NEW SUSTAINABILITY CHALLENGES

A Constitutional Perspective

Edited by

Tania Groppi
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Editoriale Scientifica

NEW SUSTAINABILITY CHALLENGES: A CONSTITUTIONAL PERSPECTIVE

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INTRODUCTION

REASSESSING SUSTAINABILITY IN THE ANTHROPOCENE

Tania Groppi, Domenico Amirante, Lucia Scaffardi

Sustainability is one of the most used and abused words in environmental studies and, consequently, in environmental law. According to the classical definition by Christine Voigt 'sustainability has gained a status comparable to democracy, freedom and justice: it is universally desired, differently understood, complex in scope, extremely difficult to establish and impossible do away with'.[1]

Nevertheless, the advent of the Anthropocene, the new epoch in which the *homo oeconomicus* is visibly turning into *homo destruens*, presents new challenges to sustainability. Human activities are threatening our climate, endangering the survival of many communities, and, ultimately, altering the stability of our civilization.[2] Against this backdrop, and despite the considerable volume of studies produced on the topic, sustainability needs to be reassessed.

Today, environmental protection *is no longer* a question *of well-living* but a problem of *survival*. For this reason, sustainability in the Anthropocene "must confront the delusions and pana-

[1] C. Voigt, *Sustainable Development as a Principle of International Law. Resolving Conflicts between Climate Measures and WTO Law*, Boston, 2009, 3. More recently see F. Ekardt, *Sustainability: Transformation, Governance, Ethics, Law*, Cham, 2020; V. Mauerhofer, D. Rupo, L. Tarquinio (Eds), *Sustainability and Law. General and Specific Aspects*, Cham, 2020.

[2] For a general overview on this topic see: M. Arias-Maldonado, Z. Trachtenberg (Eds), *Rethinking the Environment for the Anthropocene. Political Theory and Socionatural Relations in the New Geological Epoch*, New York, 2019. On the governance for the Anthropocene see: M. Fraundorfer, *Global Governance in the Age of the Anthropocene*, Cham, 2022; S. Clement, *Governing the Anthropocene. Novel Ecosystems, Transformation and Environmental Policy*, Cham, 2021.

ceas that sustainable development creates and perpetuates".[3] In other words, the Anthropocene makes it urgent to return to the enhancement of the material foundations of life, through governance practices linked to the materiality of territories and through the natural propensity for cooperation that local communities can provide. As Nicholas Robinson puts it: 'as humans stumble into the Anthropocene, it is incumbent to acknowledge that sustainability depends on cooperation and resilience and not on nostrums about the economic advantages alone of sustainable development'.[4]

In fact, engaging the debate on this issue, one might be tempted to assert that the vast range of application of the concept of sustainability goes far beyond the notion that used to be (at least in the international documents and Declarations) the structure underlying it. Despite establishing itself as an autonomous concept, sustainability has remained closely tied to the myth of development, which has, in some ways, prevented its effective evolution both at a theoretical and at an operational level. For Klaus Bosselmann since the beginnings of environmental law (in the Seventies of the last Century) the legal concept of sustainability, that should have been based on the idea of a primacy of environmental considerations, seems to 'have lost its contours', because 'its popularization in the term "sustainable development" created an invitation to use it for all sorts of objectives purported to be desirable ("sustainable economy", "sustainable growth", "sustainable policies", etc.)'.[5] Thus, sustainability has become a sort of buzzword, a repository of conflicting ideas, an empty box to be filled with very different and sometimes contradictory items.

To approach the current debate on sustainability it is, thus,

[3] L. J. Kotzé, S. Adelman, F. Dube, *The Problem with Sustainable Development in the Anthropocene Epoch. Reimagining International Environmental Law's Mantra Principle Trough Ubuntu*, in P. D. Burdon, J. Martel (Eds) *The Routledge Handbook of Law and the Anthropocene*, New York, 2023, 3.

[4] N. Robinson (n. 7), 194.

[5] K. Bosselmann, *The Principle of Sustainability. Transforming Law and Governance*, Aldershot, 2008, 40.

convenient to start from a distinction between *weak* and *strong* sustainability.

Bosselmann explains this dialectical pair referring to an ecologist and an environmental approach to sustainable development. In his view 'the ecologist approach is critical of growth and favours ecological sustainability ("strong sustainability")' while 'the environmental approach assumes the validity of growth and places equal importance on environmental sustainability, social justice and economic prosperity ("weak sustainability")'.[6] This criticism can essentially be agreed with, although in our opinion the emphasis should be placed on *the material aspect of strong sustainability* (based on the prevalence of the basis of life, human and non-human) as opposed to *the abstract nature of weak sustainability* (based on economic and financial calculations).

Nevertheless, we must admit that, even today, sustainability is routinely used with reference to environmental law in an adjectival form to describe a sound and fair economic development under the principle of 'sustainable development'. Already present *in nuce* in the general scheme of the Stockholm Declaration, this principle has become, since the 1992 Rio Declaration, a cornerstone of environmental policies at the national and international level, although its current configuration is more articulated and complex than that envisioned in Rio. It must be noted that the two elements that made up the definition of sustainable development (the *needs* and the *limits*), both contained in the *holy book* of sustainability (the Brundtland Report, 1987). formulate this principle stemming from an *instrumental perspective on environment,* aimed at guaranteeing to humans only (both present and future generations) the right to satisfy their needs. In this perspective the needs of present generations must be placed on an equal footing with those of future generations, combining the perspectives of intragenerational and intergenerational equity. On the other hand, the *limits* are considered mainly as the necessity to restrain the technological evolution and the socioeconom-

[6] Ibid. 26.

ic organization in relation to the human capacity to exploit natural resources efficiently. This markedly anthropocentric idea of sustainable development corresponds to a harmonising criterion connecting the socioeconomic needs of development to the rational use of environmental resources, symbolized by the principle of integration between development and the environment.[7] In this vision, according to Bosselmann 'sustainable development is perceived as a balancing act between economic, social and environmental goals with trade-offs as a necessary outcome', thus 'there is no guidance that could ensure, for example, a preference for ecological sustainability or the needs of future generations'. As a result 'policies may become more integrated, but they will make little difference to existing unsustainable patterns of production and consumption'.[8]

In our opinion, if we want to share and support the idea of *strong sustainability*, a sound methodological approach should try, first, to *decouple sustainability* from *development* and consider it in a more general sense and context. In other words, looking only to sustainable development we risk *missing the forest for the trees*. Both theoretically and in governance practice we need to go back to the forest (sustainability in its environmental sense) and stop looking only at the trees. This will permit avoiding the excessive proliferation of '*sustainabilities*', linked to the instrumental, economic vision of the environmental resources, and will bring in a more precise idea of 'sustainability', based on its biological roots, which are the basis of life on earth.[9] This will enable us to move away from a purely abstract approach, based on the concept of development and bring sustainability back to

[7] Principle 4 of the Rio Declaration can be considered its main matrix of reference; see M. Montini, *The Principle of Integration*, in L. Kramer, E. Orlando (Eds), *Principles of Environmental Law*, Cheltenham, 2018, 139-149.

[8] K. Bosselmann (n. 2) 98-99.

[9] Ibid. 34, for Bosselmann: "Until 1992, there was no apparent rift between strong and weak sustainability. Wherever the term sustainability was used, it had the meaning of ecological sustainability, and where the term sustainable development was used, the principle of sustainability was implied. A rift emerged, however, in June 1992 during the Rio UN Conference on Environment and Development (UNCED)".

a social dimension, thereby translating it into political and legal choices.

As brilliantly underlined, again, by Robinson, 'in place of a definition for development, perhaps, humanity requires concepts for living, grounded in principles of cooperation and resilience …'.[10] Away from the *mysticism of development,* we will rediscover the material and social aspects of sustainability.

***

Based on this theoretical framework, this book will develop in two parts. Part I will explore the three main substantive fields covered by the research project that is at the origin of the book: environmental rights, natural resources, food sustainability. The NESUS-G project was developed by three research units, based at the University of Siena, Vanvitelli University and University of Parma. The three teams have been led, respectively, by Tania Groppi (who was also the Principal Investigator of the project), Domenico Amirante and Lucia Scaffardi, who authored the chapters included in part I.

Part II aims to discuss institutional solutions from the perspective of long-term governance, focusing on three main patterns: participatory democracy, independent authorities, and courts. Participatory democracy will be framed primarily within a Global South perspective. By presenting lesser-known grassroots experiences – particularly from Asia, with special attention to India and Vietnam – the chapters seek to introduce a bottom-up perspective and offer a fresh look at the key challenges that long-term governance poses to the democratic principle. Independent authorities will be examined mainly within the legal framework of the European Union, assessing the performance of existing agencies and authorities, with particular attention to EU sustainability governance. Courts will be addressed from a global

[10] N. Robinson, *Beyond Sustainability: Environmental Management for the Anthropocene Epoch*, in 12 (3) *Journal of Public Affairs*, 181-194 (2012). This need was only partially addressed by the declaration taken at 2002 UN World Conference on Sustainable Development in South Africa, center on the theory of the three pillars for sustainability, economic development, social development, and environmental protection.

perspective, encompassing international, regional, and national jurisdictions, as well as a wide range of actors beyond judges, including plaintiffs, amici curiae, and civil society. Although the primary focus will be on climate change, other research areas will also be considered, including energy justice, gender-responsive sustainability, and the rights of nature.

***

This book is the result of a collective endeavor involving not only the members of the research teams, but also many other scholars who contributed, directly or indirectly, to the success of the project. Throughout the duration of the project, the research teams organized several seminars, workshops, and conferences to discuss research progress and to gain fresh insights from external contributors, with the participation of both senior and junior scholars.

We would especially like to acknowledge the seminars organized by Vanvitelli University: among them the Seminar held on 16th February 2024 by Prof. Shreekant Gupta (University of Delhi), on 'Economy and Environment in the Anthropocene: What Kind of Sustainability?', at the Department of Political Science, University of Campania 'Luigi Vanvitelli'; the hybrid seminar held on 29th May 2025, on 'Sustainability beyond Economics: Participatory Approaches from Asia', at the Department of Political Science, University of Campania 'Luigi Vanvitelli'; the Seminar held on 31th October 2024 by Prof. Philippe Billet (Université Lyon 3), on 'The "climate" responsibility of States: the approach of case law', at the Department of Political Science, University of Campania 'Luigi Vanvitelli'. University of Parma hosted one intermediate workshop about the results of the first year of research on January 17th, 2025 and two conferences: the first, titled 'Sustainability Governance and the Role of Independent Authorities', was held on March 21st 2025, and the second – the project's final conference – took place on November 28th 2025. The meeting provided an important opportunity for debate and discussion about the research findings of the three research units. This was made possible, in part, by the participa-

tion of external speakers who are experts in the project's subject areas.

The University of Siena contribution is especially due to the Conference on '*New Sustainability Challenges: The Role of Courts*', organized in Pontignano on 26th and 27th June 2025.

Only some of the contributions presented in the events organized within the NESUS-G project are included in the book, some others have been published in legal journals and as book chapters in other books. As principal investigator and coordinators of the research units, we would like to thank all the friends and colleagues from all around the world who have participated in all the phases of this research project with high professionalism and deep passion, and especially those who contributed to this volume. Special thanks are due to Maria Sarah Bussi, Emanuela Rassu and Ludovica Tripodi for the editorial work, to Enrico Buono, Luca Mazza and Giulia Formici for their administrative and scientific support, and to Valentina Carlino for her commitment to the full project.

At the conclusion of this extensive project, as legal scholars, we hope that this book will contribute not only to the development of more effective sustainability governance, but also to fostering a new way of thinking about the present and the future of humankind. We do so with the awareness, to borrow the words of the feminist legal theorist Catharine A. MacKinnon, that 'law is not everything, but it is not nothing either'.

Siena, 26 February 2026

PART I

SETTING THE SCENE

SUSTAINABILITY, FUTURE GENERATIONS, ENVIRONMENTAL RIGHTS: A CONSTITUTIONAL PERSPECTIVE

Tania Groppi

Abstract: *The chapter deals with the emerging concept of 'sustainability', that, according to the empirical research presented here, is mentioned in the text of 67 constitutions, very often in relation with the environment or with the rights of future generations. As the vast majority of those references consists in very general substantive provisions, needing a legislative or judicial implementation, the article deals with the challenges brought by the 'aspirational constitutions' and with the role of the courts in their enforcement. Finally, it maintains that, in order to achieve effectiveness, constitutions should include procedural provisions, aimed at integrating sustainability instances (throughout specialized bodies) into the legislative process.*

Keywords: Sustainability, Constitutional Law, Environment, Future Generations, Climate Change

1. *A New 'Constitutional Key-Concept'*

A search of the text of the constitutions of the 193 Member States of the United Nations shows that 67 of them use the noun 'sustainability' or, more frequently, the adjective 'sustainable'. All of these references are found in constitutions adopted or amended after 1987, when the United Nations Brundtland Commission's 'Our Common Future' report defined 'sustainable development' as 'development that meets the needs of the present without compromising the needs of future generations'.

These data can be considered sufficient to affirm that sustainability[1] is now a new 'constitutional key concept' which, like sovereignty, democracy, the rule of law, equality or freedom, de-

[1] On the origin of this concept, K. Bosselmann, *The Principle of Sustainability. Transforming Law and Governance*, London-New York, 2008.

mands attention by constitutional scholars: it too needs to be interpreted, balanced, applied.[2]

But what is meant by sustainability?

The aforementioned Brundtland Report shows two central aspects:

a) it is closely linked to the future, more specifically to future generations;
b) it was firstly introduced in the field of environmental protection.

This last consideration does not mean that sustainability, neither in common parlance nor in legal (including constitutional) parlance, is limited to environmental issues. The term 'sustainable' is undoubtedly in fashion today: it can be found in expressions as sustainable finance, sustainable tourism, sustainable architecture, sustainable agriculture, etc.

The notion of sustainability implies the aspiration that a certain value, currently present (the environment or the wealth of a country, the balance of the budget or a tourist activity) shall also exist in the future. In more technical terms, it can be said that the use of a good or a resource is 'sustainable' when it does not destroy the good or the resource, but it allows them to be passed to future generations.

Sustainability therefore contains in itself an intergenerational relationship, as many international documents, beginning from the Bruntland Report, have repeatedly emphasized.[3] It is no coincidence that the French term '*durabilité*' is particularly effective, because it conveys the idea of duration more clearly than the English '*sustainable*'.[4]

Its appearance in contemporary constitutional law is related to the phenomenon of the 'internationalization' of constitu-

[2] A. Jakab, *Sustainability in European Constitutional Law*, (April 11, 2015), available at SSRN: http://ssrn.com/abstract=2593371 (accessed 24 February 2026).

[3] P. Sands, J. Peel, *Principles of International Environmental Law*, Cambridge, 2012, 210.

[4] A. Touzet, *Droit et développement durable*, in *Revue de droit public et de la science politique*, 2008, 456.

tions.[5] The concept of sustainability, as well as that of 'future generations',[6] migrated from international law towards constitutional law, taking advantage of the permeability of contemporary constitutions to external influences. Actually, international law, in order to be effective, need to find reception at the domestic level: and it happens that constitutions are the most suitable tools to this purpose.

In this chapter, I will advance some considerations on: the relationship between 'future and constitution', already well developed by the doctrine of constitutional law (paragraph 2); the positivization of sustainability in written constitutions (paragraph 3); the challenges this concept raises to the constitutional law of our time (paragraph 4); the need of a more careful institutional design, focused on procedural sustainability clauses (paragraph 5).

2. *Future and Constitution: An Old Relationship*

The notion of sustainability, in constitutional law, is closely linked to intergenerational responsibility, i.e. the necessity that the constitution imposes on political decision-makers of today to also take into account future generations, when making choices likely negatively affect their needs.

Face to problems such as climate change, environmental pollution, nuclear disposal and unsustainable production and consumption, long-term governance is emerging as a crucial challenge for political decision-making: because of their complex nature, potentially severe consequences, and the demanding problem-solving paths, these challenges may have long-lasting

[5] W. Chang, J. Rong Yeh, *Internationalization of Constitutional Law,* in M. Rosenfeld, A. Sajó (Eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 1165 ff.

[6] R. Bifulco, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, Milano, 2008, 89 ff. See R. Araújo, L. Koessler, *The Rise of the Constitutional Protection of Future Generations, VerfBlog,* 2022/8/12, available at https://verfassungsblog.de/the-rise-of-the-constitutional-protection-of-future-generations/ (accessed 24 February 2026).

impacts on both present and future generations.[7] Constitutions, with their ambition to endure over time and their forward-looking perspective, appear particularly well-suited to addressing what has been called the 'democratic dilemma': the tendency of electoral democracies to prioritize short-term needs tied to the electoral cycle, a tendency that seems even more pronounced in an era of right-wing populism[8] and democratic backsliding, with its cultural backlash deeply affecting also the perception of sustainability as a value.[9]

As Pope Francis wrote in the Encyclical *Laudato Si'*:

> The drama of a politics focused on immediate results, also sustained by consumerist populations, makes it necessary to produce short-term growth. Responding to electoral interests, governments do not easily risk irritating the public with measures that could affect levels of consumption or put foreign investments at risk. The short-sighted construction of power slows down the inclusion of a far-sighted environmental agenda within the public agenda of governments. Thus, it is forgotten that 'time is greater than space', that we are always more fruitful when we are concerned with generating processes rather than dominating spaces of power. Political greatness is shown when, in difficult moments, we act on the basis of great principles and think of the long-term common good. Political power finds it very difficult to embrace this duty within a project of Nation.[10]

Without addressing the complex question of the 'rights' of future generations,[11] it is sufficient to point out that contempo-

[7] D. Scheer, S. Venghaus, S. Sardo *et al.*, *No easy way out: towards a framework concept of long-term governance*, in *Energy Sustainability, Society,* 2025, 9 ff. On long-term governance see especially A Jacobs, *Governing for the Long Term*, Cambridge, 2011.

[8] S. Gottenhuber, E. Mulholland, *Implementing the Sustainable Development Goals in Times of Rising Right-Wing Populism in Europe*, in *Sustainability*, 2020, 8465 ff.

[9] P. Norris, R. Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism, C*ambridge, 2019.

[10] Pope Francis, *Laudato Si': On Care for Our Common Home*, Encyclical Letter, 2015, no. 178.

[11] The debate on the possibility of configuring real rights for future gene-

rary, rigid, constitutions are turned, by their nature, towards the future, much more than other types of legal norms. Therefore, they appear as particularly favourable places to try to ensure that present generations are not unaware of intergenerational solidarity when making their decisions.[12]

Rigidity, first of all, already contains in itself an idea of duration, a time frame that goes beyond that of the normal political decision-making, where the majorities formed by elections decide.[13] The purpose of rigid constitutions is to establish rules that oblige political decision-makers, during the *normal-lawmaking*, not to slavishly follow the will of political majorities,[14] but to take into account other principles and values, enshrined in the constitution itself, as expression of the *higher lawmaking*, i.e. the constituent power.[15] Thus, the rights of minorities are entrusted to the protection of the courts, first of all of the constitutional courts, which are asked to fulfil a counter-majority function.

Therefore, rigid constitutions are a suitable means to entrench sustainability.[16] Indeed, one of the main problems in adopting decisions that consider the needs of the 'future', to the detriment, if necessary, of the interests of the 'present', is the dynamics of electoral democracy. Political elites tend to seek the short-term consensus of the current voters, without taking into account the

rations is very broad: see J. C. Tremmel (Ed.), *Handbook of Intergenerational Justice,* Cheltenham, 2006.

[12] A. P. Gosseries, *Constitutions and Future Generations*, in 17 *The Good Society* 2 (2008), 32 ff.

[13] The constitutions have what has been defined as the 'superb claim of duration': see O. Kirchheimer, *Gesammelte Schriften, Recht und Politik in der Weimarer Republik,* vol. 1, Baden-Baden, 2017, 175 ff.

[14] See the essays published in G. Zagrebelsky, P. P. Portinaro, J. Luther (Eds), Il futuro della costituzione, Torino, 1996.

[15] B. Ackerman, *We the People. Foundations*, Cambridge (MA), 1993.

[16] K. Skagen Ekeli, *Green Constitutionalism. The Constitutional Protection of Future Generations*, in 20 *Ratio Juris* 3 (2007), 378 ff.; J. C. Tremmel, *Establishing Intergenerational Justice in National Constitutions*, in Id. (Ed.), *Handbook of Intergenerational Justice*, cit., 187 ff.; A. P. Gosseries, *The Intergenerational Case for Constitutional Rigidity*, in 27 *Ratio Juris* 4 (2014), 527 ff.

interests of those who, not being present, cannot influence the electoral competition by their vote.

The future-oriented attitude of rigid constitutions is even more emphasized in post-World War II constitutions: they include 'programmatic norms', which, even if not directly applicable, are nevertheless prescriptive and, as such, binding for the legislator, under penalty of unconstitutionality of its decisions.[17]

The tendency to insert programmatic norms is particularly accentuated in the most recent constitutions, approved as a result of the democratization processes in the constitutional cycle after 1989,[18] especially in the Global South, which very often are explicitly addressed at 'transforming' the existing social and economic structure.[19]

The diffusion in contemporary constitutions of sustainability clauses (as well as clauses that refer to the future generations) therefore appears – as well as a consequence of the influence and, at the same time, of the ineffectiveness of international law, as above said – the symptom of the 'suitability' of the constitution, as a normative framework that can constrain today's policy makers not to ignore the needs of the future.

3. *The Irresistible Growth of Sustainability in Recent Constitutions*

A reference to sustainability or the adjective 'sustainable' was found, based on the research mentioned at the beginning, in 67 current constitutions.

Even more numerous are the constitutions which contain ref-

[17] On the 'programmatic clauses', in the perspective discussed here, M. C. Dorf, *The Aspirational Constitution*, in 77 *The George Washington Law Review*, 2009, 1631 ff.

[18] On the possibility of identifying a post-1989 'constitutional cycle', T. Groppi, La Constitution tunisienne de 2014 dans le cadre du 'constitutionalisme globale, in 1 *Constitutions*, 2016, 7 ff.

[19] On the 'transformative constitutionalism' see the seminal article of K. E. Klare, *Legal Culture and Transformative Constitutionalism*, in 14 *South African Journal on Human Rights*, 1998, 146 ff.

erences to future generations (76 according to our calculation, which also includes the 17 constitutions which only mention it in the preamble), references which very often appear in provisions relating to the environment (in this sense, 58 constitutions).

The link between the sustainability and the future is highlighted by the fact that in many constitutions (28 out of 67), the term 'sustainability' (or the adjective 'sustainable') is used in conjunction with the reference to future generations.

Of course, even when there are no specific clauses on sustainability or on future generations, this does not mean that there are no implicit protection clauses, which could possibly be developed through interpretation. This is the case, following the constitutional revision of Articles 9 and 41 carried out by Constitutional Law no. 1/2022, of the Italian Constitution. Article 9 provides:

> The Republic promotes the development of culture and scientific and technical research. It safeguards the landscape and the historical and artistic heritage of the Nation. *It protects the environment, biodiversity and ecosystems, also in the interest of future generations*. State law regulates the methods and forms of protection of animals" (the third paragraph, added in 2022, is in italics).

According to the new Article 41:

> Private economic initiative is free. It may not be carried out in conflict with social utility or in such a way as to cause harm to health, *the environment*, safety, freedom, or human dignity. The law determines the appropriate programs and controls so that public and private economic activity may be directed and coordinated for social *and environmental* purposes (the words introduced in 2022 are in italics).

By limiting the analysis to the explicit clauses, and without examining them in detail here, it must be said that in the vast majority of cases the references are found in the field of the protection of the environment or natural resources (62 constitutions),[20] whereas only in 5 constitutions does the use of the noun

[20] As for the protection of the environment, various existing researches have already shown the tendency to insert specific provisions in the constitutions

or adjective relate to other issues. In particular, the constitutions of Italy, Kosovo, Spain and Hungary only contain references to economic and financial sustainability, while the constitution of Japan is unique, as it refers to 'sustainability of human rights'.[21]

In some constitutions, the three macro-sectors in which the definition of sustainability was articulated in international documents at the end of the 20th century (environmental, economic and social sustainability) appear closely linked. For example, the Belgian constitution (Article 7-*bis*, introduced in 2007) stands out for its comprehensiveness: it refers to 'sustainable development in its social, economic and environmental aspects', which must be pursued by the public authorities 'taking into account intergenerational solidarity'.

Looking at the date of adoption of the norms that contain these references, it is clear that, in almost all cases, they are included within new constitutions, adopted after 1989 and, therefore, subsequent to the Brundtland Report. In some countries, these provisions have been introduced, also in the last decades, by constitutional amendments. It is the case, for example, of Belgium, France, Luxembourg, Greece, Portugal, Mexico, as well as Italy and Spain (the latter limited to financial sustainability).

As for the 'geographical' perspective, the expression is found in all regions of the world. It can be considered as an indicator of the trend towards 'global constitutionalism': a phenomenon which developed especially in the years 1990s and 2000s, consisting of the growing presence of elements of convergence and uniformity in constitutions, which tended to transform from expression of national identity to a sign of belonging to a global community.[22]

approved or modified during the last decades (147 constitutions in 2012): D. R. Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment*, Vancouver, 2012, 45 ff. See also J.R. May, E. Daly, *Global environmental constitutionalism*, New York, 2014.

[21] In Italy, as said above, the 2022 constitutional revision introduced an explicit reference to the environment and future generation in Article 9 of the Constitution, whereas the reference to sustainability (introduced in 2012) is contained in Article 81, on the public budget and finances.

[22] The phrase 'global constitutionalism' is used with various meanings, but

While the reference to sustainability is present in constitutions belonging to different geographical areas, it finds a particularly significant place in those that bear the name of 'new Andean constitutions':[23] the constitutions of Bolivia, Ecuador and Venezuela contain countless provisions on sustainability and sustainable development, including economic and financial aspects. The explicit reference to 'sustainability' in those constitutions goes hand in hand with the many provisions they devoted to the environmental issues, as in many other Latin American constitutions, especially Brazil (1988) and Colombia (1991). This approach has been followed also by the Constitutional Convention of Chile in 2022, although finally the proposed constitution was rejected in the final referendum of September 4, 2022 (*plebiscito de salida*).[24] These constitutions devote long and detailed articles to environmental issues, which present quite innovative profiles: for example the codification of 'Earth's rights' (*Pacha Mama*) in the Constitution of Ecuador (Article 71) or the *Agroambiental Tribunal* provided for by the Constitution of Bolivia (Article 189).

