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**FROM THE CONSTITUTIONALISATION OF THE  
PRINCIPLES OF ENVIRONMENTAL  
SUSTAINABILITY TO THE SETTING UP OF  
“INSTITUTIONS FOR THE FUTURE”: A FIRST  
APPRAISAL**

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# ABSTRACT

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*As far as environmental sustainability is concerned, there is an increasingly widespread feeling that future generations' interests have been neglected as governments and other political actors fail to take them into account when it comes to public decision-making. If so, we must consider ways of redesigning political institutions in order to safeguard these needs. The aim of this article is the following: to offer a first appraisal of a range of institutional reforms to make policies more future oriented in the field of environmental sustainability. Indeed, in order to make sense of it, the principle of environmental sustainability cannot just be respected, but it also must be actively protected.*

*There are three methods to enforce the principle of environmental sustainability. The "a priori method", which entails the constitutionalisation of principle. The "a posteriori method", complementary to the first one, through the enforcement by Courts of Justice, placed at different levels of government, and aiming to make the principle justiciable. Finally, the third approach, luminary in the field of environmental protection, is proactive at some sub constitutional levels and encompasses the creation of independent future-oriented institutions.*

**Keywords:***principles of environmental sustainability, constitutional protection, US Supreme Court, Court of Justice of the European Union, International Court of Justice, institutions for the future*

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# 1. INTRODUCTION

The concept of sustainability does not have a unique definition. The term sustainability derives from the Latin word “*sustinere*”, that means “maintaining” or “enduring”. In the environmental field, sustainability is associated to the quality of causing little or no damage to the ecosystem and therefore the ability of *maintaining* it for a long time<sup>1</sup>. During the years, this notion expanded its hard nucleus, moving from a mere philosophical conception of environmental stewardship, to assume the consistency and dimension of a legal category<sup>2</sup>. Although a large consensus on the significance of the issue has emerged in the last decade, its protection and development still remain nearly insufficient. In this regard, countless are the challenges that our legal and political systems must face, but the will of reshaping legislations with a future-oriented approach will help to better address all of them. In fact, toward the end of the twentieth century it became clear that today’s generation have an unprecedented ability to alter the environment to the loss of future generations<sup>3</sup>. With such consideration in mind, numerous theorists have argued that future generations rights should be taken into account when legislating<sup>4</sup>. There are a number of possible objections regarding the recognition of legal subjectivity for future generations: such as, the enforceability in the present of the legal claims imputable to them, or the non-identity of these subjects today, or again the defense of free will<sup>5</sup>. However, if intergenerational justice is not fulfilled, it means that our generation is putting its well-being first, without considering that of our children and, thus, falling into an unforgivable moral error. Actually, the imperative is to respect human beings *as such*, beyond our life spans. In this case, the legal and moral levels are strictly intertwined. Notwithstanding, if the idea of sustainability’s choices in function of future generations’ care can be configured as a juridical priority, the ethical inquiry results to be prodromal to the legal aspects<sup>6</sup>.

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<sup>1</sup> Since the 1980s the term “sustainability” has been used more in the sense of human sustainability on planet Earth and this has resulted in the most widely quoted definition of sustainability as a part of the concept sustainable development, that of the Brundtland Commission of the United Nations on March 20, 1987: “sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. Today, sustainable development is considered one of the guiding principles of sustainability. However, in this analysis the two concepts will be treated distinctly, as I will focus only on the environmental part of sustainability.

<sup>2</sup> Some scholars also sustain that the principle has assumed an even customary value. In this regard: Capaldo, G. Z. (2010). *Diritto globale: il nuovo diritto internazionale*. Giuffr  Editore

<sup>3</sup> Gillespie, A. (2014). *International environmental law, policy, and ethics*. OUP Oxford.

<sup>4</sup> *Ibidem*.

<sup>5</sup> Bartolucci, L. (2017). *La sostenibilit  del debito pubblico come principio costituzionale nelle procedure finanziarie euro-nazionali*. p.73.

<sup>6</sup> On the issues of intergenerational responsibility and sustainable development see: Bifulco, R., & D'Aloia, A. (2008). *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilit  intergenerazionale*. Jovene Editore.

So far, there is an increasingly widespread feeling that future generations' interests have been neglected as governments and other political actors fail to consider them when it comes to public decision-making. If so, we must consider ways of redesigning political institutions in order to safeguard these needs.

The aim of this article is the following: to advance and to assess the variety of institutional reforms to make policy-making more “long-termist” and “environmental sustainability”- oriented. I decided to focus on the environmental aspect of sustainability and therefore on the institutional reforms needed in this area because, despite the fact that this phenomenon is becoming increasingly popular, we are still completely stuck in climate change. For this reason, not writing about it would mean blindfolding our eyes in front of one of the biggest trials of our times. In order to achieve sustainable protection, the principle of environmental sustainability cannot only be implemented, but it must also be protected.

I identified three methods to safeguard the principle of sustainability. Consequently, I associated the “*a priori* method” with the constitutional protection of the principle. Whereas, I defined the “*a posteriori* method” as the protection operated by the Courts of Justice, complementary to the first one. Finally, I acknowledged some sub-constitutional proactive approaches, luminaries in the field of environmental protection, specifically independent institution future oriented.

The paper is divided in three sections. The first aims to show if a greater environmental protection may be carried out through the costituzionalization of an independent set of environmental rights. In order to do so, I will try to show whether the right to live in a healthy or adequate environment can be considered as a human right and, thus, worth of constitutional protection.

The second paragraph will analyze the work conducted by some Courts of justice – ICJ, ECJ and SCOTUS – in the *a posteriori* defense of principle violation and will underline all the problems they are experiencing so far. Just then, it will be explained how an awareness on their part could lead to positive effects on this issue.

Finally, the third section will be completely dedicated to the so-called “proactive sub-constitutional approaches”. Although only mentioned, one of the methods that I consider fundamental in this field will be presented. The final purpose will be to emphasize the importance of innovative thinking and research in order to redesign our present institutional system.

## **2. A PRIORI PROTECTION – THE COSTITUTIONAL ENTRANCHMENT OF ENVIRONMENTAL SUSTAINABILITY.**

Constitutions and time have a complex relationship. By their nature modern constitutions aspire to last indefinitely, or at least as long as possible. Constitutions are, in fact, the expression of a pact that has the objective of resisting changes in political majorities. Precisely, through the passage of time, they tend to be strengthened, since constitution power lies in its ability to adapt to epochs and to avoid an early "aging"<sup>7</sup>.

Recently, a long-standing trend is catching on which is the possibility to constitutionalize environmental rights. Of course, the mere recognition of this principles in the constitution does not automatically guarantee a total state sustainability. In fact, sustainability and environmental rights are two distinct concepts. However, results that it is extremely important to analyse this approach because, thanks to the constitutional entrenchment, the principle can be acknowledged and protected even before a clear threat to its violation occurs. This is why I called this approach “*a priori*”, as it aims to prevent an infringement of the right to happen. Though, before its defence, it must be understood why environmental protection should be considered sufficiently important to warrant the provision of guarantees for it at the highest level, by means of constitutions.

According to a recent study of T. Groppi carried out on 193 States’ constitutions, 54 of them use the noun “sustainability” or, more frequently, the adjective “sustainable” in their constitution<sup>8</sup>. The totality of these references is found in constitutions adopted, or modified, in the last decades and specifically after the 1987 World Commission on Environment and Development Report “Our Common Future”<sup>9</sup>. Contemporary rigid constitutions, by their nature, look to future much more than other legal acts. Therefore, they appear particularly suitable to ensure that present generations do not ignore, in their choices, intergenerational rights. In fact, through their rigidity (and the supremacy that, in terms of the sources of law it follows), modern constitutions aim not only to last over time, but to give voice to voiceless minorities which result less relevant when it comes to

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<sup>7</sup> Bartolucci, L. (2017). *La sostenibilità del debito pubblico come principio costituzionale nelle procedure finanziarie euro-nazionali*.

<sup>8</sup>Groppi, T. (2016). Sostenibilità e Costituzioni: lo Stato costituzionale alla prova del futuro. *Diritto Pubblico Comparato ed Europeo*.

The research conducted on the texts of the constitutions deriving from official sources (government sites, parliament or constitutional court), or alternatively, from the website [www.constituteproject.org](http://www.constituteproject.org), which contains texts in English. The words searched were “durabilty” in French, “sustainable” and “sostenibile” in Spanish, “sustainable” and “durable” in English. The update is September 20, 2015 (the most recent constitution considered is that of Nepal, approved on that date). For countries that do not have a single documental constitution (Israel, New Zealand, United Kingdom), research has been carried out on all the laws that are usually considered to constitute the written constitution of these countries.

<sup>9</sup>Bruntland Commission. (1987). Our common future. World Commission on Environment and. Full text available online at: <http://www.un-documents.net/our-common-future.pdf>.

political decisions. Then, it is not absurd to think that they could contain provisions able to address environmental protection issues. In the vast majority of the abovementioned cases, references are placed on the grounds of environment or natural resources safeguard (49 constitutions), while only in 5 constitutions the use of the noun “sustainable” concerns other themes, like for example public debt sustainability.

