

# Climate and environmental approaches in the United States and Canada at the outbreak of the 2020 pandemic

**Pasquale Viola\***

### ABSTRACT

The essay deals with the issues triggered by environmental policies and Covid-19 pandemic in the United States and Canada. The analysis starts with an outline of the environmental law systems and the main responses to the pandemic, then emphasizing the focal legal concerns about the emergency measures and environmental policies. The last section draws critical conclusions that show some current patterns and the way forward in the entanglement environmental law/pandemic.

### KEYWORDS

Covid-19 Pandemic – Climate Change – Environmental Law in the United States and Canada – Comparative Public Law

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\* Post-Doctoral Researcher, Charles University (Prague, Czech Republic).

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## Introduction<sup>1</sup>

Environmental and Climate issues are currently sharing the arena of scholarly debate with a more unexpected-but not less dangerous-subject: the Covid-19 pandemic. The United States and Canada represent a huge section of pollutant states, and their political and legal choices produce an echo on a global scale. The key-role of these two countries questions the feasibility of a more adamant effort to adopt pervasive and effective legal instruments despite contingencies. However, states of emergency-in legal, as well as in a less technical understanding-lead to a shift towards executives, usually most prone and used to adopting pragmatic and quick legal responses according to their agenda. From these assumptions, two main questions arise: are the United States and Canada implementing the same legal and political strategy in facing the ongoing threat originating from climate and environmental issues? Has something changed in the shadow of the global pandemic? Despite truisms and the narrative of lack of environmental concern in the United States, Canada as well seems to be accustomed to light efforts in climate and environmental actions. With the aim of explaining the previous assumptions, this essay is divided into two parts. As first, it provides an outline of the US and Canadian environmental systems and the main responses to Covid-19 (§ 1 and § 2). In the second part (§ 3), the analysis focuses on the significant topics that emerge from the pandemic emergency inside the climate/environmental framework, such as specific measures, possible scenarios on greenhouse gasses

<sup>1</sup> The article has been submitted on May 2020.

emissions (hereinafter GHGs), effects on principles of constitutional and international law, the rise of a peculiar activism.

## 1. An outline of environmental federalism in the United States and Canada

The field of environmental law in the United States is based on a complex system in which many actors try to find a balance among the constitutional allotment of powers, individual rights and national/international demands. The federal system of government fosters uncertainties on four main grounds: 1) the federal legislative power, where the Congress plays a key role in the approval of statutes and appropriations; 2) the executive and its implementation of laws; 3) the regulatory framework under the delegation to administrative Agencies; 4) the states' legislative and executive.

The legal basis for the distribution of powers between the federal and the state level resides in the commerce clause under the US Constitution, which regulates inter-state trade. According to this scheme, the Congress left more “environmental space” for state legislation, giving the opportunity to adopt regulations exceeding the federal standard.<sup>2</sup> However, in spite of the initial wide use of the commerce clause by the Congress, the Supreme Court gave a narrow definition of this power,<sup>3</sup> opening debates on which subject is entitled to adopt legislative measures in environmental matters. If at first glance the allotment of environmental powers seems to be fairly distributed between federal and states legislatures, several Constitutional provisions, Acts and Statutes extend congressional powers (such as the property clause, the National Environmental Policy Act (NEPA, 1969), the Clean Air Act (CAA, 1970), the Clean Water Act (CWA, 1972) or the Resource Conservation and Recovery Act (RCRA, 1976).

Along with the federal legislative power, Agencies actions represent the most important ground of the US environmental legal system, due to the role that the Environmental Protection Agency (hereinafter EPA) plays in addressing health, air and water issues. EPA's powers are manifold, and span from supervisory to advisory ones, to the adoption of rules and the adjudication of disputes. From the 1970 establishment on a presidential proposal,<sup>4</sup> the Agency is currently in ‘its fourth era, which is more complex and difficult, both scien-

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<sup>2</sup> J. Salzman, ‘United States of America’, in E. Lees, J.E. Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (OUP 2019).