On the contrary, any explicit reference is absent in vast regions of the world which, notoriously, have serious environmental problems, such as the United States or Canada in North America, Brazil, Chile, Argentina in South America, Australia in Oceania and, in Asia, China, India, Kazakhstan, Indonesia or, in Europe, Russia. However, the absence of sustainability clauses does not automatically mean that in those constitutions the needs of the future generation or the environmental rights aren't con-

in this sense see M. Tushnet, *The Inevitable Globalization of Constitutional Law*, in 49 *Virginia Journal of International Law* 4 (2009), 987 ff.; D. S. Law, M. Versteeg, *The Evolution and Ideology of Global Constitutionalism*, in 99 *California Law Review*, 2011, 1163 ff.

[23] Regarding environmental protection, the research of D. R. Boyd *The Environmental Rights Revolution*, cit., 282, shows that Latin America ranks first in the process of constitutionalizing these rights, also in terms of creativity.

[24] P. Cisterna Gaete, *Radiography of an Ecological Constitution: the Chilean Constitutional draft*, September 1, 2022, available at https://gnhre.org/?p=15630 (accessed 20 February 2026).

stitutionally protected: for example, the constitution of Brazil contains endless provisions on environment.

As for the qualitative examination, in most cases sustainability or sustainable development are conceived as 'tasks, or duties, of the state' (those which the Germans define as *Staatsziele*): goals that public authorities must pursue, as is the case also for the rights of future generations and, in some constitutions, for the protection of the environment as well (which, however, is qualified by many constitutions as a subjective right). Therefore, with a few exceptions,[25] sustainability clauses can be considered as substantial provisions of a programmatic nature, which require the active intervention of the public authorities.

Procedural provisions are almost absent. The only examples of norms or mechanisms to incorporate the sustainability in the decision-making are the constitutional provisions that identify certain consultative bodies (Burundi, Article 280 Gabon, Article 103; Guinea, Article 138; Ecuador, Article 156; Morocco, Article 152), according to the French model of the 'Economic, Social and Environmental Council' (Article 69 of the French Constitution).[26] Other constitutions limit themselves to mentioning the need for the legislature to have a parliamentary committee on the matter (Guyana, Article 119B). Only the Hungarian Constitution of 2011, taking up a previous legislative provision having established an 'Ombudsman of future generations', entrusts this task to the 'Ombudsman of fundamental rights' (Article 30).

The only constitution that identifies an independent authority with explicit reference to sustainability was the Tunisian Consti-

[25] Only in a few cases, with reference to the protection of the environment, sustainability is configured as a subjective right: see, for example, the Constitution of Ecuador, Article 14: 'The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and good living (*sumak kawsay*), is recognized'.

[26] Powers in environmental matters were assigned to this body by the constitutional reform of 2008. In France, at the legislative level, a '*Conseil national du développement durable*' had also been established in 2003, later replaced by the '*Conseil national de la transition écologique*' (CNTE), in 2013, alongside which the '*Haut Conseil pour le Climat*', that was created in 2018. See S. Schmitt, *L'emersione della giustizia climatica in Francia*, in *DPCE* 4 (2021), 955 ff.

tution of 2014, which provided for a 'constitutional independent authority for sustainable development and the rights of future generations' with advisory functions on bills in economic matters, social and environmental, as well as for development programs (Article 129). This provision was not implemented by legislation, and it was finally repealed by the new, authoritarian Constitution enacted by the President Kaied in 2022.

4. *New Challenges for old Problems: Do We Need a Sustainability Clause?*

The explicit 'sustainability clauses' are formulated in such general terms that they raise important questions as to their effectiveness. Such a consideration, can also be extended to 'implicit' ones concerning the environment and future generations.[27]

Indeed, one of the main problems in adopting decisions that take into account the needs of the 'future', even at the expense, if necessary, of the interests of the 'present', lies in the dynamics of electoral democracy, that is, in the need for political elites to secure the short-term consent of current voters, without taking into account the interests of those who, not being present, cannot influence the electoral contest through their vote.

In the face of inadequate legislative implementation, the issue of direct applicability by judges arises: a challenge that has become increasingly pressing in recent years, especially with regard to climate change, an area in which litigation before courts has been multiplying worldwide.[28]

In case of insufficient legislative implementation, the problem thus arises of direct applicability by judges (for example for the purposes of compensation, to claim responsibility for the non-execution by public authorities). However, even if these clauses

[27] C. Jeffords, L. Minkler, *Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes*, in 69 *Kyklos* 2 (2016), 294 ff.

[28] S. Bagni, *La costruzione di un nuovo "eco-sistema giuridico" attraverso i formanti giudiziale e forense*, in 50 *DPCEonline*, SP. (2021), 1027-1059.

were not considered as *self-executing* and they were qualified as standards for judicial review, the fact remains that it is extremely difficult for constitutional judges to declare the unconstitutionality of the inactivity of the legislator, raising the dilemma of how courts can deal with legislative omissions.[29]

Indeed, even if the obstacle constituted by the standing (often raised when the rights of future generations are put forward) can be overcome in one way or another, the extreme discretion left to constitutional judges would remain. They, in very technical matters – be it pensions, biotechnology, balanced budgets, environmental protection, natural resources, climate change – would be (and they increasingly are)[30] called upon to indicate to the legislator the measures to be taken to preserve the needs of the future generations, intervening significantly in the sphere of political decision-making: it is in fact undeniable that the insertion of sustainability in the balancing and in the control of proportionality implies a sacrifice, sometimes heavy, of expectations and even of rights of present generations.

Not to mention the likelihood that, faced with such open and generic clauses, the least active constitutional judges may dismiss guaranteeing them, opting instead for solutions aimed at avoiding the challenges, by favoring, more or less openly, the discretion of the legislator.[31]

We are therefore faced with a new, difficult, dilemma.[32]

On the one hand, the democratic decision-making process does not seem to be the right forum to adequately take into ac-

[29] On the role of jurisdictions and constitutional courts in guaranteeing the principle of intergenerational responsibility, closely linked to the one in question here, see R. Bifulco, *Diritto e generazioni future*, cit., 175 ff.

[30] All the judicial decisions on climate change, including the landmark case of the German Constitutional Court of March 24, 2021, 1 BvR 2656/18.

[31] This is what happened in Norway, notwithstanding the constitutional revision aimed at strengthening the environmental protection clause (Article 112): Supreme Court, judgment of December 22, 2020, in the case HR-2020-2472 – P (case no. 20-051052SIV-HRET). Recently, this case was decided by the European Court of Human Rights: *Greenpeace Nordic and Others v. Norway*, Application no. 34068/21, Judgment of 28 October 2025.

[32] L. K. Weiss, *Environmental Constitutionalism: Aspiration or Transformation?*, in 16 *International Journal of Constitutional Law* 3 (2018), 836-870.

count the needs of sustainability, due to its short-term, even very short-term perspective, linked to the timing and pressures of the electoral process.

On the other hand, the substantive constitutional clauses, in their vagueness and genericity, entrust an excessively difficult task to the judges, called upon to strike a difficult balance.

The risks, in this situation, are numerous, in particular that of the loss of confidence in the constitution, in the face of its ineffectiveness,[33] to the point of making the absence of substantive clauses appear preferable to their non-application.[34]

The question, therefore, is how to operationalise sustainability:[35] can more appropriate institutional solutions than those currently found in comparative law be imagined so as to enable constitutional law to contribute effectively to guarantee sustainability, first and foremost environmental sustainability? This is a task which remains crucial, given the very limited effectiveness of international law in this area.

5. *Conclusion: Towards A Procedural Sustainability Clause*

In conclusion, to make constitutional sustainability clauses effective, a more careful constitutional design is required. As the lack of a future-oriented vision in the decision-making process is at the origin of ineffectiveness, this is the main shortcoming to be addressed. In other words, the key guarantee should move from the substantive level to the procedural level: constitutional clauses should not be limited to enshrining the principle of sustainability, or the protection of future generations, in the matters

[33] In this meaning see O. Pedersen, *Environmental Rights and Future Generations*, in M. Tushnet, T. Fleiner, C. Saunders (Eds), *Routledge Handbook of Constitutional Law*, London-New York, 2013, 407.

[34] In this sense see M. Hartwig, *La costituzione come promessa per il futuro*, in R. Bifulco, A. D'Aloia (Eds), *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*, Napoli, 2008, 67.

[35] In the meaning of A. Alemanno, *Protecting Future People's Future: How to Operationalise Present People's Unfulfilled Promises to Future Generations*, in 14 *European Journal of Risk Regulation* 4 (2023), 641-655.

of the environment, finance, retirement etc. They should identify the decision-making procedures and mechanisms to be followed to take decisions which could impact on the possibilities of life in the future on the planet.[36] Compliance with those procedures should be subject to the control of the constitutional courts.

The mechanisms of participatory democracy, often invoked in matters of the environment, are not so relevant to incorporate the needs of future generations, because they also aim, in essence, to give voice to the actors directly involved in the present moment, but, as representative democracy, they are not suited to taking into account the future impact of actual decisions.

What is needed is the inclusion in the decision-making process of mandatory opinions, delivered by bodies (to be regulated at constitutional level), designated to enhance the principle of sustainability. This, however, is not in the name of the representation of the future generations (since, without wanting to retrace the long discussions on the subject, it is difficult to speak of representation in reference to subjects not yet born),[37] but in the name of the principle of precaution. It is necessary to introduce into the legislative process a moment of a technical-scientific nature, which allows a critical integration and mediation of scientific knowledge and of what, in the current state of this knowledge,

[36] To some extent, all legal norms influence future situations. It therefore becomes crucial to identify those that have a strong impact not so much on future situations, but on 'future life possibilities': in this regard, for an attempt to delimit 'critical resources', see K. Skagen Ekeli, *Green Constitutionalism*, cit., 387 ff.

[37] On the contrary, this was the aim of the proposals to introduce a sort of 'fourth power' for sustainability, in the form of a 'Sustainability Council', put forward by J. C. Tremmel, *Parliaments and Future Generations – the Four-Branches-Model,* in D. Birnbacher, M. Thorseth (Eds), *The Politics of Sustainability. Philosophical Perspectives*, London-New York, 2015, 212 ff. See also J.C. Tremmel, *The Four-Branches Model of Government: Representing Future Generations*, in M.C. Cordonier Segger, M. Szabó, A. R. Harrington (Eds), *Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions*, Cambridge, 2021, 754-780.

can reasonably be assumed to be the future impact of current decisions.[38]

In other words, when decisions that affect future life chances have to be taken, it becomes necessary to carry out an impact analysis, entrusted to a specialized body: an independent constitutional authority which has to be carefully designed by the constitution.[39] This analysis should contain precise conclusions on the decisions to be taken, from which the legislator, or the government, could only deviate by giving a precise justification: it is not a question of creating something from a vacuum, since this type of procedure already exists in administrative law, especially for environmental decisions.

This type of procedure, in constitutional law, could on the one hand favour the transparency of the legislative decision-making process and therefore the control of public opinion; on the other hand, it would allow the constitutional judge to assess the reasonableness and proportionality more easily, which would be based both on the technical opinion and on the motivation provided by the legislator.

However, the research shows that the 'procedural constitutional law of sustainability' has not yet taken its first steps.

In some countries, important doctrinal and political debates took place;[40] in some cases, legislative provisions which go in this direction do exist,[41] which have attracted the attention of inter-

[38] As reported, for example, by S. Grassi, *Ambiti della responsabilità e della solidarietà intergenerazionale: tutela dell'ambiente e sviluppo sostenibile,* in R. Bifulco, A. D'Aloia (Eds), *Un diritto per il futuro,* cit., 189.

[39] S. Bookman, C. Clark, J. Dehm, E. Hicks, R. Levy, *Constitutional Mechanisms for Environmental Governance*, in R.C. Brears, J. Lindley (Eds), *The Palgrave Handbook of Environmental Policy and Law. Palgrave Studies in Sustainable Future,* Cham, 2025, 442 ff.

[40] For certain references to the German experience and to the debate which took place on the occasion of the constitutional revision which led to the insertion of Article 20a of the *Grundgesetz,* see J. C. Tremmel, *Establishing Intergenerational Justice in National Constitutions*, cit., 196; K. Bosselmann, *The Principle of Sustainability*, cit., 138 ff.

[41] See the legislative solutions adopted in Wales, Norway, Canada, Finland, New Zealand, Germany, summarized in M. Göpel, C. Pearce, *Guarding our Future. How to Include Future Generations in Policy Making,* World Futu-

national organizations in their search for institutional mechanisms to grant sustainability,[42] but the constitutional provisions are very rare. For example, in Italy, also under the impetus of the European Union, and in particular of the Better Regulation objectives aimed at enhancing preventive oversight tools within the framework of the Youth Dialogue,[43] a future generations impact assessment has recently been introduced for government regulatory acts (with the exception of decree-laws), as part of the regulatory impact analysis. [44]

Leaving aside the numerous limitations of this framework (for example, the fact that the analysis is envisaged only for government acts) and whatever its concrete implementation may turn out to be, it remains a merely informative tool, devoid of any consequence for the validity of regulatory acts that may be adopted without taking into account the findings that emerged from it.[45]

It is therefore a field to be explored, which also opens up new

re Council Foundation, 2018, available at https://www.worldfuturecouncil.org/wp-content/uploads/2018/07/brochure_guarding2018b.pdf (accessed 24 February 2026). See also E. Dirth, N. Kormann da Silva, *Building Our Common Future: The role of the Network of Institutions for Future Generations in Safeguarding the Future,* ZOE Institute for Future-fit Economies, Cologne, 2022, available at https://ourfuturegenerations.com/wp-content/uploads/2023/05/NIFG-Publication_VFINAL-3.pdf (accessed 24 February 2026).

[42] M. Szabò, *National Institutions for the Protection of the Interest of Future Generations*, in 2 E-*pública. Revista Electronica de Direito Publico* 2 (2015), 10 ff. See also D. Chalali, *How a "Guardian" for Future Generations Can Transform Global Policymaking***,** in UNU-CPR (blog), 25 January 2025, available at https://unu.edu/cpr/blog-post/how-guardian-future-generations- can-transform-global-policymaking (accessed 24 February 2026).

[43] https://commission.europa.eu/law/law-making-procee/better-regulation/better-regulation-guidelines-and-toolbox_en (accessed 24 February 2026).

[44] This framework follows the one initially introduced for the implementation of the measures under Next Generation EU, which provided for the establishment of a Committee for the Evaluation of the Generational Impact of Public Policies (COVIGE): see L. Monti, *La valutazione di impatto generazionale delle politiche pubbliche: dalle linee guida del COVIGE al possibile Youth-check in Italia*, in *Amministrazione in cammino*, 30 December 2022.

[45] M. Mezzanotte, *La valutazione di impatto generazionale come tecnica di 'programmazione'*, in *Consultaonline*, 27 October 2025.

perspectives for reflection on the role of parliaments, constitutional judges and experts in the democratic-pluralistic State.

SUSTAINABILITY, NATURAL RESOURCES AND COMMUNITIES: LEARNING FROM SOUTHERN VOICES

Domenico Amirante

Abstract: *This essay offers a critical reflection on the evolution of the concept of 'sustainability', analysing its scope in the Anthropocene era. Through a comparative study of various Asian experiences, the paper examines the new frontiers of environmental law and community-based natural resource management practices, focusing on the Indian case (with the Kerala model), on some environmental participation processes in China and Vietnam, and on the emergence of new development indicators based on social well-being and environmental protection in Bhutan. The study highlights how these examples of sustainable and participatory governance, based on a Glocal approach involving communities, provide a response to the new sustainability challenges posed by current times and represent useful models also for moving away from the mainstream western idea of sustainability.*

Keywords: Sustainability, Natural Resources, Local Communities, Glocalisation, Southern Voices

1. *Sustainability and Natural Resources in the Anthropocene*

In the introduction to our research on New Sustainability Governance (NESUS-G), we addressed some of the theoretical foundations of the concept of sustainability and discussed the main criticisms levelled at it.[1] We also supported the idea of a strong sustainability, a sound methodological approach capable of decoupling it from the *mysticism* of development and consider

[1] For a general overview, see C. Voigt, *Sustainable Development as a Principle of International Law. Resolving Conflicts between Climate Measures and WTO Law*, Boston, 2009, 3. More recently see F. Ekardt, *Sustainability. Transformation, Governance, Ethics, Law*, Cham, 2020; V. Mauerhofer, D. Rupo, L. Tarquinio (Eds), *Sustainability and Law. General and Specific Aspects*, Cham, 2020. For a critical approach: K. Bosselmann, *The Principle of Sustainability. Transforming Law and Governance*, Aldershot, 2008.

it in a more general sense and context. We have critically highlighted the central role assigned to the notion of sustainable development by the mainstream Western interpretations of the principle of sustainability, both from a theoretical and from a practical point of view.

We started from the assumption that the advent of the Anthropocene,[2] the new epoch in which the *homo oeconomicus* is visibly turning into *homo destruens*, presents new challenges to sustainability. Human activities are threatening our climate, endangering the survival of many communities, and, ultimately, altering the stability of our civilization.[3] Today, environmental protection is no longer a question of *well-living* but a problem of *survival*. For this reason, sustainability in the Anthropocene 'must confront the delusions and panaceas that sustainable development creates and perpetuates'.[4] In their critical evaluation Kotzé, Adelman and Dube strongly affirm that today we are facing the need 'to urgently replace the predatory paradigm of sustainable development with alternative epistemologies of care and humility'.[5] This requires radical renovation to implement the methods of political action and to rewrite legal norms, from the international and state level to local communities. This implies, also, an epistemological review because, as underlined by Robinson, 'old assumptions no longer work, and our innovations are now out of date because of the pervasive change that the Anthropocene represents', and consequently 'many of our "busi-

[2] N.A. Robinson, *Beyond Sustainability: Environmental Management for the Anthropocene Epoch*, in 12 *Journal of Public Affairs* 3 (2012), 181-194.

[3] For an interdisciplinary approach see M. Arias-Maldonado, Z. Trachtenberg (Eds), *Rethinking the Environment for the Anthropocene. Political Theory and Socionatural Relations in the New Geological Epoch*, New York, 2019. On the governance for the Anthropocene see M. Fraundorfer, *Global Governance in the Age of the Anthropocene*, Cham, 2022; S. Clement, *Governing the Anthropocene. Novel Ecosystems, Transformation and Environmental Policy*, Cham, 2021.

[4] L.J. Kotzé, S. Adelman, F. Dube, *The Problem with Sustainable Development in the Anthropocene Epoch. Reimagining International Environmental Law's Mantra Principle Trough Ubuntu*, in P.D. Burdon, J. Martel (Eds), *The Routledge Handbook of Law and the Anthropocene*, New York, 2023, 3.

[5] Ibid.

ness-as-usual" assumptions no longer are reliable'.[6] Thus, we must find inspiration in alternative views of the relations between man and nature, or, better, between humans and non-humans.

In the Anthropocene the pressure of human activities on natural resources has reached unprecedented levels such as to question the notion of sustainable development or, at least, to require a new conceptualization for sustainability.[7] The first point of view is expressed by Kotzé, Adelman and Dube arguing that there is 'a problem with sustainable development in the Anthropocene epoch', because 'few, if any, of the myriad definitions of sustainable development – and certainly not the SDGs – promote the radical transformation required to deal with exigencies of the Anthropocene such as climate change, biodiversity loss, and the Sixth Mass Extinction'.[8] In a different way, authors like Robinson, while maintaining criticism of sustainable development as an expression of weak sustainability, believe that it is possible to formulate 'approaches to management that can serve a renewed, holistic conceptualization of sustainability'.[9]

This is particularly true for the management of natural resources, as illustrated by some case studies we analysed in our research on new sustainability governance in the Asian continent.[10] Of course, the concept of natural resources is very broad and covers a large array of issues, including forests, water, minerals, fisheries, but also nature conservation, prevention, abatement of pollution, waste management, to quote just a few entries. This made it impossible for us to cover the entire spectrum of the natural resources management problem.[11] We thus decided to

[6] N.A. Robinson, *Fundamental Principles of Law for the Anthropocene?* in 44 *Environmental Policy and Law* 1-2 (2014), 13-27.

[7] C. La Follette, C. Maser (Eds), *Sustainability and the Rights of Nature in Practise*, London, 2017.

[8] L.J. Kotzé, S. Adelman, F. Dube, *The Problem with Sustainable Development in the Anthropocene Epoch*, cit., 6.

[9] N.A. Robinson, *Beyond Sustainability*, cit., 186.

[10] With reference to the Global South see K.W. Junker, P.D. Farah, *Globalization, Environmental Law, and Sustainable Development in the Global South. Challenges for Implementation*, New York, 2022.

[11] For a complete assessment on the relations between development and natural resources, with relation to the Indian subcontinent see P. Cullet, L.

select a small number of case-studies that we considered relevant for a particular perspective: the participation of people and communities. In fact, Asia harbours a very rich repository of community-based conservation, from the well-known 'social forestry' projects, started in the 1970s in West Bengal (India), to the recent experiments in conservation that some East-Asian countries like China and Vietnam are currently carrying out. From the legal point of view, community-based conservation in Asia offers innovative instruments and 'radical well-being alternatives to development'.[12] According to Ashish Kothari, such alternatives

> come in myriad forms, from assertions of democratic decision-making by local collectives to experiments in ecologically sensitive production systems, from re-commoning of urban spaces to democratization of knowledge and technology, from alternative learning centres to socially controlled media, from experiments in gender equity to explorations in multiple sexualities, from indigenous peoples' assertion of territorial and epistemological identity to the takeover of production facilities by workers …[13]

Dealing with sustainability in the Anthropocene implies the search for new economic, political, and legal paradigms, based on the concepts of responsibility and interdependence between human beings and nature. In this context, constitutional law and comparative law are destined to play a pivotal role, incorporating innovations that come from broad-spectrum comparative investigations and articulating effective and coherent frameworks for the action of political and administrative powers, as well as for civil society.

This quest for such innovations, which should not lead to a return to the past but to fruitful hybridisations between alterna-

Bhullar, S. Koonan (Eds), *The Oxford Handbook of Environmental and Natural Resources Law in India*, Oxford, 2024.

[12] A. Kothari, *Radical Well-Being Alternatives to Development*, in P. Cullet, S. Koonan (Eds), *Research Handbook on Law, Environment and the Global South*, Cheltenham, 2019, 64-84.

[13] Ibid., 64.

tive ontologies and different models of social organization, must necessarily start from the *South of the world*.

2. *Learning from Southern Voices*

The environmental crisis is the worst symptom of a larger crisis of civilisation, that threatens the foundations of contemporary Western societies, with negative repercussions for the entire planet. Its origins are embedded in the fracture of the modern thought, which, starting from Descartes, has caused an irreconcilable separation between man and nature (and between nature and culture) and has progressively spread it to all dimensions of human action and scientific disciplines, including law.

From this perspective, F. Ost, as early as 1995, illustrated the peculiar epistemological-philosophical path that ended placing nature outside the law (*la nature hors la loi*) in the scientific paradigm of Western modernity.[14] For Descartes, in fact, the forest 'is no longer a source of wisdom and a repository of knowledge as it once was; it embodies error and darkness'.[15] This has determined a profound fracture between science and morality, resulting in 'the destruction of knowledge, the decline of interdisciplinary dialogue and, most importantly, the discrediting and loss of interest in questions about the meaning of knowledge'.[16] This divide has fully characterised social sciences, determining their extreme fragmentation; for legal disciplines this produced a complete lack of correlation between philosophy of law and positive environmental law and between environmental regulations and their foundations.

For these reasons, a look towards the South, towards alternative ways of living and thinking, will give new life to environmental law but also, and more generally, to our way of addressing envi-

[14] F. Ost, *La nature hors la loi. L'écologie à l'épreuve du droit*, Paris, 1995.

[15] Ibid., 39.

[16] S. Ferlito, *L'Ecologia come paradigma delle scienze sociali*, in A. Andronico, M. Meli (Eds), *Diritto e antropocene. Mutamenti climatici e trasformazioni giuridiche*, Milano, 2020, 37-59.

ronmental problems. Needless to say, it is impossible to identify a single generic southern perspective encompassing continents as diverse and rich in scientific and intellectual traditions as Africa, Asia, Latin America, and Oceania. Moreover, it should also be noted that alternative lifestyles and ways of thinking coexist in areas of southern Europe, namely Italy, Greece, Spain, France and Portugal. Some European epistemologists such as Boaventura de Sousa Santos, Edgar Morin, and Franco Cassano have worked intensively on these issues and concluded that, despite their diversity, the different regions of the various Souths share one key characteristic: their openness to dialogue with other cultures.

Regarding the methodological foundations for alternative thinking in the South, Boaventura de Sousa Santos affirms that 'the epistemologies of the South reflect creatively on reality in order to offer a critical diagnosis of the present which, obviously, has a constituent element in the possibility of reconstructing, formulating and legitimising alternatives for a more just and free society'.[17] Edgar Morin also insists that 'in order to achieve full awareness of the qualities and virtues of the South, a Southern way of thinking would be needed', but 'such a way of thinking has yet to be developed based on the experiences of the various Souths'.[18] Similarly, Franco Cassano proposes the notion of 'meridian thinking' (*pensiero meridiano*)[19] as a critique of the dominant perspective in contemporary culture: 'a vision through which the Northwest defines reality, defines time, defines the characteristics of the future, defines the other'.[20]

For Cassano, however,

> the South is not just a non-North, an infinite pathology from which we must cure ourselves in order to finally become civi-

[17] B. de Sousa Santos, *Las epistemologías del Sur*, in AA.VV. *Formas-Otras: Saber, nombrar, narrar, hacer*, Barcelona, 2011, 14.

[18] E. Morin, *Por un pensamiento del Sur*, in *Quaderns de la Mediterrània* 27 (2018), 297.

[19] F. Cassano, *Il pensiero meridiano*, Bari, 1996.

[20] F. Cassano, *Il pensiero meridiano oggi: Intervista e dialoghi con Franco Cassano*, interview realized by Claudio Fogu, in 1 *California Italian Studies* 2 (2010).

> lised and worthy of the gift of speech; the South is many things (…) but it is also a different perspective. Looking South (…) meridian thinking must try to focus on the diversity and richness of this vision, without any pretension of being able to represent it exhaustively, but rather as an indication, a perspective.[21]

The inclination to engage in dialogue and the natural openness of the peoples of the South to confrontation with other cultures is an essential means of building effective environmental policies and a new environmental law, based on alternative interpretations of the world.

