the most longstanding and high-profile environmental movements, namely the No TAV struggle against the Turin-Lyon high-speed railway project.² I will analyze the judicial criminalization of this Northern Italian social movement and of another movement in the Southern, namely the mobilization against the Trans-Adriatic Pipeline

² See the No TAV file on EJAtlas-Global Atlas of Environmental Justice: <https://ejatlas.org/conflict/no-TAV-movement-against-high-speed-train-val-di-susa-italy>

The research is based on a judicial ethnography carried out in the Bunker courtroom of the Turin prison between July 2014 and January 2016 and parallel fieldwork based on observant participation in the Val di Susa. Between October, November, and December 2015 I collected interviews with 17 militants. They are all *militanti di base*, that is, subjects who, actively participating in the actions of the movement, also constitute the part most exposed to sanctions. Given that the research focuses on the criminalization process and resistance practices, it seemed necessary to listen in particular to this part of the No TAV movement as well as those other subjects (not based in Susa Valley) who were charged. The respondents are between 24 and 70 years of age. The base in Val di Susa was Bussoleno, as it is the most active location. Yet, as the No TAV movement has become a nationally widespread struggle, activists come also from the rest of the country. I had known most of the people interviewed for more than a year at the time of the interview. I preferred to get to the formal exchange only once I established a relationship of mutual trust and once I was aware of all the issues at stake.

(TAP).³ These two cases can offer significant showcases of the tactics of criminal law once employed against protestors, who in turn had previously attempted to unsuccessfully use any possible legal instrument.

I will then focus on a “positive” case selection, namely the most relevant and pioneering climate litigation strategies pursued worldwide, with a special focus on *Giudizio Universale*, the first Italian climate class action.⁴ The Italian case is not present in the map of global trends in climate change litigation in 2019 (Setzer and Byrnes 2019). This essay explains why by addressing the general context and the specific problems of the ongoing Italian climate action. What is being asked to the Italian state is to implement more stringent measures to respond to climate change. “What the citizens will ask the judge is the exact fulfillment of all the climate obligations that the State has sovereignly decided to take to avoid the most destructive consequences of climate change and guarantee the effectiveness of the rights of its citizens” (*Giudizio Universale* n.d.) This essay aims at analyzing these eminent Italian cases through a collection of empirical data and qualitative socio-legal analysis.

2. Social movements and criminalization processes

Cases of shrinking spaces of freedom of assembly and free speech on a global level have come back to the forefront of public and academic debate in democratic contexts. It has long been assumed that the problem of fundamental rights associated with collective mobilizations was a central issue in authoritarian contexts⁵ (Chua 2012, Son 2018, p. 46), but the potentially authoritarian elements systematically reproduced within a democracy have not been sufficiently recognized. On the contrary, the inquisitorial subconscious can be particularly illuminated by how the judicial power deals with social movements (Fiorentino and Chiaramonte 2019).

It is a long-standing matter and not a new problem, but recently the phenomenon seems to be worsening. While in the past harsh measures were publicly used to counter forms of rebellion and terrorist challenges to the status quo, nowadays extremely harsh treatment is applied against a global array of struggles that are generally absolutely non-terrorist even if they would be labeled as such (Smith 2008, Terwindt 2013, Norris 2016). Changes in the *criminal governmentality of social conflict* (Chiaramonte 2019a) are to be interpreted in conjunction with the changing forms of mobilization. The issue is not

³ See the No TAP file on EJAtlas - Global Atlas of Environmental Justice: <https://ejatlas.org/conflict/trans-adriatic-pipeline-in-puglia-italy>

The research is based on participant observation conducted through various periods of permanence (especially October-December 2018 and December 2019) in San Foca, Melendugno and Lecce where I have met and participated in several No TAP assemblies. I took part in conferences organized by the movement, and I added to my work with them an accurate documental analysis.

⁴ My knowledge of this class action is based on individual conversations with the promoters, a legal planning meeting, a public initiative (which curiously enough took place in Susa Valley on the occasion of the Festival dell’Alta Felicità 2019) and a semi-structured interview with one of the legal team lawyers.

⁵ As Cummings clarifies: “In countries with strong democracies and a commitment to judicial independence, law is more likely to be seen by advocates as a viable tool to advance reform. In authoritarian countries with weak legal institutions and fear of reprisal for dissident activity, lawyers adopt less adversarial strategies on day-to-day matters – working within the system to promote incremental change – although there are moments when they rise up and take significant risks to advance the democratic project” (Cummings 2017, p. 258).

about strict ideological models anymore; current protestors tends not to be previously politicized and/or contesting the overall status quo. Differently than in the past – where political subjectivities were tendentially ideologically pre-formed – social movements can now potentially become political subjects from direct experience of exploitation.