<sup>3</sup> *United States v Lopez*, 514 US 549 (1995).

<sup>4</sup> X. Liu, ‘The U.S. Environmental Protection Agency. A Historical Perspective on Its Role in Environmental Protection’ (Inaugural-Dissertation zur Erlangung des Doktorgrades der Philosophie, Ludwig-Maximilians-Universität München 2010).

tifically and legally, than any of the earlier three eras'.<sup>5</sup> Presently, EPA is the main implementing agency for several federal laws related to the CAA, the CWA, the RCRA, as well as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 1980) as amended by the Emergency Planning and Community Right-to-Know Act (1986). Despite the unquestionable importance of EPA in the US environmental legal system, other Agencies regulate different relevant areas, e.g. the Department of Agriculture in forest management. Independence and functional approach are the main features of specialized administrative bodies, however, as J. Salzman points out, the tensions between the federal legislative and executive in trying to influence Agencies affect their independence.<sup>6</sup>

The Canadian environmental legal system is facing a double-side context: on the one hand, federal environmental jurisdiction encompasses a wide range of powers; while on the other, allotment of legislative power is going towards a functional devolution to provinces and local bodies, also trying to decolonise the "green approach".<sup>7</sup> Despite some areas of exclusive federal jurisdiction (i.e. fisheries, criminal jurisdiction related to environmental matters), the division of powers may be outlined with respect to each single object, rather than on the constitutional or legislative division of powers. For instance, environmental impact assessments on chemicals or pesticides can be made on the ground of federal or provincial jurisdictions, with an overlap of standards and methodology. In cases of conflicts, federal law prevails, but the legal issue must fall under those cases where it is impossible to comply with both.<sup>8</sup> In other cases, such as marine pollution and ozone depletion, provincial jurisdictions adopted and enforced more effective legislations, although federal legal intervention seems to be the most suitable for these topics.<sup>9</sup>

Along with the federal and the provincial levels of government, despite the lack of a recognized constitutional status, municipalities play a crucial role in facing environmental issues within their jurisdiction (e.g. climate change adaptation, land use planning). Of course, they act within the legal framework traced by other levels of government. One of the most pervasive challenges for the Canadian legal system is actually the reshaping process after the acknowledgment of indigenous traditions' legitimacy worth to set a dialogue and

<sup>5</sup> P. Bohannon, 'U.S. Environmental Protection Agency Policy: from the Beginning to the Millennium' [2000] 19 *Environmental Toxicology and Chemistry* 781. Cf L. Anzenberger, 'The Environmental Protection Agency's Regulatory Practices: The Impact of a Holistic Approach' [1985] 4 *Environmental Progress* 155: 'Quality leadership, technically valid statistics and regulations, and research activities have been problematic areas which have plagued the agency for some time now.'

<sup>6</sup> Salzman (n. 2) 387. Cf P.R. Verkuil, 'The purposes and limits of independent agencies' [1988] *Duke Law Journal* 257; P.M. Corrigan, R.L. Revesz, 'The genesis of independent Agencies' [2017] 92 *New York University Law Review* 3.

<sup>7</sup> S. Wood, 'Canada', in Lees, Viñuales (n. 2).

<sup>8</sup> *Ibid.* *Bank of Montreal v Hall* 1 SCR 121 (1990); *Multiple Access Ltd v McCitcheon* 2 SCR 161 (1982).