According to Morin:

> we need to blend our Mediterranean cultural heritages with African and South American cultural heritages. However different they may be, they all involve mythical or religious ways of integrating with the cosmos and nature, from which we must extract the profound truth and connect it to our new ecological consciousness, which recognises our integration into the biosphere, something that the ongoing process of globalisation continues to degrade, driven by the North[22]

(and this list should include, in my view, Asia and Oceania also).

In legal terms, such a paradigm shift can only take place if the different branches of law engage in meaningful dialogue, both within their broader disciplinary context and beyond it. If law wants to play an effective role, it will have to profoundly change its way of looking at the environment, starting with a thorough review of its methodological paradigms. For this reason, in a recent collective book, I proposed to analyse the relationship between man and nature from different cultural cosmovision, both religious and not (Christianity, Islam, Hinduism, Buddhism, Ubuntu, *Sumak kawsay/Buen vivir*).[23] This perspective offers some epistemological clues to understand the context in which environmental law will have to operate in order to find the most

[21] Ibid., 1.

[22] E. Morin, *Por un pensamiento del Sur*, cit., 298.

[23] D. Amirante, S. Bagni (Eds), *Environmental Constitutionalism in the Anthropocene. Values, Principles and Actions*, London-New York, 2022.

appropriate means of adapting each legal system to local cultures. It also offers precious tools for comparison, because a synchronic picture of the relationship between man and nature in the various chthonic traditions[24] will help us to rediscover our ecological traditions and disclose new models to be tested.

In our research concerning new paths towards sustainability, we focused especially on Asia, for several reasons.

First, we must recognise that, in recent times, Asia has received great scholarly attention, because of its increasing importance in the global geopolitical arena. This explains why the interest of global legal scholars for the Asian continent has grown considerably. Primarily, the region is home to two emerging (better '*emerged*') giants, China and India, that are becoming dominant powers in the international geo-political scenario of the third millennium. In addition, it must be noted that the activism of a devoted group of scholars, working in some of the best reputed Universities of the area, is passionately promoting academic research in the field, with a particular focus on constitutional law.[25]

A new approach, considering the Asian continent as a relevant 'terrain' for comparative constitutional studies, has also received impetus from the recent reassessment of the legal systems of the world by postcolonial studies, which are oriented in two directions. On the one hand, common law scholars recognise that post-colonial studies expand 'the lens of analysis from state-centred law in the context of specific national colonial enterprises to a more global post-Westphalian worldview that takes into account the postcolonial dimensions of a range of transnational, regional, state and local legal engagements'.[26] On the other hand, even within civil law academia some scholars consider

[24] See H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford, 2014.

[25] Here I refer to a large group of constitutionalists, mainly from Asian Universities that, following an intense activity of academic and interuniversity collaboration, founded on December 2017 in Bangkok the 'Association for Asian Constitutional Studies'.

[26] E. Darian-Smith, *Post-colonial Theories of Law*, in R. Banakar, M. Travers (Eds), *Law and Social Theory*, Oxford-Portland, 2013, 247.

the opportunity to pay more attention to postcolonial studies, by recognising that 'the latter offer a critical reconstruction of the concepts of Western modernity, by analysing the impact of their projection on the colonial territories'.[27] One of the main reasons for enhancing legal studies looking beyond *finis terrae* (for us beyond the Western world), as provocatively pointed out by Werner Menski, is that 'largely for historical reasons Asian, African and other non-Western legal system seem inherently more attuned than Western legal systems, and therefore, offer great learning opportunity to scholars interested in intellectual and practical challenges of comparative law and legal pluralism'.[28] Moreover, non-Western legal orders show a deeper consciousness of the mixed character of all legal systems, and have experienced, more often than the West, 'the dynamic nature of legal systems as constantly negotiated entities'.[29]

Regarding our research, the history of environmental constitutionalism well illustrates the need to listen to Southern voices. In fact, the expansion of environmental constitutionalism over the last decades has produced a substantial increase in the number of democratic Constitutions containing environmental rules and principles. Globally, out of the 193 Constitutions of the current member States to the UN, 156 contain explicit references to the environment. Most of these Constitutions reflect the growing sensitivity and a common public concern towards the protection of the environment. Especially in recent years, the evolution of environmental constitutionalism has gained momentum, marking an upward trajectory: environmental protection has nowadays reached a central position in the world's constitutional systems, with more stringent and, above all, structural forms of protection. In the first decades of the new millennium, environmental constitutionalism took a decisive acceleration especially in qualitative terms. In addition to this, many of the new environ-

[27] A. Di Martino, *Il territorio: dallo Stato-nazione alla globalizzazione. Sfide e prospettive dello Stato costituzionale aperto,* Milano, 2010, 24.

[28] W. Menski, *Beyond Europe*, in E. Örücü, D. Nelken (Eds), *Comparative Law. A Handbook*, Oxford-Portland, 2007.

[29] Ibid.

mental Constitutions are based on original visions of the relations between man and the environment, considered as basic elements of the whole constitutional order. We have therefore entered a new phase in which the protection of the environment plays the role of a founding value of constitutional systems.

The major impulses in this direction come from recent Constitutions of the South of the world. The new Constitutions enacted and the constitutional reforms approved after 2000 are at the confluence of different evolutionary processes of the World's constitutionalism, ranging from the *revival* of the rights of the indigenous peoples and of chthonic law,[30] to the recognition of multiculturalism (also in the forms of an evolution from the federal state to the multicultural or the 'plurinational' state), to the identification of the 'environmental question' as a central element of a State's structure.[31]

In this perspective, notably, the so-called Andean *nuevo constitucionalismo* has triggered great interest (particularly in relation to the Constitutions of Ecuador and Bolivia, enacted respectively in 2008 and 2009 respectively), but apart from the ongoing debates on the 'newness' of the Andean constitutionalism,[32] we can identify a *new environmental constitutionalism* worldwide, arising not only from Latin America, but also from Asia, Africa and Oceania.

Thus, the history of environmental constitutionalism discloses a *counter-narrative* based on a proactive role played by the constitutional systems from the *South of the world* that have become the vanguard of environmental constitutionalism. In comparison with the activism and constitutional creativity that characterises

[30] On the chthonic traditions and their influence on legal systems, especially those of the South of the world, see H.P. Glenn, *Legal Traditions of the World*.

[31] R. Viciano Pastor, R. Martínez Dalmau, *El nuevo constitucionalismo latino-americano: fundamentos para una construcción doctrinal,* in *Revista general de derecho público comparado* 9 (2011), 1-24.

[32] For a general overview about this debate see A. Von Bogdandy, E. Ferrer Mac-Gregor, M. Morales Antoniazzi *et al.* (Eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*, Oxford, 2017.

the development of environmental constitutionalism in the Global South, Western law is still anchored to an ancient approach to environmental protection showing a considerable reticence to accept the challenges posed by the Anthropocene to constitutional and environmental law.

3. *Community-based Management of Natural Resources:* Glocal *Lessons from Asia*

If one wants to explore sustainability governance in the field of natural resources and its relation to participatory instruments of environmental protection, Asia is a continent offering many research hints and proposing interesting case-studies, at all latitudes and in all government systems, democratic or otherwise. Faced with the need to make some choices in a panoply of possible case studies we started from the following assumptions.

The starting level to conduct our analysis could not be global: solutions for new forms of sustainability cannot be developed in an abstract way and with a universalising function but, on the contrary, they must be sought at national and local dimensions. The national dimension helps with better understanding and analysing the cases studied. But the most suitable level of analysis is grassroots democracy. In the context of the Anthropocene new practices for sustainability will start from the bottom (while still having to seek elements of coherence at a global level) and must be applied at that level, directly involving both the institutions and the stakeholders, as well as citizens. Thus, our approach has been neither merely national nor local, but *Glocal*, according to the idea that *Glocal governance* can, in brief, be described as a 'procedural, rotating, and nonpermanent regime of different actors and stakeholders that gather, consult, and build consensus in adherence with universally agreed norms and standards'.[33]

Of course, grassroots democracy is a very general concept and

[33] A. Mihr, *Glocal Governance. How to Govern in the Anthropocene?,* in *Springer Briefs in Political Science* (2022), 2.

can be very variable if we consider the cleavage between the Global North and the Global South. For example, while in the Global North the most important action should be related to and originated from an urban context (see the models of the Citizens' Assemblies based on individual citizenship), in the Global South the weight and the function of *communities* (cultural, religious, tribal), both in urban and rural context, is very important and has inspired interesting strategies for involving groups in environmental governance.

Among the Asian countries that are facing environmental challenges with successful strategies, we have studied some cases coming from different, geographical, political and institutional contexts: India, China, Vietnam and Bhutan. They provide theoretical proposals (see the Gross National Happiness model in Bhutan), system changes to the entire structure of local government and governance (e.g. the Panchayat system in India), and practical applications (the participatory planning in the State of Kerala in India, the Urban Agenda in Vietnam and the Ant Forest project in China). Given the multiplicity and complexity of the Asian continent, these are just basic examples, some sort of 'core drilling', but their significance goes far beyond the single cases studied.

4. *The Indian Constitution and Environmental Protection*

Within the Asian continent, India stands out as an example for the stability of its democratic government but also for its numerous success stories of participation of citizens and communities to environmental governance, especially with relation to the management of natural resources.

Indeed, the success of Indian democracy is due to the stratification of different factors related to its specific cultural, historical and political context, rather than to the mere theoretical elaboration of a political and constitutional model. Thus, in the regional context, India can be depicted as an institutional 'prototype'. In fact, many scholars believe that 'the success of democracy in India is still defying many prevailing theories that stipulate

preconditions for democracies'.[34] Furthermore, it has often been admitted that the success of Indian constitutionalism defies many doctrinal *clichés* and that 'the emergence and persistence of Indian democracy are theoretical and historical anomalies'.[35]

To illustrate this original character, we can quote a few examples. First, considering the relation between State building and constitutional democracy, one can observe that, after independence, India managed to establish a durable State not through coercion or authoritarian routines (as in several of the so-called third wave democracies in Asia and Africa) but through democratic practices. A second feature describing the originality of the Indian Constitution lies in its federal character. The Indian federal system displays peculiar features, achieving a successful policy of inclusion of cultural identities through the creation of the so-called 'linguistic States'. Since independence, India has nearly doubled the number of states in the attempt of reducing conflicts between regional and ethnic groups and the state, with very good results, deserving the label of 'flexible federalism'.[36] As showed by some innovative studies on the evolution of the State, this policy has not undermined the consolidation of an Indian identity, but, on the contrary, has consolidated it.[37] Indian federalism has received many labels and definitions, from 'quasi-federation' to 'unitary state with subsidiary federal principles' (in the classical definition by Wheare), to 'centralized federalism', all of them showing some discomfort with the traditional criteria of identification and classification of federal states. In my view, a realistic definition could be 'a federal State with centripetal tendencies', indicating the multiple possibilities of the federal system to function alternatively as a more decentralised or centralised system,

[34] A. Kohli, *Introduction,* in A. Kohli (Ed.), *The Success of India's Democracy*, Cambridge, 2001, 1.

[35] S. Ganguly, *Introduction*, in S. Ganguly, L. Diamond, M.F. Plattner (Eds), *The State of India's Democracy*, Baltimore, 2007, IX.

[36] B. Arora, *Adapting Federalism to India: Multilevel and Asymmetrical Innovations*, in B. Arora, D. V. Verney (Eds), *Multiple Identities in a Single State: Indian Federalism in a Comparative Perspective*, New Delhi, 1995, 71-104.

[37] A. Stepan, J.J. Linz, Y. Yadav, *Crafting State-Nations. India and Other Multinational Democracies*, Baltimore, 2011.

according to the evolution of historical conditions. This view is also in tune with the idea of federalism as a continuous bargaining process between different levels of government.

Along these lines, I have elsewhere defined Indian constitutionalism as 'hybrid'[38] with reference to some of its apparent contradictions, e.g. a Westminster government with a pluralist party system, a 'centralised' federalism, a constitutional set-up of local government combining new administrative bodies with ancient traditional units like the *Panchayats*.

Moreover, India has an important constitutional background in environmental protection, showing a steady evolution from the initial lack of principles for environmental protection (in the original text of the Constitution, 1950), to a gradual development of a panoply of legal instruments and judicial actions concerning the environment.[39] These achievements were based on the constitutional amendments of 1976, on the one hand, and on a proactive role played by the Supreme Court of India in green issues, on the other. The constitutional amendments stimulated a strong commitment to environmental protection from both the State (art. 48A) and the citizen (art. 51A, letter g) because they contain 'a constitutional pointer to the state and a constitutional duty to the citizen not only to protect but also to improve the environment and also to preserve the forest, the flora and fauna, the rivers and lakes and all the other water resources of the country'.[40] There have been several interventions by the courts in defence of citizens' subjective positions, both indirectly, e.g. in application of Article 21 (on the right to life), and regarding the practical implementation by governments and administrations of

[38] D. Amirante, *Nation Building through Constitutionalism: Lessons from the Indian Experience*, in 42 *Hong Kong Law Journal* 1 (2012), 23-42.

[39] India Constitution, art. 48A and art. 51A, amended by The Constitution (Forty-second Amendment) Act, 2007. The amendment inserted a 'green article', stating that 'the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country' (art. 48A). It also imposes a fundamental duty to every citizen of India 'to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures' (art. 51A-g).

[40] G. Singh, *Environmental Law in India*, New Delhi, 2011.

Article 48 itself. For its part, Article 51A-g provides that 'it is the duty of every citizen to protect and improve the natural environment, forests, lakes, rivers, wildlife and to respect all living beings'. Environmental protection is therefore, to all intents and purposes, a constitutional duty of both the State (Article 48A) and citizens (Article 51A, letter g), and consequently is subject to thorough judicial review to ascertain compliance in the conduct of the subjects of the legal system, with the scope of such review increasing in proportion to the number of instruments of action offered by the Indian legal system. In the field of environmental protection, the Indian Parliament established a special court in 2010, the National Green Tribunal of India (NGT), whose specific mission, as stated in the introductory report to the founding law, is to ensure 'the swift and effective resolution of judicial disputes relating to the protection of the environment and the conservation of forests and other natural resources' (NGT Act, 2 June 2010).[41]

4.1. *The Panchayat System in India*

One of the distinctive features of India's federal organisation lies in the recognition and introduction of *village Panchayats*, a local level of government that reflects not only socio-cultural traditions, but also Gandhi's ideas of the 'village democracy'.[42] Given its profoundly multicultural social composition, India is a very important case, not only in the Asian context. In fact, India's constitutional reform of local government (finalised in 1993) has been described as 'the second life of Indian democracy',[43] espe-

[41] On the *National Green Tribunal* see D. Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, in *Pace Environmental Law Review* (2012), 441-469.

[42] For further information on Gandhi's thinking on 'grassroots democracy', see R.K. Prabhu, U.R. Rao, *The Mind of Mahatma Gandhi. Encyclopedia of Gandhi's thoughts*, Ahmedabad, 1960.

[43] P.R. De Souza, *Decentralisation and Local Government: the 'Second Wind' of Democracy in India*, in Z. Hasan, E. Sridharan, R. Sudarshan (Eds), *India's Living Constitution. Ideas, Practices, Controversies*, London, 2005, 370;

cially because it was able to create a new political space for minority groups: from the Dalits (or untouchables) to the Adivasis (traditional rural communities) to the Tribal communities.

In the Indian context, decentralisation has taken even more significance with relation to the rise of globalisation, which, on the one hand, has prompted local government to play an effective political and institutional role and, on the other, has modified the State's position regarding the new dynamics of the national and international market. The allocation of significant powers and responsibilities to autonomous institutions, particularly in public service management, made it possible to achieve simplification objectives, but also to improve living conditions for the most disadvantaged groups. With regards to social relations, this process of democratic decentralisation has helped to partially mitigate the predominantly elitist and feudal nature of rural areas, especially on the management of resources and social relations in general, strengthening the representative nature of the local political system.[44] These changes have strengthened the role of local government, consolidating the position of villages as genuine institutions representing local communities.[45]

The 1993 constitutional amendments extended to the Union an original model of local government, which is linked to the traditional *Panchayat* (the 'Council of Elders', composed of five members) and the *Gram Sabha* (the 'Village Assembly'). Its most interesting feature is the institutionalisation of rural India and of its villages through a political language in tune with local traditions and capable of stimulating bottom-up democratic processes, in stark contrast to the elitist approach, typical of the early stages of the Indian state's building. This reform, assigning a central role to Village Assemblies (in which all the residents partici-

see also, in this book, L. Mazza, *A Case of Partecipatory Environmental Democracy: the Indian Model of Panchayat Raj*, 189.

[44] P.R. De Souza, *The Struggle for Local Government: Indian Democracy's New Phase*, in XXXIII *Publius - The Journal of Federalism* (2003), 104.

[45] V. Vijayakumar, *Il governo locale nell'esperienza indiana*, in H. Kudo, G. Ladu, L. Pegoraro (Eds), *Municipi d'Oriente. Il governo locale in Europa orientale*, *Asia e Australia*, Roma, 2008, 263-283.

pate), is universally recognised as an instrument of direct democracy, with both symbolic and substantial functions.

The new system is based on the division of local authorities into urban (Municipalities) and rural bodies (Village *Panchayats*). This facilitated the transition from a simple administrative decentralisation to a multi-level power structure, with the division of power between the Union, the federal states and local authorities identified as a layered order. Panchayat members are appointed through direct elections, with some seats reserved for disadvantaged castes, scheduled tribal communities and women. It is very important to note that constitutional reform has conferred broad powers on local units through specific provisions included in Annex XI of the Constitution. Currently, throughout India, rural local government is organised on three levels: the District (*Zilla Parishad*), an intermediate level (*Mandal Panchayats*) and the Village (*Gram Panchayat*).

Rural autonomous bodies play a dual role, acting as decentralised authorities (with extensive administrative powers) but also as promoters of human development. Indeed, particular attention is paid to women's participation in local political life, which is particularly significant given the failure to implement gender quotas in Parliament, which have often been proposed but never successfully implemented. In fact, women, as well as tribal communities (*Scheduled Tribes*) and disadvantaged castes (*Scheduled Castes*), are reserved a quota of seats of no less than one third, which in some cases can reach up to half of the total number of seats.[46]

This reform has raised many expectations, but, in my opinion, its most interesting aspect is the development of a real grassroots democracy through the institutionalisation of the Village Assembly (the *Gram Sahba*), where all adult members of the village can meet and deliberate on issues concerning their community. This has not been followed by a uniform regulation of powers and

[46] The number of seats reserved for tribes and castes is determined in proportion to the population, and an additional number of seats is reserved for women belonging to these groups. Seats are also reserved for women, tribal communities and castes in municipalities.

functions, leaving their determination to the legislation of individual Member States of the Union in a differentiated manner. The potential of *Gram Sahba* and similar participatory tools in addressing the problems posed by environmental degradation lies in their ability to stimulate informal mechanisms for conflict resolution and political discussion, valuing traditional methods tailored to local history and conditions, and facilitating the participation of villagers (especially the most marginalised) in decision-making processes on issues ranging from local development plans to taxation.

The figures for the reform, in terms of citizens involved in political institutions, are impressive: almost 230,000 Village Councils (*Gram Panchayat*)[47] and as many Village Assemblies (*Gram Sahba*), and just over 6,500 intermediate and district councils, for a total of about 3 million new elected representatives.[48]

Of course, such an ambitious reform could not be achieved easily or immediately. In particular, the varying approaches by the governments of the different Member States seem to be the main critical factor, given the role assigned to them in defining the operating methods of local government and in promoting the new local bodies. The level of participation by the people in local government bodies is also highly variable, depending on to the difficulty of ensuring the smooth running of local elections and the representation of women and less affluent classes.[49] The root of this problem lies in the control that rural oligarchies still manage to maintain over local politics, often using bodies such as the *Gram Sahba* to confer democratic legitimacy on their power.

This explains the different approaches taken by Indian States in implementing decentralisation. For example, West Bengal and Kerala[50] have always shown a particular propensity for implementing decentralisation, unlike Karnataka and Andhra Pradesh

[47] The *Gram Panchayat* is the executive body of the village, responsible for implementing the decisions taken by the village assembly, which also acts as a supervisory body for the Council.

[48] P.R. De Souza, *The Struggle for Local Government*, cit., 100.

[49] B.K. Sharma, *Introduction to the Constitution of India*, New Delhi, 2005, 262.

[50] One of the most significant initiatives adopted in India for the decentra-

which, despite showing commitment even before the 1992 amendments came into force, subsequently scaled back their approach for political reasons.

Despite such vicissitudes, the system of Panchayats and Municipalities represents an important vehicle for public participation in government, especially in those States with a larger territorial extension. Village Councils are the bodies closest to the Indian people and, therefore, those that contribute most to the democratic nature of the administration. The local government system outlined by the amendments to the Constitution therefore represents one of the most important investments in India's democratic development and confirms the structural trend of this democracy towards strengthening the instruments for recognising social diversity and addressing environmental governance challenges.

4.2. *Community-based Management in India: from Joint Forest Management to Community Conservation*

With reference to our research theme, India is universally recognised for its long-standing examples of community-based management of natural resources.

The most famous example is probably the movement for *joint forest management* (also known as social forestry). Joint forest management is a concept of developing relationships between fringe forest groups and state forest departments based on mutual trust and jointly defined roles and responsibilities for forest protection and development.[51] In India, this concept of participatory forest management evolved in late 1970s and 1980s in the States of West Bengal, Haryana and Madhya Pradesh. In these

lisation of functions at local level was that adopted in 1996 by the State of Kerala with the Campaign for Decentralized Planning.

[51] For a general overview on the topic see S. Lele, *Forest Management and Conservation Regime*, in P. Cullet, L. Bhullar, S. Koonan (Eds), *The Oxford Handbook of Environmental and Natural Resources Law in India*, cit., 465-486 and S. Khanna, *Forest Rights and the Forest Rights Act*, in Ibid., 487-506.

first experiences, uncultivated or degraded land was entrusted to local communities, based on a multi-year programme to restore the site using traditional methods. Within 10 years, these communities were generally able to revitalise forest resource, using only the minimum necessary for their survival. Subsequently, the communities could continue to use the territories entrusted to them to create resources for self-consumption and profit.

Over the past decades, this philosophy of forest conservation and livelihood improvement through cooperation between state and civil society has emerged as both a specific paradigm of forest governance in India and as the largest Indian community forestry program.[52]

The National Forest Policy (1988) created space for community participation in forest management decision-making. Communities are presently involved through the *Joint Forest Management Committees (JFMCs)*. A *Joint Forest Management Committee* is an agency formed at a village level or a cluster of villages situated adjacent to the Reserved Forests (RF) registered with the Territorial Divisional Forest Office. The JFMC is responsible for selecting the plant species to be planted in the forest, suggesting physical and financial targets, conducting awareness programs. Its objectives are to ensure sustainable management of forest resources, to improve forest cover via afforestation, to restore degraded forest land, to promote conservation awareness through environmental education, restore watershed capability in catchment areas and to assure employment opportunities to tribal communities. Today the JFM program is implemented by more than 100.000 Joint Forest Management Committees (JFMC) and it covers 22 million ha of forests spread across 28 constituent states of India and union territories.

The Indian Union is also a very interesting case of experimentation with institutions for the community management of natural parks. In this regard, it should first be noted that the law on protected areas, passed in the 1970s, has a fairly rigid structure:

[52] On these aspects see P. Bhattacharyaa, L. Pradhanb, G. Yadav, *Joint Forest Management in India: Experiences of Two Decades*, in *Resources, Conservation and Recycling* (2010), 469-480.

the National Parks are established by Member States, with the consent of the Union, which also has considerable economic influence by financing many of their expenses, and are managed by the administration of the concerned Member State. The ordinary management of Parks is based on a centralized governance under the control of the State ministries responsible for the environment and forests.

However, in the first thirty years of implementation of the Wildlife Act many exceptions to the general scheme were introduced. Driven by the proactive efforts of local movements which, drawing on the successful experiences of direct management of forest resources by village and tribal communities illustrated above, proposed the introduction of some forms of cooperative management of protected areas, where local communities with strong roots in the territory were present.

To apply this approach, three models of co-management of protected areas were proposed and, in some cases, implemented.

The first one consisted of establishing committees to represent the interests of tribal and local communities (so called Eco-Development Committees or EDCs), which worked alongside the Parks' authorities. The second involved the almost-total replacement of the Parks' administrative management bodies with local communities, applying a scheme linked to zoning. The third model proposed was based on a legal fiction and provided for the establishment of tribal and village communities as private companies (under a common law regime), which were entrusted with the management of services relating to the Park's management.

The most used instruments for participation of local communities were the Eco-Development Committees (EDCs), developed since the 1990s on the grounds of an Indicative Plan prepared by the Indian Institute of Public Administration on behalf of the Government of India (Ministry of Environment and Forests). The setup, working, role, responsibilities, powers, funds of these Committees varied according to the regulations laid down by individual Member States. Their extent of operation applied to protected areas**,** and forest and non-forest regions near protected areas, for the purpose of protecting wildlife and other biodiversity and undertaking eco-development activities in the villages.

These experiences were then definitively institutionalized by the Wildlife (Protection) Amendment Act of 2002, that created two new categories of protected areas, the Conservation reserves and the Community reserves. Those areas, typically situated in the buffer zones of the already established protected territories (National Parks and others) are managed by local communities and in most cases, administered directly by the *Gram Panchayats*. They present many advantages. Firstly, their establishment depends on the consent of local populations; secondly the residents and local communities are not relocated and continue traditional livelihood activities compatible with conservation; thirdly they are managed through flexible rules, adapting to local needs; fourthly they perform the function of an ecological link between major protected areas, enhancing habitat connectivity.[53]

4.3. *The 'Kerala model' and Community-based Conservation*

The State of Kerala, situated in the south-western corner of the Indian subcontinent, represents a model for social participation and good governance, especially within the Global South. According to Devika Jayakumari, Kerala became the focal point of an important international debate on development in the 1970s and afterwards because of its 'unique historical trajectory which produced social development comparable to the OECD countries even though its record of economic development was undoubtedly poor'.[54] Moreover, 'if in the 1970s, Kerala seemed an exemplar of social development, it also came to be much celebrated for high human development achievements in the 1980s,

[53] For a discussion on this topic, see G. Shahabuddin, M. Rao, *Do Community-Conserved Areas Effectively Conserve Biological Diversity? Global Insights and the Indian Context*, in 143 *Biological Conservation* 12 (2010), 2926-2936; on the Indian protected areas see, in this book, M.S. Bussi, *The Participation of Local Communities in the Management of Natural Protected Areas: a Virtuous Example from India*, 103.