“It is not enough to say that these are anti-authority struggles” – wrote visionary Foucault at the beginning of the ‘80:

They are ‘transversal’ struggles; that is, they are not limited to one country. Of course, they develop more easily and to a greater extent in certain countries, but they are not confined to a particular political or economic form of government (...). In such struggles people criticize instances of power which are the closest to them (...) [and] do not look for the ‘chief enemy’ but for the immediate enemy. Nor do they expect to find a solution to their problem at a future date (that is, liberations, revolutions, end of class struggle).

These struggles are “against the ‘government of individualization’”. Perhaps – we could say that today, after decades of neoliberalism – these struggles promote solidarity over individualism, competition, and growth. They support a new conception of what growth is all about.

They are an opposition to the effects of power which are linked with knowledge, competence, and qualification: struggles against the privileges of knowledge. But they are also an opposition against secrecy, deformation, and mystifying representations imposed on people. There is nothing ‘scientistic’ in this (that is, a dogmatic belief in the value of scientific knowledge), but neither is it a skeptical or relativistic refusal of all verified truth. What is questioned is the way in which knowledge circulates and functions, its relations to power. (Foucault 1982, pp. 780-781)

In other words, current struggles move against certain forms of governmentality (Foucault 1991, Rose *et al.* 2006) rather than against institutions as such. The No TAV mobilization was initially against the high-speed railway, but it gradually morphed into a struggle against certain mantras: development, competence, and efficiency. Such forms of knowledge are considered as the only valid pre-requisites for public choices, and monopoly of political power as far as people’s lives are concerned.

The No TAV movement, composed by railway workers, local governors, engineers, and environmental experts opposed its own knowledge. It is a completely technical and extremely solid knowledge against the supposedly neutral engineering science, or the science of finance. This is by no means an approximate knowledge fomented by ideology. On the contrary, social research has shown the opposite, and this is the reason why the supporting arguments for the high-speed train (TAV) are not in the public debate (Calafati 2006): the No TAV arguments have solid and scientific bases.

And, this “situated” knowledge (Haraway 1988) has not been the exclusive privilege of a small group within the movement, but has become widespread knowledge, circulating indifferently in the speeches of a student or a senior citizen. By doing so, the movement rejected the individualizing aspect of the knowledge-power that it challenges, because it turned the knowledge into a common good.

Nowadays, struggles are transversal and transnational; they have goals that are not immediately political, if by politics we mean the institutions of the State. And, they are immediate because they are not targeting major reversals, but they contrast “near” effects of power, such as the forms of extractivism in the territories. This does not mean

that they are NIMBY struggles, because they indeed are connected to a global network of ecological movements. This consideration finds further confirmation in the fact that these “experienced” environmental movements are in contact with “brand-new” ecological movements, such as Extinction Rebellion and Fridays for Future. “Experienced” movements know that it is better to lay out the conditions for “passing the baton” to new generations. At the same time, the latter wants to understand and learn from controversial issues and practical problems from a mobilization that has been carrying on in the last 30 years, such as the No TAV movement.

3. The No TAV case: fighting for the law and being criminalized #1

The Turin-Lyon high-speed train project dates back to 1989, and already at that time it generated technical criticisms and grassroots resistance. The reasons against the TAV are the proven uselessness of the infrastructure due to the fact that existing infrastructures have not yet reached a level of saturation nor have traffic by road or rail increased. Additional reasons for criticism lie in the high and unjustified cost of the project and the harmfulness of substances contained in the mountains to be excavated, mainly uranium, radon, and asbestos.

To seek protection, No TAV activists have resorted to the so-called “paper barricades”: from municipal resolutions against the megaproject to petitions of the Susa Valley Coordination related to the health risks connected to the realization, from tireless collections of signatures to the appeals to the appropriate European Union institution. All these efforts have been unsuccessful.

From the economic viewpoint, the 2004 Paris agreement between France and Italy on TAV raises doubts, as Italy would be required to contribute to 2/3 of the overall TAV costs, in spite of the fact that only 1/3 of the route would cross Italian soil. Anyhow, ten years later an increasingly severe economic crisis favored a specific rethinking of the infrastructure as such and above all, to a broader reflection on the idea of development embodied by this obsolete project conveys.

In 2015, the No TAV movement promoted a campaign called “with a meter of TAV”: “Every euro spent on the TAV is a euro taken from something useful for all and everyone: school, health, land maintenance, social housing, etc. Those needs and rights are far more important and ‘strategic’ than another high-speed train” – it is written in the flier. Austerity has led to financial cuts on every front: land maintenance, welfare, pensions, hospitals, schools. Increasingly dangerous cuts on *social security* are replaced by a surplus of *police security*: the history of the TAV and above all the history of the No TAV testify this replacement.