In the light of this development, it seems that a new view has emerged. If environmental sustainability means maintaining the factors and practices that contribute to the quality of environment on a long-term basis, it follows that the right of living in an adequate and healthy environment must be safeguarded. Thus, “environmental rights” – and precisely the right to live in an adequate environment – should receive constitutional protection.

The theorization of “constitutional environmental rights” is a relatively recent phenomenon<sup>10</sup>. Its main claim is that ecological values can be assimilated to human interests and it would be fair to incorporate them under the theory concerning the “basic institution of society”<sup>11</sup>. It is a matter of fact that environmental problems require cooperation among parties to overcome political differences. However, history shows us, that a large compromise is difficult to achieve on a voluntary basis; or even if achieved, the agreement is often inefficient. In such cases, mandatory and binding requirements would be necessary. Indeed, they will assure the environmental rights’ supremacy over diverging political interests. However, this supremacy would mean that environmental rights would become *non-negotiable*. It is evident that a right defined as non-negotiable and, therefore absolute, may easily be assimilated to *human rights*<sup>12</sup>. If we assume that environmental rights and, more precisely, the right to live in an adequate environment<sup>13</sup> is a human right, it follows that it should be constitutionalized. According to Hayward, the logic for this reasoning is the subsequent:

- all human rights must to be constitutionalized;
- the right to an adequate environment is a human right;
- hence this right should be constitutionalized<sup>14</sup>.

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<sup>10</sup> See generally, Daly, E., & May, J. (2014). Constitutional Environmental Rights.

<sup>11</sup> The theory of constitutional environmental right was firstly theorized by Tim Hayward.

See Generally, Hayward, T. (2005). *Constitutional environmental rights*. Oxford University Press.,

Hayward, T. (2000). Constitutional environmental rights: a case for political analysis. *Political studies*, 48(3), pp. 558-572.

Hayward, T. (2001). Constitutional environmental rights and liberal democracy. In *Sustaining Liberal Democracy*, pp. 117-134. Palgrave Macmillan, London.

Hayward, T. (2005). Greening the constitutional state: environmental rights in the European Union. *The State and the Global Ecological Crisis*, pp. 139-158.

<sup>12</sup> Hayward, T. (2005). *Constitutional environmental rights*. Oxford University Press, p. 119.

<sup>13</sup> In this analysis I will use the terms “adequate” and “safe” environment as interchangeable.

<sup>14</sup> Ibidem p. 63



This view is grounded on two important assumptions: namely that the right to adequate environment is a human right (*hypothesis a*) and, second, that (democratic) states should constitutionalize all human rights (*hypothesis b*). This logic presupposes a universal consensus precisely on these two hypotheses.

For the purpose of this analysis first, it is necessary to understand if the right to an adequate environment can be considered a human right and, just then, if it deserves to be constitutionalized. Nevertheless, in order to do this, we should before agree on a certain shared conception of human rights.

Although the contemporary international doctrine of human rights has many antecedents, both philosophical and political, it is principally a legacy of Second World War<sup>15</sup>. In fact, in the preamble of the Charter of United Nations, it is affirmed the “faith in fundamental human rights” and Article 1 encourages the respect for “human rights and for fundamental freedom for all”<sup>16</sup>. Moreover, during one of the last major international conference on human rights conducted in Vienna, these issues were considered at length. The final act of the conference declined to set priorities among categories, holding that “all human rights are universal, indivisible and interdependent and interrelated”<sup>17</sup>. Although it is recognized that “the significance of national and regional particularities [...] must be borne in mind,” it declared that “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”<sup>18</sup>. However, still today the discourse on human rights is not universally recognized and there is no consensus of what these rights defend and why they deserve a special protection.

In order to solve this issue, it can be sustained that a human right is a right that a person holds “simply in virtue of being human”<sup>19</sup>. This affirmation means that human rights have a *per se* value, deriving from moral norms and then not depending on conventions or agreements. Hence their existence, does not depend on the recognition by a legal order, but derives its force from morality<sup>20</sup>.

But what does it mean to hold a moral status?

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<sup>15</sup>Beitz, C. R. (2001). *Human rights as a common concern*. American Political Science Review, 95(2), pp. 269-282.

<sup>16</sup> United Nation. (1948). *Charter of the United Nations*.

Available online at:

<http://www.un.org/en/charter-united-nations/>

<sup>17</sup> United Nation, (1993). Word conference on Human rights. , in Beitz, C. R. *ocp. Cit.* 2001

<sup>18</sup> Ibidem.

<sup>19</sup> See generally Hohfeld, W. N. (1920). *Fundamental legal conceptions as applied in judicial reasoning: and other legal essays*. Yale University Press.

<sup>20</sup> In this respect it would be important to take into consideration the theory of natural rights, for example with U. Grozio. to know more see generally: Tuck, R. (1981). *Natural rights theories: their origin and development*. Cambridge University Press.

Leaving aside general theories that question what can be considered moral or not<sup>21</sup>, for the purpose of synthesis, I will refer here to human moral rights as those rights that protect interests of “paramount moral importance”<sup>22</sup>. Then, given the fact that threatening the environment can *undermine vital human interests*, the right to a safe or, at least, adequate environment can be associated to human rights in this moral conception<sup>23</sup>. On the other side, many are the critics that can be addressed to this. Probably, the one most relevant in Habermas’ words is that “the concept of human rights it is not of moral origin, but [...] by nature juridical”<sup>24</sup>. Obviously, not conferring a value *per se* to rights, it results that environmental rights should derive their legitimacy from others legal sources.

By contrast, some legal theorists suggest that there is the possibility of “mobilizing existing human rights, so that in campaigning for effective implementation of existing international instruments, environmental protection will follow automatically”<sup>25</sup>. This means that some political, social and economic rights can be revisited in order to *include* in them also the environmental protection. For example, right to health, right to good work conditions and to decent living conditions can bear directly upon environmental conditions. Similarly, right to life can be interpreted also including the right to live in a healthy environment because a polluted environment is a serious threat to life. Following this path, it seems that the right to an adequate environment is assimilated as a *substantive* right<sup>26</sup>. However, the idea of a human right to “an adequate environment”, understood as a substantive right, raises other complications. For example, it is generally difficult to find legally useful definitions of “adequate environment”, or the related phrases that are encountered in contemporary constitutions. There are also various associated problems regarding its application and adjudication. Another challenge could be to reach a sufficiently strong and lasting consensus regarding their inviolability in relation to competing claims. So, while some substantive rights could be gradually implemented – along with health, housing and education rights

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<sup>21</sup> to know more f.e. see generally Lakoff, G., & Johnson, M. (1999). *Philosophy in the Flesh* (Vol. 4). New York: Basic Books. Scanlon, T. M. (2011). What Is Morality?. *The Harvard Sampler: Liberal Education for the Twenty-First Century*, p.243. Folger, R., Cropanzano, R., & Goldman, B. (2005). *What is the relationship between justice and morality*. Handbook of organizational justice, 215, 215-245. Warnock, G. (1993). *The object of morality*. Cambridge Quarterly of Healthcare Ethics, 2(3), pp. 255-258.

<sup>22</sup> Hayward, T. *op.cit.* (2005), p.47.

<sup>23</sup> Ibidem.

<sup>24</sup> in Pogge, T. W. (2008). *World poverty and human rights*. Polity, p. 223, n.72.

<sup>25</sup> Ibidem.

To know more see generally: Boyle, A. E., & Anderson, M. R. (1996). *Human rights approaches to environmental protection*. Clarendon Press. Ksentini, F. Z. (1994). *Human Rights and the Environment*. United Nations, Economic and Social Council.

<sup>26</sup> A Substantive right is a basic right of man, as life, liberty, etc., which exists independently from all man-made laws; to know more see generally Alexander, L. (1998). Are Procedural Rights Derivative Substantive Rights?. *Law and Philosophy*.

– it is realistic to expect that greater prospects of success depend on the link between substantive claims and procedural claims<sup>27</sup>.

Whatever may be the meaning attributed to environmental rights once included into the scope of human rights, indifferently conceived as moral environmental right, or as implemented in existing human rights, or as a link between substantial and procedural rights, hypothesis a)– environmental rights can be considered human rights – can be justified. It remains to be addressed question b), that is if *all* human rights should be constitutionalized. One of the first arguments in favour of this theory is given by Pogge. In his view, in order to recognize a human right, it is always required its juridification<sup>28</sup>. According to him if right X is to be understood as a human right, this implies its constitutional recognition and a legal protection. This approach is also supported by Habermas, who states that “[human rights] belong, through their structure, to a scheme of positive and coercive law which supports justiciable individual right claim. Hence, it belongs to the meaning of human right that they demand for themselves the status of constitutional rights”<sup>29</sup>. Another general explanation is that the normative nature of human rights includes a mechanism of implementation which is empirically enforceable. This enforcement mechanism results appropriate by considering human rights among the highest imperative that states consider fundamental in their constitution. Since human rights are prerequisites to enjoy other rights, the best way to secure them is through enforcement and, therefore, by incorporation into the constitution. An objection to this approach is that whether this can result appropriate, it is not strictly necessary. According to Waldron, the significance of human rights is too general and its implication can be absorbed in some more specific rights addressing the particular problem<sup>30</sup>. What it is argued is that a human right normative claim does not automatically call for a constitutional provision. For example, if:

- X has a moral right to Y

It does not entail that

- X morally ought to have a moral right to Y

But only that

- The law should be such that X get to Y<sup>31</sup>.