[54] See in this volume J. Devika, *The Changing Vicissitudes of 'Participation' the State of Kerala, India*, 161.

and for participatory development initiatives in the 1990s'.[55] In this perspective Heller and Isaac note that 'there are probably few examples in the world where the causal link between organized social movements and significant social gains is strong as in Kerala'.[56]

Some features of this model are political stability, high literacy rate, comprehensive healthcare, robust social welfare schemes, involvement of local communities in territorial governance. Over time the 'Kerala model' continued to be highlighted for its achievements in extension of health, education, and other welfare services by the state and for its long history of grassroots movements and bottom-up political mobilisations. As recently as 2025 Kerala has been celebrated for its bottom-up approach, built on a partnership between people and the government and for 'the government's pro-people policies and the progressive mindset of its citizens, resulting in effective governance', thus 'few States exhibit such strong alignment between government initiatives and public support in driving progress, making the Kerala Model a worthy example to follow'.[57]

In Western political imagery, Kerala has not only stimulated a huge amount of research in the field of comparative social sciences,[58] but has also inspired the literary creativity of many writers, as evidenced by the role assigned, for example, to this state in K.S. Robinson's famous climate-fiction novel 'The Ministry for the Future'.[59]

[55] Ibid.

[56] P. Heller, T.M. Isaac, *The Politics and Institutional Design of Participatory Democracy: Lessons from Kerala, India,* in B. de Sousa Santos (Ed.), *Democratizing Democracy: Beyond the Liberal Democratic Canon*, 2005, London, 411.

[57] From a newspaper article by N. Banik in *The Times of India*, 15 January 2025.

[58] See O. Törnquist, J. Harriss (Eds), *Reinventing Social Democratic Development. Insights from Indian and Scandinavian Comparisons,* Copenhagen, 2017.

[59] K.S. Robinson, *The Ministry for the Future. A Novel*, New York, 2020, 134: 'Things are changing. And there are good models to study and use, Indian models. Kerala has been big in this regard as a high-functioning state for almost a century now, devolving power to the local, and the state government

With respect to our area of study, in Kerala, as rightly noted by Ganapathy

> history of grassroots movements and bottom-up political mobilisations, led by the political left, helped to foster a conducive state-society relationship leading to the institution of a state apparatus that was responsive to needs of people articulated through civil society organisations as well as the political process.[60]

In our research we considered three very relevant cases: a) the development and establishment of the system of participatory planning, involving local people, especially at the Panchayat level; b) the case of Jalasamrudhi, a water conversation program that saw the participation of local communities, several government agencies, local elected representatives, civil society organisations, and educational institutions; c) the cooperative management experiences conducted at the Periyar Tiger Reserve in the Southern Western Ghats, that was designated as a learning centre of excellence by the Government of India.

5. *China and Vietnam: Progress of Environmental Participation in two Transitional States*

In South-East Asia, China and Vietnam are both undergoing economic and social transitions, opening to some aspects of a liberal economy and to important legal reforms without rejecting their political centralized structure. Not being able to address here the debate about the doctrinal definition of these two political regimes (which received many different labels, from Par-

alternating in a scheduled way between Left and Congress leadership. Much has been taken from Kerala and applied nationally'.

[60] See in this volume G. Ganapathy, *Participation and the Challenge of Social Learning for Sustainability: Insights from a Water Conservation Programme in Kerala, India*, 135; see also M. Desai, *Indirect British Rule, State Formation, and Welfarism in Kerala, India, 1860-1957*, in 29 *Social Science History* 3 (2005), 457-488 and R. Véron, *The "new" Kerala Model: Lessons for Sustainable Development*, in 29 *World development* 4 (2001), 601-617.

ty-state constitutionalism, Confucian constitutionalism, populist constitutionalism, authoritarian constitutionalism), we will simply highlight some of the insights that emerged from the case studies analyzed in our research.

In their essay, Messina and Duong Nguyen, noted that presently citizen participation in Vietnam is affected by changes in the relationship between the state and its citizens, which are fairly consistent with both the traditional and contemporary ideological background of the country.[61] For both the Confucian and the Marxist ideology, in fact, 'the central role of the ruler is to care for the people, in accordance with a conception of the human being as part of a larger community that denotes the inseparability of individuals within the social context'.[62] This in turn implies an emphasis on collective interests and the submission of individuals to the state where people entrust their well-being to a morally correct power which is built on a paternalistic trusteeship (or soft authoritarianism).

In our perspective, the recent reforms to the Vietnamese Environmental Protection Law and the Law on Grassroots Democracy have represented genuine innovation. Besides, citizen activism and engagement play an increasingly crucial role in effecting a shift toward reshaping state-society relations in Vietnam 'by skillfully leveraging existing legal instruments and pushing for further renovation of direct democracy institutions even if the central state still holds an important role'.[63]

Such evolutionary developments are further confirmed by Nguyen Anh Duc's study on the role of communities in nature reserves in Vietnam.[64] According to Anh Duc's research 'the country has made significant strides in recognizing the role of communities in nature conservation and climate change mitigation', while legal reforms such as the 2020 Law on Environmen-

[61] See in this volume S. Messina, T.D. Nguyen, *Perspectives on Grassroots Environmental Democracy: An Overview of Vietnam,* 243.

[62] Ibid.

[63] Ibid.

[64] See in this volume A.D. Nguyen, *The Role of Communities in Nature Reserves and Climate Change Management in Vietnam: Constitutional Challenges*, 217.

tal Protection have started to recognize community rights and, moreover, grassroots initiatives have demonstrated the transformative potential of local engagement.[65]

In China environmental protection was mentioned firstly in the 1978 Constitution and was reaffirmed by the 1982 Constitution, whose article 26 declares that 'the State protects and improves the living environment and the ecological environment, and prevents and controls pollution and other public hazards'.[66] In this formulation the right to environment is not explicitly affirmed, with the consequence that in the Chinese constitutional order the protection of the environment and the conservation of natural resources are mere obligations of the government and not a right to be claimed by the citizens, thus deserving the label of 'State environmentalism'. Of course, this attitude is tributary to the overall approach of the Chinese legal order, traditionally reticent to adopts a right's approach. Generally, as it has been noted, 'in a cultural milieu that has long favored rang or 'yielding' in dispute situation and a legal and political milieu that does not encourage the assertion of rights, many environmental grievances are not transformed into disputes'.[67] This has not prevented the development of an overflowing environmental legislation starting with the Environmental Protection Law of 1979, significantly encouraged by the constitutional recognition of environmental protection, and covering almost all the fields of contemporary environmental law. Moreover, article 26 of the Constitution also declares that 'the State shall organize and encourage afforestation and protect forests'. This legal apparatus has been

[65] Ibid.

[66] See also Article 9: 'mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the state, that is, by the whole people, with the exception of the forests, mountains, grassland, unreclaimed land and beaches that are owned by collectives in accordance with the law. The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited'.

[67] M. Palmer, *Environmental Regulation in the People's Republic of China: The Face of Domestic Law*, in *The China Quarterly* 156 (1998), 800.

used since the 2010s as a basis for a broader constitutional narrative of building an *ecological civilisation* and public campaigns such as 'Beautiful China'.

According to the study conducted by Darya Pereira Rega 'these constitutional commitments are not merely rhetorical, they provide the normative basis for a range of State-led initiatives in reforestation, pollution control, and ecological governance', but, obviously, 'environmental constitutionalism in China functions less as a liberal safeguard against arbitrary power and more as a framework that legitimizes and mandates proactive environmental action by state (and non-state) institutions'.[68]

In our research we analysed a very interesting case, the Ant Forest project, launched by the private Alipay's Ant Group in 2016, which illustrates how constitutional environmental directives can extend beyond state action to encompass private-sector innovation and mass public engagement.

The Ant Forest project, based on a phone application, gamifies public engagement in green behavior by rewarding users with 'green energy points' for engaging in low-carbon activities such as walking, taking public transport, or paying bills online; these points can then be used to cultivate virtual trees which correspond to the planting of real trees in arid regions of northwestern China.

According to Pereira Rega 'Ant Forest can be interpreted as an example of the practical realization of environmental constitutionalism in China, because it embodies the constitutional directive found in Article 26' and 'demonstrates how constitutional directives are not merely aspirational but can be operationalized through the combined efforts of state policy, private innovation, and mass public engagement'.[69] In addition to this, the project 'exemplifies how constitutional directives can be operationalized not only through State-led action but also via private-sector initiatives that align with State objectives'.[70] The add-

[68] See in this volume D. Pereira Rega, *Alternative Environmental Policies in China: Reforestation Through Public Engagement*, 293.

[69] Ibid., 321.

[70] Ibid.

ed value of this case to our research is that it enables the transfer of environmental engagement into urban spaces, somehow democratising participation in reforestation efforts traditionally confined to rural areas.

6. *The Gross National Happiness Experiment in Bhutan*

Located in the center of the Himalayan Mountain range, virtually inaccessible in the past and free from colonial influence until recently, the small state of Bhutan has attracted the attention of constitutionalists for the experiment inaugurated with the Constitution of 2008, which outlines a theoretical model of sustainable constitutionalism of great interest. In its Constitution, Bhutan has established an alternative model based on the concept of 'Gross National Happiness' (GNH) and developed from the premise that a nation's true progress cannot be measured solely in economic terms but must take into account the overall well-being of the population, including spiritual, cultural, social and environmental dimensions.

In our research Emilia Morra highlighted how GNH

> holistically combines external material conditions with inner satisfaction: inner activities would include, for example, helping all sentient beings achieve enlightenment, or in any case helping others; external activities, on the other hand, would include promoting basic human needs through government, adequate healthcare for all, equitable economic development, and environmental protection.[71]

GNH is proposed as an alternative to traditional indicators of well-being such as GDP, which, considering only the sum of goods and services produced during the year, has proved to be very limited and incapable of representing the distribution of resources among citizens, thus concealing inequalities in the population. Indeed, as illustrated in our research, various internation-

[71] See in this volume E. Morra, *Social Indicators and Sustainable Development in the Kingdom of Bhutan: the Gross National Happiness Model*, 283.

al experiences have already tried to identify indicators to complement GDP in order to measure aspects that we could define as 'social', demonstrating a generalized need to critically rethink the current model of development to embrace a new one, a model that seeks to achieve a complete human well-being.

The question has therefore been raised as to whether GDP is still capable of comprehensively representing a nation's growth: the example of Bhutan shows that the well-being of citizens can no longer be excluded from this assessment and that, in order to measure multidimensional development, it is necessary to use equally multidimensional indicators capable of both quantitative and qualitative considerations. Through this holistic approach aimed at establishing a nation-state based on GNH, Bhutan strives to create a supportive society founded on collective happiness, mitigating the conflict between modernization and capitalism on the one hand, and between mainstream and Buddhist cultural values, on the other.

In other words, our study demonstrates that 'it is possible to take into account the principles of sustainable development and environmental protection in political decisions' and to make them the 'core' of the constitutional system'.[72] For these reasons, Bhutan's experience should be considered an inspirational model for industrialised and modernising countries also.

7. *Concluding Remarks: Learning from the 'Glocal South'*

We started our research by setting out some theoretical considerations, to be verified through selected case studies. First of all, we have discussed some of the criticisms levelled at the concept of sustainability. We have critically highlighted the central role assigned to the notion of sustainable development by the mainstream Western interpretations of the principle of sustainability, both from a theoretical and from a practical point of view.

In fact, the most important international instrument currently in force, the Sustainable Development Goals mechanism, assigns

[72] Ibid.

a secondary role to specific environmental objectives (there are only 3 out of 17: climate action, life below water, life on land) and relegates them to the bottom of the list (number 13 to 15). In the words of Kotzé, Adelman and Dube, this reveals 'the ontological design and ethical orientation of the SDGs which are fully 'constituted', shaped, and steered by sustainable development'.[73] Dorine Van Norren confirms that the focus of the SDG goals is still on growth and use of resources, 'be it in a sustainable way (a static balancing scale, rather than cyclical concept) and departs from an individual, not collective, point of view'.[74]

We also highlighted how the advent of the Anthropocene makes it urgent to return to the enhancement of the material foundations of life, through governance practices linked to the materiality of territories and through the natural propensity for cooperation that local communities can provide. As Robinson puts it: 'as humans stumble into the Anthropocene, it is incumbent to acknowledge that sustainability depends on cooperation and resilience and not on nostrums about the economic advantages alone of sustainable development'.[75]

This brings us to a theoretical and practical turning point that makes it urgent to consider other conceptions of the world, different ontologies, alternatives to the mainstream trend of liberal economics and law based on endless growth and to take other pathways. Such alternatives can only be sought in the South of the world, an appellation that we prefer to use instead of the label Global South, which, according to Michelle Lim, 'has gained

[73] L.J. Kotzé, S. Adelman, F. Dube, *The Problem with Sustainable Development in the Anthropocene Epoch*, cit., 10.

[74] D.E. van Norren, *The Sustainable Development Goals Viewed through Gross National Happiness, Ubuntu, and Buen Vivir*, in 20 *International Environmental Agreements: Politics, Law and Economics* 3 (2020), 431-458, 453. Describing the mainstream western approaches van Norren argues that 'these systems of thought are based on collective interest, biocentrism, cyclical processes, cooperation, duty towards the community (from which one derives collective rights), markets based on use value (not speculative value) of goods (food, housing, financial products), spirit transcending the material, work as life-fulfilling, earth governance and law, and restorative justice'.

[75] N.A. Robinson, *Beyond Sustainability*, cit., 194.

prominence as other terms have become unpalatable'.[76] We have also emphasized how the dialogue between the North(s) and South(s) of the world can be further encouraged by the recognition of widespread traditions of southern thinking (e.g. 'meridian thinking') in some areas of the North, particularly in the Mediterranean countries and Southern Europe.

In other words, one could say that a compelling reason to listen to Southern voices is that *there is a considerable amount of South in our North*.

In this perspective, we have focused our research on case studies from the South and, to give our work greater consistency, we have limited ourselves to a few examples from the Asian continent.

Listening to Southern voices implicates a shift in our conceptual paradigm: faced with problems that are of a global dimension but must be solved at the local level, we need to dismiss the Kantian idea of *universality* to embrace *pluriversality*.

In their introduction to 'Pluriverse. A post-development dictionary' Kothari, Salleh, Escobar and Demaria explain that in a pluriversal world

> people re-learn what it means to be a humble part of 'nature', leaving behind narrow anthropocentric notions of progress based on economic growth. While many pluriversal articulations synergize with each other, unlike the universalizing ideology of sustainable development, they cannot be reduced to an overarching policy for administration either by the UN or some other global governance regime, or by regional or state regimes.[77]

This requires an emphasis on the local dimension by empowering not only local government institutions, but also communities, indigenous peoples, social and minority groups. At the same

[76] M. Lim, *Sustainable Development Principles and the Global South in the Context of Planetary Change,* in S. Khair, S. Alam, M.E. Haque (Eds)*, Implementation of Sustainable Development in the Global South. Strategies, Innovations, and Challenges,* Oxford, 2024*,* 58.

[77] A. Kothari, A. Salleh, A. Escobar *et al.*, *Introduction. Finding Pluriversal Paths*, in A. Kothari, A. Salleh, A. Escobar *et al.*, *Pluriverse. A Post-Development Dictionary*, New Delhi, 2019, XVIII.

time, by acknowledging the scale of environmental problems, the local must look at the global context as a frame of reference for local actions and as a connecting medium between territories. In other words, if 'glocalism is a process of norm diffusion from the local to the global and from the global to the local',[78] Southern voices invite us to privilege bottom-up approaches, especially to come to terms with effective and engaging environmental actions.

The case of India appears particularly significant from this point of view, both theoretically and in terms of concrete achievements.

From the first point of view, we can mention the inspiring suggestions of Kothari, who proposes an original model of *Eco-swaraj*. This innovative model comes from the ancient Indian notion of *swaraj* based on an intrinsic tension towards an 'individual and collective autonomy' and

> …freedom linked to responsibility for others' autonomy and freedom; a focus on ethical behavior that makes possible the fulfilment of this responsibility, a stress on limiting one's wants and desires, and a sophisticated understanding of the balance between the individual and the collective, as evident for instance in the work of Gandhi.[79]

Starting from this premise, Kothari elaborates the concept of *Eco-swaraj*, that is 'a socio-cultural, political and economic arrangement in which all people and communities have the right and full opportunity to participate in decision-making, based on the twin fulcrums of ecological sustainability and human equity'.[80] Accordingly, the transformation towards *Eco-swaraj*

> …will render the role of formal, statutory law and policy much less important; the social contract amongst people will be based much more on evolving norms and customs, sustained through collective mechanisms of dispute resolution and dealing with vi-

[78] A. Mihr, *Glocal Governance. How to Govern in the Anthropocene?*, cit., 15.

[79] A. Kothari, *Radical Well-Being Alternatives to Development*, cit., 72.

[80] Ibid., 83.

> olations, and able to accept considerable diversity, adaptability and flexibility.[81]

In this scheme

> …unit of direct democracy would be a unit for formulating such norms (or where necessary laws), and in this sense considerably deepening the decentralization of powers currently envisaged in India's Panchayat system, adding crucial financial and lawmaking powers.[82]

India has been experimenting with the effectiveness and feasibility of this model, applied to natural resources and environmental protection, since the 1970s with the social forestry movements, which spread from West Bengal to many other Member States of the Indian Union. The ability to develop radical and alternative models of community participation is facilitated in India by two institutional elements: its contractual and cooperative federalism and the unique system of local government known as *Panchayat system*, which was institutionalized throughout the country in the 1990s.

We have investigated in detail the case of the state of Kerala, India's leading model of participatory and inclusive development, noting how practices of glocalisation *ante litteram* have developed here, such as the participatory planning, developed through the 'People's Planning Campaign', since 1996. This program is aimed at moving the management of natural resources and production, and social welfare distribution to the local level by strengthening local elected bodies at the village and other decentralised levels. We also examined a water conservation program, conceived and implemented in Kerala, analysing the challenges to transitioning towards sustainability. This successful experience was based on the involvement of local communities, several government agencies, local elected representatives, civil society organizations, and educational institutions, demonstrating the validity of such an *integrated glocal approach*, despite

[81] Ibid., 84.
[82] Ibid.

some critical issues related to the rigidity of the traditional parties and the administrative structures. We also highlighted the substantial involvement of traditional communities in the management of protected area, through the study of the formal and informal arrangements used at the Periyar Tiger Reserve (Kerala).

These experiences, which represent only the tip of the iceberg, are echoed in other parts of Asia, albeit in more embryonic and less entrenched forms. This is the result of the research we have conducted on community management of protected areas and developments in grassroots democracy in Vietnam, or civil society involvement in environmental management and environmental awareness programs such as the Ant Forest project in China.

Among the best practices relating to community participation in environmental and natural resource governance, we could not overlook the isolated but significant case of Bhutan, which proposes, even at the constitutional level, an original model for regulating the relations between politics, economics and the environment, from a perspective that can be considered typically 'glocal'.

In fact, the Bhutanese concept and policy of Gross National Happiness (GNH) contrasts conventional economic thinking rooted in Gross National Product (GNP), and considers a broad concept of well-being, to be evaluated by a 'Gross National Happiness index'. According to van Norren the Bhutanese legal system 'contributes to the deconstruction of conventional concepts of law, while it goes against law rooted in objective rationality and strict secularism' and builds a constitutional system 'based on people's ethics of Happiness, focusing on harmony, derived primarily from Buddhism but also supported in Hinduism', by guaranteeing, at the same time, separation of religion and state.[83]

The results of our research confirm the priority of the biological-natural dimension for a sound and realistic conception of subsidiarity not ideologically oriented by economic interests, like

[83] For all these quotes see D.E. van Norren, *The Sustainable Development Goals*, cit., 436.

it occurs in the mainstream sustainable development theory. It also confirms that sustainability cannot be an end goal or a destiny but should be a 'continuous learning path that will lead towards a more desirable place compared to where we are currently at or headed to'.[84] In other terms sustainability still has transformative potential not as an abstract doctrine but as a mode of action.

In terms of governance, this means that sustainability cannot be achieved through universally applicable theoretical tools (as in the philosophy underlying the SDGs) but through practices in line with the mentalities, traditions and social dynamics of the territories, which are the actors primarily affected (as collective units) by environmental and climate crises. This corresponds to a political-legal dynamic that represents a new and original interpretation of the *Glocal model*, reinterpreted from the perspective of the Global South.

Allow me to conclude, by using a neologism: our research journey indicates that our initial invitation to *listen to Southern voices* means, in terms of New Sustainability Governance (NESUS-G), *learning theories and practices from the 'Glocal South'*.

[84] See in this volume G. Ganapathy, *Participation and the Challenge of Social Learning for Sustainability*, 133.

INDEPENDENT AUTHORITIES AND THE GOVERNANCE OF SUSTAINABILITY: THE TRANSFORMATION OF FOOD REGULATION IN THE EUROPEAN UNION

Lucia Scaffardi

Abstract: *The chapter explores the evolving role of independent authorities in the governance of sustainability, with particular attention to the transformation of food regulation in the European Union. Against the backdrop of climate change, food insecurity, geopolitical crises, and growing scientific complexity, the study examines how independent authorities increasingly contribute to sustainability-oriented regulatory frameworks. Focusing on the EU experience, it analyses the role of agencies such as the European Food Safety Authority (EFSA), highlighting the interaction between scientific expertise, political decision-making, and democratic legitimacy. The chapter argues that sustainability governance is undergoing a profound transformation in which independent authorities have become key actors in balancing environmental protection, economic sustainability, food security, and regulatory objectives, while revealing the opportunities and limits of science-based governance.*

Keywords*:* Sustainability Governance, Independent Authorities, Food Regulation, Food Safety, European Union, EFSA

1. *Introduction*

Sustainability *governance*, in food systems but also in other contexts,[1] represents one of the most complex areas of contemporary public action. This is because institutions must grapple with scientific uncertainties, growing environmental risks, socio-economic vulnerabilities and global interconnections: all fac-

[1] See what has already been highlighted by the co-editors of this text in the previous chapters: T. Groppi, *Sustainability as a New "Constitutional Key Concept": A Comparative Perspective* and D. Amirante, *Sustainability, Natural Resources and Communities: Learning from Southern Voices*, in this volume.

tors whose significance has increased remarkably compared to the past. The world today is facing a series of challenges linked in part to the food sector and governance, which can no longer be considered a reflection of isolated or sectoral phenomena but rather an expression of a systemic emergency involving geopolitical, environmental and socio-economic aspects.[2] International tensions, climate emergencies and the worsening of global inequalities represent some of the key dimensions of a complex, multi-level crisis, now widely recognised in scholarship and several international reports.[3]

The management of this crisis requires comprehensive and coordinated responses. The growing interdependence of markets and the global nature of the causes and consequences of food *insecurity* make it clear that the phenomenon can no longer be addressed by traditional national policies but rather requires transnational reflection and response.[4]

This global dimension has been further accentuated by other events highlighting the structural fragility of contemporary food systems: in particular, the COVID-19 pandemic exposed the dependence of entire regions of the planet on international trade flows and the vulnerability of food supply chains, reopening the

[2] FAO, IFAD, UNICEF, WFP and WHO, *The State of Food Security and Nutrition in the World 2022. Repurposing Food and Agricultural Policies to Make Healthy Diets More Affordable*, Rome, 2022, https://doi.org/10.4060/cc0639en; World Food Programme, *A Global Food Crisis*, 2023. https://www.wfp.org/global-hunger-crisis. More recently, particularly with regard to the consequences of geopolitical crises on price fluctuations, FAO, IFAD, UNICEF, WFP and WHO. 2025. *The State of Food Security and Nutrition in the World 2025 – Addressing High Food Price Inflation for Food Security and Nutrition*, Rome. 2025, https://doi.org/10.4060/cd6008en.

[3] See C. Barrett, E.C. Lentz, *Food Insecurity*, in N. Roy (Ed.), *Oxford Research Encyclopedia of International Studies*, New York, NY, online edn., 2018; M. Sassi, *Understanding Food Insecurity. Key Features, Indicators, and Response Design*, Cham, 2018; E. Webster, A. Gupta, R. Ambros (Eds), *Transnational Food Security*, London, 2020; S. Savary *et al.*, *Revisiting Food Security in 2021: An Overview of the Past Year*, in *Food Security* 14 (2022), 1-7.

[4] M. Canfield, *Transnational Food Law*, in P. Zubansen (Ed.), *The Oxford Handbook of Transnational Law*, Oxford, 2021.

long-dormant debate on food sovereignty[5] and the self-sufficiency of national food systems.[6]

Compounding this are the destabilising effects of armed conflicts,[7] not least the war in Ukraine, which affects the availability of agricultural raw materials and fertilisers and the stability of global markets, with particularly severe repercussions in the most vulnerable areas of the planet,[8] as well as conflict-affected populations.[9] More recently, the military escalation in Iran has deprived global trade of a key shipping route, namely the Strait of Hormuz, resulting in tensions for maritime traffic and the price of energy and fuel, all key factors for the agri-food supply chain and the cost of basic food products.

These phenomena are intertwined with the evident impacts of climate change, whose adverse effects, increasingly frequent extreme weather events including prolonged droughts, directly affect the productive capacity of agricultural systems, whilst simultaneously reducing their sustainability.[10] Moreover, it is worth

[5] On this important concept, see, *inter alios*, G. Zagrebelsky, *Due concetti costituzionali: sovranità alimentare e olismo*, in Vv. Aa., *Carlo Petrini: la coscienza del cibo*, Pollenzo, 2014, 12 ff.; A. Rinella, H. Okoronko, *Sovranità alimentare e diritto al cibo*, in *DPCE*, 1, 2015, 89 ff.; M. Edelman (Ed.), *Critical Perspectives on Food Sovereignty: Global Agrarian Transformations*, Volume 2 (1st Ed.), London, 2016; G. Cerrina Feroni, T.E. Frosini, L. Mezzetti, L. Petrillo (Eds), *Ambiente, energia, alimentazione. Modelli giuridici comparati per lo sviluppo sostenibile*, Firenze, 2016.

[6] L. Costato, *Globalizzazione, Covid-19 e sopravvivenza*, in *Rivista di Diritto Alimentare*, 1, 2021, and, also in this journal, and issue F. Albisinni, *Rules, Responsibilities and Governance Facing Covid-19 in the Agri-Food Sector: EU and Italian Perspectives*.

[7] B. Kemmerling, C. Schetter, L. Wirkus, *The logics of war and food (in) security*, in *Global Food Security*, 33, 2022,

[8] See the 2025 FAO report cited in footnote 2 and European Commission, COM (2022)133; World Food Programme 2022.

[9] S. Papale, E. Castelli, *Russia, Ukraine and Food Warfare*, in *International Affairs* 1 (2026), 23-42.