In addition to so-called “paper barricades”, No TAV activists have built up a vast repertoire of protest: symbolic cuts of the protection fences, marches, sit-ins, etc. In other words, they put in practice the liberal constitutional and supranational right to freedom of assembly. In 2005 No TAV activists succeeded in blocking the installation of the construction site, after having suffered acts of unprecedented violence by the police. Unarmed persons, many of them sleeping in tents set up to occupy the area under eviction, were ferociously beaten.

After that, an Observatory was set up as a possible solution. Its alleged goal was to negotiate and find an agreement, but it turned out to be a mockery since all those who advanced technical reasons against the megaproject were soon expelled from the Observatory.

In the following years, resistance persisted, and in spite of harsh confrontation, the TAV construction site could finally be installed. Soon after, the site was put under 24 hours of police surveillance, and the area declared as a site of national strategic interest, with a consequent increase in the penalties for violations.

As a result, activism started being criminalized, dating back to an exact time: in January 2010 one of the most famous anti-terrorism and anti-mafia Italian district's attorney office instituted a specific pool to investigate the No TAV movement. Soon after, incriminations began. Currently, 1,500 suspects, 51 criminal trials, a hundred precautionary measures have been registered in connection to a set of crimes ranging from violations of the "red zone" to supposedly terrorist attacks (eventually denied, after long times of detention in isolation for those considered guilty). Recently, hundreds of administrative preventive measures based on the so-called "social dangerousness", have been issued against No TAV activists.

How do we make sense of a grassroots mobilization that has pursued the protection of fundamental rights, and ended up being criminalized? Not only is the quantitative aspect of criminalization worth investigating, but also its quality. The largest trial against the movement, the so-called "maxi trial" (53 defendants for resistance and violence against public officials), inaugurated a new and dangerous conception of complicity in crime. Essentially, what is proven is not the commission of a crime, but only the presence of the subject in the place where people protest (Chiaramonte 2019b).

The main argument is that participation in a demonstration implies committing offenses. Implying that that participation in a protest implies delinquency is not an indicator of an interpretation grounded on the Constitution since protesting is an effective expression of the right to freedom of assembly.

On the contrary – following the judge's argument – given that the participation as such demonstrates already the necessary elements of the complicity in crime (*concorso*), it is not necessary to prove the causal link between the psychological or material assistance of the accomplice and the offense. In fact, the ordinance of the judge of the preliminary investigations stated that:

the participation in similar, imposing and violent clashes necessarily implies and shows the existence, upstream, of prior acceptance of developments and outcomes detrimental to the physical integrity of others...

Indeed, it would be

superfluous to identify the specific object that reached and injured each police officer, as well as the demonstrator who launched it. All the participants in the clashes must account for all (planned or even only foreseeable) crimes committed in that situation in the place where (s)he was.

The same approach is confirmed by the judicial decision of the first instance. Therefore, the lack of any evidence of the causal contribution of the individual leads to the open violation of personal liability. In other words: Criminal liability is no longer personal. It

cannot remain so when the goal becomes that of punishing the phenomenon, rather than individual actions, as liberal criminal law would admit. Indeed, collective liability highlights the political nature of the trial, as a case of *political justice* that does not appeal to the individual but to a “criminal crowd” (Sighele 1891/2018).

No TAV activists have opposed these accusations in multiple ways: their protest repertoire has also involved the courtroom, where hundreds of activists for years have followed the hearings and organized banquets outside prison. Through legal defense, they also attempted to show that their allegations of degenerating in violence still had to be balanced with the right of assembly.

Obviously, the frequent argument heard during the hearings was that the object of judgment is not the entire social movement, but those individual criminal actions performed by each protester. Nevertheless, public prosecutors’ reasonings contradict that justification being them argued upon the social movement’s progress, its history, and its composition. The best example of this attitude is provided by the indictment issued at the “maxi-trial”, where reference is made to the “precedents” of the late ‘90s as if those actions could be considered relevant for a proceeding occurring in 2017, and related to different actions.

The only “success”, if one may say so, for the harshly repressed No TAV movement was to appeal to the Permanent Peoples’ Tribunal (PPT) and receive a favorable decision. In November 2015, the Permanent Peoples’ Tribunal recognized the presence of a “systematic violation of the fundamental right of a community to be an indispensable and priority subject in the decision-making processes regarding its context and its present and future living conditions” (PPT 2015). In particular, a careful empirical comparison was made with other megaprojects.