But does this demand that

- X ought to have a constitutional right to Y?

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<sup>27</sup> Hayward, T. (2001). Constitutional environmental rights and liberal democracy. In *Sustaining Liberal Democracy* Palgrave Macmillan, London, pp. 117-134.

<sup>28</sup>Pogge, T. (2002). World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms Cambridge. *Polity*, 65.

<sup>29</sup> Ibidem. Cfr. p. 223 n. 72.

<sup>30</sup> See generally Waldron, J. (1993). *Liberal Rights: collected papers 1981-1991*. Cambridge University Press.

<sup>31</sup> In Hayward, T. (2000). Constitutional environmental rights: a case for political analysis. *Political studies*, p. 68.

There is no particular need for an express constitutionalization of a Y moral right, because it can easily be provided by any other policy statement. Constitutional rights are usually generic movements. Many times, therefore, a targeted law may be needed, more specific to achieve a certain end. Hence, in this view, their constitutionalization may not be required many times.

However, I strongly believe that there is a big difference between a constitutional provision and a statement of public policy. While the former, limits the governmental intrusion in the private sphere, the latter encourage its action. Furthermore, constitutionalizing human rights implies a commitment to enforce them. Thus, enjoying human rights of greater importance than others, it is my opinion that the state meddling must be limited to its protection, without incurring the risk of falling into wrong political prescriptions guided by particular interests or majorities.

The reasoning up to this point has been turned to justify hypotheses *a)* and *b)*. Once done, initial syllogism can be confirmed, the result of which is that environmental human rights could be constitutionalized.

## 2.1 Pros and Cons

Constitutionalizing environmental rights means that they should entrenched tree major conditions. First of all, rights should be included in a legal document that have normative superiority over ordinary laws. So then, when conflicting with other concurring norms, environmental rights should prevail. Secondly, they can be amended only with a particular process, different from that used to pass ordinary legislation and/or with supermajorities. And finally, their violation can be challenged before independent Courts – in particular, where established, before Constitutional Courts –<sup>32</sup>. Possible benefits resulting from it are easy to identify. Primarily, it can basically solve the major problem of *short-termism*. By curb time inconsistency, electoral cycles may not just bring to short term policies and may also induce policy to deviate prior policy commitment<sup>33</sup>. Additionally, problems at *enforcement* and *adaptation* level can be addressed. As far as the enforcement is concerned, increasing executional costs faced by policy makers, can be reduced short-sighted, extending the time horizon. Three are the major methods according to which politics can be more resilient to change in time: transforming these provisions into a piece of superior law with the precedence of legislation on ordinary statutes; making their amendment more stringent than ordinary legislation; and giving Courts the opportunity to review inconsistent statutes<sup>34</sup>. However, for this to be possible, it would be necessary for rights in question to have the capability to create rights which are non-negligible and juridically enforceable<sup>35</sup>.

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<sup>32</sup>González-Ricoy, I. (2016). Constitutionalizing Intergenerational Provisions. *Institutions For Future Generations*, p. 172.

<sup>33</sup> Ibidem, p. 174.

<sup>34</sup> Ibidem.

<sup>35</sup> Ibidem.

On the other hand, the constitutional implementation of environmental and intergenerational rights could have important effects on citizens. In fact, by reducing the uncertainty on the outcome of long-term policy results, citizens' willingness to support forward-looking policies could exponentially increase. Secondly, this can shape their beliefs and influence their behaviour and values, coordinating them around the new intergenerational ideals<sup>36</sup>. In fact, constitutional entitlements can lead citizens to change their convictions on the issue prescribed by the entrenched provisions. The inclusion of environmental and intergenerational rights in the constitution can provide people with more precise information on the risks and intergenerational benefits associated with policy alternatives in this regard. Since the Charter contains state principles', it can shape the values of citizens, assuming a pedagogical worth of fundamental importance. Hence, new constitutional rights can influence citizens' *perception* of the significance of adopting appropriate intergenerational policies.

Obviously, many are the counterarguments to this approach<sup>37</sup>. The first problem that comes to mind is epistemic. As stated above, environmental constitutional provisions will have an extended time horizon. Still, our knowledge of the future is uncertain and limited. As far forward in the future we go, the more uncertain our knowledge is about both the way the world will present itself, and the uncertainty about which policies will have to be appropriate to produce desirable effects in the future. The problem is therefore twofold. If, on the one hand, environmental constitutional rights could end up producing long-term results that are sub-optimal, or detrimental to future generations, on the other hand, given their rigidity, they may not be able to adapt to unpredictable situations and changes in our knowledge with promptness and flexibility. Another difficulty concerns *sovereignty*. Reinforcing rights against change, the will of a generation is imposed on the will of each successive generation<sup>38</sup>. This difficulty, though, is related to the epistemic one. As mentioned above, it is likely that the interests of future generations will change, and future people will probably no longer see their interests reflected by the entrenched provisions as a result. Yet it is different because, even if the interests should not change, the ability of future generations to live according to constitutional rules of their choice would be, in any case, compromised.

Some solutions to these complications have been theorized. First of all, Courts, both at national and international level, could play a big role thanks to their interpretative function. In point of fact, they could help to adjust the understanding of a norm when necessary. Norms abstraction would make it easier for Courts to adapt their understanding of constitutional provisions to changes in our scientific knowledge and to better reflect on the evolving interests of future generations<sup>39</sup>. As a result, epistemic and generational

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<sup>36</sup> It can be taken as an example, the Bavarian Constitution, which under art. 131(2), expressly lists among its various educational goals the "sense of responsibility for nature and the environment".

<sup>37</sup> See generally: Brandl, E., & Bungert, H. (1992). Constitutional entrenchment of environmental protection: a comparative analysis of experiences abroad. *Harv. Envtl. L. Rev.*, 16, 1; Hayward, T. (2005). *Constitutional environmental rights*. Oxford University Press; Ekeli, K. S. (2007). Green constitutionalism: the constitutional protection of future generations. *Ratio Juris*, 20(3), 378-40; González-Ricoy, I. (2016). *Constitutionalizing Intergenerational Provisions*. Institutions For Future Generations, 170.

<sup>38</sup> see Gosseries, A. (2014). Nations, generations and climate justice. *Global Policy*. And González-Ricoy, I. (2013). An Account of the Democratic Status of Constitutional Rights. *Res Publica.*, pp. 241-256.

<sup>39</sup>Waluchow, W. J. (2007). A Common Law Theory of Judicial Review. *Am. J. Juris.*, 52, p.297.

sovereignty problems could become less daunting. Some could argue that, to deal with this problem, the content of the theorized constitutional norms could be limited to issues on which uncertainty is only slight. This would make rights more general, but perhaps no less relevant. A proposal to this effect was put forward by Ekeli, who contends that PGIs should be limited to protecting the critical natural resources necessary to meet the basic physiological needs of future individuals<sup>40</sup>. Hence, a constitutional provision should be vague in order to address future uncertainty. However, this can also have unexpected outcomes. For example, generality and vagueness can obstruct implementation. In fact, a constitutional right can be directly justifiable, only when its definitive declaration is clear and the imperative force equivalent to the statutory or customary right which is capable of conferring punishable rights. Actually, a frequently cited problem is that it is notoriously difficult to obtain clear and unequivocal interpretations of phrases such as “decent” or “adequate” environments. However, this cannot be a misleading objection. First of all because it is not a specific problem of environmental rights, but it is generalized for all rights. Furthermore, the general nature of a provision does not necessarily have to result in non-compliance with the precision requirement, since a provision can be unequivocal even if expressed in general terms<sup>41</sup> and, therefore, sufficiently precise to be invoked. In this case, the role of Court in interpreting norm can be once again decisive.

Certainly, constitutionalizing environmental rights is not in itself a panacea for all ecological and social challenges. Furthermore, environmental rights may be relevant even if they are related to alternative environmental strategies. Principles such as the “polluter pays” principle, “precautionary principle”, “environmental impact assessment” and “sustainable development”, indeed raise rights themselves. The functioning of the precautionary principle and the environmental impact assessment (EIA), for example, are mainly based on procedural rights to know and influence the proposed eco-friendly developments and where the precautionary principle is accepted as a decision-making rule, such as in Europe, can be the basis of rights claims. However, a general recognition by *all* states could be necessary. If not as fundamental rights, at least of their absolute moral importance.

### **3. A *POSTERIORI* PROTECTION – THE ROLE OF COURTS.**

The second safeguard method toward environmental sustainability is what I call the “*a posteriori*” protection. Courts, national and international, could represent, in fact, a great tool in many regards. However, before reaching this point, I want to analyze the positions that some Courts have taken up to date. When we talk about environment, the biggest contrast is in fact between economic and environmental interests. Therefore, it is essential to see, in this context, the way

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<sup>40</sup> See generally: Ekeli, K. S. (2007). Green constitutionalism: the constitutional protection of future generations. *Ratio Juris*.

<sup>41</sup> Holder, J. (1996). A Dead End for Direct Effect?: Prospects for Enforcement of European Community Environmental Law by Individuals. *Journal of Environmental Law*, 8(2), pp. 313-335.