<sup>9</sup> See J. Benidickson, *Environmental Law* (Irwin Law 2013).

a relationship nation-to-nation.<sup>10</sup> As pointed out by S. Wood, this reconciliation process intensely affects the environmental legal field, especially in determining ‘settler and indigenous governments’ environmental powers; [...] identifying indigenous law-makers and laws; managing conflicts between indigenous and settler laws’.<sup>11</sup>

## 2. Main responses to the Covid-19 pandemic<sup>12</sup>

The Covid-19 emergency broke out in the United States at the beginning of 2020. In January, the President established the White House Coronavirus Task Force, in order to coordinate at the federal level the monitoring, prevention, containment and mitigation of the pandemic. On May 13, the executive declared the national emergency, while the legislative passed the Coronavirus Aid, Relief, and Economic Security Act. According to the constitutional framework, Governors and local mayors may declare the state of emergency within their own jurisdictions. Due to these autonomous powers, the response to Covid-19 has been jeopardized by the different approaches of state and local governments. Currently, all of the fifty states, as well as the federal district and some of the US Minor Outlying Islands have declared the state of emergency in a time-range that goes from January 29 (American Samoa) to March 15 (Maine). The measures undertaken by the states differ on the ground of the virus impact on the population, shifting from stay-at-home-orders and quarantine at the entry into the state, until the light measures adopted in Nebraska, where there is no stay-at-home-order, a limited quarantine, and no restriction to non-essential retail was implemented.

About the Canadian response to the pandemic, since January 15 the federal government activated the Emergency Operations Centre, and enacted measures invoking the Quarantine Act of 2005. Furthermore, considering the possibility to face the pandemic without forcing constitutional guarantees at the federal level of government, there had been no enactment of the Emergency Act of 1985. In a different way, Provinces and Territories followed the World Health Organization declaration of pandemic, adopting measures of

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<sup>10</sup> Truth and Reconciliation Commission of Canada, *Calls to Action* (TRC 2015); Truth and Reconciliation Commission of Canada, *What We Have Learned* (TRC 2015); Truth and Reconciliation Commission of Canada, *The Survivors Speak* (TRC 2015); Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (TRC 2015). Cf E. Bozhkov *et al.*, ‘Are the natural sciences ready for truth, healing, and reconciliation with Indigenous peoples in Canada? Exploring ‘settler readiness’ at a world-class freshwater research station’ [2000] *Journal of Environmental Studies and Sciences*; J. Ball, P. Janyst, ‘Enacting research ethics in partnerships with indigenous communities in Canada: “do it in a good way”’ [2008] 3 *Journal of Empirical Research on Human Research Ethics* 33; F. Berkes, ‘Indigenous ways of knowing and the study of environmental change’ [2009] 39 *Journal of the Royal Society New Zealand* 151; K. Watene, E. Palmer (eds), *Reconciliation, Transitional and Indigenous Justice*, Routledge, 2020.

<sup>11</sup> Wood (n. 7) 111.

<sup>12</sup> Considering the up-to-date and evolving situation, this paragraph is mainly based on Official Reports or information provided by the Governments, as well as on the most affordable news published by the main media.

health and/or state emergency, in a time frame from March 12 (Quebec) to March 22 (Nova Scotia). The actions are the ones adopted in other cases, similar to the US measures, but without issuing stay-at-home-orders.

The US and Canadian responses to Covid-19 emergency seem to be quite similar, with the federal executives and legislatives more focused on the financial and commercial aspects, while the state and provincial responses are more effective and impact the individual behaviours and needs. In both cases the first decision was the isolation of the country from outside, trying to reduce the spread of the contagion, leaving state and local levels wide margins of manoeuvre. At a first glance, the absence of a federal declaration of emergency in Canada could be interpreted as a different response to the pandemic, leading to a weak coordination among the levels of government; however, considering the legal nature and the frequent routine of national emergencies in the United States,<sup>13</sup> these data cannot determine a different approach.

### 3. Focal issues among climate, environmental and pandemic concerns

While ensuring aid and health protection as the main contemporary target, the efforts of the executives and the legislatives in the United States and Canada at the all levels of government seem to be more focused on individual health and economic demands, rather than on the development of appropriate measures with more long-term and wide views (especially with respect to a healthy environment). This short-term necessity also has repercussions on the interconnectedness between environmental law systems and Covid-19 measures, affecting the pre-emergency standard of environmental protection in a more or less blatant way. These approaches determine an extensively critical assessment on the recent developments in environmental legislation.