The outcome is the systematic nature of governmental techniques that goes from the dams of the Mose project in Venice to the thermodynamic solar power plant in Basilicata (Italian Central Region), from the Basque Country (Spain) to the HS2 London-Birmingham high-speed railway, from the Stuttgart railroad station to the Rosia Montana open-air gold mine in Romania. In fact, “very notable similarities emerged (in some cases we can even speak of overlaps) in the methods used with reference to such projects, regarding the authoritarian and centralized character of the decisions related to them, the exclusion of the local population and administrations from decision-making (or with a purely superficial involvement), the inadequacy and (sometimes) clear inconsistency of the data provided in support of the projects, the transformation of political issues inherent to the projects into issues of public order that are assigned to the police and the judiciary (including through the use of special legislative and administrative measures of a general character) and the rather heavy police and judicial interventions that are interpreted by many as direct methods to discourage and/or block emerging opposition and protest” (PPT 2015, p. 13).

4. The No TAP case: fighting for the law and being criminalized #2

The acronym TAP stands for Trans Adriatic Pipeline, a multinational infrastructure and pipeline project for the transport of natural gas from Azerbaijan fields to Europe. The TAP pipeline is part of the largest project called the Southern Gas Corridor (SGC). The Southern Gas Corridor crosses seven countries (Azerbaijan, Georgia, Turkey, Greece,

Albania, Italy) and includes three gas pipelines. The TAP is the segment of the gas pipeline crossing Greece and Albania, and an undersea section to the Italian coast of Salento (Apulia).

The No TAP movement is in the frontline against this megaproject. In particular, demonstrations in Lecce and San Foca (Apulia) have been attracting thousands of participants since 2017, when a permanent *presidio*, was set up by the No TAP movement by the project construction site and affected area. In that same year, enclosure of spaces occurred, accompanied by militarization of portions of territory to make room for the construction site. Secular olive trees were removed, and street confrontations between demonstrators and police were characterized by well documented violent repression by the latter. In the summer of 2017, criminalization of the protest began: a march of a thousand people in Lecce was denounced as an unauthorized demonstration. A few months later, a prefectural order denied access to the whole area adjacent to the TAP site and consequently forced activists to abandon the eight-month permanent *presidio*. By doing so, activists were in fact forbidden to demonstrate in the only area where it made sense to demonstrate, notably the area adjacent to the TAP site. Besides, preventive measures against activists also began (e.g. by means of expulsion warrants).

The No TAP mobilization was influenced by the most important Italian environmental movement, namely the abovementioned No TAV movement. Activists have been extremely aware and developed deep expertise on the TAP from the very beginning: experts learned from activists how to formulate slogans and to act publicly; activists learned from experts to understand technical issues in detail and to be able to better argue in favor of their struggle. “This interweaving guaranteed and substantiated a permanent and precise self-training and information activity (seminars, reports, dossiers, information notes, ‘cultural’ mobilizations) as well as allowed to explore a series of legal actions” (Tarabini 2019).

As regards the Trans-Adriatic Pipeline, the gas receiving terminal will occupy a 12-hectare area. It includes filtering and depressurization systems, two electric boilers (to heat the gas), two gas boilers and two burners. According to experts’ calculations, it would generate two thousand tons of combustion fumes, 86% of which would be carbon dioxide, the rest being nitrogen and sulfur oxides, particulates, methane, etc. This plant is located only 800 meters away from homes. The European Union position on the TAP is that while this is considered as a strategic infrastructure, the EU 2050 strategy requires that by 2050 80% of the energy produced must come from renewable sources.

Among the main ongoing issues:

- 19 people, some of whom work for the TAP company, are under investigation, or illegal dumping of polluting elements and the consequent pollution of soil and groundwater.
- Eight municipalities asked for an overall environmental assessment of the work, claiming that it violates European legislation on environmental impacts. The absence of a project cost-benefit analysis is also evident. The No TAP Movement, therefore, claims its right to access data and documents held by public administrations. The response has always been evasive.

- A trial against 47 activists is ongoing, in what seems to be only the first step of a criminalization process that started in 2017.

An important fact to keep in mind is that the movement and its legal experts are considering the possibility of filing a climate action against TAP.