[10] In Italy, for example, the WWF in its Planet Report (available at: https://www.wwf.it/cosa-facciamo/pubblicazioni/living-planet-report) highlighted the unsustainability of the national agricultural system. The IPCC (Intergovernmental Panel on Climate Change) has also emphasised in its reports that the severity of the climate crisis, caused by rising global temperatures, requires innovative, radical and urgent action. See the report by P.R. Shukla, J. Skea, A.

noting that the relationship between food systems and climate change is bidirectional: whilst climate change compromises agricultural productivity, food systems contribute significantly to global emissions and the deterioration of natural resources.[11]

This interplay of causes and effects further reinforces the systemic nature of food crises and calls for a comprehensive rethinking of the ways in which food is produced, distributed and consumed. Against this backdrop, the unequal distribution of resources and the persistent asymmetries and inequalities between the Global North and the Global South[12] inflame an already critical situation. Phenomena such as food waste in more developed countries lay bare the structural inefficiency of current models and consumption habits, as well as the need for comprehensive regulatory and political interventions.[13]

The combination of these factors thus delineates an extremely complex and interconnected configuration of global food systems, wherein the multiple variables involved exert reciprocal influence, generating cumulative effects that are difficult to govern through traditional approaches.[14] To this must be added a

Reisinger *et al.*, *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC), Cambridge-New York, 2022.

[11] See FAO, *Greenhouse Gas Emissions from Agrifood Systems – Global, Regional and country trends*, 2001-2023, FAOSTAT Analytical Brief Series, No. 115, Rome, 2025, https://www.fao.org/statistics/highlights-archive/highlights-detail/greenhouse-gas-emissions-from-agrifood-systems.-global--regional-and-country-trends--2001-2023/en. See also the points highlighted in M. Crippa *et al.*, *Food Systems Are Responsible for a Third of Global Anthropogenic GHG*, in *Nature Food* 2 (2021), 198 ff.

[12] With regard to the role of the Global South in promoting new constitutional models, ideas and paradigms concerning sustainability, see D. Amirante, *Sustainability, Natural Resources and Communities: Learning from Southern Voices*, in this volume.

[13] On this point, see, among the latest reports on the subject, United Nations Environment Programme, *Food Waste Index Report* 2024, Nairobi, 2024. With regard to the Italian legal system, see C. Cerbone, *Pratiche virtuose contro lo spreco alimentare in Italia: alcune note a partire dalle recenti proposte di legge sulla cd. doggy bag*, in *federalismi.it* 24 (2024).

[14] The available data confirm the severity of the crisis: hundreds of millions of people suffer from hunger today, and a significant proportion of the world's population lives in conditions of food insecurity, a phenomenon that is gra-

further layer of complexity, which legislators and policymakers can no longer ignore: the growing importance of technical and specialised knowledge necessitates the increasingly frequent involvement of non-legal actors and expertise within policy-making processes.[15]

In the complex scenario outlined above, food governance can no longer be regarded as the exclusive domain of state action or sectoral policies. Conversely, the development of regulatory solutions capable of addressing changing social needs requires the involvement of a wide range of stakeholders and the adoption of an integrated approach capable of combining environmental sustainability, social equity and economic efficiency. From this perspective, the sustainability of food systems emerges as a critical and urgent objective, as also demonstrated by the central role attributed to the issue within the United Nations 2030 Agenda and, particularly, by the second Sustainable Development Goal (SDG).[16]

In the face of this formal recognition, the growing complexity of food systems and the necessary integration of sustainability policies has also led to an ongoing transformation regarding the

dually spreading even to the most economically advanced countries. FAO, IFAD, UNICEF, WFP and WHO, *The State of Food Security and Nutrition in the World 2022*, cit.; World Bank, *Food Security Update, 11 August 2022, https://thedocs.worldbank.org/en/doc/b5de315c82b1a3bb32bf30057aad9b74-0320012022/original/Food-Security-Update-LXVIII-Aug-11-2022.pdf*; C.M. Pollard, S Booth, *Food Insecurity and Hunger in Rich Countries. It Is Time for Action against Inequality*, in *Int. J. Environ. Res. Public Health*, 16, 2019. In this context, the need to ensure access to food for an ever-growing global population, in the face of increasingly limited natural resources, stands as one of the major challenges of our time: FAO, *The future of food and agriculture – Trends and challenges*, Rome, 2017; United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects 2019: Highlights*, 2019 (ST/ESA/SER.A/423).

[15] On this subject, regarding the specific context of the European Union, to which we shall return later in this chapter, see E. Korkea-Aho, P. Leino-Sandberg, *Introduction*, in E. Korkea-Aho, P. Leino-Sandberg (Eds), *Law, Legal Expertise and EU Policy-Making*, Cambridge, 2022, 1-16.

[16] UN, *Sustainable Development Goals Report*, 2022, https://unstats.un.org/sdgs/report/2022/The-Sustainable-Development-Goals-Report-2022.pdf.

methods of public policymaking:[17] the latter now appears characterised by a progressive shift towards polycentric structures and the greater involvement of non-state actors and institutional bodies composed of technical experts in decision-making processes.[18] From this perspective, regulation is no longer limited solely to the production of binding rules or 'hard law', but also unfolds through a variety of instruments, including coordination mechanisms and agreements, the development of technical standards and other forms in the multifaceted galaxy of 'soft law'.[19]

This evolving trend, however, entails significant challenges. In particular, the proliferation of decision-making centres and the increasing 'technicalisation' of policymaking raise significant questions regarding democratic legitimacy, transparency and accountability.[20] Furthermore, the delegation of regulatory functions to technical or independent bodies, such as independent authorities or agencies, raises additional issues concerning the relationship between scientific knowledge and political decision-making, as well as the role of representative institutions in highly complex contexts.[21]

[17] It is worth noting, however, that effective and coherent strategies capable of bringing about a genuine paradigm shift have not always been developed. The difficulties in implementing effective policies reflect, in fact, the complexity of a phenomenon that affects not only the agri-food sector, but more generally the relationship between human activity and the environment, today deeply marked by an awareness of the impact of the Anthropocene; on this point, see D. Amirante, *Costituzionalismo ambientale*, Bologna, 2022.

[18] On this subject, see G.F. Ferrari, *Tendenze verso il costituzionalismo transnazionale*, in G.F. Ferrari (Ed.), *Atlante di diritto pubblico comparato*, UTET, 2023; D. Kennedy, *The Mystery of Global Governance*, in J.L. Dunoff, J.P. Trachtman (Eds), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009.

[19] For a general overview, see E. Mostacci, *La soft law nel sistema delle fonti: uno studio comparato*, Padova, 2008; L. Senden, *Soft Law in European Community Law*, Oxford, 2004.

[20] On this point, see W.C. Chang, J.R. Yeh, *Internationalisation of Constitutional Law*, in M. Rosenfeld, A. Sajò (Eds), *Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, according to whom 'democratic legitimacy and accountability suffer to the greatest extent when affected citizens have no access to influence the norm-generating process and to hold norm-generators accountable'.

[21] For a general overview, see, *among others*, M. Maggetti, *The role of inde-*

In light of these dynamics, it appears necessary to examine the transformations currently underway in the governance of sustainability, including the food sector, with special attention to new key actors in these processes, the evolution of institutional models, and their implications for the overall configuration of public action in the contemporary context.[22]

This paper aims to provide food for thought on this complex topic, starting from a broader theoretical framework concerning the role of independent authorities in the governance of sustainability (Section 2), before turning attention to the food sector and the process of definition – and sometimes redefinition – that has shaped the functions and tasks of these new and increasingly crucial actors in shaping regulatory choices and frameworks geared towards sustainability (Section 3). From a methodological perspective, this study aims to focus on the specific context of the European Union, which is a paradigmatic example due to the richness of its landscape, complexity of the current regulatory framework and its focus on the objective of sustainability. The concluding remarks of Section 4 advance broader systemic reflections on the relationship between science and law; the tension between technical decision-making and political evaluation; the interplay between specialised knowledge and responsibility grounded in democratic legitimacy; and the balance between environmental sustainability and the guarantee of the proper functioning of the economy. Such themes are increasingly central to contemporary legal debate, particularly in relation to the challenge of developing effective and innovative models of sustainability governance.

pendent regulatory agencies in policy-making: a comparative analysis, in 16 *Journal of European Public Policy* 3 (2009), 450-470; P. Bonini, A. Celotto, *Profili costituzionali delle autorità amministrative indipendenti*, in *Quaderni della Rivista della Corte dei Conti* 1 (2022); More generally, on the repercussions of the aforementioned phenomena on the system of sources, see A. Pizzorusso, *La produzione normativa in tempi di globalizzazione*, Torino, 2008.

[22] M. Maggetti, *The Role of Independent Regulatory Agencies in Policy-Making: A Comparative Analysis*, cit., 450-451.

2. *Theoretical Framework and Classifications of Independent Authorities in Sustainability Governance: Areas of Application Beyond the Food Sector*

The emergence and development of sustainability governance in the European context has manifested itself through a diverse array of different sectors regulated or co-regulated by independent authorities.[23] In many cases, these authorities were not established to deal with issues such as the environment, climate or food insecurity; however, today many of them integrate environmental and social objectives into their activities and agendas, helping to progressively redefine traditional categories of regulation and take on functions that were previously considered outside their mandate and competence.[24]

To fully understand these developments, it is first necessary to clarify what is meant by 'independent authorities'. In general terms, these regulatory bodies can be defined as public organisations endowed with regulatory powers – that is the capacity to regulate a field, albeit not necessarily through means comparable with legislative provisions issued by parliaments – that are neither directly elected nor subject to the hierarchical control of political authorities.[25] Thus, independent authorities form part of the broader phenomenon of so-called 'agencification', which has characterised the countries of the Organisation for Economic Cooperation and Development (OECD) since the 1990s, representing one of the main regulatory approaches in complex sec-

[23] For an overview, European Parliamentary Research Service, *EU Agencies, Common Approach and Parliamentary Scrutiny*, available at http://www.europarl.europa.eu.

[24] See on this point the contribution by A. Volpato and Ellen Vos, *The Role of EU Agencies in EU Environmental Law and Policy: from Information Gathering to Policy Advice*, in this volume, and the taxonomies of the authorities' tasks set out therein.

[25] See C. Sartoretti, *Le autorità amministrative indipendenti nel diritto costituzionale comparato*, Bologna, 2018, 22-23, who instead emphasises expertise in highly technical matters, 'such as to require a specific position of independence from political power' in order to achieve 'greater impartiality (so-called neutrality) with respect to the interests involved'.

tors such as telecommunications, energy, environmental protection and competition.[26]

The origins of such bodies date back to the late 19th century in the United States,[27] with the Independent Regulatory Commissions, which subsequently developed and spread to Europe, albeit following different trajectories. These are specialised bodies, equipped with high levels of technical expertise called upon to operate in sensitive areas with the aim of reducing political discretion and adopting decisions based on technical and scientific knowledge, rather than contingent interests. From this perspective, the emergence of independent authorities is closely linked to the transition towards the so-called *regulatory state*.[28]

However, this evolution has been far from uniform. In the United States, independent authorities emerged in the context of the New Deal as instruments for strengthening public intervention, aimed at correcting the distortions of an unregulated market. Conversely, in Europe[29] and particularly in countries such as

[26] D. Levi-Faur, David, *Regulatory Network and Regulatory agencification: Towards a Single European Regulatory Space*, in B. Rittberger, A. Wonka (Eds), *Agency Governance in the EU*, London, 2013, 32-51.

[27] The emergence and development of independent authorities follow profoundly different trajectories across various legal systems. On this point, see V. Sartoretti, *Le autorità amministrative indipendenti*, cit. In particular, the US model represents the historical archetype of independent regulatory agencies, emerging as early as the late 19th and early 20th centuries (starting with the Interstate Commerce Commission) to meet the need to regulate complex markets through technical bodies removed from the direct control of the executive, within a system characterised by the separation of powers and mistrust of the concentration of administrative authority. The US Supreme Court, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), had already provided a definition of independent authorities as bodies composed of experts independent from the executive, except with respect to their appointment. See J.J. Laffont, *Regulation and Development*, Cambridge, 2005.

[28] G. Majone, *The Rise of the Regulatory State in Europe*, in W.C. Mueller, V. Wright (Eds), *The State in Western Europe, Retreat or Redefinition?*, London, 1994.

[29] In the European Union, independent agencies and authorities have emerged much more recently and serve primarily to facilitate the integration of the internal market, technical regulation and the management of complex risks (consider, among others, the food, environmental and energy sectors). In this context, independence responds not so much to an original need for the

Italy, independent authorities have developed within the framework of liberalisation and privatisation processes, assuming the role of supervisors of sectors previously managed directly by the state or by public bodies. In this transition, the state has progressively abandoned the role of a manager to assume the role of regulator.[30]

At the international level too, institutions such as the World Bank and the International Monetary Fund have promoted the spread of the regulatory authority model, particularly in developing countries. However, in such contexts, the presence of highly centralised political systems has often limited the actual degree of independence of these authorities, making them, at least in part, dependent or highly influenced by the executive branch.[31]

This results in an extremely complex and diverse landscape from a comparative law perspective, in which independent authorities, whilst sharing certain common features, exhibit profoundly different characteristics depending on the institutional, socio-economic and political context in which they operate.[32] Hence, there is no single, universally applicable model, but rather a plurality of different configurations stemming from diverse legal traditions.[33]

This heterogeneity is also reflected in terminology: expressions such as 'independent administrative authorities', '*autorités administratives indépendantes*', 'independent regulatory agencies' or 'quangos' are not entirely interchangeable but express the specific features of their respective legal systems.[34]

The Italian name '*autorità amministrative indipendenti*' also

balance of powers, but rather to the necessity of ensuring technical competence, uniformity of application and regulatory credibility at the supranational level.

[30] P. Bonini, A. Celotto, *Profili costituzionali*, cit., *passim*.

[31] C. Sartoretti, *Le autorità amministrative indipendenti nel diritto costituzionale comparato*, cit., 25 ff.

[32] G. Napolitano, *Introduzione al diritto amministrativo comparato*, Bologna, Il Mulino, 2020, 179-196.

[33] See G. Grasso, *Spunti per uno studio sulle autorità amministrative indipendenti: il problema del fondamento costituzionale (Italia, Francia, Stati Uniti d'America)*, in *Quaderni regionali*, 1993, 1303 ff.

[34] Ibid., 1331 ff.

highlights this distinction.[35] The term '*autorità*' indicates the possession of decision-making powers and the adjective '*amministrative*' refers to the capacity to adopt unilateral acts, whilst the qualifier '*indipendenti*' emphasises the absence of a hierarchical link (at least initially[36]) with the Government, even though these authorities remain part of the organisation of the state (so-called '*Stato-apparato*').[37] Conversely, in the US context, the term 'regu-

[35] The Italian 'case' also has its own distinctive features: independent administrative authorities began to emerge primarily from the 1990s onwards, in tandem with processes of liberalisation, privatisation and European integration. They were introduced into a system traditionally shaped by the Napoleonic administrative model, founded on the centrality of the executive and central administration, thus bringing about a significant institutional break. In this context, independence serves both to adapt to European constraints and to strengthen the credibility of regulatory policies *vis-à-vis* the markets and economic development. The debate that began in the early 1990s and continued into the first decade of the 21st century represents a truly impressive starting point and subject of study, giving rise to multiple interpretations of the doctrine that allow us to reconstruct the evolution of the model that has taken shape in Italy. Without claiming to be exhaustive, see: F. Bassi, F. Merusi (Eds), *Mercati e amministrazioni indipendenti*, Milan, Giuffrè, 1993; M. D'Alberti, *Autorità indipendenti (dir. amm.)*, in *Enc. giur.*, vol. IV; S. Cassese, C. Franchini (Eds), *I garanti delle regole*, Bologna, 1996; A. Predieri, *L'erompere delle autorità amministrative indipendenti*, Firenze, Passigli, 1997; M. Manetti, voce *Autorità indipendenti (dir. cost.)*, in *Enc. giur.*, vol. IV; Id., *Le autorità indipendenti*, Roma-Bari, 2007; G. Amato, *Le autorità indipendenti*, in L. Violante (Ed.), *Storia d'Italia*, Torino, Einaudi, 1998; P. Perlingieri (Ed.), *Authorities e tutela della persona*, Napoli, Esi, 1999; Aa. Vv., *Autorità indipendenti e principi costituzionali*, Conference Proceedings (Sorrento, 30 maggio 1997), Padova, 1999; S. Cassese, *La nuova costituzione economica*, Roma-Bari, 2000; V. Cerulli Irelli, *Aspetti costituzionali e giuridici delle Autorità*, in F.A. Grassini (Ed.) *L'indipendenza delle Autorità*, Bologna, 2001, 49 ff.; F. Merusi, M. Passaro, *Le autorità indipendenti. Un potere senza partito*, Bologna, 2003; M. Clarich, *Autorità indipendenti: bilancio e prospettive di un modello*, Bologna, 2005; M. De Benedetto, *Autorità indipendenti*, in S. Cassese (Ed.), *Dizionario di diritto pubblico*, vol. I, Milano, 2006, 588 ff.; P. Rossi, *Le autorità di regolazione dei servizi di interesse economico generale*, Torino, 2006; M. Cuniberti, *Autorità indipendenti e libertà costituzionali*, Milano, 2007; G. Napolitano, A. Zoppini, *Le autorità al tempo della crisi: per una riforma della regolazione e della vigilanza sui mercati*, Bologna, 2009; F. Luciani (Ed.), *Le Autorità amministrative indipendenti come istituzioni pubbliche di garanzia*, Napoli, 2011.

[36] M. Manetti, *Autorità indipendenti*, cit., 1 ff.

[37] Even in the most recent scholarship, there is a renewed interest in research on the composition and nature of independent authorities and on the

latory' refers to a specific legal tradition, developed in opposition to the *laissez-faire* paradigm and aimed at curbing the power of large economic concentrations.

Against this framework, it is possible to distinguish from the perspective of the types of functions performed, between market regulatory authorities (such as antitrust authorities) and other independent authorities with different functions affecting other sectors of public life.[38] Alongside the former, recent decades have seen the growth of so-called accountability agencies, such as anti-corruption authorities, *ombudsmen* and electoral bodies, which perform oversight and safeguarding functions in areas of public interest that are not strictly economic but nonetheless require a high degree of technical knowledge and which are established with the aim of helping to strengthen transparency and trust in public institutions.[39]

Regardless of the specific functions actually performed, the independence of the authorities is an essential element for the performance of their duties, and is generally guaranteed through specific institutional mechanisms, such as fixed terms of office, limitations on powers of removal, special provisions on the appointment of the members and a collegial structure.[40]

However, independence is not devoid of tensions. In the US context, recent developments in case law and legal doctrine appear to call into question the traditional structure of Independent

relationships between these actors and political power. See, among others, R. Morgante, *Autorità indipendenti e separazione dei poteri: un'analisi empirica delle nomine e dei mandati*, in *Rivista trimestrale di diritto pubblico* 1 (2023), 441-486; G. Napolitano, *L'ARERA e le sfide della regolazione indipendente a trent'anni dalla legge n. 481/1995*, in *Mercato Concorrenza Regole*, *Rivista quadrimestrale* 3 (2025), 529-539; A. Averardi, *Le autorità indipendenti tra neutralità e ricerca del consenso*, in *Rivista trimestrale di diritto pubblico* 2 (2025) e, con accenti più critici, S. Cassese, *La legge n. 481/1995. Crisi delle autorità indipendenti*, in *Energia* 4 (2016), 10-11.

[38] See G.F. Ferrari, *Diritto pubblico dell'economia*, Egea, 2025.

[39] See in particular, with regard to the area of corruption, M. Pierri, *Autorità indipendenti e politiche di contrasto alla corruzione: esperienze europee a confronto*, in *DPCEonline* 2 (2021), 2309 ff.

[40] On this point, see F. Merusi, M. Passaro, *Le autorità indipendenti*, Bologna, 2011, 74 ff.

Agencies, based on the Humphrey's Executor precedent,[41] opening up the possibility of a strengthening of the executive's powers of control over such bodies. As highlighted in legal scholarship, here lies a risk of a possible reduction in their degree of autonomy, with significant implications for the separation of powers and the balance between political and technical regulation.[42]

This appears of particular significance when one considers that, in the US context, numerous *agencies* also exercise regulatory powers in the strict sense, adopting measures designed to supplement and specify legislative provisions (*rulemaking powers, legislative rules)*. A prime example is the Food and Drug Administration (FDA), which is vested with extensive powers to define technical standards and safety requirements, with legally binding effects for operators in the sector.

Returning to a more general perspective, independent authorities may be understood as an administrative model designed to govern sectors characterised by high technical complexity, ensuring informed decision-making that is, at least in principle, free from political and stakeholder pressure. They are called upon to operate in rapidly evolving contexts, particularly in areas characterised by rapid technological development – such as personal data protection and the telecommunications sector – in order to protect public interests from undue interference, while functioning within institutional frameworks where the actual degree of independence can vary significantly.[43]

[41] The traditional model of Independent Agencies in the United States is rooted in the case law of the Supreme Court, in particular in the decision *Humphrey's Executor v. United States (1935)*, which recognised the legitimacy of limits on the presidential power to remove members of such bodies, by virtue of their technical and regulatory functions.

[42] On this point, see H.L. Reiter, *The Likely Weakened Role of "Independent Agencies" in a Post-Humphrey's Executor World*, in *Yale Journal on Regulation*, 17 January 2026, https://www.yalejreg.com/nc/the-likely-weakened-role-of-independent-agencies-in-a-post-humphreys-executor-world-by-harvey-l-reiter/ where it is highlighted how recent developments in constitutional interpretation in the United States may lead to a scaling back of the traditional model of *agency* independence, in favour of greater scope for executive intervention.

[43] See C. Sartoretti, *Le autorità amministrative indipendenti*, cit., 61.

It is with this backdrop that the growing importance of independent authorities in the governance of sustainability can be appreciated. In competition law, for example, the issue of sustainability has become central, presenting European authorities with the need to assess whether and to what extent agreements aimed at pursuing environmental objectives can be considered compatible with the rules of economic competition.[44]

In the energy and transport sectors, this trend is even more evident. Energy regulators are no longer limited to setting tariffs and overseeing competition but are called upon to ensure that infrastructure development is consistent with climate and environmental objectives.[45] Similarly, authorities active in the transport sector are playing an increasingly significant role in defining the conditions for the adoption of alternative fuels and in monitoring emissions in the maritime and aviation sectors, which are crucial for both the green transition and the stability of global supply chains,[46] also affecting the food sector.

[44] Reference is made to the case of Dutch poultry producers who had decided to market only products from farms with higher animal welfare standards. The Dutch Authority for Markets and Consumer Protection (ACM), initially opposed this due to the decision's impact on competition and prices, subsequently reconsidered its approach, recognising the environmental and social value of the agreement, thereby helping to redefine how the benefits of sustainability can be considered under competition law. See ACM – Netherlands Authority for Consumers and Markets (ACM), Vision Document on Competition and Sustainability Reference, 2014, ACM/DM/2014/206028.

[45] One can consider the decisions taken in Germany to assess the compatibility of the electricity grid development plan with the national decarbonisation strategy, or the measures taken by the Italian authority to incentivise energy communities and strengthen the climate resilience of water infrastructure. For these latter aspects, see L. Cuocolo, P.P. Giampellegrini, O. Granato, *Le comunità energetiche rinnovabili: Modelli, regole, profili applicativi*. Milano, 2023.

[46] An example can be found in the activities of ENAC (the Italian Civil Aviation Authority), which has established environmental protection as one of its strategic areas of institutional activity. In particular, ENAC is responsible for 'combining the competitive development of the national market with the environmental needs of the community; (…) collaborating with the MIT and the MASE to establish a strategic roadmap for aviation and the environment; participating in a structured manner in the activities of international bodies; accelerating the implementation of the national regulatory framework and its

Digital regulation represents another area in which sustainability has become a key consideration. The environmental impact of digital infrastructure, once marginal, is now the subject of growing attention. Authorities are therefore called upon to assess not only the competitive profiles of platforms, but also the accuracy of environmental claims and the transparency of information provided to consumers.[47]

A common feature emerging from these areas is the growing need for cooperation between different authorities. The complexity of sustainability-related challenges, in fact, requires a range of expertise that single authorities can hardly possess on their own.[48] This gives rise to a more profound transformation: sustainability is no longer a separate area of regulation, but a cross-cutting dimension that permeates the mandates of the main independent authorities, within the framework of a cross-sectoral approach that is emerging as a structural feature of regulatory processes.[49]

Market and consumer protection, energy security, infrastructure resilience and environmental protection are no longer dis-

monitoring; developing initiatives to improve civil aviation regulation, aimed at producing environmental benefits, in line with the guidelines and recommendations of the ICAO and the European Union'. https://www.enac.gov.it/ambiente/.

[47] Authorities in the United States and the United Kingdom have conducted in-depth investigations into the use of potentially misleading environmental labels, whilst European authorities are monitoring the energy impact of digital technologies and the risks associated with greenwashing in commercial communications ever more closely, including in the food sector.

[48] In France, the competition, consumer and environmental authorities collaborate on a permanent basis to identify and sanction greenwashing practices and to assess the environmental impact of several economic operations. In the United States, collaboration between the consumer authority, the financial markets authority and the environmental agency has created a more effective regulatory ecosystem for monitoring companies' environmental claims as well as climate risks and assessment.

[49] This is particularly evident with regard to the so-called 'twin transition' (green and digital). See on this point European Commission, Joint Research Centre, R. Muñoz De Bustillo Llorente, *Critical Review of the Digital and Green Twin Transitions. Implications, synergies and trade-offs*, European Commission, Seville, 2024, JRC140036.

tinct spheres, but interconnected components of a single regulatory architecture. In this context, independent authorities represent key actors, not merely applying rules but actively contributing to the construction of a system capable of integrating environmental, economic and social needs into a dynamic regulatory balance, in which the food sector, at all stages of the production chain, also plays a central role.

3. *European Union Agencies in Sustainability Governance: from the Green Deal to the New Post-Common Agricultural Policy Phase*

The European Union constitutes a significant regulatory laboratory in the context described above. Its regulatory evolution, vividly represented by a trajectory that begins with the market and food safety policies of the 1990s,[50] through the creation of the General Food Law,[51] up to the Green Deal and the Farm to Fork initiative,[52] demonstrates how the debate on food has evolved from what could be defined as a simple, albeit vital, physical good into a complex process;[53] a process so multifaceted and extensive that it encompasses production, distribution, consumption and even waste management.[54]

It is for these reasons (i.e. the transformation and enrichment of the very concept of 'food') that regulation in this field has re-

[50] F. Albisinni, *The Path to the European and Global Food Law System*, in F. Albisinni, L. Costato, T. Georgopoulos (Eds), *European and Global Food Law*, Padua, 2025, 27 ff.