Courts have played with those rights and competing interests. I would here review some fundamental judgments of the European Court of Justice and the US Supreme Court in matters of environmental protection as representative of the most advanced economies and democracies in the world – and so those who theoretically can tackle better with this problem<sup>42</sup>. Both in the United States and in the EU, environmental protection is a matter of concurrent competence between the federal level and the Member States, but in fact it has been one of the areas of maximum expansion of respectively federal and supranational competences. Moreover, I will also consider the International Court of Justice in order to have a global perspective of the defence of the principle.

It is however of paramount importance to acknowledge the very different nature of these Courts, in order to comprehend that the narration is based on different levels of jurisdiction and a diversified array of powers<sup>43</sup>. One of the first dissimilarities is given by the fact that US judicial apparatus is internally ordered by and observes the principle of *stare decisis*<sup>44</sup>. In common law systems indeed the Supreme Court defines precedents that are binding for the lower Courts<sup>45</sup>. Each ruling delivered by the US Supreme Court, then creates law. By contrast, the ECJ and ICJ does not have this power, at least formally. Their only power in theory should be to issue a ruling that will be binding for the state, on a particular matter. However, although they set the interpretation of a right in their own legal system, they should not create the right<sup>46</sup>. Though this is only a formal dissimilarity, the major difference occurs in their *legal* nature. In point of fact, while one US Supreme Court is a state one, the ECJ is supranational – but with respect to a minor group of states – and the other one international – and so its power should be binding for all states –.

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<sup>42</sup> This statement takes for granted that democracies are the most suitable system to protect the principle of sustainability. However, it is important to note that there is absolutely no consensus on this statement among scholars. On this debate see generally: Achterberg, W. (2002). Can liberal democracy survive the environmental crisis? Sustainability, liberal neutrality and overlapping consensus. In *The politics of nature*. Routledge; Anderson, T. L., & Leal, D. R. (1993). *Free market environmentalism. Nature's Web: Rethinking Our Place on Earth.*; Barry, J., & Wissenburg, M. L. (Eds.). (2001). *Sustaining liberal democracy: ecological challenges and opportunities*. Basingstoke: Palgrave

<sup>43</sup> On the comparison of these Courts see: Rösler, H. (2006). *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* By Mitchel De SOL'É Lasser, *International & Comparative Law Quarterly*.

<sup>44</sup> *Stare decisis* is a general principle of common law systems, under which the judge is obliged to comply with the decision taken in a previous sentence, in the event that the case brought to its examination is identical to that already dealt with in the case it decided. To know more see generally: Douglas, W. O. (1949). *Stare decisis*. *Columbia Law Review*, 49(6), pp.735-758; Monaghan, H. P. (1988). *Stare decisis and constitutional adjudication*. *Columbia Law Review*, 88(4), pp.723-773.

<sup>45</sup> Rosenfeld, M., & Sajó, A. (Eds.). (2012). *The Oxford handbook of comparative constitutional law*. Oxford University Press.

<sup>46</sup> See Ugo, V. (2013). *Istituzioni di Diritto dell'Unione europea* (Vol. 1). Cacucci Editore Sas, pp. 309-393; and Ronzitti, N. (2016). *Introduzione al diritto internazionale*. G Giappichelli Editore. pp. 269-298.

### 3.1 The European Court of Justice

Today, the ECJ has no rivals as the most effective supranational judicial body in history, not far away from the standing of the most powerful constitutional Courts<sup>47</sup>. In the environmental field, it can be affirmed that numerous progresses have been made in order to protect the principle of sustainability in the EU and by this Court. As a matter of fact, the ECJ in the case *Commission v. Denmark*, has affirmed the importance of safeguarding the principle, applying the environmental protection as “*mandatory requirement*” of Community law<sup>48</sup>.

Going with order, we must contextualize these developments. In point of fact, until 1987, when the Single European Act entered into force, the EC did not have an explicit authority based on the treaties to adopt environmental protection measures<sup>49</sup>. In 1971, the Commission suggested that this competence should be implemented through what is now art. 352 TFEU (former art. 308 TEC), which implied powers to the Community to achieve treaties’ objectives<sup>50</sup>. In the following years, the EC has produced the first legislation on the subject, basing it on art. 308 and art. 94 (CE). The Single Act, has established new and strengthened existing environmental standards and principles and has provided the legal basis for the adoption of specific measures in the field. In 1993, The Maastricht Treaty then placed environmental protection on par with other EC priorities. Art. 2 (EC) then read: “The Community shall have as its task [...] to promote a harmonious, balanced, and sustainable development of economic activities, sustainable and non-inflationary growth, a high degree of convergence of economic performance, a high level of employment and of social protection, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States”<sup>51</sup>. Furthermore, the Single Act introduced many other measures, such as the principle of “subsidiarity” on environmental matters and the “precautionary principle”; it also imposed that, where possible, the EC should legislate on the presumption that “the polluter pays” and that “environmental damage must be corrected at source”. However, this list of objectives is not

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<sup>47</sup>Sweet, A. S., & Brunell, T. L. (2004). *The judicial construction of Europe*. Oxford University Press, p. 1

<sup>48</sup> Case 302/86, *Commission v. Denmark*, 1988 E.C.R. 4607, 4630. Ar. 7 “In the present case the Danish Government contends that the mandatory collection system for containers of beer and soft drinks applied in Denmark is justified by a mandatory requirement related to the protection of the environment”;

Available online at:

<http://curia.europa.eu/juris/showPdf.jsf?docid=95033&doclang=EN>

<sup>49</sup>Sweet, A. S., & Brunell, T. L. (2004). *The judicial construction of Europe*. Oxford University Press, p. 202.

<sup>50</sup> Art. 308 (ex-Art. 235): If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

<sup>51</sup>European Union. (1992) Treaty on European Union (Consolidated Version), Treaty of Maastricht. Official Journal of the European Communities C 325/5; 24 December 2002, available at: <https://www.refworld.org/docid/3ae6b39218.html>



self-executing, nor hierarchically organized. Hence, the principle by itself does not tell legislators, regulators or Courts what form of precautionary measures should be adopted. The presumptions that polluters should pay and environmental damage should be treated at the source are often difficult to apply in any coherent way. Therefore, European Court intervention is very often necessary.

The role of the Court, in the specific case of the EU, has been essential because the Court of Justice resembles, in authority and function, national “constitutional” or “supreme” Courts, while maintaining its own peculiar “supranational” characteristics<sup>52</sup>. One of the first cases of environmental protection dates back to 1983, with the *Inter-Huiles* case<sup>53</sup>. The question went back to a 1975 Council directive, where it had been stated that MS were required to “take the necessary measures to ensure the safe collection and disposal of waste oils, preferably by recycling”<sup>54</sup>. Then, the directive authorized MS to divide their territory into zones of waste recovery and to certify those companies that would provide services for each zone. However, some MS had introduced an authorizations’ system which granted exclusive rights to designated companies. Companies excluded from the system and those prosecuted for violating them tried to defend their interests in the Court. Since waste oils constituted a tradable “good” and were therefore subject to the free movement of goods, they claimed that their rights under Community law had been undermined by these new disposal directives. This claim was made by the French government on environmental grounds. Yet the Court rejected it, stating that the French decree was *disproportionate* to the purpose of the Directive 75/439 and to the provision concerning the free movement of goods. This ruling is important because it is the first one that elaborates on the principle of proportionality. Just some weeks after the *Inter-Huiles* case, a different French Court raised a similar issue. In the *ADBHU* case<sup>55</sup>, the French public prosecutor tried to abolish an association (ADBHU), whose purpose was to defend the commercial interests of those who manufactured and used stoves that burned waste oils. The Association responded by attacking the French and EU rules as invalid under the Treaty – free movement of goods, freedom to provide services and antitrust rules –. In the hearings, Italy, the Council of Ministers, and the Commission, invited the Court to uphold the validity of the directive. It was argued that the directive would not restrict intra-Community trade any more than would be necessary to achieve the “general interest” and, thus, the principle of proportionality was respected. The Court ruled that “the objectives of general interest pursued by the Community provided that the

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<sup>52</sup>Sweet, A. S., & Brunell, T. L., *op.cit.* 204, p. 228.

<sup>53</sup> ECJ, (1983), C-172/82M, *Fabricants raffineurs d'huile de graissage v Inter-Huiles*.

<sup>54</sup> Council Directive 75/439.

<sup>55</sup> ADBHU (ECJ 240/83, 1985);

available online at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0240>

rights in question are not substantially impaired. There is no reason to conclude that the Directive has exceeded those limits. The Directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives". For the first time in the EU, the Court considered traders rights in light of the Community's interest in protecting environment. This is seen as a landmark decision because the Court identified environmental protection as an "essential objective"<sup>56</sup>. Although there are numerous other examples of the Court's will to protect the environment, the main problem remains: reconcile economic and ecological interests.

During the years the ECJ aimed to join liberalism and economic profit, on the one hand, and environmental sustainability, on the other, trying to balance the two principles<sup>57</sup>. Despite being a promoter of environmental sustainability, this balance has never been fixed once and for all, and the economic interests of the internal market often re-gain momentum<sup>58</sup>.