5. Climate Legal Cases: sue the companies or the States?

In Italy, the panorama of movements is not only composed of territorial environmental struggles. As a matter of fact, in the last few years the awareness about the hard condition of the climate has been growing. Hence, claiming climate standards has become a public issue and grassroots movements are now raising new ecological questions. The experiences of the No TAV and the No TAP movements are particularly important for those who today are reformulating their social struggles within the global framework of struggles against climate breakdown. The advantage of those undertaking climate litigation actions is that their starting point is immediately global and nature-centric. There are, however, downsides as well. These “brand new” mobilizations, that do not support a specific territorial struggle, tend to propose the opposite of what Foucault had so well understood. In other words, since they do not have a territorial basis (and consequently a specific area of activism) they tend to conceive issues in an idealistic way, somehow detached from material conditions.⁶

As a consequence, their activists may not have the same tenacity as those who immediately see the (potential or ongoing) effects of extractivist projects in the territories where they inhabit.

With the stipulation of the Paris Agreement, climate justice has become a global issue and climate litigation a global phenomenon both in the rich part of the planet and in the Global South (Richardson *et al.* 2009, Peel and Lin 2019). Climate activists all over the world have so far chosen two avenues, suing companies (Ganguly *et al.* 2018) or suing States.

As to the former, the following cases offer valuable insight and examples. One of the most important recent cases is in the Philippines where Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement filed a petition with the support of 12 organizations, 20 individuals, and 1,288 Filipinos.⁷ The claimants asked the Commission on Human Rights of the Philippines to carry out an “investigation of the responsibility of the carbon majors for human rights violations or threats of violations resulting from the impacts of climate change”. In sum, “what we, the Petitioners, are saying, is that the production of fossil fuels by the Carbon Majors is primarily responsible for large

⁶ In this sense it could be argued that these “young” brand new mobilizations recall the universalist horizons of the “historical” movements and differ from the new movements.

⁷ It is clear that a specific expertise is involved in the campaign and that the social movement behind it is aware of the scientific knowledge implied. See e.g. in the petition the reference: “The Carbon Majors findings, based on peer-reviewed methodology, are found in three ground-breaking publications: 1. Climate Accountability Institute, Press Release on Update of Carbon Majors Project, released in December 2014, appended as Annex ‘D-1;’ 2. Carbon Majors: Accounting for carbon and methane emissions 1854-2010 Methods and Results Report, released in 2013 and updated at the beginning of 2014, appended as Annex ‘D-2;’ and 3. Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010, published online in the journal Climatic Change in November 2013, appended as Annex ‘D-3’”. Petition available at Greenpeace Philippines 2019 (p. 12).

amounts of greenhouse gases. The concentration of gases, especially carbon dioxide in the atmosphere, causes climate change. An estimated 25-30% of the carbon dioxide already emitted by these activities has been absorbed by the oceans, causing ocean acidification”.

An important decision from the first climate change litigation against a company in France is expected. “Fourteen local authorities, together with the NGOs *Notre Affaire à Tous*, *Sherpa*, *France Nature Environnement*, *Eco Maires* and *ZEA*, are taking the oil giant Total to court, requesting that Total be ordered to take the necessary measures to drastically reduce its greenhouse gas emissions” (France Nature Environnement *et al.* 2020). Similar arguments are used in the 2018 Dutch climate action, against Shell, considered to be one of the most polluting companies and therefore one of the major actors impacting climate.

As to the latter, suing the State might be a more effective climate strategy, or in any case, the one that seemingly ensures better outcomes. However, as mentioned above, both strategies must be valued and considering them as complementary seems to be the most valid and successful approach.

Details of the most important climate actions against the State in Europe (France, Norway, and the United Kingdom), Colombia and Australia are provided in the following section that also deals with the unique Urgenda case in the Netherlands, that inspired the climate class action in Italy. Since the main focus is on Italy the *Giudizio Universale* case will be analyzed in a separate section.

A) Europe

As for the French case, four nonprofit organizations sent a “lettre préalable indemnitaire” (letter of formal notice) to the Prime Minister and 12 members of the government in December 2018. It was the first step in a lawsuit for inadequate action on climate change.

This type of letter is part of a legal proceeding known as ‘recours en carence fautive’ (action for failure to act). The plaintiffs allege that the French government’s failure to implement proper measures to effectively address climate change violated a statutory duty to act. The four plaintiff groups are *Fondation pour la Nature et l’Homme (FNH)*, *Greenpeace France*, *Notre Affaire à Tous* and *Oxfam France*. In their press release, they describe the lawsuit as challenging the state’s inaction on climate change and failure to meet its own goals for reducing greenhouse gas emissions, increasing renewable energy, and limiting energy consumption. (*Notre Affaire à Tous and Others v France*, 2018)

In Norway, in January 2020 the Borgarting Court of Appeal ruled on a case which “involves the question of whether the decision taken by the Royal Decree of 10 June 2016 on awarding production licenses for petroleum on the Norwegian continental shelf in Barents Sea South and in Barents Sea South-East, the ‘23rd Licensing Round’ is invalid” (*Natur og Ungdom and Föreningen Greenpeace Norden v Norway*, 2020). The court was of the opposite opinion and the government won the lawsuit. The considerations regarding the moral and civic value of the proposed case that avoided the obligation for applicants to pay the costs of the dispute. So far so good, since at least they would still have available resources for future legal action. This is not a trivial consideration, as the amount of time and effort, as well as the funding and resources that are required to launch a lawsuit against a State, are considerable.