[51] Ibid., 39-40.

[52] M. Holle, *Sustainability in European Agri-Food Law*, in F. Albisinni, L. Costato, T. Georgopoulos, *European and Global Food Law*, cit., 414 ff.

[53] Reference should also be made to the most recent developments, which are leading to a 'recalibration' of the CAP and consequently to a possible slowdown of the Farm to Fork initiative; these developments show that the balance between food safety, food security and food sustainability is far from stable, a point discussed in the final part of this section.

[54] For some aspects of this development, following the evolution of the concept of 'food', see P. Borghi, *Alimento*, in *Digesto delle Discipline Privatistiche*, Turin, 2016.

quired, and continues to require, an integrated regulatory approach that takes into account health protection, the economic and physical availability of food, the environmental impact of supply chains, worker protection, the economic sustainability of farmers and livestock breeders, as well as animal welfare.

Whilst it is true, as noted previously, that European independent authorities[55] play a crucial role in contemporary governance processes, the complexity of processes in the food sector and the need to base public decisions on sound scientific grounds make it essential to ensure the credibility of these bodies' technical and advisory assessments. Thus, institutions such as the European Food Safety Authority (EFSA), the European Environment Agency (EEA), the European Chemicals Agency (ECHA), or the European Maritime Safety Agency (EMSA) form the technical and scientific backbone of sustainability governance at European level.

Therefore, it is necessary to analyse how these institutions effectively contribute to the emerging framework of European sustainability governance, including in relation to corresponding structures at the national level, while also highlighting the limitations they encounter and their prospects. Sustainability governance is, in fact, evolving within a space in which science, law, and public decision-making are increasingly intertwined. With the transition to the 'risk society',[56] scientific knowledge no longer represents a mere technical support, but rather a structural condition for the very legitimacy of public action. Institutions are called upon to govern inherently uncertain phenomena, in which science does not provide definitive answers, but tools for understanding the probability of harm and the complexity of causal mechanisms.[57]

[55] For a discussion of its distinct role, see the comments set out *infra* in the conclusions.

[56] U. Beck, La *società del rischio. Verso una seconda modernità*, Roma, 2013; A. Bagnasco, P. Giovannini, *Arnaldo Bagnasco e Paolo Giovannini discutono su la società del rischio. Verso una seconda modernità di Ulrich Beck*, in 63 *Stato e Mercato* 3 (2001), 513-531. http://www.jstor.org/stable/24650747.

[57] Against this backdrop lies the precautionary principle, which represents one of the cornerstones of the European approach to environmental and food

Traditional regulatory tools thus give way to an anticipatory model, which integrates environmental protection, food safety, health protection and economic needs.[58] This entails a significant shift in legal categories, as administrative authorities increasingly tend to position themselves as institutions endowed with high level scientific expertise. It is precisely the para-normative activity of the authorities – understood as the production of non-binding acts that are nevertheless capable of guiding the content and application of public decisions – that takes on fundamental importance at this juncture in their attempts to dispel scientific uncertainty in highly complex contexts. This model of independent

sustainability. Precaution does not impose outcomes, but defines procedures: it requires that public decision-making, even when unequivocal scientific certainty cannot be attained, be constructed through a rigorous, proportionate and transparent process of inquiry. The precautionary principle is crucial for the relationship between science and political decision-making, and entrusts independent authorities with a central role in risk assessment. In the European model, this centrality finds a paradigmatic expression in the separation between risk assessment and risk management: the former entrusted to technical-scientific bodies such as EFSA, the latter primarily to the Commission and subsequently to the Member States. On this subject, without claiming to be exhaustive, see H. Bergkamp, L. Hanekamp, *European Food Law and the Precautionary Principle: Paradoxical Effects of the EU's Precautionary Food Policies*, in H. Bremmers, K. Purnhagen (Eds), *Regulating and Managing Food Safety in the EU. Economic Analysis of Law in European Legal Scholarship*, Cham, 2018, 217-244 and A. Anyshchenko, *The precautionary principle in EU regulation of GMOs: Socio-Economic Considerations and Ethical Implications of Biotechnology*, in *Journal of Agricultural and Environmental Ethics* 5 (2019), 855-872. On the relationship between science, law and sustainability, see, among the most recent papers, the article (and the bibliography cited therein) by L. Violini G. Ragone, *Reconciling the Fluid and the Rigid: the Intersection of Law, Science, and Sustainability*, in L. Scaffardi C. Cerbone (Eds), *Food Innovation and Legal Challenges*, Brill, 2026, 6 ff.

[58] A clear example of this anticipatory trend can be appreciated with respect to the One Health normative approach, on which see*, inter alios*, A. Latino, *Il paradigma One Health nell'ordinamento internazionale: un'analisi critica di origini, protagonisti, strumenti normativi*, in *Corti supreme e salute* 3 (2022), 782 ff., F. Rescigno, G. Giorgini Pignatiello (Eds), *One Earth-One Health. La costruzione giuridica del Terzo Millennio*, Torino, 2023, S. Pitto, *Cambiamento climatico e sicurezza alimentare: dall'approccio One Health ai modelli olistici del Global South*, in *BioLaw Journal-Rivista di Biodiritto* 2 (2023), 315-47.

authorities serves as a useful point of reference when dealing with strongly contested issues on which opinions are polarised,[59] where the role of the authority is to help define the scope of reasonably viable options.

Within this context, lies one of the main sources of tension in the current phase. Whilst, on the one hand, European Authorities[60] continue to provide support for legislators' decisions as guarantors of technical and scientific rationality, on the other the recent political context appears to mark a re-politicisation of regulatory choices, including in the agri-food sector, where references to the national interests of states are increasingly common, sometimes even masking blatant political pressure.[61]

Currently, the trajectory outlined by the Green Deal and the Farm to Fork Strategy now appears to have been partially scaled back.[62] The slowdown in many legislative initiatives, the revision of environmental targets and, above all, the recalibration of the

[59] See, for example, the case of the EFSA opinions regarding the Xylella emergency in Puglia, also referred to by the Court of Justice, *inter alia* in the judgment of the Court of Justice of the European Union of 5 September 2019, Case C-443/18, *Commission v Italian Republic*, on which see S. Pitto, *Il principio di precauzione e i pareri dell'EFSA come strumenti normativi contro l'incertezza scientifica: note a margine della decisione della Corte di Giustizia sul caso Xylella*, in *DPCEonline* 4 (2019). For another case of extensive use of EFSA opinions in the case law of the Court of Justice in Luxembourg, see the judgment of the Court of Justice of the European Union of 13 September 2017, Case C-111/16, *Giorgio Fidenato and Others*, concerning genetically modified organisms.

[60] Hereinafter, the term will be used to refer to the Union's technical and scientific bodies, as distinct from the independent regulatory authorities operating at national level.

[61] On this point, see E. Vos, A. Volpato, G. Bellenghi, *Independence and Transparency Policies of the European Food Safety Authority* (EFSA), publication for the Committee on the Environment, Public Health and Food Safety (ENVI), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2023, pp. 17 ff. https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740080/IPOL_STU(2023)740080_EN.pdf. Cf. M.A. Fino, A.C. Cecconi, *Gastronazionalismo*, People Editions, 2021.

[62] Cf. P. Borghi, "*La" sostenibilità e "le" sostenibilità. L'UE, la sicurezza alimentare e il senso di un sistema alimentare più sostenibile*, in F. Rossi Dal Pozzo, V. Rubino (Eds), *La sicurezza alimentare tra crisi internazionale e nuovi modelli economici*, Bari, 2023, 245 ff.

Common Agricultural Policy (CAP) point to a paradigm shift: sustainability, once a guiding principle, is increasingly being balanced – and sometimes subordinated – to the need for competitiveness, security of supply and economic stability in the agricultural sector.[63]

The new phase ushered in by the CAP 2023-2027 and further developed with the 2025 'Vision for Agriculture and Food' thus appears to call into question, at least in part, the systemic vision of sustainability attempted until now within the EU context. Derogations from environmental requirements, pressures arising from geopolitical crises and domestic agricultural protests, as well as the growing focus on food sovereignty, highlight how the governance of sustainability is currently caught between ecological and economic imperatives.[64]

In this context, however, the role of the European authorities is not diminished, but rather tends to change in nature: they come to function as epistemic stabilisers**,** called upon to ensure methodological and scientific continuity and reliability even in the face of political fluctuations and polarisation.[65] However, it is precisely this function that highlights the model's limitations: the agencies produce knowledge, studies and technical supporting evidence, but do not determine the final decision, which remains within the political sphere.[66]

[63] See H. Schebesta, *The Member States in the EU Food System: National Regulatory Options for Sustainable Food Offer, Food Consumption and Food Environments*, in 15 *European Journal of Risk Regulation* 2 (2024), 292-309.

[64] On food sovereignty in the specific EU context, see European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Vision for Sgriculture and Food: Shaping Together an Attractive Farming and Agri-Food Sector for Future Generations*, COM/2025/75, *passim*.

[65] See S. Pitto, *Il principio di precauzione e i pareri dell'EFSA come strumenti normativi contro l'incertezza scientifica*, cit., regarding the use of EFSA opinions by the Court of Justice in politically highly contentious matters such as genetically modified organisms. On this point, see also the observations of A. Anyshchenko, *The precautionary principle in EU regulation of GMOs: socio-economic considerations*, *and ethical implications of* biotechnology, in *Journal of Agricultural and Environmental Ethics* 5 (2019), 855-872.

[66] By definition, as independent bodies, the authorities must provide poli-

This dynamic is particularly evident in the field of Novel Foods and food innovations in general. As highlighted in the scholarly debate, novel foods represent one of the areas in which the European Union has sought to balance food safety, innovation and sustainability in a structured manner.[67] Regulation (EU) 2015/2283 constitutes, in this sense, a paradigmatic attempt to strike a balance between scientific risk assessment (EFSA) and risk management, entrusted to the final political decision-making level.[68]

However, recent cases show that this balance is increasingly fragile and unstable. A case-study in point is so-called cultured meat:[69] although there is currently no scientific evidence to justify a total ban on cellular agriculture, some Member States have adopted restrictive measures based on arguments that go beyond the scientific dimension to address economic, cultural and identity-related concerns.[70] This is despite the EFSA not yet having the opportunity to give its opinion on cultured meat as the two authorisation procedures submitted to date are still at an early stage. Similarly, the regulation of edible insects, although validated from a food safety perspective, has been accompanied by na-

cymakers with a contribution that is as objective and non-political as possible, remaining as isolated as possible from the political and economic interests underlying the decisions themselves. See E. Vos, A. Volpato, G. Bellenghi, *Independence and Transparency Policies of the European Food Safety Authority*, cit., 73.

[67] On this point, see A. Volpato, *Novel Foods in the EU Integrated Administrative Space: An Institutional Perpsective*, in G. Formici, L. Scaffardi (Eds), *Novel Foods and Edible Insects in the European Union*, Cham, 2022, 15 ff.

[68] See S. Gabbi, *L'Autorità europea per la sicurezza alimentare. Genesi, aspetti problematici e prospettive di riforma*, Milano, 2009 and, more recently, F. Adornato, *The European Food Safety Authority among Teqnique, Norms, and fs*, in L. Costato, F. Albisinni, T. Georgopoulos (Eds), *European and Global Food Law*, Milan, 2025, 392 ff.

[69] On this point, see G. Formici, *Un assaggio di futuro? La carne a base cellulare e il vivace dibattito regolatorio dentro e fuori i confini dell'Unione europea*, in *BioLaw Journal-Rivista di BioDiritto* 4 (2024), 173 ff.

[70] On the relevant bans, see M.G. Corazza, G. Formici, *Cell-Based Meat in the European Union: A Regulatory* Crossroads, in G. Formici, M.C. Mancini, L. Scaffardi (Eds), *Cell-Based Meat in the European Union and Beyond*, Springer, 2025, 85 ff.

tional interventions aimed at hindering or slowing their spread for a wide variety of reasons.[71]

In such cases, science is not denied, but scientific findings are politically re-contextualised (often with results that are not entirely accurate), with the outcome that the contribution of the European Authority is marginalised in the political decision-making process, with the risk that these 'scientific' actors increasingly become the target of criticism for the opinions expressed and conveyed by political actors. This confirms that food sustainability is a field in which these three dimensions –namely food safety, environmental sustainability and the economy – converge and occasionally clash.[72]

Against this background and to understand the present outcomes, the recent evolution of the CAP and the European agri-food policy guidelines seems to represent not merely a policy shift but rather a development with deeper impact on the very architecture of new sustainability governance.[73] These transformations and changes of course call into question the idea, underlying the European Green Deal, of regulation guided primarily by scientific evidence integrated into a systemic vision. But they also reopen the space for political choices more heavily influenced by economic interests and contingent social pressures, carrying the risk – in highly technical matters requiring scientific

[71] On this point, particularly with reference to Regulation (EC) No 258/97, see G. Formici, *Legislative and Judicial Challenges on Insects for Human Consumption: From Member States to the EU, Passing Through the Court of Justice of the EU*, in G. Formici, L. Scaffardi (Eds), *Novel Foods and Edible Insects*, cit., 100 ff.

[72] This is not, however, an entirely new trend, but one already discussed by, among others, T. Lang, D. Barling, M. Caraher. *Food Policy: Integrating Health, environment and society*, Oxford, 2009 and, more generally, C. R. Sunstein, *Risk and Reason: Safety, Law, and the Environment*, Cambridge, 2002, 261 ff.

[73] For a more detailed discussion of the relationship between the CAP and sustainability, see issue 2 (2022) of the Italian *Rivista di Diritto Agrario* and, in particular, the articles by L. Russo, *Le "nuove" misure agroambientali della Pac 2023-27: quali novità?*, in *Rivista di Diritto Agrario* 2 (2022), 142-165 e I. Canfora, V. Leccese, *La sostenibilità sociale nella nuova Pac*, in *Rivista di Diritto Agrario* 2 (2022), 110-141.

expertise such as *food law* – that the measures adopted will be less effective in achieving final objectives.

4. *Concluding Reflections*

The governance of sustainability is now one of the most complex arenas of national, European and global public action. Sustainability is no longer merely an environmental objective, but a fundamental dimension cutting across food security, the supply of goods and the functioning of the market, as well as public health, economic competitiveness and cultural identity.[74] Food sustainability itself highlights just how deeply scientific assessments, economic interests, public health and political choices have become interdependent.[75]

The key element to emerge from the above analysis is the central role of the economic dimension. This should neither be stigmatised nor regarded as a neutral factor on a par with the other variables at play, as Tania Groppi explains clearly in the introduction.[76]

Indeed, if we look at the most recent European policies on food sustainability, we can see how they have refocused the debate on competitiveness, farm income and the ability of production systems to bear the costs of the ecological transition.[77] The review of the Common Agricultural Policy and the agricultural

[74] Furthermore, on the dimensions of sustainability within the branch of food law constituted by food security, see F. Bruno, *Il diritto alimentare*, Milan, 2022, 203 ff.

[75] Ibid., 206 ff.

[76] T. Groppi, *Sustainability as a New "Constitutional Key Concept": a Comparative Perspective*, in this volume.

[77] See, for example, the aforementioned Communication COM(2020) 381 final – *A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System*, Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022, amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU as regards corporate sustainability reporting, or, furthermore, Directive (EU) 2024/1760 on corporate due diligence for sustainability and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

protests of 2023-2025 clearly demonstrate that environmental sustainability cannot progress without adequate economic and support measures, which should also be free from local political interests or pressures. The general unease among operators, rising costs and global competitive pressure stemming from systemic geopolitical crises originating outside Europe have made it clear that the transition requires careful management of all factors at play, including economic ones; it should also be based as far as possible on planning, coordination and long-term visions, mindful of the variables and the general context in which they operate.

The importance of such a vision has a direct bearing on the role of the European authorities under consideration. For example, the EFSA, established to provide objective and independent technical and scientific assessments on food safety, now operates in a context of complex and unprecedented repercussions. On the one hand, the EFSA must examine scientific issues closely intertwined with the systemic risks linked to climate change (with economic operators seeking alternative foods that have a lower environmental impact, which are sometimes not available or are marketed in a different form on the European market), the loss of biodiversity and global interdependencies.

On the other hand, its opinions are directed at EU (and, consequently, national) policymakers who, even in the absence of significant risks highlighted in scientific assessments, may legitimately adopt measures that take into account additional factors relating to the protection of traditional agri-food supply chains, as well as economic[78] and identity-related considerations.

This creates a framework in which scientific findings are not

[78] Similarly, in the case of the EU-Mercosur agreement, despite technical assessments highlighting significant environmental impacts – particularly in terms of deforestation and production standards – the decision to proceed with trade liberalisation appears to be driven primarily by the need for market access and competitive balance, with safeguard measures designed to operate *ex post* rather than to guide the decision *ex ante*. Here too, therefore, science becomes part of the debate, but not its starting point. See L. Pasquali, *Il contributo dell'accordo UE-Mercosur alla governance internazionale dell'ambiente*, in *Nomos* 40 (2020), 179-200.

formally contested, but are integrated into broader political assessments; a phenomenon which appears to be consistent with the European model, based on the distinction between risk assessment and risk management, leaving the final decision to politically responsible bodies even in the presence of scientific opinions favouring the marketing of certain products.[79]

However, such discretion may raise concerns when it results in national measures that are likely to hinder, even indirectly, the circulation of products authorised at EU level, or that might introduce distinctions that are difficult to justify in the light of the objectives of internal market integration.

The case of edible insects, particularly flours derived from them, is emblematic.[80] What is significant is not so much their distance from the common dietary imagination, but rather their role as an alternative protein source, capable of broadening consumer options with a reduced CO^2 impact. This is not to argue that they should replace the consumption of more common protein-rich foods, but rather that they represent an informed choice for consumers and a potential building block towards more sustainable dietary choices.

Consequently, the introduction of barriers to their marketing – based on misinformation or communicative devaluation, such as unequal presentation in retail settings, which ends up implic-

[79] See in this regard the authorisation procedure for novel foods, governed by Regulation (EU) 2015/2283, which provides for a centralised procedure at the EU level. The European Commission, having obtained the opinion of the European Food Safety Authority, is competent to adopt the final decision by means of an implementing act, within the framework of the examination procedure referred to in Regulation (EU) No 182/2011, with the assistance of the Standing Committee on Plants, Animals, Food and Feed. Novel foods may be placed on the market 'only if authorised and included in the Union list'; whilst the EFSA's scientific opinion forms the technical basis for the decision, it is not binding, as risk management and the final decision rest with the Commission, within the comitology framework.

[80] See on this point the findings of the study on consumer perceptions of these new products by G. Sogari, H. Dagevos, M. Amato, D. Taufik, *Consumer Perceptions and Acceptance of Insects As Feed and Food: Current Findings and Future Outlook*, in G. Formici, L. Scaffardi, *Novel Foods and Edible Insects*, cit. Similar considerations may be extended to the topic of cultured meat, already mentioned above.

itly labelling them as undesirable foods – risks precluding the development of a potential pathway towards more sustainable forms of nutrition. The role of European policymakers is therefore crucial: they must make decisions and ensure they are effectively communicated, including through appropriate information campaigns, especially when such decisions are made in divisive or prejudicial contexts. This need for accountability in food sustainability cannot be overlooked.

Of great interest to the present discussion is the in-depth analysis of the Post-Brexit UK case,[81] which highlights the opposite risk: when an independent authority is deprived of the scientific support established at supranational level within the EU, the (solely national) authorisation procedure becomes fragile and costly. This is because the Food Standards Agency (FSA) assumed responsibilities previously shared with EFSA, resulting in delays and increased uncertainty for economic operators and consumers.[82]

These examples demonstrate that the core issue in food governance is no longer simply the distinction between science and politics, but instead the relationship between sustainability and competitiveness. Policymakers tend to be more receptive to the findings of scientific assessments with limited cost implications and more resistant to findings that risk creating difficulties for strategic sectors, thereby opening the way to new factors and dynamics capable of influencing market segments. Independent agencies thus become exposed to a particular vulnerability: although formally independent from political power, they may be perceived as excessively influential, giving rise to the risk of their marginalisation from decision-making processes, not so much in formal terms as in substantive ones.

This picture clearly highlights how food sustainability requires a new institutional pact, capable of integrating scientific

[81] For a broader context, see C. Martinelli, *La Brexit e la Costituzione britannica. Come e perché il Regno Unito è uscito dall'Unione europea*, Torino, 2023.

[82] See L. Tripodi, *Synergistic Crises: Relations between EFSA and FSA Post-Brexit* in this volume.

knowledge, democratic accountability and economic sustainability. Science can and must continue to produce rigorous and independent knowledge; at the same time, politics must take responsibility for decisions, making explicit the reasons (scientific or otherwise), costs and effects. Finally, the economy must be properly integrated into the policy-making process in a transparent manner, preventing the most powerful interests from dictating the political agenda through dynamics that are not always fully comprehensible and transparent, and ensuring that the weakest interests, lacking effective representation, do not bear the brunt of the consequences.

Independent authorities therefore play a decisive role in this quest for balance, but only with a public policy culture of consistent and responsible political action. Neither science nor the markets alone can steer the transitions currently underway; only informed and coordinated public action can guarantee a sustainable future for European food systems and beyond.

In conclusion, sustainability is not a goal we can delegate; it is a process that requires participation, knowledge and responsibility. Institutions alone are not enough and without solid, authoritative and legitimate institutions, the transition risks remaining merely a collection of good intentions.

A genuine new sustainability governance must therefore explicitly integrate the economic dimension, because advances in sustainability can neither happen against the economy nor by ignoring it. It is therefore necessary to recognise that the transition entails social, economic and political costs, and that these costs must be fairly distributed and accompanied by adequate support mechanisms. Credible governance must also be based on clarity regarding the relationship between assessment and decision-making, on transparency regarding interests, costs and benefits, and on support for those most exposed to the consequences of the decisions taken.

This new sustainability governance represents an important first step towards full awareness: an invitation to build a model that brings together dimensions often considered separate – such as science, economics and politics – in a shared project for a sustainable future, which can no longer be postponed.

PART II

INSTITUTIONAL SOLUTIONS. A WAY FORWARD

A. Sustainability and Participatory Democracy. A Bottom-Up Perspective From the Global South

THE PARTICIPATION OF LOCAL COMMUNITIES IN THE MANAGEMENT OF NATURAL PROTECTED AREAS: A VIRTUOUS EXAMPLE FROM INDIA

Maria Sarah Bussi

> 'There is a pleasure in the pathless woods,
> there is a rapture on the lonely shore,
> there is society where none intrudes,
> by the deep Sea, and music in its roar:
> I love not Man the less, but Nature more'.
>
> Lord George Gordon Byron,
> *Childe Harold's Pilgrimage* (1812-1818)

Abstract: *The paper analyses the strategies of management of the* Periyar Tiger Reserve*, located in the State of Kerala in India, which represents a virtuos exemple with regard to the involvement of local communities both in terms of protection of biodiversity and in view of eco-development. Starting from the study of* The Wild Life Protection Act *of 1972 and the provisions of Indian Constitution, this experience has been contextualised in the framework of natural and cultural environment of Kerala, which makes clear the reasons that have led during years to the success of many projects and schemes applied in the PTR.*

Keywords*:* Protected Areas in India, Kerala Model, Participative Management, Local Communities, Ecodevelopment

1. *Methodological Approaches for Studying the Protected Areas (PAs) Management in India*

In accordance with the Annual Report 2024-2025 published by the Ministry of Environment, Forest and Climate Change of the Government of India, this country at present counts 1022 Protected Areas, for a geographical area of 1,78,640.69 square kilometres, equal to the 5.43% of the national territory.[1]

[1] Cf. Ministry of Environment, Forest and Climate Change of the Govern-

If the first National Park in India – the Jim Corbett National Park – was established in the State of Uttarakhand in 1936,[2] during the Seventies of the Twentieth century *The Wild Life Protection Act* of 1972 was adopted providing for 'the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country'.[3]

In 1976, with a constitutional Amendment, articles 48-A and 51-A, containing express provisions regarding the protection of the Environment, were introduced in the Indian Constitution. Indeed, the first Report by the Ministry of Environment and Forests of the Government of India appeared in the Eighties, considering it was dated back 1986-1987,[4] after the enactment of *The Forest Conservation Act* of 1980 and *The Environment Protection Act* of 1986.[5]

From 2000 to 2023 the number of Protected Areas in India has experienced a significant increase, as the media outlets pointed out, underling a '72% increase in the number of protected areas and around 16% increase in area under the protected landscape in the country' during this time frame.[6] In particular, in 2023, the Protected Areas were 1014, including 106 National Parks, 573 Wildlife Sanctuaries, 115 Conservation Reserves and 220 Community Reserves.[7]

ment of India, *Annual Report 2024-2025*, available at https://moef.gov.in/annual-reports, accessed 3 November 2025; see in particular, for the data reported, 181.

[2] M. Ghosh-Harihar, R. An, R. Athreya *et al.*, *Protected Areas and Biodiversity Conservation in India*, in 237 *Biological Conservation*, (2019), 114-124, https://doi.org/10.1016/j.biocon.2019.06.024, accessed 3 November 2025.

[3] See the preamble of *The Wild Life Protection Act (1972)*, which was omitted by Act 44 of 1991, s. 3.

[4] The *Annual Report 1986-1987* by Ministry of Environment and Forests of the Government of India is available at https://moef.gov.in/annual-reports, accessed 3 November 2025.

[5] Cf. *The Forest Conservation Act (1980)*, Act No. 69 of 1980, and *The Environment Protection Act (1986)*, Act No. 29 of 1986.

[6] See the article appeared on the online version of *The Time of India* titled 'Number of Protected Areas increased by 72% during 2000 to 2023 period: Govt green data' by Vishwa Mohan, 30 September 2024.

[7] The data were reported by PIB (Press Information Bureau) of the Gover-

With particular reference to National Park, among the 28 States/Union Territories of India, those with the highest number of parks are: Andaman & Nicobar Islands (9), Madhya Pradesh (9), Kerala (6), Uttarakhand (6) and West Bengal (6).[8]

The present work is an attempt to investigate the participation of local communities in the management of protected areas through the identification of a case study in *Periyar Tiger Reserve* placed in the State of Kerala.