### 3.2 The US Supreme Court

Let us now analyse the case law of the Supreme Court of the United States (SCOTUS). The comparison obviously takes place on a different stage being the Supreme Court the final instance Court in cases concerning interpretation of the federal Constitution and involving original and appellate jurisdiction<sup>59</sup>. Moreover, in the US constitution of 1787 no mention is made about sustainability and, for this reason, the principle can only be inferred by means of interpretation<sup>60</sup>.

Some of the most important cases concerning environmental protection have generated harsh debates and "[the Court] has either stayed on the side-lines or participated ineffectually in the making of environmental law"<sup>61</sup>. Proceeding with order, the period going from 1964 to 1980 was for America the Golden Era of environmental policymaking. In these years, the work of Supreme Court was also quite prominent in environmental fields<sup>62</sup>. In fact, Chief Justice Rehnquist, who

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<sup>56</sup>Demiray, D. A. (1994). Movement of Goods in a Green Market, *The. Legal Issues of Eur. Integration*, 21, p.73.

<sup>57</sup> See f.e. the important case of *Leybucht Dykes* (Commission v. Germany, ECJ C-57/89, 1991), available online at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989CJ0057>

<sup>58</sup> In this regard, shifting away from the jurisdiction of ECJ, but remaining within the margins of the EU, the ILVA case in Italy is emblematic. This case is important because confirms how governments are not inclined to protect the environment when dealing with economic talks. To have more information on that, see: Diletta, P. (2017). *Il difficile bilanciamento tra diritto alla salute e libertà economiche: i casi ILVA e TEXACO-CHEVRON*. COSTITUZIONALISMO. IT, (2/2017); Costa, G. (2013). *Some reflections on the city of Taranto referendum on ILVA*. Studi economici;

<sup>59</sup>Bundzen, A. (2011). *The United States Supreme Court and the European Court of Justice: A Comparative Study of Compliance*, p.4-9.

<sup>60</sup>In point of fact, the American bill of rights dates back 1689, very far from the conception of the environmental sustainability problematic.

<sup>61</sup> See Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 421 (1989).

<sup>62</sup>Percival, R. V. (1993). *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*. 23 *Environmental Law Reporter* 10606.

joined the Court in exactly 1971, participated in 213 of the 243 environmental cases<sup>63</sup>. During this time span, 19 Nineteen Justices worked for the Court<sup>64</sup>. In this context, Justice White is considered the main columnist for the Court by a large margin<sup>65</sup>. He wrote thirty-six environmental opinions, but these have often been considered as cynical, dispassionate, arid and formalistic, with minimal effort to elaborate a particular philosophical vision<sup>66</sup>. Moreover, White did not express any preoccupation on the possible impact of scientific uncertainty on the environment, nor did his views show efforts to discern and consider how future generations' interests in environment protection can merit consideration regarding law evolution<sup>67</sup>.

Going over the years, a research carried out by James May has demonstrated how during the mandate of Chief Justice John G. Roberts from 2003 to 2005, the Court has assumed a behaviour of hostility or most likely unawareness about sustainability as a governing principle<sup>68</sup> despite having considered several cases on environmental protection. One of the cases that in my opinion deserves attention is the *Entergy Corp. v. Riverkeeper Inc.* case<sup>69</sup>. In particular, it concerns a set of regulations adopted by the Environmental Protection Agency (EPA) under section 316(b) of the Clean Water Act<sup>70</sup>. The issue was whether, as the Court of the Second Circuit held, the EPA was allowed to use cost-benefit analysis in determining the content of regulations promulgated under §1326(b). The parties involved in the case were: Entergy, which is an energy company engaged in electric power production and playing the role of petitioner, and the respondent Riverkeeper, which was a member-supported environmental protection organization dedicated to defending Hudson River.

Entergy operated in large power plants. In the course of energy generation, plants produce large amounts of heat. In order to cool their facilities, the signatories use “cooling water intake structures”<sup>71</sup>. However, this process represents various threats to the environment. As a result, the

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<sup>63</sup>Lazarus, R. J. (1999). Restoring What's Environmental About Environmental Law in the Supreme Court. *UCIA L REV.*, 47, 703.

<sup>64</sup> The justice in question are: Harlan, Black, Douglas, Stewart, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, and there have been two Chief Justices, Burger and Rehnquist.

<sup>65</sup>Lazarus, R. J *op. cit.* 1999.

<sup>66</sup> Ibidem.

<sup>67</sup> Ibidem.

<sup>68</sup>May, J. R. (2009). Not at all: Environmental sustainability in the supreme court. *Sustainable Dev. L. & Pol'y*, 10, 20.

<sup>69</sup> *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009); available online at: <https://supreme.justia.com/cases/federal/us/556/208/>.

<sup>70</sup>Act, C. W. (1977). 33USC1251. *Public Law.*, “CWA Section 316(b), 33 U.S.C. § 1326(b), imposes a technology standard for cooling water intake structures (CWISs) at facilities with pollutant discharges subject to NPDES permitting, where the CWIS will withdraw cooling water from the waters of the United States. CWA Section 316(b) requires “that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact” (BTA)”.

<sup>71</sup> Legal Information Institute, Cornell University Law School, *ENTERGY CORP. v. RIVERKEEPER, INC.* (Nos. 07-588, 07-589 and 07-597) 475 F. 3d 83, reversed and remanded;

facilities are subject to regulation under the Clean Water Act, 33 U. S. C. §1251 and following, which imposes: “Any standard [...] of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”<sup>72</sup>. This rule then allows, but does not necessarily require, a Cost Benefit Analysis (CBA) before setting National performance standards with the Best Technology Available (BTA). To be clear, the use of CBA *is invariably at odds with sustainability* as it is skewed in favour of industrial producing interests over those providing access to sustainable fisheries for future generations<sup>73</sup>. In fact, it is difficult to measure costs in this field, because, clearly, we do not know what value to give to the environmental good. Perhaps, in quantitative terms, one can understand how much fish are worth, but fish affect the ecosystem in which we live and therefore influence human life, which is not quantifiable in terms of the economy. Entergy has challenged a decision of the Court of Appeals of the second circuit, in 2007 (in *Riverkeeper / EPA 2007*) according to which the CBA cannot be used in the interpretation of the Clean Water Statute to determine NPS (National Policy Standard) and BAT (Best Technology Available) for power plants existing. Instead, *Riverkeeper* supported the Second Circuit decision that EPA's decision to provide site-specific cost-benefit variances and the use of CBA to determine NPS and BAT for existing facilities does not fall under the statute and postpone the regulations to the clarification agency. Later, in 2011 the case was referred to the Supreme Court. The question was whether “ §1326(b) authorizes the [EPA] to compare costs with benefits in determining the best technology available for minimizing adverse environmental impact at cooling water intake structures”<sup>74</sup>. The Court finally concluded that the EPA can permissibly rely on CBA in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations.

This ruling is of major importance because it demonstrates the orientation of the Supreme Court, which once again favours the economy over total environmental safety. The regulatory flexibility subsequent from the ruling could also result in significant environmental damage, as the facilities are not required to implement a BTA, which is probably the most protective of the nation's waterways<sup>75</sup>.

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available online at: <https://www.law.cornell.edu/supct/html/07-588.ZO.html>

<sup>72</sup>Act, C. W. (1977). 33USC1251. *Public Law art.* §1326(b).

<sup>73</sup>May, J. R. (2009). Not at all: Environmental sustainability in the supreme court. *Sustainable Dev. L. & Pol'y*, 10, 20.

<sup>74</sup>Vinuales, J. E. (2008). The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment. *Fordham Int'l LJ*, 32, 232.

<sup>75</sup>Cannon, J. (2010). The Sounds of Silence: Cost-Benefit Canons in *Entergy Corp. v. Riverkeeper, Inc.* *Harv. Envtl. L. Rev.*, 34, p. 425.

Positions of uncertainty regarding environment and sustainability have been verified also in many other judges, such as Chief Justice Rehnquist, Justice Brennan or Justices O'Connor and Marshall. *Entergy* case joins a list of recent Supreme Court judgements that seem to be aimed at rebalancing the perceived excesses of the strict legislation of the '60-80s. The five major environmental decisions from 2008 to 2009, including *Entergy*, have resulted in adverse environmental effects pronouncements. Four out of five judgments of the executive branch preserved that precluded environmental protection<sup>76</sup>. All of the judges have been hesitant in their decisions<sup>77</sup>. However, none of the environmental cases decided thus far during the tenure of Chief Robert engaged sustainability; in fact, the word "sustainability" *per se* does not occur in any majority, dissenting or concurring opinion<sup>78</sup>.

From this analysis it appears evident that also judges considered more sympathetic to the cause have always played on two levels, never taking sides completely in favour of total environmental protection. Obviously, environmental issues are not a priority for the American Supreme Court. At least until now.

### 3.3 The International Court of Justice

In order to draw a complete picture of the situation, it is important to briefly see how environmental sustainability is protected at global level and therefore by the International Court of Justice.

Jorge Viñuales has divided the jurisprudence body into two major "waves". I will then use his classification to assess environmental protection by the ICJ.