#### 3.1. The specific environmental laws and regulations during the Covid-19 emergency and their impact on present and future climate/environmental legislation

The study conducted by the Environmental and Energy Law Program (Harvard Law School) shows several US “rollbacks” originated or finalised during the Trump administration and the Covid-19 emergency, adopting a ‘one-two punch’ approach: ‘First a delay rule to buy some time, and then a final substantive rule’.<sup>14</sup> This trend affects a wide range of topics, i.e.

<sup>13</sup> Until today, 68 national emergencies have been declared since 1917 (T.W. Wilson, Emergency in Water Transportation of the United States); 34 of them are still pending. Cf Congressional Research Service, National Emergency Powers, Updated March 23, 2020, CRC, Washington, 2020.

<sup>14</sup> N. Popovich, L. Albeck-Ripka, K. Pierre-Louis, ‘95 Environmental Rules Being Rolled Back Under Trump’ *New York Times* (New York 21 December 2019). The metaphor of the one-two punch and the further explanation have been proposed

natural resources (especially offshore activities related to oil and gasses), air, water, flora, fauna, etc. Although this approach is more a continuum with the pre-Covid-19 policy than a shift towards novel kinds of political agendas, recent developments suggest a subtle use of the globally-declared pandemic and health emergency to foster significant downgrades in the field of environmental law.

An evidence on the path undertaken during the Covid-19 emergency is the memorandum addressed by EPA (on March 26) to all governmental and private sector partners on the enforcement and compliance assurance program. Through this provision, EPA announced a temporary (time-undefined) discretion compliance policy on the ground of the current national emergency. In other words, this plan allows for a deficiency in enforcing environmental obligations. More specifically, through the memorandum the Agency justifies a non-complying strategy on the basis of a concern regarding the facility operations, the availability of staff and contractors, as well as on delays of laboratories in analysing samples and providing results. Furthermore, the Agency acknowledges effects which 'constrain the ability of regulated entities to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification'.<sup>15</sup> The aforementioned concerns imply the difficulties in fulfilling federal environmental permits, regulations and statutes. However, the EPA is trying to guarantee 'the ability of an operation to meet enforceable limitations on air emissions and water discharges, requirements for the management of hazardous waste, or requirements to ensure and provide safe drinking water'.<sup>16</sup> This discretionary power does not apply to criminal violations and to policies adopted according to the CERCLA Act and the RCRA Act. In introducing such measures, EPA highlights that 'the general statements contained in this policy may not address every potential civil violation that may arise as a result of Covid-19. As such, EPA may provide additional enforcement guidance applicable to specific programs on an ongoing basis and EPA's self-disclosure'.<sup>17</sup>

Canadian efforts in mitigating and adapting to the pandemic show a similar climate/environmental trend, although environmental policies suffered a lack of coordination and implementation among jurisdictions, as the recent international outcomes have shown as well.<sup>18</sup> The Canadian regulatory system is mainly based on self-reporting data, determining a two-fold attitude in international and domestic trends addressing climate and environmental issues. As far this double attitude is concerned, the international agenda shows the

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by C. McCoy.

<sup>15</sup> United States Environmental Protection Agency, Memorandum 'COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program' (Washington 26 March 2020).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> B. Meyer, *The International Law on Climate change* (CUP 2018).

political will to tackle climate and environmental issues in the phase of negotiation, while the internal implementation of such will lacks in terms of effectiveness. On these aspect, I may recall the Canadian decision to leave the Kyoto Protocol mechanisms to avoid a finding of non-compliance<sup>19</sup> or the uncertain political agenda, as J. Welsh Brown, P.S. Chasek and D.L. Downie emphasize: ‘Canada shifted from a swing state in the climate negotiations under the liberal government of Paul Martin to a veto state under the conservative government of Stephen Harper to a likely swing state, but also a potential lead state, under Prime Minister Justin Trudeau’.<sup>20</sup>

At first glance, a general and strong downgrading of environmental legislation and regulation is not documented. However, federal measures of environmental restraint have been adopted, while other strategies to tackle the emergency, similar to those adopted by the EPA in the United States, have been introduced at the provincial level, notably in Alberta, Saskatchewan and Quebec.