The choice to analyse the development of this protected area primarily derived by the circumstance that the latter has gradually views to recognise the status of Wildlife Sanctuary firstly, then that of Tiger Reserve and finally that of National Park, respectively in 1950, 1978 and in 1982. As underlined by some authors, the *Periyar Tiger Reserve* 'is a unique case, because usually the status of a park influences the management, and usually one park has one status', and with regards to this protected area 'management is controlled by single management, and status of the park (WS, TR, NP) is expressed in the program and zoning system'.[9]

Secondly, it represents a virtuous example in general referring to the management of natural areas. Particularly noteworthy here is the involvement of local communities in this management, with the overcoming of the most critical aspect of protected areas identified by Indian scholars, i.e. the conflict between human and wildlife. In this respect, while it is true that the latter is an issue undoubtedly 'geographically' limited, because it mainly concerns 'the South of the world' (or, if one prefers, the Global South),[10] where one can find the presence of traditional commu-

nment of India in the press release titled *India's Wildlife Conservation Milestones: Policies, Achievements and Global Commitments*, published on 3 March 2025, available at the web site https://www.pib.gov.in/, accessed 3 November 2025.

[8] All data are available on the website https://www.jimcorbettnationalpark.com/wild-life-park-in-india.htm, accessed 3 November 2025.

[9] See E. K. Damayanti, M. Dhakal, M. Masuda *et al.*, *Institutional Aspect of Protected Areas and Local People's Involvement into the Management: A Case Study in Periyar Tiger Reserve, Kerala, India*, Oral presentation held at the Japan Forestry Economic Society, Tsukuba, on 21 November 2004.

[10] Although the concept 'Global South' that recurs in most scientific publications – e.g. P. Dann, M. Riegner, M. Bönnemann (Eds), *The Global South*

nities, it does not represent a 'false' problem, as it might appear. In fact, on one side, it stands to reason that the local communities are holders of all of that ancestral knowledge necessary for live in harmony with the Nature understood as a set of ecosystems.

From a legal perspective, these communities relate to everything around them through a complex of rules, characterised by informality and orality, that H. Patrick Glenn has brought back to the so-called the Chthonic legal tradition:[11] they live in close contact with the Earth to the point that this Author has pointed out how Chthonic Law is 'sincerely environmentalist'.[12] However, on the other hand, it is evident that the conflict between human and wildlife constitute an issue that has concrete consequences in terms of maintenance of biodiversity, as explained below.

Environmental law embodies an emblematic post-modern science for being regulated by principles[13] and, therefore, it represents a fertile ground to explore how elements, only apparently external to the Law, influence and concur to the production of legal norms.

As we were taught by Rodolfo Sacco, with his elaboration of the theory of legal formants,

> … even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there can be only one rule in force, recognizes implicitly that living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges – elements that he keeps separate in his own thinking.[14]

and Comparative Constitutional Law, Oxford, 2020 – is probably the most correct to describe the contemporary world scenario from a geopolitical point of view, it appears, in my opinion, divisive, which is why I prefer to refer to the 'South of the world'.

[11] See H. P. Glenn, *Tradizioni giuridiche nel mondo. La sostenibilità della differenza*, Bologna, 2011, 115 ff.

[12] Ibid., 141.

[13] Cf. N. De Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules*, Oxford, 2002; D. Amirante (Ed.), *La forza normativa dei principi. Il contributo del diritto ambientale alla teoria generale*, Padova, 2006.

[14] R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (I of

However, with regard of the topic of this study is necessary to integrate the classical methodological approach of comparative law proposed by Sacco with that one draw up by Werner Mensky, which is based on the well-known model of law as a kite.[15]

In this perspective, legal pluralism – as a conception emerging 'when other systems of law were found working in reality together with the 'law', whether in harmony or in conflict'[16] – represents a point of departure to initiate a dutiful research exercise aimed to find a new framing for Environmental Law.

Evidently, as has been observed, 'postmodernism suggests that truth, knowledge and even reality are all culturally relative and that human rationality is heterogeneous and diverse',[17] and consequently 'Law is always something particular, not just a generalised phenomenon, and it is culture-specific because its manifestations depend on socio-cultural settings that differ from place to place and through time'.[18]

Nevertheless, it should be noted that in this essay – for sake of brevity and usefulness in connection with the research objectives – we will focus, under the methodological profile, mainly on constitutional and statutory rules, combining then the Law produced by the state institutional entities with the Law as outcome both of religious-ethical-moral regulative entity and of society.[19] Consequently, according to Sacco's taxonomy, case-law formant will de-

II), in 39 *The American Journal of Comparative Law* 1 (1991), 1-34, 23.

[15] W. Menski, *Remembering and Applying Legal Pluralism: Law as Kite Flying*, in S.P. Donlan, L. Heckendorn Urscheler (Eds), *Concepts of Law: Comparative, Jurisprudential, and Social Science Perspectives*, London-New York, 2016, 91-108.

[16] M. Chiba, *Legal pluralism: Toward a General Theory through Japanese Legal Culture*, Tokyo, 1-2.

[17] W. Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa*, Cambridge, 2nd edn, 2006, 11.

[18] Ibid., 179.

[19] Ibid. 173 ff., but see also W. Menski, *Flying Kites in a Global Sky: New Models of Jurisprudence*, in 7 *Socio-Legal Rewiew* (2011), 1-22, where the Author defines the Law as a 'plurality of pluralities', emphasising that 'Law […] is not just this or that, but it is a lot of different things at the same time, in effect mainly four kinds of law, with many hybrid combinations in the daily lived experiences of people all over the world'.

liberately not be investigated, while on par, considering Mensky's classification, international law will not be explicitly taken into account. Lastly, with particular reference to constitutional and statutory rules, a synchronic approach was predominantly chosen, for obvious reasons related to the fact that the main legislative provisions, namely those of *The Wildlife Protection Act*, were adopted before the advent of the constitutional amendment designed to offer a protection to the environment and to ecosystems.

2. *The Management of Natural Protected Areas in the Light of the Constitution of India and of* The Wild Life Protection Act

As anticipated, the provisions regarding the protection of the environment were introduced in the Constitution of India, which entered into force in 1950, with *The Constitution (Forty-Second Amendment) Act, 1976*. These are two new articles, 48-A and 51-A precisely.[20] The former were inserted in Part IV, relative to *Directive Principles of State Policy*, stating that 'The State shall endeavour to protect and improve the environment and to safe-

[20] With regard to the interpretation of these two provisions given by the doctrine and by the Courts see M.A.A. Baig, *Environmental Law and Justice*, New Delhi, 1996; J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, The Hague, 2004; O.P. Dwivedi, *Hindu Religion and Environmental Well-being*, in R.S. Gottlieb (Eds), *The Oxford Handbook of Religion and Ecology*, Oxford-New York, 2006, 160 ff.; M.P. Singh (Ed.), *V. N. Shukla's Constitution of India*, Lucknow, 11th edn, 2010 with Supplement, 359 ff. and 361 ff.; J. R. May, E. Daly, *Global Environmental Constitutionalism*, Cambridge, 2014; G. Sahu, *Environmental Jurisprudence and the Supreme Court. Litigation, Interpretation, Implementation*, New Delhi, 2014; C.K. Chapple, *India*, in W. Jenkins, M. E. Tucker, J. Grim (Eds), *Routledge Handbook of Religion and Ecology*, London, 2017, ff.; G.N. Gill, *Environmental Justice in India: The National Green Tribunal*, London-New York, 2017; E. Lees, J. E. Viñuales (Eds), *The Oxford Handbook of Comparative Environmental Law*, Oxford-New York, 2019; S. Divan, A. Rosencranz, *Environmental Law and Policy in India: Cases and Materials*, Oxford-New York, 3rd edn, 2023. Lastly, allow me to refer to M.S. Bussi, *Courting the Environment*: *Public Interest Actions in the Global South*, in D. Amirante, S. Bagni (Eds), *Environmental Constitutionalism in the Anthropocene. Values, Principles and Actions*, London-New York, 2022, 201-220.

guard the forests and wild life of the country'. The latter, under the new Part IV-A all dedicated to *Fundamental Duties*, establish, in its letter *g*), that 'It shall be the duty of every citizen of India…to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures'.

Moreover, the 42nd amendment modifies the *Seventh Schedule* of the Constitution. In a context where India figures as a federal State, adopting a cooperative federalism approach,[21] this schedule indicates the matters that, on the basis of article 246, fall within the competence of the Union (List I - Union List) or the States (List II - State List), but also these matters with reference to the Legislature of any State have also power to approve laws (List III - Concurrent List).

In 1976, indeed, in the Concurrent List, the subject of 'Forests' and that of the 'Protection of wild animals and birds' were inserted (17A and 17B).

Although in the adoption of articles 48-A and 51-A a role must be recognised to international law, they fall within a broader constitutional revision project, which has firstly provided important innovations to the Preamble and has introduced the new article 39-A.

In fact, with the constitutional reform of 1976 'India turned more openly towards certain indigenous concepts to restructure its own model of 'good governance' along ancient Indian principles',[22] connected to the concept of *rājadharma*.

The *rājadharma* can be defined as the conception of the existence of a *dharma* of the king which expresses the connecting link existing between the cosmic and social order and it consolidates in the 'fluid' evolution of Hindu law from the classical period to the late classical period.[23] It is a declination – or rather, the out-

[21] Cf. D. Amirante, *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*, Napoli, 2019, in particular Chapter III.

[22] W. Menski, *Comparative Law in a Global Context*, cit., 265.

[23] Cf. D. Francavilla, *Il diritto nell'India contemporanea. Sistemi tradizionali, modelli occidentali e globalizzazione*, Torino, 2010, 28-29.

come of a process in which a philosophical tradition has assumed institutional forms[24] – of the more general idea of *dharma*.

The *dharma* represents a paradigm that has a metaphysical origin[25] and joins, in the classical period of Hindu Law, the doctrine of *karma*.[26] *Karma* 'is the individual's action seen from the perspective of the consequences it produces',[27] while *dharma* can instead be defined as the conception based on the 'correct or 'good' action of all individuals, at any moment in their life'.[28]

If it is true, in this context, that 'the basic paradigm of all indigenous traditions is that of the cosmic, social and moral order or *dharma*',[29] this premise allows us to understand how the choices made within the Indian Constitution with the *Forty-Second Amendment Act* of 1976, have been translated into the legislative and governmental discipline on environmental matters. Moreover, it allows us to understand how *The Wild Life Protection Act* of 1972, like *The Forest Conservation Act* of 1980 and *The Environment Protection Act* of 1986, trace their theoretical roots, with regard to the protection of ecosystems, in a thousand-year-old philosophical-religious tradition.[30]

The Wild Life Protection Act of 1972, was approved – in its

[24] Ibid.

[25] T.N. Madan, *La religione in India*, in Aa.Vv., *Cultura e società in India*, Torino, 1991, 109-137.

[26] For a comprehensive analysis of Indian philosophy and its roots see G. Tucci, *Storia della filosofia indiana*, Roma-Bari, 2012 and R. Torella, *Il pensiero dell'India. Un'introduzione*, Roma, 2020, that analyse the complex relationship between Indian philosophy and the religions practiced in India. With reference to that last aspect, it must be remembered the well-known work of the distinguished scholar M. Eliade, *Storia delle credenze e delle idee religiose*, Milano, 2006.

[27] G. Ajani, D. Francavilla, B. Pasa, *Diritto comparato. Lezioni e materiali*, Torino, 2018, 320.

[28] W. Menski, *Comparative Law in a Global Context*, cit., 209. The Author recalls the definition of *dharma* as 'the totality of rules governing the social order' given by B. N. Mani in his book *Law of dharmasastras* (New Delhi, 1989, 4).

[29] T.N. Madan, *La religione in India*, cit., 111.

[30] On this point, it is sufficient to consider the Edicts of Ashoka, available in the Italian translation *Gli editti di Aśoka*, Milano-Udine, 2015, and the *Manusmriti* or *Mānavadharmaśāstra*, known as the Laws of Manu, cf. W. Doniger, B. K. Smith (Eds), *Le leggi di Manu*, Milano, 1996.

original text – in order to protect wild animals and birds 'and for matters connected therewith or ancillary or incidental thereto'; however, in the text currently in force, it is defined as an 'Act to provide for the conservation, protection and management of wild life and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country'.

It should be noted that, if after the reform of 2003[31] the title states that it was an Act providing for 'the protection of wild animals, birds and plants … with a view to ensuring the ecological and environmental security of the country', after the reform of 2022[32] the expression 'protection of wild animals, birds and plants' were substituted with the new one of the 'conservation, protection and management of wild life'.

Proceeding from the foregoing, it could be deduced that from the 1970s to today an ecological vision has gained ground in legislation, by virtue of which the term 'wildlife' includes all the ecosystems present in protected areas, and therefore fauna and flora, as biology requires.

This also seems to be demonstrated by the discipline of protected areas contained in the Chapter IV of the Act, which was dedicated to the establishment, the management and the administration of the former.

In the text of 1972, which is worth remembering it was approved with the procedure of art. 252 of the Constitution,[33] Chapter IV identifies four categories of natural areas.

[31] This reform was approved by the Act 16 of 2003, (w.e.f. 1-4-2003).

[32] This reform was approved by Act 18 of 2022, (w.e.f. 1-4-2023).

[33] In particular, section 1 of *The Wild Life Protection Act* of 1972 – in its original text – stated:

'(1) This Act may be called the Wild Life (Protection) Act, 1972.

(2) It extends, in the first instance, to the whole of the Slates of Andhra Pradesh, Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, Manipur, Punjab, Rajasthan, Uttai Pradesh and West Bengal and to all the Union territories; and it shall also extend to such other State as may adopt this Act by resolution passed in that behalf in pursuance of clause (1) of article 252 of the Constitution.

(3) It shall come into force in a State or Union territory to which it extends, or may become extended in future, on such date as the Central Gover-

Indeed, with reference to the original formulation of the Act it is necessary to use the term 'natural areas', because it will only be with the 2000s reform that this Chapter will be entitled as 'Protected Areas'. This data also suggests that the idea of a protected area, as generally understood, was only recognised after about 30 years from entry into force of the Act, accompanied by an approach oriented towards zoning.

In 1972 *The Wild Life Protection Act* identified, thus, four types of areas, i.e. Sanctuaries, National Parks, Game Reserves and Closed Areas.

Section 18 laid down that 'The State Government may, by notification, declare any area to be a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wild life or its environment'.

Therefore, for the purposes of the declaration of an area as a Sanctuary, the crucial element was that the same had a sufficient relevance under the ecological, faunal, floral, geomorphological, natural or zoological profile, such that it is desirable, not only to protect the wildlife present in the area and its environment, but also that the propagation and the development can be allowed.

With regard to National Parks, Section 35 outlines a regulatory framework where, under a functionalist perspective – and then the objectives of the provision – nothing differs from article 18, but in this case the area, which may or may not fall within a Sanctuary, requires to be preserved 'by reason of its ecological, faunal, floral, geomorphological or zoological association or importance'. Ultimately, while after the declaration of the status of Game reserve inside of it is allowed to hunting wild animal only if in possession of a specific licence, in a Closed Area the hunt is closed for a determined period.

Moreover, it should be remembered that already the text of 1972 of *The Wild Life Protection Act* provided the possibility for the Central Government, under certain conditions, to declare an

nment may, by notification, appoint, and different dates may be appointed for different provisions of this Act or for different States or Union territories'.

area as a Sanctuary or a National Park, and after the revision of 2022,[34] also as a Conservation Reserve (section 38).

Given this legal framework, already with the 1991 amendment[35] the definition of Sanctuary was modified, adding the following phrase, before the provision of Section 18 cited above: 'any area other than an area comprised within any reserve forest or the territorial waters'.

In addition, the 2003 amendment[36] has introduced two new sections: the section 18A and the section 18B. In particular, the latter has provided that the State Government will appoint a Collector. This officer, in a certain time term, have firstly to 'inquire into and determine the existence, nature and extent of rights of any person in or over the land comprised within the limits of the sanctuary'.[37] Furthermore, it should be noted that since 1972 – although there have been some additions later – sections 27 and 28 discipline, respectively, the restrictions for the access to the Sanctuary and the eventual granting of permits.

Despite of some parts of section 35 have been integrated/modified through the reforms of 1991 and 2003, the definition of National Park has remained unchanged over time. On the other hand, while the provisions about Game reserve and Closed Area were abrogated,[38] *The Wild Life (Protection) Amendment Act, 2002* introduces as well in the Act the sections from the 36A to 36D.

These provisions appear of particular interest, considering that two new categories – or rather, subcategories of protected areas – make their entrance into the Indian legal system. This is about the Conservation reserves and the Community reserves.

Section 36-A, sub-section 1, states that:

> The State Government may, after having consultations with the local communities, declare any area owned by the Government, particularly the areas adjacent to National Parks and sanctuaries

[34] This reform was approved by Act 18 of 2022, (w.e.f. 1-4-2023)
[35] See the Act 44 of 1991 (w.e.f. 2-10-1991).
[36] This reform was approved by the Act 16 of 2003, (w.e.f. 1-4-2003).
[37] The reference is to the section 18B and ff.
[38] Respectively, in 1991 and in 2003.

> and those areas which link one protected area with another, as a conservation reserve for protecting landscapes, seascapes, flora and fauna and their habitat.

Section 36-C, sub-section 1, establishes instead that:

> The State Government may, where the community or an individual has volunteered to conserve wild life and its habitat, declare any private or community land not comprised within a National Park, sanctuary or a conservation reserve, as a community reserve, for protecting fauna, flora and traditional or cultural conservation values and practices.

From the analysis of the discipline of Sanctuaries and National Parks, into a confrontation with that of sections 36-B and 36-D, the differences that exist within the macro-category of Protected areas clearly emerge.

National Parks can be established on the initiative of a State Government, which acquires full ownership of the land and extinguishes any property or usage rights relating to the territory, without any prior consultation with the populations concerned. For the Sanctuaries we refer to section 27 *et seq.* instead.

According to Domenico Amirante, the fundamental differences between these two types of protected areas concern, in particular, zoning and the regime of permitted activities, aspects that are closely related; in fact, while the entire territory of the National Park is subject to full protection, within the Sanctuaries there is a clear distinction between areas under full protection (known as 'core zones') and other areas where certain forestry, agricultural or livestock farming activities are permitted, with regard to which it is also possible to recognise various rights of use and even property rights.[39]

Conservation reserves and Community reserves share with Sanctuaries the procedure of the appointment of a Chief Wildlife Warden by the State Government. Nevertheless, in the case of Conservation reserves the State Government designate a Conser-

[39] See D. Amirante, *Le aree protette nell'Unione indiana: profili giuridici*, in XV *Rivista Giuridica dell'Ambiente* 1 (2000), 177-191, 185.

vation Reserve Management Committee, which has the task 'to advise the Chief Wild Life Warden to conserve, manage and maintain the conservation reserve'; indeed, among the members of the Committee there are also 'one representative of each Village Panchayat in whose jurisdiction the reserve is located' and 'three representatives of non-governmental organisations working in the field of wild life conservation' (section 36B).

Similarly, article 36D provides that the State Government shall form a Community Reserve Management Committee, which 'shall be the authority responsible for conserving, maintaining and managing the community reserve' and it is responsible 'to prepare and implement the management plan for the community reserve and to take steps to ensure the protection of wild life and its habitat in the reserve' (section 36D).

The composition of this Committee differs depending on whether or not the Community Reserve insists on private land. In the first case (sub-section 2A) – which was only foreseen with the 2003 reform – it is composed by 'the owner of the land, a representative of the State Forests or Wild Life Department under whose jurisdiction the community reserve is located and also the representative of the Panchayat concerned or the tribal community, as the case may be'. Otherwise, it comprises 'not less than five representatives nominated by the Village Panchayat or where such Panchayat does not exist by the members of the Gram Sabha and one representative of the State Forests or Wild Life Department under whose jurisdiction the community reserve is located'.[40]

3. *Why Chose the State of Kerala in order to Analyse the Communitarian Participation in the Protected Areas Management in India? The* Periyar Tiger Reserve *as a Case Study*

> When we talk about India, one region that was considered special and different from the rest of the country is Kerala. It is easy to understand why: it has a unique magic, characterised by extraordinary natural beauties. Its lagoons, the forests, the beaches, and, above all, its intensely and varied green rice paddies –

[40] The expression of 'not less of' was inserted by the 2022 reform.

> accompanied by palm trees gently bending in the wind that blows across the region – leave us breathless. For Kerala native people like me, its beauty isn't just a feast for the eyes, but it is a profound part of our essence, something that is part of our soul. Having grown up in a land crisscrossed by 44 rivers, dotted with lakes and with 1,500 kilometres of inner canals, we bathe in these waters at least twice a day and wear immaculate white robes. The women, often simple and unadorned, seem to move as if in a dance of colors: the lush green of the foliage, the intense red of the fertile land, the brilliant blue of the waters, and the shimmering gold of the beaches and riverbanks.[41]

With these words Shashi Tharoor describes the territory of Kerala, defined as 'the pearl of India'. As pointed out by this Author, Kerala is not only a State with an immensity of natural resources, but it is also a place where numerous ethnic groups, philosophies, religions and, in the end, traditions, come together and co-exist, as evidenced by 'a rare and precious legacy, which belongs to all Keralans: a heritage of openness, diversity, pluralism, tolerance'.[42]

In my opinion, this state of things has concurred to form the right humus in order to build the foundations of an approach based on integral ecology, sustainability and social justice in the

[41] Cf. S. Tharoor, *Viaggio nel Kerala: perla dell'India*, in *Limes – Bharat, la strategia dell'India* 8 (2024), 115 [my own traslation in English]. The article was published on the periodical, after being translated, in Italian. The published text is reproduced in full below: 'Quando si parla dell'India, una delle regioni che viene considerata speciale e diversa dal resto del paese è il Kerala. È facile capire perché: possiede una magia unica, caratterizzata da bellezze naturali straordinarie. Le sue lagune, le foreste, le spiagge e soprattutto le risaie di verde intenso e variegato – accompagnate da palme che si piegano dolcemente al vento che soffia su tutta la regione – lasciano senza fiato. Per gli originari del Kerala come me, la sua bellezza non è solo un piacere per gli occhi, ma è una parte profonda della nostra essenza, qualcosa che fa parte della nostra anima. essendo cresciuti in una terra attraversata da 44 fiumi, punteggiata da laghi e da ben 1500 chilometri di canali interni, siamo soliti immergerci in queste acque almeno due volte al giorno e indossare vesti bianche immacolate. Le donne, spesso semplici e senza troppi orpelli, sembrano muoversi come in una danza tra i colori: il verde lussureggiante del fogliame, il rosso intenso della terra fertile, il blu brillante delle acque e l'oro scintillante delle spiagge e delle rive dei fiumi.' (Ibid.)

[42] Ibid., 129.

management of natural resources, setting up a cultural substrate that has led to overcome at least in part the human-wildlife conflict mentioned before.

Generally speaking, it was pointed out that the establishment of Protected Areas represents one of the strategies aimed to guarantee the conservation of biodiversity, term by which one refers 'in a broad sense, to species abundance, richness, and variety within the living world – plants, animals, and micro organisms – as well as to the ecosystems and ecological processes to which they belong'.[43] Furthermore, it should be borne in mind that the institution and management of Protected Areas are considered as 'significant moments' in the field of the protection of the environment, whose approach traces historically its origins in the idea of 'integral protection', which found its highest expression in the United States Yellowstone model.[44] With a view to enhancing the various modalities of management, a proposal for a legal classification of Protected Areas was elaborated by Domenico Amirante, so that the latter model has been joined by other models, i.e. a model based on an 'integrated conservation' and a model oriented to the 'co-operative management'.[45]

India, in the light of this taxonomic proposal, is included in the co-operative management model, also defined as 'co-management' model, within which a general outline marked by centralised management by the competent Ministries is counterbalanced by a management shared with local communities.[46]

Looking at Kerala's *Periyar Tiger Reserve* experience in hindsight, from its historical and institutional evolution the reasons

[43] See L.K. Arun, B. Jayasankar, K.M. Abraham, *Biodiversity Conservation and Livelihood Issue of Tribesfolk: A Case Study of Periyar Tiger Reserve*, Discussion Paper No. 37, Kerala Research Programme on Local Level Development, Centre for Development Studies - Thiruvananthapuram, 2001, 5-6. Cf. D. Amirante, *Diritto ambientale italiano e comparato. Principi*, Napoli, 2003, reminds us how the specialist literature on the concept of biodiversity is vast, by referencing some of the major works of Italian scholars (Ibid. 84-85).

[44] D. Amirante, *Diritto ambientale italiano e comparato*, cit., 83.

[45] Ibid., 92 ff.

[46] Ibid., 95.

that allow us to consider it as unique example of Protected Area clearly emerge.

Today it is a Wildlife Sanctuary, a Tiger Reserve and a National Park, having indeed three statuses, however, already in 1934, it was constituted as a Game Sanctuary: the *Nelikkanpetty Game Sanctuary*.

It is the oldest and largest Protected Area of Kerala with its 925 square kilometers, falling, under the administrative profile, in the Idukki, Kottayam and Pathanamthitta districts and being geographically situated in the Western Ghats, precisely between the Cardamom Hills and the Pandalam Hills of the Southern Western Ghats.[47] In fact, among the many awards and recognitions it has obtained, it was recognised by the UNESCO as a part of the World Heritage site 'Western Ghats': it is a huge source of biodiversity for its flora, which represent more than 41% of that one of the State, and fauna, firstly for the presence of Bengal Tiger.[48] Moreover, in the territory of National Park live six indigenous tribal communities, i.e. Paliyans, Mannas, Mala Pandarams, Malayarayans, Ulladans and Uralis.[49]

With regard to its development, this Protected Area owes its recognition and its establishment to the teachings of Sri Narayana Guru, a Hindu sage, thinker and social reformer, who settled in the early Twentieth century in Kerala, and of the politician, social activist and environmentalist E. V. Ramasamy, also known as Periyar, to whom the name of the Sanctuary, the Reserve and the Park clearly belongs.[50]

Established in 1950, the Periyar Wildlife Sanctuary was inserted in 1973 in the 'Project Tiger', a project launched by the Government of India that allowed that today there are 51 Tiger reserves in the country.[51] In this way, the Periyar Tiger Reserve

[47] These data are available on the websites https://forest.kerala.gov.in and https://www.periyartigerreserve.org, accessed 3 November 2025.

[48] Ibid.

[49] Cf. https://www.periyarnationalparkonline.in, accessed 3 November 2025.

[50] Ibid.

[51] For more information about this Project see https://ntca.gov.in/about-us/#project-tiger, accessed 3 November 2025.

was created in 1978, putting it under the control of the Kerala Forest Department.