In the first wave, which starts in 1941, the principle of environmental sustainability was still not considered as such. This period is marked by two contentious cases, namely the *Corfu Channel* case (U.K. v. Alb.)<sup>79</sup> and the *Nuclear Tests* case<sup>80</sup>, as well as an important obiter dictum made in the *Barcelona Traction, Light and Power Company, Limited* case (Belg. v. Spain)<sup>81</sup>. Initially, the basis of environmental protection was only focused on cross-border injury consequences', contrary to the idea, later affirmed, that the environment is an international common good that all states must

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<sup>76</sup> Ibidem.

<sup>77</sup> May May, J. R. (2009). Not at all: Environmental sustainability in the supreme court. *Sustainable Dev. L. & Pol'y*, 10, 20.

<sup>78</sup> Ibidem.

<sup>79</sup> See generally *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

<sup>80</sup> See generally *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests* (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20);

<sup>81</sup> See *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

preserve<sup>82</sup>. In fact, in the first case, environmental damage is not taken into consideration itself, but only its *economic* injury.

Moving forward, during the *Trail Smelter* case, the tribunal was called upon to decide whether Canada was responsible for the damage inflicted to crops and land in the State of Washington by sulphur dioxide emissions from a Canadian zinc foundry and lead minerals, based in Canada<sup>83</sup>. In its decision of March 1941, the Court upheld that Canada was responsible for the damages and should pay some reparations to the US. Some fifteen years later, a similar case arose over a cross-border dispute between France and Spain concerning the use of the waters of Lake Lanoux; in this case too an arbitral tribunal re-approved the restricted conception of environmental protection<sup>84</sup>. The sentence postulated was that: “The Spanish government has also sought to establish the contents of contemporary positive international law [...] principles that it seeks to demonstrate are, assuming it succeeds, without relevance for the issue under review. Thus, assuming there is a principle prohibiting the upstream State from altering the waters of a river in such a way as to seriously harm the downstream State, in any event such principle would not apply in the present case, to the extent that it has been admitted by the Tribunal [...] that the French project does not alter the waters of the river Carol. In fact, States are nowadays perfectly aware of contradictory interests’ importance involved in the industrial use of international watercourses and of the need to reconcile them through mutual concessions. The only way to achieve such compromises of interests is by conclusion of agreements”<sup>85</sup>. In particular, the last part of this sentence makes clear that it was uncertain whether environmental protection was required *as such*, or only when another state was damaged by a given conduct.

From the abovementioned cases it seems difficult to grasp the idea that the environment has an intrinsic value that must be protected, regardless a state is damaged or not. Going over, in fact, the debate will shift from the economic problem to the environmental one and will increasingly

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<sup>82</sup>Vinuales, J. E. (2008). The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment. *Fordham Int'l LJ*, 32, 232.

<sup>83</sup>Read, J. E. (1963). The Trail smelter dispute. *Canadian Yearbook of International Law/Annuaire canadien de droit international*, 1, 213-229.

<sup>84</sup>Laylin, J. G., & Bianchi, R. L. (1959). The role of adjudication in international river disputes: the Lake Lanoux case. *American Journal of International Law*, 53(1), pp.30-49.

<sup>85</sup>Affaire du Lac Lanoux (Spain v. Fr.), 12 R.I.A.A. 285 (1963). Original French text says :

“ [Le] Gouvernement espagnol s'est efforcé d'établir également le contenu du droit international positif actuel [...] Certains principes dont il fait la démonstration sont, à supposer celle-ci acquise, sans inter pour le problème actuellement examine. Ainsi, en admettant qu'il existe un principe interdisant A l'Etat d'amont d'altérer les eaux d'un fleuve dans des conditions de nature A nuire gravement A l'Etat d'aval, un tel principe ne trouve pas son application A la présente espèce, puisqu'il a été admis par le Tribunal . . . que le projet français n'altier pas les eaux du Carol. En réalité, les Etats ont aujourd'hui parfaitement conscience de l'importance des intérêts contradictoires, que met en cause l'utilisation industrielle des fleuves internationaux, et de la nécessité de les concilier les uns avec les autres par des concessions mutuelles. La seule voie pour aboutir A ces compromis d'interne est la conclusion d'accords, sur une base de plus en plus compréhensive “.

focus on the cross-border pollution issue. Especially, during the *Nuclear Test* case, the then Solicitor General for Australia, R.J. Ellicott, asserted the existence of an emerging rule of customary international law forbidding nuclear tests by reference to the well-known Principle 21 of the Stockholm Declaration<sup>86</sup>. In point of fact, this principle asserts that “ States have [...] the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”<sup>87</sup>. Hence, the issue of cross border pollution, even though the aforementioned cases, never did assert the issue in a proper manner. Moreover, Judges Petrèn and de Castro readdressed the matter, stating that if a general norm exists it is *limited the transboundary pollution* to the extent on which it is necessary to the protection of another state<sup>88</sup>. The most important jurisdiction in this wave however was emanated by the ECJ, during the *Barcelona Traction* case. In these sentences the Court, noted that there are some *erga omnes* obligations and that “all States can be held to have a legal interest in their protection”<sup>89</sup>. Although, this statement was not directly referred to environmental protection, this was the first step to address for environmental recognition on international law level.

By contrast, during the so called “second wave”, that started in the mid 90s, more concrete results have been achieved. As a matter of fact, one of the most important ICJ Advisory sentences – the *Legality of the Use by a State of Nuclear Weapon*<sup>90</sup> – has ratified the recognition of the importance of the environment as such. After being asked if the utilized of nuclear weapon was allowed under any circumstances of international law, the Court has stated that there was no general principle of international law that forbidden its utilized; however, some limitation must be addressed: nuclear weapon must be in conformity with the law of self-defence and *must respect the environment*. Clearly, the underlying principle to this is that nuclear weapons are harmful for the environment. With this statement, the environment value was finally recognized and denied its abstraction<sup>91</sup>. For the first time, states were formally asked to take the proportionate measure to

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<sup>86</sup> Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. Pleadings 163, 185-87 (May 21, 1973), available online at:

<https://www.icj-cij.org/files/case-related/59/059-19741220-JUD-01-00-EN.pdf>

<sup>87</sup> Stockholm declaration, p. 21. Available online at:

<http://www.un-documents.net/unchedec.htm>

<sup>88</sup>Vinuales, J. E. (2008). The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment. *Fordham Int'l LJ*, 32, p.232.

<sup>89</sup> Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), at 32.

<sup>90</sup> See generally Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 266 (July 8); available online at:

<https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

<sup>91</sup> Ibidem, art. 29 “The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations

assure the protection of the ecosystem, applying the criteria of proportionality and necessity<sup>92</sup>. Most importantly, the major Court assertion was that such principles were from then on part of the international law related to the environment and not just of international law<sup>93</sup>.

Finally, other two sentences seems to address this particular issue: the *Nuclear Tests II* and *Gabcikovo-Nagymaros*<sup>94</sup>. Regarding the first one, it has been specified that every state has this kind of environmental obligation whether it has signed a particular treaty or not<sup>95</sup>. While, in *Gabcikovo-Nagymaros* case, the Court re-affirmed the customary value of international environmental law without referring to a particular norm<sup>96</sup>.

To summarize, generally we can state that, as far as ICJ sentences is concern, there is a common recognition of the existence of a general state obligation to ensure that activities within their jurisdiction and control respect the environment of other States, as well as the environment of areas outside national control now being firmly rooted in customary international law.

However, when dealing with such challenging matters, there can be some problematic to overcome. Generally, we can say that part of these problems beyond justiciability can be related to the difficulties in establishing the merits of cases aimed at protecting the environment. The complications that can arise when environmental cases come to Courts can be illustrated by referring to private civil actions seeking remedies for environmental damage or causes of public interest aimed at protecting the environment. These problems arise, in particular, from the need to establish the cause of the environmental damage in question and the legal responsibility for it. The nature of the difficulties, however, is sometimes such that their causes are often demanding to identify with the degree of certainty necessary to determine definitive responsibilities for them and, therefore, support legal actions against specific subjects.

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unborn”

<sup>92</sup>Ibidem. “Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality”.

<sup>93</sup> Ibidem. “ The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”.

<sup>94</sup> See Galambos, J. (1993). An international environmental conflict on the Danube: The Gabcikovo-Nagymaros dams. In *Environment and democratic transition* Springer, Dordrecht, pp. 176-226.

<sup>95</sup> See *Nuclear Tests II* at 306 “ without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment”.



## 4. PROACTIVE SUB-CONSTITUTIONAL PROPOSALS

Inserting environmental rights in constitutions and enforcing them in Courts are just some of the numerous approaches that can be used to cope with the problem of sustainability. As a matter of fact, to date there are numerous decisive and pioneering tools that many states are adopting. Some refer to the environmental impact assessment (EIA)<sup>97</sup>, others prefer to rely on the precautionary principles (PP)<sup>98</sup>, others created *ad hoc* commissions for legislation's review<sup>99</sup>. It would be, for me, impossible in this research to list them all and to conduct a meticulous study on the strengths and weaknesses of each proposal. However, having enumerated mostly only difficulties that democratic systems are facing in front of a challenge of intergenerational scope, it seems to me proper to report some proactive approaches that I consider to be luminaries in this field – in addition to the protection into constitution of environmental rights. This paragraph does not claim to be exhaustive and certainly advanced theses require more research and studies. However, I want to acknowledge the importance of innovative thinking as a way out from today's stagnation. In order to address all the challenges explained, I would briefly summarize some of the approaches that I believe being worthy of consideration.