Regarding the federal jurisdiction, the most pervasive emergency measure impacting environmental standards is the Fisheries Management Order of May 15 (revoking the previous order of April 2), which allows to carry out fishing activities without at-sea observers. The order provides some exceptions, such as for companies that developed safe working procedures related to Covid-19 and ‘in case at-sea observer companies are satisfied that safe working procedures consistent with their own procedures are in place on vessels on which the observers they employ are to be deployed, and keep a record of these procedures for presentation to a fishery officer upon request’.<sup>21</sup>

About the provincial jurisdictions, similar measures have been issued by the Fisheries and Oceans Canada-Quebec Region, through the Fisheries Management Order of April 3 (which prevails over any regulations made under the Fisheries Act and any Order related to), which equally authorizes fishing activities without at-sea observers on board fishing vessels<sup>22</sup>.

In a different way, also Alberta permitted environmental downgrades during the pandemic; for instance, the Ministry of Environment and Parks postponed the date of reporting on renewable fuels standards. Other measures regard the Environmental Protection and Enhancement Act, the Water Act and the Public Lands Act, providing for a temporary suspension of information reporting requirements (except in the case of drinking water facilities).<sup>23</sup>

<sup>19</sup> Meyer (n 17).

<sup>20</sup> J. Welsh Brown, P.S. Chasek, D.L. Downie, *Global environmental politics* (Routledge 2018) 52. For further information on the Canadian legal developments in environmental and climate matters see <http://www.ICLG.com> accessed 24 May 2020.

<sup>21</sup> Ministry of Fisheries, Oceans and the Canadian Coast Guard, ‘Order related to Section 9.1 of the Fisheries Act’ (15 May 2020).

<sup>22</sup> Fisheries and Oceans Canada – Quebec, ‘Notice to Fish Harvesters – Fisheries management order’ (3 April 2020).

<sup>23</sup> <https://inter-l01-uat.dfo-mpo.gc.ca/infoceans/> accessed 24 May 2020.



The Saskatchewan province issued a Temporary Enforced Policy During the pandemic, stating that subjects must comply with environmental obligations, but if compliance is not reasonably practicable because of Covid-19 issues, ‘proponents shall report the non-compliance to the ministry’, [...] ‘act responsibly to minimize the effects and duration of any non-compliance caused by Covid-19 related issues’, ‘identify and document the specific nature and dates of the non-compliance’, and ‘identify and document how Covid-19 was the cause of the non-compliance, and actions taken in the response, including efforts to comply as soon as possible’.<sup>24</sup> These provisions of reporting emergency measures, however, do not apply to Waste Stewardship Regulations, Mining and Industrial Operations, Landfill Operations, Potable Water Facilities Regulated by the Ministry of Environment, Hazardous Waste Storage Facilities, Other Activities, Fish, Wildlife and Lands Branch, Climate Change Branch. In these matters, the non-compliance report to the Ministry is optional.<sup>25</sup>

### 3.2. Impact of the measures on GHG emissions and some remarks on constitutional and international principles

A recent study conducted by a team of experts on altered patterns of energy demand around the world, combining energy, activity and policy data during the Covid-19 emergency and the 2019 statistics, demonstrates a decreasing of CO<sub>2</sub> emissions on a global scale.<sup>26</sup> Currently, the most affected sectors are aviation, transport, industry and the public. As the United States Energy Information Administration (EIA) pointed out, there should be a decrease in emissions of –7.5% in 2020,<sup>27</sup> while there is no forecast related to the impact of the pandemic measure on GHG emissions in Canada from official sources. The most up-to-date Canadian data repository on GHGs is Canada’s official national greenhouse gas inventory, prepared and submitted annually to the United Nations Framework Convention on Climate Change (UNFCCC).