At the end of February 2020 plans for a third runway at the Heathrow airport in London, have been ruled illegal by the court of appeal. Essentially, ministers had not adequately taken into consideration the government's commitments to tackle the climate breakdown. Lord Justice Lindblom stated: "The Paris agreement ought to have been taken into account by the secretary of state. The national planning statement was not produced as the law requires" (*R (Friends of the Earth) v Secretary of the State for Transport and others*, 2020). This is the first major ruling in the globe to be based on the Paris agreement. Hopefully, this ruling will influence other decisions around the world thus creating a precedent to be followed.

B) Other relevant cases

The Colombian climate action is related to the Amazon, considered as the green lung of the world and at the same time one of the most violated natural paradises, where the worst extractive processes in the world occur. The destruction of the Amazon forest has been caused, as is has been known for decades, by large scale deforestation. The climate action was successful and resulted in the issuance of an order to launch a short, medium, and long-term plan within four months. Such a "plan must counteract the deforestation rate in the Amazon, where the effects of climate change are faced" (STC4360-2018; translation from Spanish by the author).

One of the most important climate cases, *Gloucester Resources Limited v Minister for Planning*, was filed in New South Wales, Australia and a decision was issued on 8 February 2019. The case is significant for several reasons. First of all, it represents a clear victory for the proponents and inhabitants of the unique Gloucester Valley. Secondly, it is a success based on a preventative criterion. Thirdly, it is a case in which the State is asked for preventative protection against the destructive impacts of the extractive activities that a private company planned to carry out in the aforementioned valley. Unlike other cases where the company was directly sued, here the claimants opted for suing the State. Essentially, the "mining company, Gloucester Resources Limited (GRL), wishes to mine this coal. It has proposed an open cut coal mine to produce 21 million tonnes of coal over a period of 16 years" (*Gloucester Resources Limited v Minister for Planning*, 2019). The judicial decision was clear: "In short, an open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because an open cut coal mine in this scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused."

c) Urgenda, Netherlands

The issue, in this case, was "whether the Dutch State is obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990, and whether the courts can order the State to do so".⁸ The judges

⁸ The entire case is reconstructed at Urgenda n.d.

rejected the appeal made by the State against Urgenda, reasserting its fundamental legal considerations. The judges had to free themselves from the accusation of making political decisions that would pertain not to them, but the Government and Parliament. They replied to the accusation by asserting that “in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is the power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound”. The European Convention on Human Rights is directly binding in this case. And, the threat of dangerous climate change is real. So, “it is clear that measures are urgently needed, as the District Court and Court of Appeal have established and the State acknowledges as well. The State is obliged to do ‘its part’ in this context. Towards the residents of the Netherlands, whose interests Urgenda is defending in this case, that duty follows from Articles 2 and 8 ECHR, on the basis of which the State is obliged to protect the right to life and the right to private and family life of its residents”.

6. Giudizio Universale: how the Italian climate campaign works

The Italian climate lawsuit replicates the Urgenda approach, namely: to sue the State, not as a strategy to obtain compensation but rather to force it to adopt an effective climate policy. The gap between international commitments (containment of temperatures within 2 degrees and possibly within 1.5 degrees) and efforts undertaken by Italy is making it far too evident. According to the IPCC (Intergovernmental Panel on Climate Change), the use of fossil fuels should be reduced as soon as possible. Nevertheless, the entire energy system in Italy is still heavily dependent on fossil fuels, which continue to receive substantial incentives.

The legal case that will be initiated in Italy is partly different from the Dutch one, since the legal systems in the two countries are different. Differently from the Netherlands, the European Convention on Human Rights is not immediately applicable in Italy. The Dutch judge was, therefore, able to argue against the state on the ground of an effective thesis: had the Dutch state not respected its climate commitments, a violation of the ECHR (art. 2 and 8) would be determined. In Italy, this is not the case. While the ECHR is relevant, it does not apply directly. It is a source that integrates the Italian Constitution, but only when an internal norm potentially conflicts with a supranational norm then the convention can be applied, and consequently, the internal norm could be considered unconstitutional. Therefore, one cannot directly assert the ECHR in Italy to protect subjective rights, but only to establish the contrast of a national norm with a supranational one.