### 4.1 A World Climate Bank

The first proposal that I want to suggest, implementable at the international level, has been ideated by Broome and Foley in 2016 and falls outside the legislative field. The two scholars suggested the creation of a World Climate Bank. This, basically, has the pretence to be a financial institution that should help the shift from fossil fuels to renewable energy without inefficiencies and sacrifices for present generations<sup>100</sup>.

Generally, the current generation emits greenhouses gas harming the future generations. It follows that future generations have no mean of compensating for the present generation by reducing emission, so pollution can be reduced only by a “sacrifice” from the present generation. However, the long unsuccessful negotiations under UNCC, show that international actors are not inclined to

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<sup>97</sup> To know more see generally: Glasson, J., & Therivel, R. (2013). *Introduction to environmental impact assessment*. Routledge.

<sup>98</sup> see De Sadeleer, N. (2000). The enforcement of the precautionary principle by German, French and Belgian courts. *Review of European Community & International Environmental Law*, 9(2), pp. 144-151.

<sup>99</sup> F.e. in 2001 was created by Knesset the Israeli commissioner's task was to review legislation and to define areas of importance to future generations. To know more see generally Shoham, S., & Lamay, N. (2006). 13 Commission for Future Generations in the Knesset: lessons learnt. *Handbook of intergenerational justice*.

<sup>100</sup> Broome, J., & Foley, D. (2016). A world climate bank.

accept this cost<sup>101</sup>. The heart of the problem is that there is a maldistribution of wealth both between generations and within the current generations. Starting from the famous research carried out by Stern and Northaus<sup>102</sup>, Broome and Foley noticed how there is no agreement on social discount rate and on risk-free interest rate<sup>103</sup>. Anyway, in both cases a sacrifice is required by the present generation.

Broome and Foley present an alternative theory for having a Pareto improvement, helping the transition to a new type of economy. The answer is given on three levels: macroeconomic, microeconomic and financial. First of all, the macroeconomic answer is that there is the need of a *transformation* of investments into “green investments”. In order not to require sacrifices from current societies, investments can be moved in this direction leaving the aggregate consumption of the current generation constant. By doing this, new, less demanding carbon-intensive goods are necessary. This is obviously a win-win situation, but in order to put investment transactions into practice, a world government controlled institution is indispensable. Nevertheless, in a capitalistic system like those we are living in, decisions are made by private sectors. The only solution then is to entrust the financial system.

However, before this step there is the need of examining the transformation on the *microeconomic* level. In point of fact, transforming investment is not only a purely economic matter, but it is also necessary a change in *behaviour*. So as to do this, Broome and Foley propose an increase of carbon intensive good prices, for example with a carbon tax. The “defensive economic adjustment” will then require people to conduce a less carbon-intensive way of life. However, not to create inefficiency, holders of fossil fuels reserves must be compensated, by the value of their reserves. Here, some problems arise. Firstly, carbon taxes create an economic inefficiency. Therefore, the proposal is to reduce some other taxes in order to impose a new one. This suggestion is quite unrealistic, because the tax system is, itself, generally inefficient. Hence, the solution found is that some compensation should be financed by *borrowing*. In this view, international organizations and governments should borrow on a large scale<sup>104</sup>. An available means could be to issue government or international bonds. The effect will be to push interest rates up, which in turn will eliminate some conventional investments. In order to buy bonds, they withdraw funds from conventional investments. These funds will come into the hands of bond issuers, who can use them

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<sup>101</sup> Ibidem.

<sup>102</sup> See Stern, N., Peters, S., Bakhshi, V., Bowen, A., Cameron, C., Catovsky, S., ... & Edmonson, N. (2006). *Stern Review: The economics of climate change* (Vol. 30, p. 2006). London: HM treasury. And Nordhaus, W. D. (2008). A question of balance: economic modeling of global warming.

<sup>103</sup> In Northaus test risk-free interest rate was at 6%, while Stern took the social discount rate at 1.25%.

<sup>104</sup> Broome, J., & Foley, D. *op. cit.* (2016).

to pay for the reduction of greenhouse gas emissions through green investments. This includes the compensation of current consumers and producers for increasing energy costs. Indeed, “ the present generation borrows from future generations to pay for improvements it makes for the sake of future generations. And it does have the effect of moving real resources from the future generations back to the present. It is in effect a real payment from future generations to the present generation, to compensate the present generation for its green investment. [...]future governments will repay future people”<sup>105</sup>.

However, many problems arise. First of all, long-term bonds can only be sold by entities that force buyers to consider the likelihood of persisting and remaining solvent for the maturity of the bond. This implies that borrowers must be institutions with very credible long-term profitability. Instruments of infinite maturity have already been issued by some governments, but what is called a “long-term” horizon in the existing bond markets is of the order of fifty years, while climate change develops over a much longer time horizon.

This observation leads Simon and Foley to hypothesise the creation of a credible supranational financial institution called “World Climate Bank” (WCB). To pay interest on bonds, the WCB should impose regular revenue. In this regard, two possibilities are advanced. The first is that the WCB would directly receive proceeds of a global carbon tax, or have a first claim on them. One advantage is that there would be a counterpart flow that would be available as a loan. In second instance, WCB may require a share of national government revenue, which would enable it to pay interests on the appropriate amount of debt, even as revenues from carbon tax or royalties decline with the decline in fossil fuel use. In this way, the source of the WCB revenue would be spread through many national governments, and thus increase the credibility of the guarantees of interest.

The example of a World Climate Bank, also if just a hypothesis and full of uncertainty, is a fundamental one. Indeed, his theorization represents a clear alternative to that omnipresent incompatibility between economy and sustainability. Or rather, it symbolises a strong suggestion on how one could think of a transition to a green economy, without disadvantaging the present generations. But obviously, alone it could not be enough.

#### **4.2 Institutions for the future at national level**

During all this analysis, the strength of the correlation between sustainability and future generations has been shown. For this reason, in order to solve some of the problems related to climate change, short-termism and intergenerational rights, many proposals have been made

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<sup>105</sup> Ibidem.

regarding the so called “institutions for the future”. The idea of an ombudsman for the future is not exactly new and has previously been defended in the literature and already applied by some States. Between many examples, it comes to my mind the Israeli Commission for Future Generation<sup>106</sup>, the Hungarian Ombudsman<sup>107</sup>, or again to the Finnish Committee for the Future<sup>108</sup>. However, apart from the Finnish committee that is still operating, the other attempts resulted quite ineffective. In point of fact, this is a complicated field, that surely requires future research and innovative practices. In order to build a real and working institution for the future, numerous are the subjects that should be taken into consideration such us law, economy, political science, philosophy, justice and legitimacy<sup>109</sup>. All of them are of equal importance, but clearly coordinating them all requires a big effort.

Many are the proposals are advanced. Beckam and Uggla, for example, have thought of an ombudsman for future generations<sup>110</sup>. In their view, this institution should have power to investigate the actions of public powers. However, I will reject this hypothesis because this institution – according to them – should not have binding powers and it seems to me that the fulcrum of the issue is properly the absence mandatory constrains.

From my personal standpoint a more effective and complete proposal is that planned by Simon Caney<sup>111</sup>. He suggests not properly an institution, but a package of five main reforms that governments should implement. It is as follows:

- i. *Governmental Manifesto*. Governments are asked to outline their policies for addressing long-term trends, opportunities, and trials, responding on the economic, social, environmental challenges.
- ii. *Parliamentary Committee*. Every piece of legislature must include a committee for the future, which must undergo all policies, empowered to call the Prime Minister, parliamentary and civil, to give evidence for their decisions.
- iii. *“Vision for the Future” Day*. Government Manifesto for the future records are scrutinized by oppositions and are required to justify their polices in a public forum.

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<sup>106</sup> See Shoham, S., & Lamay, N., *op.cit.* 2006.

<sup>107</sup> the Hungarian Ombudsman was tasked to protect constitutional rights to healthy environment, and entrusted powers such us obtaining informations or seek action from constitutional Court. See generally Jávör, B. (2006). Institutional protection of succeeding generations: ombudsman for future generations in Hungary. *Handbook of intergenerational justice*.

<sup>108</sup> Created in 1993 can investigate major long-term policies and to hold government accountable for its report for the future.

Official site: <https://www.eduskunta.fi/EN/lakiensaataminen/valiokunnat/tulevaisuusvaliokunta/Pages/default.aspx>

<sup>109</sup> González-Ricoy, I., & Gosseries, A. (Eds.). (2017). *Institutions for future generations*. Oxford University Press.

<sup>110</sup> Beckman, L., & Uggla, F. (2016). An Ombudsman for Future Generations. *Institutions for Future Generations*, p. 117.

<sup>111</sup> The five packave reform is contained in: Caney, S. (2016). Political institutions for the future: A five-fold package.