In the light of the current emergency measures, climate change issues, and international concerns/pressures, the US and Canadian approach to international venues is a symptom—or the effect—of their own involvement and strategic policy system, as per the recent withdrawal of the United States from the Paris Agreement and the aforementioned Canadian “two-fold attitude”. If we adopt a wider perspective, a strict bond may be identified

<sup>24</sup> Saskatchewan Ministry of Environment, ‘Temporary Enforcement Policy during the Covid-19 Pandemic’, available at <https://www.saskatchewan.ca/> accessed 24 May 2020.

<sup>25</sup> Ibid: ‘This policy addresses violations related to: The Environmental Management and Protection Act, 2010 and Regulations; The Environmental Assessment Act; The Waste Stewardship Regulations; The Wildlife Act and Regulations; The Provincial Lands Act and Crown Resource Land Regulations; The Conservation Easement Act; The Management and Reduction of Greenhouse Gases Act and Regulations; and The Saskatchewan Environmental Code. <https://www.saskatchewan.ca/> accessed 24 May 2020.

<sup>26</sup> C. Le Quéré *et al.*, ‘Temporary reduction in daily global CO<sub>2</sub> emissions during the Covid-19 forced confinement’ [2020] *Nat. Clim. Chang.* 1.

<sup>27</sup> US Energy Information Administration, ‘Short-Term Energy Outlook (STEO)’ (May 2020).

between the international policy agenda and the federal management of such issues, more focused on leaving margins to agencies or sub-federal levels of government.

In spite of future uncertainties on the impact of Covid-19 on GHG emissions, currently there is a convincing connexion between air pollution and a higher death rate due to the novel coronavirus, as some studies revealed in the cases of China and Italy.<sup>28</sup> Regarding the United States, a nationwide cross-sectorial study is proposing that an increase of only 1  $\mu\text{g}/\text{m}^3$  in PM<sub>2.5</sub> is associated with an 8% increase in the Covid-19 death rate.<sup>29</sup> Despite the scientific results and some uncertainties, the aforementioned studies are influencing future legal measures, especially in the shift from a hypothetical application of the precautionary principle to the commitment for preventive action.

At this stage, a proper assessment on GHGs impact would lack of sufficient and long-term scientific bases. However, considering the emergency measures adopted and the time-limited positive outcomes of the worldwide lockdowns,<sup>30</sup> common sense suggests that an uncontrolled and almost-limitless pollutant activity will have an impact on future environmental and pandemic patterns, but to what extent is far from being detected.<sup>31</sup>

On the contrary, a tentative assessment can be made regarding constitutional and international principles, as demonstrated by environmental and climate challenges arising from measures adopted in both countries during Covid-19 emergency. In this scenario, the long-lasting question regarding the uncertain balance between restrictions and individual rights opens new grounds of investigation. According to the individual perspective, the rollbacks may favour property rights, but this interpretation collides with the fundamental right to life and, to some extent, the right to a healthy environment. This issue shows the need to find the proper ratio between economic activities and the protection of the environment, as well as solutions to the problems related to workplace's safety operating with a lack of personnel (e.g. oil and natural gas industry, the management of hazardous waste). Furthermore, Covid-19's measures are stressing the factual implementation of environ-

<sup>28</sup> Y. Zhu *et al.*, 'Association between short-term exposure to air pollution and Covid-19 infection: Evidence from China' [2020] *Science of the Total Environment* 727; Y. Han *et al.*, 'Outdoor Air Pollutant Concentration and Covid-19 Infection in Wuhan, China', 26 May 2020 (preprint). Similar studies have been already conducted also regarding the SARS: Y. Cui *et al.*, 'Air pollution and case fatality of SARS in the People's Republic of China: an ecologic study' [2003] 2 *Environmental Health* 15. About the Italian case: E. Conticini, B. Frediani, D. Caro, 'Can atmospheric pollution be considered a co-factor in extremely high level of SARS-CoV-2 lethality in Northern Italy?' [2020] *Environmental Pollution* 261.