So how the responsibility of the State can be framed? Legal technique is a real laboratory of analogy, that is, a way of building new categories on existing standards. This study has led to delve into the responsibility for the unlawful act (art. 2043, Italian Civil Code) according to which: “Any intentional or negligent act, which causes unjust damage to others, obliges the person who committed the fact to compensate the damage”.⁹ The most relevant element is how to interpret the concept of “fact”: the fact is any human

⁹ Author’s translation.

action of a commissive type. However, the current jurisprudential interpretation has considered as a fact that omission that violates an obligation to take action imposed by the law. Here, imposing the State to limit emissions to a certain level – the problem, as mentioned above, is to understand exactly what level is – is a viable legal strategy.

So, the claimants gathered substantial documental evidence to show that the State is well aware of the seriousness of climate conditions.

As a lawyer of the Giudizio Universale legal team pointed out, “we have reconstructed the impacts that climate change has on Italy based on official documents and are devastating. For example, 4,500 km of coast are at risk of flooding, more than half of the Italian coast. So, we have reconstructed both the objectivity of the issue and the awareness of the Italian state”.¹⁰

As mentioned above, the Italian legal strategy does not consist in asking the public administration to compensate for previous damages, but to prevent causing further damages. This omissive action can be asked to the public administration if the claimants can demonstrate that the public administration’s activity clashes with fundamental human rights.

As to how did this campaign come about, promoters stressed that this action does not come from below, if by “below” we mean laypeople. This climate action stems from the commitment of some lawyers, who gathered in a sort of legal team. Only in a subsequent moment, was a multiplicity of actors from different areas of mobilization and climate activism engaged.

Some considerations can be drawn from this dynamic. In the previously analyzed cases, the No TAV and the No TAP cases, it was a mobilization that drew strength from the extractive megaprojects on a specific territory. Here it is an action that is no longer single-issue. On the contrary, it is a climate action that affects the structure of the economy and the growth and development model of the State as a whole. It is not therefore a matter of contesting a single project – even if, as we have seen, the mobilization never stops strictly within “its” pertinent territory. This is a radical legal action in which the State is asked to completely change course and respect the Planet’s health.

Various associations, organizations, and groups of activists have joined the Giudizio Universale action. However, as strange as it may seem, unlike other European experiences such as France, “historical” environmental associations tend not to join in. Usually, they do not engage in lawsuits in Italy. The only appeals that Greenpeace made, for example, have been appeals to the local administrative court (TAR) but no environmental lawsuits. The same for Amnesty International.

The promoters of the Italian climate action argue that in Italy there is an extreme need for funding and plaintiffs, which can lead to a robust campaign and that the cultural approach to the climate issue must change. It must become culturally hegemonic.

“The administrative court is sensitive to public issues by its nature. If the authorizations comply with the rules, the administrative judge cannot accept your complaints, and the project will go on” – says a lawyer of the Giudizio Universale legal team. “Instead, the

¹⁰ Interview given to the author. Telephone interview, 10 March 2020.

civil lawsuit is little explored. Yet Shell and Total succumb to civil cases". Perhaps, the potential of civil law has to be explored and might be the future path of climate action.

7. Conclusions

This piece intends to fill a gap in the sociology of law as well as in social movements studies. The latter is interested in the relationship between police and protest but does not deal with judicial criminalization which is often the result of clashes between activists and law enforcement.

The sociology of law, on the other hand, tends to see law as a positive tool for the benefit of social movements and to forget the conflicting aspects and the effects of criminalization. Very few authors have dealt with public law (criminal and administrative) in relation to protest phenomena: the criminalization of social movements is a field of study that deserves to be theoretically and empirically founded (Barkan 2003, 2006, Chiaromonte 2019a, Terwindt 2019). The attempt conducted through this selection of empirical cases (both in the sense of case law and in the sociological sense of "case study") is a first step in this exploration.

The main idea behind this analysis is that the law is a double-edged sword. Law is a technique, and as such, can be filled with conflicting interpretations as well as exploited for or against social struggles. To show this manifold nature, the focus has been on two main cases in which the law has been employed to limit environmental protests (No TAV and No TAP) and criminalize demonstrators. Secondly, the article tackles the main climate actions spreading worldwide both by suing companies and the national states. In particular, the focus is on Italy and the *Giudizio Universale* case. It is worth asking whether the use of legal repertoires (on which current movements seem to bet the most) benefited them or not. In other words, an important question must be addressed, whether legal strategies are successful or unsuccessful for a social movement. Can this question be answered generally or only on a case-by-case basis? "Early scholarship was skeptical about whether reliance on the courts would yield positive movement outcomes" (Boutcher and McCammon 2019, p. 314). By channeling social and political claims into the legal framework, litigation might reduce the potential for change (Cummings and Eagly 2001). In other words, the legal field has its own norms that could even change or misrepresent the political scope of mobilization. At the same time, the mobilizations – this essay wanted to develop this specific aspect – also need a legal battle. In particular, in an increasingly complex knowledge society, various technical skills are a fundamental part of a social movement. Among these, the law also deserves to be freely considered, not a threat in advance.