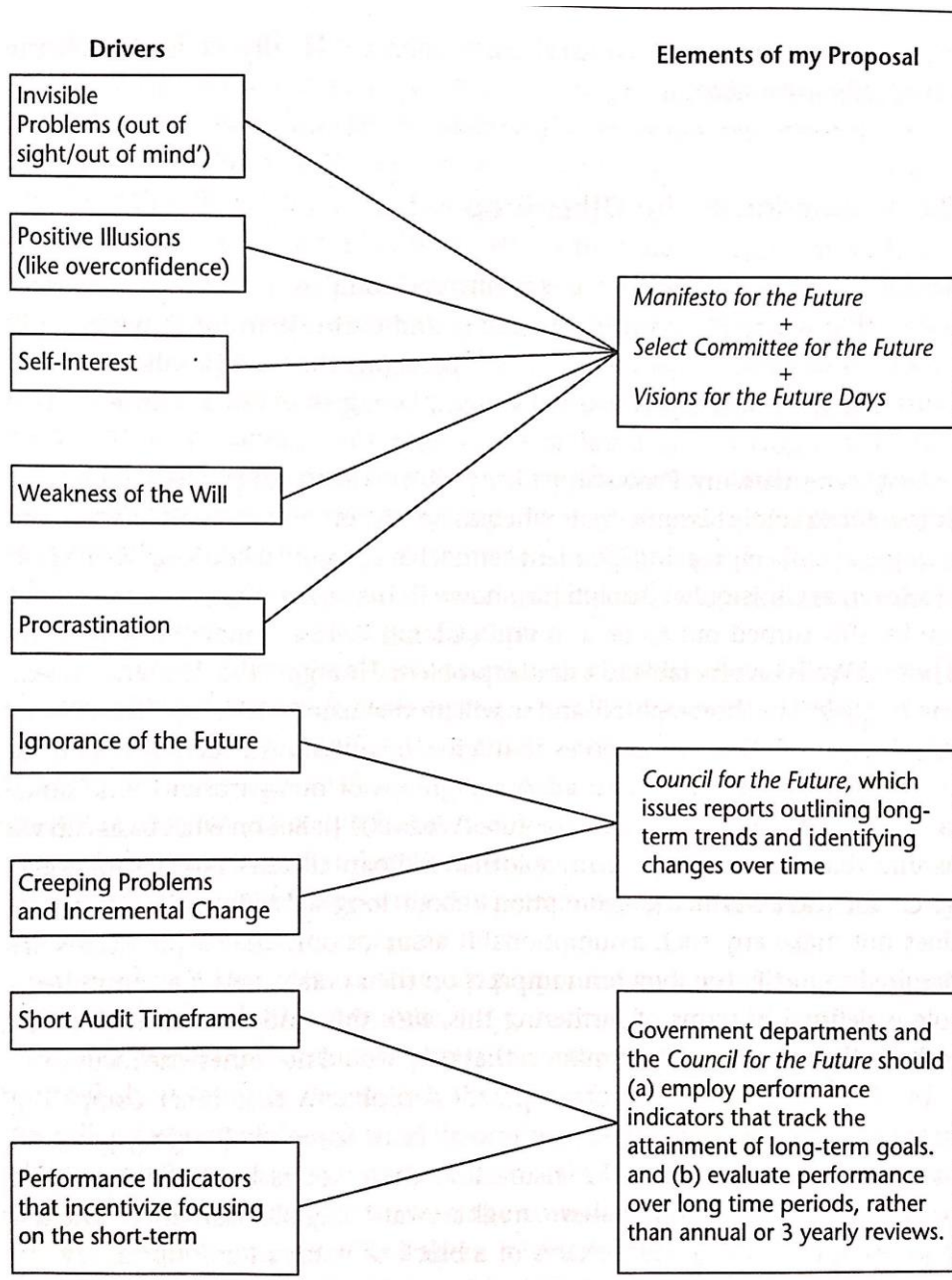
- iv. *Independent Council for the Future*. Is an external, *independent* body, whose aim is to analyze policies and its impact ?. Members are elected among environmental and science experts.
- v. *Performance indicators*. Lastly, government and council or the future employ to performance indicator to track long-term objectives<sup>112</sup>.

Each of these reforms should assess particular problems that are briefly examined in the following graphs.

*Illustration 4. Institution for the Future*

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<sup>112</sup>Ibidem.



<sup>113</sup>Caney, S.

(2016). Political institutions for the future: A five-fold package.

As can be seen, all the elements are strictly connected and all serve to reach a particular goal and to eliminate the corresponding problem.

Personally, I find this proposal much more complete than any others, at least because it is a mix of different elements and does not fall outside moral criteria. Nevertheless, I would suggest that at least the role of the Council for the future should be binding. Or, if not possible, this proposal

should be accompanied by those of an *Environmental or Green Court*<sup>114</sup>. However, comparing this theory with others imagined, this one has the added value of electing representative of independent bodies. By contrast, in Dobson and Ekeli view, some portion of the legislature should be made up of elected by a proxy electorate such as those of sustainability lobby<sup>115</sup>. But which are the real criteria for identify such voters?

Similarly, many other suggestions concern the role of Courts protecting future generations. However, for how good their intentions may be, their work depends on the protection of existing legislations and, as above amply discussed, this is to date clearly not enough. Other, very different, proposals have been postulated. Just to give some examples, some regards voting rights, others representatives of future generations in the legislature, independent advisory body, delegated decision making power, and also a UN High Commissioner for the future<sup>116</sup>. The *fil rouge* between all of them is that we need legislature that is sufficiently forward looking in order to create new laws or constitutions that promote sustainable policies, but without compromising our generation.

Obviously, even the proposals so far exposed are full of limits, someone may even define them utopian. For this kind of problem, a global solution is required and, even assuming that Caney's proposal can be realized, it could only be done in the already democratic regimes. Half of the world would remain uncovered. Moreover, why should a state accept to delegate, in a democratic way, powers to an institution, leaving aside their own interests? Is ethics so strong that should be consider a priority? If states cannot ratify an international agreement on climate change, how could they even think about creating an independent establishment of this kind? And likewise, problems concerning the democratic strength of this institution and its legitimacy also remain to be addressed.

There are a thousand doubts and as many problems, both on the practical and theoretical level. Still, the importance of these theories is essential. It is through research, education and understanding that we can gradually shift our ethical order and try to adapt it to the needs of today's and tomorrow's generations. Courts, constitutions, World Climate Bank, Institutions for the future, if not improved, certainly will not be a placebo for the difficulties we have questioned until now. But it is from here that we must start. The intersection of law, ethics, economy is the focus. It is necessary to find new systems on which to reason together.

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<sup>114</sup> To know more see f.e. Murphy, S. D. (1999). Does the world need a new international environmental court? *Geo. Wash. J. Int'l L. & Econ.*; or Whitney, S. C. (1973). The Case for Creating a Special Environmental Court System--A Further Comment. *Wm. & Mary L. Rev.*

<sup>115</sup> Dobson, A. (1996). Environment sustainability: An analysis and a typology. *Environmental Politics*, 132-3.

<sup>116</sup> On this regard I suggest to take a look at The Report of the Oxford Martin Commission for Future Generations, available online at: [https://www.oxfordmartin.ox.ac.uk/downloads/commission/Oxford\\_Martin\\_Now\\_for\\_the\\_Long\\_Term.pdf](https://www.oxfordmartin.ox.ac.uk/downloads/commission/Oxford_Martin_Now_for_the_Long_Term.pdf)

## 5. CONCLUSION

This working paper has looked into the uneasy relationship between the principle of environmental sustainability and its protection and implementation in a number of legal systems. If many are the challenges that our systems have to face, not less are the solution methods that can be applied. The previous has indeed shown some new trends that seem to foster and accelerate the implementation and the defence of the environmental sustainability principle. The constitutionalization of environmental rights can solve a lot of these difficulties. First of all, by curb time inconsistency, electoral cycles may not just bring to short term policies and may also induce policy to deviate prior policy commitment. Additionally, it can address problems at enforcement and adaptation levels. Lastly, embodying society's values, its pedagogical use could be of fundamental importance. By contrast, constitutional rigidity may not only bring a problem of sovereignty (of one generation above another), but also obstacle the adaptability to unpredictable situations and subsequent changes in knowledge with promptness and flexibility. In this case, the work of Courts of Justice in modifying the understanding of constitutional provisions and in reflecting the evolving interests of future generations will be absolutely indispensable.

However, in this paper it has been also shown that to date, the position that Courts have assumed is not unanimous and that, again, the divergence between the protection of the economic interest with respect to the environment, remains wide. ECJ seems to perform better, due also to the fact that the principle is protected in the legal skeleton of the European Union, unlike in USA. This clearly demonstrates that the *a priori* and *a posteriori* protection methods cannot be separated, but they are strictly essential to each other.

Clearly, today society is more and more recognizing this kind of problem and its trying to deal with it. Also many are the already successful efforts which can inspire and act as a catalyst for future policies, such us, for example, the Aarhus Convention. However, even if the reconceptualization of assets and the inclusion of new proposals led to promising results, they are not yet sufficient. Redesigning alternative methods to those used so far is the only way to tackle new challenges. For this reason, the search for completely new and future-oriented institutions is imperative to achieving a goal.

In order to address a change, we must move on several levels rethinking our legal\institutional, moral, and economic framework.



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