<sup>29</sup> X. Wu *et al.*, 'Exposure to air pollution and Covid-19 mortality in the United States: A nationwide cross-sectional study', 24 April 2020 (preprint).

<sup>30</sup> See F. Dutheil, J.S. Baker, V. Navel, 'Covid-19 as a factor influencing air pollution?' [2020] *Environmental pollution* 263.

<sup>31</sup> As L.-A. Duvic-Paoli points out, the Covid-19 emergency is questioning the deep connections among humans, animals and the environment, stressing the international law regime. However, she finds hope and opportunities in the current emergency: 'The Covid-19 pandemic is a striking image of the Anthropocene era: human impacts on Earth have been so profound that they have constituted a new geological epoch. We have destabilised the fragile equilibrium of our planet's ecosystems and are now facing the direct consequences. The pandemic is nevertheless a chance to remedy this and build new foundations.' L.-A. Duvic-Paoli, 'Covid-19 Symposium: The Covid-19 Pandemic and the Limits of International Environmental Law' [2020] *Opinio Juris* 30 March, <http://opiniojuris.org/> accessed 30 May 2020.

mental principles. For instance, the precautionary principle and the preventive action are fundamentally set aside from policies of “non-compliance to environmental standards”, although these choices seem to be addressed to economic targets, more than human health concerns; moreover, an uncontrolled pollutant activity can voluntarily dismiss the duty to avoid transboundary environmental damages.

### 3.3. Digital Activism: how many steps forward, how many backwards?

Digital activism embraces various aspects and techniques to address climate and environmental issues. In a wide approach, they may be summarised in i) legal provisions for participation and information; and ii) civil society movements. Despite a top-down (from the legal field to the civil society) or bottom-up (from the civil society to the legal system) approach, the current pandemic is actually reshaping the ways to address global concerns. As per the concept of Environmental Democracy, ‘land and natural resource decisions adequately and equitably address citizens’ interests,’ furthermore, ‘rather than setting a standard for what determines a good outcome, environmental democracy sets a standard for how decisions should be made’.<sup>32</sup> Thus, the main feature of digital activism resides in its aptitude to “force” legal systems according to the demand of climate/environmental justice, establishing the momentum for effective legal actions.<sup>33</sup> In line with the main role of activism (both real and digital), in the last decades, movements have influenced different conceptions of distributive justice, implementing the ethical debate revolving around different responsibilities and capabilities, as well as accountability of past and present pollutants.<sup>34</sup>

Not only as a result of Friday for Future movement, in the United States climate and environmental activism is rising, as demonstrated by a wide set of strikes and protests in the past two years, especially among young people<sup>35</sup> and NGOs. Efforts have been made in many directions, such as the implementation of independent sources based on affordable data, as it is the case for Climatesexus.<sup>36</sup> Also Canadian forms of activism are increasing, even in official venues, as confirmed by the efforts of the Canadian Government in officially addressing these forms of participation related to action, climate future, partnerships, adaptation, health, science, and emissions reporting.<sup>37</sup> This form of activism deals

<sup>32</sup> Center for International Environmental Law, <https://www.ciel.org>. accessed 24 May 2020.

<sup>33</sup> Concerning environmental and climate movements as driving forces in the ethical and political debate: T. Jafry (ed.), *Routledge Handbook of Climate Justice* (Routledge 2019); D. Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford 2007); E.A. Page, *Climate change, justice and future generations* (Edward Elgar Publishing 2006).

<sup>34</sup> C. McKinnon, *Climate Change and Future Justice: Precaution, Compensation and Triage* (Routledge 2012); J.C. Heyward, D. Roser, *Climate justice in a non-ideal world* (OUP 2016); T.M. Thorp, *Climate Justice: A Voice for the Future* (Palgrave Macmillan 2014); J. Ebbesson, P. Okowa, *Environmental Law and Justice in Context* (CUP 2009).