Perhaps, it is needed a comprehensive thinking, which would reflect upon the reciprocal influences of such an "encounter" between social movements and the law. This is e.g. what Hilbink (2006) does when he explores the faces of legal consciousnesses approaching racial justice.

It is necessary to frame the issue in broader terms. "Opposition is constant and sophisticated, so that there is never a clear 'win', only moves that are certain to be countered" (Cummings and NeJaime 2010, p. 1329). It is not easy to evaluate the broader legal and political achievement by enumerating only the outputs of trials and judicial decisions. The socio-political context is fundamental for the selection of a certain kind of

activism and advocacy. Social movements employ legal strategies or not, and prefer certain strategies rather than others according to political opportunity (McAdam 1982, Kitschelt 1986, Pellow 2017), such as public structures expanding access for social movements actors or sensitive political leaders.

However, it is important to note that there is also a concept of opportunity that refers directly to the legal field. As some authors have effectively argued, there is also a *legal opportunity* (Hilson 2002). As Boutcher and McCammon explain, “legal opportunity structures are largely rooted in state structures that offer access for politicized groups to make their claims before adjudicative bodies, including judicial and administrative agencies, as well as laws and legal doctrine granting standing. Contingent legal opportunity, according to Hilson, occurs when judicial elites are sympathetic to movement claims and thus may decide in their favor” (Boutcher and McCammon 2019, p. 311). It is frequently important “to count on agreeable juries, which have gradually been able to operate a ‘disruption through court’”¹¹ (Chiaramonte 2018, p. 22).

Furthermore, legal opportunities are not only exploited by social actors, but can also be created by them through the most appropriate and innovative forms of activism. For example, a movement for common goods has spread in Italy, made up of jurists and activists, which has transformed the way of looking at civil law. The Italian movement for the commons proposed to value the social function of property envisaged by the Italian Constitution through the occupation of theaters, cinemas and other previously abandoned spaces that have “opened up” to the population (Bailey and Mattei 2013). This is not an isolated case, as shown in the experiences gathered by Peñalver and Katyal (2010) under the captivating title: *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership*.

In general, it seems that “[t]o better understand movement success and failure, including results in court, scholars must look beyond a single venue and instead relate activity in one venue to the broader, dynamic political context” (NeJaime 2013, p. 900).

Social movements are new forms of resistance and counter-behaviors that with no intermediation embody a political and *legal* attendance. Especially, the phenomena of extractivism spreading worldwide are leading to the politicization and “normativization” of people whose life is threatened. In the current turn of neoliberal capitalism, (different forms of) extractivisms are crucial (Machado Araújo 2014, Zibechi 2016, Mezzadra and Neilson 2017). We are facing not only the commodification of labor and money, according to Karl Polanyi (1944), but also that of land, or more widely of nature (Burawoy 2017). Extractivist operations and the criminalization processes systematically involved in them require a more careful look into these phenomena, if only for the reason that they tend to transform – in the absence of intermediate bodies (trade unions or political parties for example) – local communities into subjects who mobilize and through direct experience become politicized, something that constitutes a brand new socio-political experience in comparison with the “historical movements”.

Newly formed ecological movements can learn from those who preceded them in the last thirty years, but can also follow innovative paths, such as suing the state or companies polluting the planet. The decisive factor is to join in strong campaigns with

¹¹ The concept is used by Friedman (1975).

experts, engineers, and lawyers. The combination of these experiences has generated excellent outcomes, such as climate lawsuits. Structured organizations seem to be, at least in the Italian case, less inclined to “get their hands dirty” with lawsuits that may fail and to engage with modalities of informal activism.

These new movements must learn how to use the law before their opponents use it; in the No TAV and No TAP cases the (ab)use of (criminal and administrative) law against the activists was extremely considerable. At the same time, those “old-style” environmental movements and the “young” and “brand new” ecological movements do not think at all like “historical” movements. They generally do not have a pessimistic and negative view of the law. They do not see the law as a pure and simple form of power in the hands of the powerful. On the contrary, they believe – in the author’s view, correctly – that law as such is like Harlequin, servant (at least) of two masters. We, the people, are one of the two masters.

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