<sup>35</sup> J. Ramadan, ‘The Rise of U.S. Youth Climate Activism’ *Harvard Political Review* (Cambridge 4 October 2019).

<sup>36</sup> <https://climatesexus.org> accessed 24 May 2020.

<sup>37</sup> <https://www.canada.ca/> accessed 24 May 2020.

with other practices of civil participation, as exemplified by the Climate Action Network Canada-Réseau Action Climat Canada (CAN-RAC Canada), that is a coalition of more than 100 Canadian organizations,<sup>38</sup> or the Climate Atlas of Canada, which ‘combines climate science, mapping and storytelling to bring the global issue of climate change closer to home for Canadians. It is designed to inspire local, regional, and national action that will let us move from risk to resilience.’<sup>39</sup>

The current pandemic did not stop climate and environmental activism,<sup>40</sup> as well as movement, in gaining a significant role in four main areas: i) participation of the citizens in the decision-making processes; ii) access to information related to the environment; iii) surge trends in facilitating and encouraging public awareness; iv) renewal of doctrinal debates on judicial and administrative proceedings, including redress and remedy. Despite uncertainties and the fact that the top-down and the economic-oriented approaches seem to better suit the economic needs, a wide range of civil activism is still growing. The forced shift from “real” to digital definitely altered shapes and ways of protest and participation, making strikes easier to join, but less persuasive in terms of substantial and tangible impact. This change is producing new forms of activism, altering ways of participation that may be improved or distorted in the light of forthcoming developments. However, in spite of the ongoing proliferation of talks, conferences and online-strikes, we are still far from a truthful assessment of success, failure, or decline on these new approaches.

## Conclusion

Climate and environmental law are dealing with Covid-19 emergency through patterns of adaptation, rather than mitigation<sup>41</sup>. US environmental policy, in spite of not being an example of best-practice even in the past, under the current presidency is increasingly considering environmental legislation a tight tie for economic needs. The common idea that identifies Canada as an uncontaminated country is far from reality, and the pragmatic political agenda which reflects on international negotiations demonstrates how the United States and Canada are sharing, in different manners, the same attitude towards the environment and climate change. From this assumption, and regarding the focal points previously introduced, the pandemic highlighted some critical—and still evolving—topics:

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<sup>38</sup> <https://climateactionnetwork.ca/> accessed 24 May 2020.

<sup>39</sup> <https://climateatlas.ca/> accessed 24 May 2020.

<sup>40</sup> Conference organized by the School of Advanced International Studies, Johns Hopkins University, JHU SAIS: Covid-19, Climate Change and Environmental Advocacy, 27 April 2019.

<sup>41</sup> A statistical study about Covid-19 mitigation measures in the United States reveals that compliance is personal and context related, and ‘perceptual deterrence was not associated with compliance, people actually comply less when they fear the authorities’. Cf B. van Rooij *et al.*, ‘Compliance with Covid-19 Mitigation Measures in the United States’ [2020] Amsterdam Law School Research Paper 21.

i) in situation of emergency, the legislative power is usually set aside in comparison to the executive; this trend points out that the lack of political will can be a bigger obstacle than the legislation;<sup>42</sup> ii) as a result of the previous assumption, the existence of a regulatory framework is not a guarantee of climate and environmental success; iii) climate and environmental policies are disposable if compared to other needs (individual, rather than communal; economic, rather than health); iv) the emergency legislation is going towards a lower protection within norms and policies for the environment, as well as towards less effective measures for adaptation and mitigation to climate change; v) civil society is somehow managing the lack of means for movement restrictions, with the aim of strengthening its action.

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<sup>42</sup> The current pandemic extends the thesis proposed by Wood (n. 7) 110: 'A lack of political will can be a bigger obstacle to environmental leadership than constitutional limits are'.