Although under the institutional profile the Kerala Forest Department dated back to the colonial era, it is a state agency founded in order to guarantee the protection and management of forests through the promulgation, respectively in 1961 and 1971, of the *Kerala Forest Act* and the *Kerala Private Forests (Vesting & Assignment) Act*.

In 1973 the State of Kerala passed the *Indian Wildlife (Protection) Act* of 1972, which were then followed by the creation of numerous wings, unit and bureau within the Forest Department of the State, as well as the Special Forest Courts in 1994 in Manjeri, Punalur, and Thodupuzha.[52]

The Periyar Tiger Reserve indicates its mission in:

> …maintain viable habitat for source population of tiger by ensuring conservation of biodiversity with minimal human-wildlife conflicts. To promote the coexistence between wildlife and human activity with due recognition of livelihood, developmental, social and cultural rights of local people.[53]

In 1982 was lastly established the Periyar National Park, which has been described as 'an ideal example of the peaceful co-existence of indigenous tribes and exotic wildlife'.[54]

Between the Nineties and the beginning of the Twenty-first century the *Periyar Tiger Reserve* was involved in India Eco-development Project (IEDP) launched by the World Bank in 1996, elaborated around five objectives: 'improve capacity of PA management to conserve biodiversity and increase opportunities for local participation in PA management activities and decisions', 'reduce negative impacts of local people on biodiversity, reduce negative impacts of PAs on local people, and increase collaboration of local people in conservation efforts', 'develop more effective and extensive support for ecodevelopment' and, as well as,

[52] Cf. https://forest.kerala.gov.in/en/history/, accessed 3 November 2025.

[53] Ibid.

[54] See https://www.periyarnationalparkonline.in/nature-co-existence-in-periyar.php, accessed 3 November 2025.

to ensure effective implementation of the project, also in view to the setting up of other future projects.[55]

In this framework, the report of the project is worthy of attention in the part where, tackling the issue of the 'Project Impacts and Justification', one the one hand refers to sustainability, and, on the other, deals with the condition of tribal groups, women and disadvantaged people; on this latter point, the report underlines:

> The project would operate in a setting where the previous establishment of PAs and changes in forest use have already significantly and negatively affected the livelihoods of tribal groups living in and around the protected areas. The establishment of PAs has also negatively affected women (…) and poor and landless households in the vicinity of the PAs. The project would facilitate participatory decision making on changes in practice to benefit conservation and to help offset past negative impacts of PAs on people.[56]

The India Eco-Development Project was concluded in 2004, in a context in which it encountered certain criticalities in some of the seven Protected Area involved, but with successful results in the *Periyar Tiger Reserve*, to the point that it has recognised as a Learning Centre of Excellence in the country by the Government of India, in 2005 the Tiger Task Force of GOI identified it as an emblem of a 'conservation model' and in 2012 it was awarded also by the United Nations Development Programme (UNDP) as 'the best-managed protected area' in India.[57]

[55] Cf. https://documents.worldbank.org/en/publication/documents-reports/documentdetail/204961485977280771/india-ecodevelopment-project, accessed 3 November 2025. In particular see the complete report of the project, World Bank Group, *India - Ecodevelopment Project*, Washington D.C., available at http://documents.worldbank.org/curated/en/204961485977280771, accessed 3 November 2025. The latter includes indication of the 'specific objectives' of the project, which are of particular interest (Ibid., 4).

[56] World Bank Group, *India - Ecodevelopment Project*, cit., 7.

[57] Cf. J. W.K. Parr, *Institutional Analysis of Multi-Level Collaborative Management in Periyar Tiger Reserve, Southern India*, in 21 *Parks* 2 (2015), 37-50. For a comprehensive analysis of the India Eco-Development Project from the perspective of conservation see S. Gubbi, *Tiger habitats and Integrated Conser-*

The circumstance that the India Eco-Development Project had a favourable outcome, combined with the implementation of another initiative that will be discussed below, undoubtedly has influenced the Indian Governments in supporting the realisation of the subsequent 'Biodiversity Conservation and Rural Livelihoods Improvement Project' (BCRLI), still developed by the World Bank, which was started in 2013 and was completed in 2019.[58]

Lastly, from this perspective, the Participatory Forest Management scheme, which finds its roots in the National Forest Policy of 1988 and was implemented by the Forest and Wildlife Department of the Government of Kerala in 2000,[59] become also relevant. Moreover, the first forest policy in India was actually adopted under the British Administration, demonstrating that some kind of attention towards the management of the natural resources is dated back to the Nineteenth century.[60]

However, it is with the Resolution of 1988 of the Ministry of Environment and Forests that the main objective of the Indian Forest Policy is made explicit and identified as follows:

> The principal aim of Forest Policy must be to ensure environmental stability and maintenance of ecological balance including atmospheric equilibrium which are vital for sustenance of all lifeforms, human, animal and plant. The derivation of direct economic benefit must be subordinated to this principal aim.[61]

vation and Development Projects: A case study from Periyar Tiger Reserve, India, Durrell Institute for Conservation and Ecology, University of Kent, October 2006.

[58] See https://documents.worldbank.org/en/publication/documents-reports/documentdetail/497941468041940864, accessed 3 November 2025.

[59] See the *Participatory Forest Management Guidelines*, published by Kerala Forest Department in 2006.

[60] Cf. K. Balooni, *Participatory Forest Management in India. An Analysis of Policy Trends amid 'Management Change'*, in *Policy Trend Report* (2002), 88-113. The Author traces back all the historical evolution of the Forest Policy in India starting from the Nineteenth century and continues up to the 2000s. See also P. Bhattacharya, L. Pradhan, G. Yadav, *Joint Forest Management in India: Experiences of Two Decades*, in 54 *Resources, Conservation and Recycling* 8 (2010), 469-480, https://doi.org/10.1016/j.resconrec.2009.10.003, accessed 3 November 2025.

[61] K. Balooni, *Participatory Forest Management in India*, cit., 103, where

In the final analysis, if the *Periyar Tiger Reserve* earned in 2022 the title of the 'Best managed Tiger Reserve' by the National Tiger Conservation Authority in terms of management effectiveness assessment,[62] this is due, in my opinion, to the development outlined so far, founded on important and concrete projects and initiatives aimed to seriously involving the local communities in the management of the Protected Area.

Indeed, in 2006, with an amendment to the *Wild Life Protection Act*, the National Tiger Conservation Authority was established, circumstance that seems to mark one more before and after point in this evolution.

The Authority is defined in section 38L as a governmental body which see as Chairperson the Minister in charge of the Ministry of Environment and Forests and as Vice-Chairperson the Minister of State in the Ministry of Environment and Forests; it is thus composed by federal and local government members, as well as by members of Parliament, by experts in wildlife conservation, including those of tribal origin, and, last but not least, by various officers.

Pursuant to the section 38O, the Authority, in addition to approve the Tiger Conservation Plan drawn up by the State Government, has the following powers and functions:

> (*b*) evaluate and assess various aspects of sustainable ecology and disallow any ecologically unsustainable land use such as, mining, industry and other projects within the tiger reserves;
> (*c*) lay down normative standards for tourism activities and guidelines for project tiger from time to time for tiger conservation in the buffer and core area of tiger reserves and ensure their due compliance;
> (*d*) provide for management focus and measures for addressing conflicts of men and wild animals and to emphasise on co-existence in forest areas outside the National Parks, sanctuaries or tiger reserve, in the working plan code;

the complete text of the Resolution was reproduced in Annex 1 of the essay.

[62] See the press release concerning the *5th Management Effectiveness Evaluation of Tiger Reserves in India* of 2022, available at the web site https://www.pib.gov.in/, accessed 3 November 2025.

> (*e*) provide information on protection measures including future conservation plan, estimation of population of tiger and its natural prey species, status of habitats, disease surveillance, mortality survey, patrolling, reports on untoward happenings and such other management aspects as it may deem fit including future plan conservation;
> (*f*) approve, co-ordinate research and monitoring on tiger, co-predators, prey, habitat, related ecological and socio-economic parameters and their evaluation;
> (*g*) ensure that the tiger reserves and areas linking one protected area or tiger reserve with another protected area or tiger reserve are not diverted for ecologically unsustainable uses, except in public interest and with the approval of the National Board for Wild Life and on the advice of the Tiger Conservation Authority;
> (*h*) facilitate and support the tiger reserve management in the State for biodiversity conservation initiatives through eco-development and people's participation as per approved management plans and to support similar initiatives in adjoining areas consistent with the Central and State laws;
> (*i*) ensure critical support including scientific, information technology and legal support for better implementation of the tiger conservation plan;
> (*j*) facilitate ongoing capacity building programme for skill development of officers and staff of tiger reserves; and
> (*k*) perform such other functions as may be necessary to carry out the purposes of this Act with regard to conservation of tigers and their habitat.

Furthermore, the sub-section 2 recognises to the Tiger Conservation Authority the faculty to issue directions to natural or legal persons including State bodies, but it makes clear that 'no such direction shall interfere with or affect the rights of local people particularly the Scheduled Tribes'.

On this point, the Tiger Conservation Plan, provided for section 38V, ensures:

> (a) protection of tiger reserve and providing site specific habitat inputs for a viable population of tigers, co-predators and prey animals without distorting the natural prey-predator ecological cycle in the habitat;

> (b) ecologically compatible land uses in the tiger reserves and areas linking one protected area or tiger reserve with another for addressing the livelihood concerns of local people, so as to provide dispersal habitats and corridor for spill over population of wild animals from the designated core areas of tiger reserves or from tiger breeding habitats within other protected areas;
> (c) the forestry operations of regular forest divisions and those adjoining tiger reserves are not incompatible with the needs of tiger conservation.

Lastly, the definition of Tiger Reserves given by section 38V, sub-section 4, draws particular attention. They are described as

> core or critical tiger habitat areas of National Parks and Sanctuaries, where it has been established, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of tiger conservation, without affecting the rights of the Scheduled Tribes or such other forest dwellers, in consultation with an Expert Committee constituted for the purpose.

However, the definition also includes all the

> buffer or peripheral area consisting of the area peripheral to critical tiger habitat or core area, where a lesser degree of habitat protection is required to ensure the integrity of the critical tiger habitat with adequate dispersal for tiger species, and which aim at promoting co-existence between wildlife and human activity with due recognition of the livelihood, developmental, social and cultural rights of the local people, wherein the limits of such areas are determined on the basis of scientific and objective criteria, in consultation with the concerned Gram Sabha and an Expert Committee constituted for the purpose.

With particular reference to the relationship between Tiger Reserves and local communities, the same section 38V, sub-section 5, clarifies that 'no one Scheduled Tribes or other forest dwellers shall be resettled or have their rights adversely affected for the purpose of creating inviolate areas for tiger conservation', except under certain conditions.[63]

[63] See e.g. section 38V, sub-section 5, (ii) that states: 'the concerned agen-

4. *Some Concluding Remarks: the Overcoming of Human-Wildlife Conflict in the Indian Context?*

The projects and schemes that over the years the *Periyar Tiger Reserve* was involved in led to a series of activities developed around two main objectives: the management and the Eco-Development of the Protected Area.[64]

With regard to the Protected Area management, it is embodied in a series of protection activities, like, e.g., the GPS tracking, a protection-oriented community-based eco-tourism, an interstate joint controls through a dog squad (a team known as 'Periyar Sniffers') and trained and experienced personnel (the 'VIPER' special task force), also making use of new technologies (such as the 'Sarpa' App and the 'Monitoring System for Tigers Intensive Patrolling and Ecological Status' App). Furthermore, in 2012 the *Periyar Tiger Reserve* was expanded with the addition of an area of 148 square kilometres. From this perspective we cannot forget the women's voluntary Group of Asnthasena, which implements in particular the activity for plastic collection.

The Village Eco-Development activities, which are basically oriented to the conservation, aim at supporting livelihood of local communities especially through the mentioned mechanism of Participatory Forest Management; they also aim at granting subsistence to the former and implementing the economic activities that they can carry out, e.g. encouraging the fishing and the harvest of pepper and honey.

Moreover, within the eco-development activities falls these ones that are finalised to the attraction of tourist in an optical of people-oriented and park-centered community-based ecotour-

cies of the State Government, in exercise of their powers under this Act, establishes with the consent of the Scheduled Tribes and such other forest dwellers in the area, and in consultation with an ecological and social scientist familiar with the area, that the activities of the Scheduled Tribes and other forest dwellers or the impact of their presence upon wild animals is sufficient to cause irreversible damage and shall threaten the existence of tigers and their habitat'.

[64] All the following information are available at the web site https://www.periyartigerreserve.org, accessed 3 November 2025.

ism. In a context in which the area accessible to tourists is territorially delimited and the control of the more vulnerable parts of the protected area is vested in local communities, there is the possibility, for tourists and pilgrims, to visit two important religious venues: the Sabarimala Temple, dedicated to Lord Ayyappa and the Mangala Devi Temple dedicated to Kannagi, the two Hindu sites located in the reserve, with the provision of services such as cafeterias and parking. For these purposes it was set up many eco-development committees, among which the best known are the Swami Ayyappa Poogavana Punarudharana. Particular efforts were indeed spent for the dissemination of the cultural heritage of the Periyar Tiger Reserve and the values related to the conservation of its biodiversity among visitors, with the institution of museums (the Interpretation centre and the Tribal Heritage Museum) and many event locations (i.e. the Kalari Hall, the Asari Hall, the Robinson Hall, the Vanasree Hall and the Amphitheatre), also thanks to the Tribal Heritage Programme. Last but not least, it should be remembered those strategies aimed at mitigating the consequences of climate change with respect to agricultural activities carry out in tribal settlements.

Considering what has been said hitherto, it appears not casual that all the projects and schemes above mentioned have been initiated during the Nineties of the last century, a decade in which the Indian economy changed.

In those years, India moved from 'an economic regime with strong State participation' – from 'a mixed economy, halfway between socialism and capitalism', which had characterised the government of Jawaharlal Nehru and his daughter Indira Gandhi – to the free market.[65]

In particular, the first phase of its history from an economic perspective would have been characterized by a significant intervention of the State in industrial activity, by price controls and by the protection of the internal market, by a tax policy aimed at taxing consumer goods and, at the same time, by a limitation on foreign investments.[66]

[65] See A. Rondinone, *India. Una geografia politica*, Roma, 2008, 77 ff.
[66] Ibid.

On the contrary in 1991, with the victory of the Congress Party after the murder of Rajiv Gandhi, a 'new era' began, which was linked to the opening to the global market, which however was counterbalanced by 'the social and economic gap between those who belong to the India that shines and those who do not'.[67]

Michelguglielmo Torri pointed out that the coalition government of the United Progressive Alliance formed in 2004 did not betray the neo-liberal approach that has characterized all governments in office since 1991 (not least those of the BJP between 1998 and 2004): the year that would have launched an 'economic miracle' based on an implementation of the tertiary sector to the total detriment of the primary sector.[68]

The economic analysis highlighted many twists and turns affected the years from 2005 to 2016, which can be summarised in light of the reconstruction offered by U. Kapila, who firstly noted that:

> after unprecedented growth of over 9 per cent for three successive years between 2005-06 and 2007-08 and recovering swiftly from the global financial crisis of 2008-09, the Indian economy has been going through challenging times that culminated in lower than 5 per cent growth of GDP at factor cost at constant prices for two consecutive years, i.e., 2012-13 and 2013-14.[69]

And, in a broader perspective, this author observed:

> despite global headwinds and a truant monsoon, India registered robust growth of 7.2 per cent in 2014-15 and 7.6 per cent in 2015-16, thus becoming the fastest growing major economy in the world.[70]

[67] Ibid., 81.

[68] Cf. M. Torri, *Le ambizioni di grande potenza dell'India*, in M. Torri (Ed.), *L'Asia negli anni del drago e dell'elefante: 2005-2006. L'ascesa di Cina e India, le tensioni nel continente e il mutamento degli equilibri globali*, Milano, 2007, 155-200.

[69] See U. Kapila*, Indian Economy today. Overview and Comparative Perspective*, in U. Kapila (Ed.), *Indian Economy Since Independence. A Comprehensive and Critical Analysis of India's Economy, 1947-2016*, New Delhi, 27th edn, 2017, 997-1014, 997.

[70] Ibid., 998.

While it is true that India experienced a steady increase in the growth rate of its economy until 2008, the dynamics with which this result was achieved revealed that neoliberal policies led to an increase of social inequality between States, between city and countryside and within the urban fabric.[71]

From the analysis conducted what ultimately emerges is that in the Indian context – but, probably also in all the other countries of the South of the world, which see the presence of tribe communities on their territories – the issue of the management of Protected Areas it does not only determine a clash between the principle of sustainable development and the protection of natural ecosystems, as occurs in the Western legal tradition, but also involves the problem of the survival of native populations and their cultural heritage.

Indeed, 'the economic argument of protection of biodiversity stems from different concepts of value attached to it such as market values, ecosystem values, existence values, and intergenerational values'.[72]

The mentioned human-wildlife conflict[73] takes the form and can therefore be summarised by looking at the risks that both humans and natural ecosystems face when coexisting within the same territory. The presence of a local community in a protected area certainly leads to a loss of biodiversity, but, on the other hand, the presence of certain wildlife puts human life at risk, both directly and indirectly, for example, by causing damage to crop.

As a result, 'there always arise conflicts of interests between conservation and maintenance of livelihood of local communities'.[74]

Furthermore, the reform of 2022 of the Wildlife Protection

[71] Cf. M. Adducci, *L'India contemporanea. Dall'indipendenza all'era della globalizzazione*, Roma, 2009, in particular 93 ff., 103.

[72] See L.K. Arun, B. Jayasankar, K.M. Abraham, *Biodiversity Conservation and Livelihood Issue of Tribesfolk*, cit., 6.

[73] On this topic see K.K. Karanth, R. DeFries, *Conservation and Management in Human-Dominated Landscapes: Case Studies from India*, in 143 *Biological Conservation* (2010), 2865-2869.

[74] Ibid.

Act[75] – although it has not been free from critics[76] – has increased the number of protected species and it was adopted also in order to implement CITES, even in view to modernise the law to respond to the obligations arising from international law.

In a study of 2010, aimed at comparing community-conserved areas (CCAs) with strictly protected areas (SPAs) and open-access areas in terms of biological conservation effectiveness, emerged that:

> …community-conserved areas do represent a significant improvement over open-access areas in conservation effectiveness. Yet they may fall short of the needs of comprehensive biological conservation that can be achieved in SPAs when species composition and vulnerable species are taken into account. CCAs tend to conserve an altered species complement compared to the native fauna and tend to lose some species, often those of the most conservation value that may be habitat-restricted, area-sensitive or endemic. At the same time, diversity and species richness of most taxa or other indicators such as deforestation rates do not appear to be consistently different under the two types of management regimes. CCAs do have the potential to protect significant proportion of regional flora and fauna.[77]

In conclusion, as it has been observed by Tapoja Chaudhuri, 'The rhetoric of the 'Kerala model' continues to work as an umbrella concept, whereby PTR's ongoing successes with various social policies get incorporated within the regional narrative of democracy and economic development'.[78]

[75] See the new Chapter VB inserted by Act 18 of 2022, s. 30 (w.e.f. 1-4-2023).

[76] Cf., e.g., https://www.thehindu.com/opinion/op-ed/when-tigers-and-jackals-get-the-same-protection/article67430687.ece, accessed 30 October 2025.

[77] G. Shahabuddin, M. Rao, *Do Community-Conserved Areas Effectively Conserve Biological Diversity? Global INsight and the Indian Context*, in 143 *Biological Conservation* (2010), 2926-2936, 2931.

[78] T. Chaudhuri, *Revisiting the 'Kerala Model': Place-making, Environmentalism and Regional Pride in the Periyar Tiger Reserve*, in 12 *Journal of South Asian Development* 2 (2017), 155-176.

PARTICIPATION AND THE CHALLENGE OF SOCIAL LEARNING FOR SUSTAINABILITY: INSIGHTS FROM A WATER CONSERVATION PROGRAMME IN KERALA, INDIA

*Gautam Ganapathy**

Abstract: *This chapter interrogates a water conservation programme in Kerala, India to understand the challenges to social learning for transitioning towards sustainability. Post Kerala's celebrated democratic decentralisation reforms in the 1990s, the institutional spaces for local planning and governance emerged as a key site for individual and collective learning. Jalasamrudhi could not foster the construction of new meanings, institutions, and identities through individual and collective interactions between the people and the environment. Focusing on the relationship between government bureaucracy and the political process, this chapter argues that a combination of overpoliticisation of associational life, and a disproportionate influence of bureaucratic agencies precludes any meaningful participation, consequently limiting the potential for social learning. Along with emergence of the new political subject in Kerala deeply shaped by the expanding power of the market, it highlights that the deeply entrenched modernist epistemological moorings of bureaucratic agencies remain a significant hurdle to co-producing knowledge for transitioning to sustainability.*

Keywords: Sustainability, Water Conservation, Social Participation, Kerala, India.

1. *Introduction*

India passed its 73rd Constitutional Amendment Act in the year 1992. The act recognized Panchayati Raj Institutions (PRIs)

* This essay is based on the data collected from a project funded by Research Unit for Local Self-Governance, Centre for Development Studies, Thiuvananthapuram, Kerala. Titled Bureaucracy, Sustainable Development and Decentralisation: Reflections on Jalasamrudhi, a community-based water conservation programme in Kerala, the project reflected on the contemporary state of decentralized governance in Kerala by focusing on the role of bureaucratic institutions and its relationship with local elected members in shaping

as the third tier of governance after the central and state governments. This is considered a major landmark in India's Constitutional history as it conferred direct governance powers to Gram Sabhas, bringing local development planning and implementation, elected members, local government bureaucracy under its control.[1]

Dozens of domains were brought under the purview of PRIs which includes the local assembly, the body of elected representatives, and the administration. The eleventh schedule of the Indian Constitution (Article 243G) brought land use and management, water resource management, promotion and implementation of renewable energy projects, soil and waste management, fisheries, forestry and a number of other domains and functions under the PRIs.

Decentralization was expected to catalyse a more responsive and community-driven local planning and development regime. Along with enabling the poor and marginalized to exert greater influence over local planning and governance, the act has been recognized for having the potential to improve environmental outcomes at the local level.[2] This is following the recognition that substantial proportion of India's rural population continues to be dependent on natural resources at the local level for its livelihood and sustenance. While it is one thing to argue that the act can potentially bring about improved governance (greater participation, community-based interventions resulting in improved

local planning and development. The author is deeply indebted to Prof. J. Devika for her patience and intellectual mentoring in this project. This work would not have been possible without the contributions of C.S. Salil, a freelance journalist working in Kerala. Salil and I jointly researched this programme. I would like to acknowledge Salil's substantial contribution (during fieldwork as well as dozens of hours of conversation) in shaping the insights that emerge in this essay.

[1] A Gram Sabha is the legislative body at the village level in India. All adults living within the administrative jurisdiction of the village are members of the body. A Gram Panchayat is the executive body – consisting of members elected by the Gram Sabha – that implements programs and manages routine administrative affairs.

[2] D. Ghai, J. M. Vivian, *Grassroots Environmental Action: People's Participation in Sustainable Development*, London-New York, 2014.

near-term social and environmental outcomes, and democratic deepening), it is another thing to assume that conjuring of such spaces for participatory decision-making would automatically result in local governance regimes transitioning towards sustainability. It becomes pertinent to understand the configuration of actors, institutions, and the dominant knowledge frameworks that shape local development planning at the local level to navigate the journey towards sustainability. Journey is missing here. Before forging ahead with such an interrogation, a brief word on sustainability itself is warranted at this point.

Sustainability is increasingly recognized not as an end goal or destiny. It is envisaged as a continuous learning path that will lead towards a more desirable place compared to where we are currently at or headed to. Sustainability as a *problématique* has unconcealed the real nature of the problems we are faced with in this century (food and nutritional insecurity, our collective vulnerability to accelerating loss of biodiversity and ecosystem services, increasing social inequity, and climate change). We are faced with issues that do not have a clear problem definition owing to their complex and interconnected nature and more importantly cannot be disentangled from issues of values, equity, and justice.[3] The journey towards sustainability is not a straightforward one where experts, governments, communities, and markets, by themselves, can be stewards. The transition requires an approach that is essentially transdisciplinary in nature as multiple perspectives and different types of knowledge are required for moving towards sustainability.

In this context, the role of social learning in transitioning to sustainability is increasingly being recognized. This is especially the case in the context of natural resource management.

Considered as a normative goal in transitioning towards sustainability, it is conceptualized as a form of learning that 'embrac-

[3] A. E. Wals, R. Rodela, *Social Learning Towards Sustainability: Problematic, Perspectives and Promise*, in *NJAS-Wageningen Journal of Life Sciences* 69 (2014), 1-3; F. Berkes, *Rethinking Community-Based Conservation*, in 18 *Conservation biology* 3 (2004), 621-630; D. Ludwig, *The Era of Management is Over*, in 4 *Ecosystems* 8 (2001) 758-764.

es diversity, dissonance, social cohesion, and reflexivity'.[4] The following characterization fleshes out this conceptualization in simpler terms: social learning is a process where a change in understanding happens not merely among individuals involved in the intervention but also becomes situated in the broader web of communities of practice.

The interactions between constituents of a social network are critical for social learning to happen.[5] To this, I would add that social learning is not merely about a change in understanding but a shift in meanings about how individuals and communities situate themselves in the web of interconnections between the social and ecological worlds they inhabit. Therefore, the question of social learning, while it encompasses participation, is much more than that.

This chapter considers *Jalasamrudhi*, a water conversation programme, conceived and implemented in the Indian state of Kerala, to reflect on the challenges to transitioning towards sustainability. The programme saw the involvement of local communities, several government agencies, local elected representatives, civil society organisations, and educational institutions.

It was also animated by different modes of engagement – public meetings, cultural programs, academic workshops, trainings to build administrative and technical capacity, inter-ministerial meetings, and public campaigns. This programme – that brought together a wide range of stakeholders and involved extensive people's participation – allows us to delve into the concrete to understand the complex process of change that typifies transitioning towards sustainability. As argued by several scholars and commentators, the theoretical basis for the tilt towards sustainability is quite well established, the blueprint for *how of it* cannot be universal.

There is a need for carefully considering such experiments to abstract key learnings that might prove relevant for a particular context. In this case, it is hoped that the insights from Jalasamru-

[4] A. E. Wals, R. Rodela, *Social Learning Towards Sustainability*, cit., 2.

[5] M. S. Reed, A. C. Evely, G. Cundill *et al.*, *What is Social Learning?* in 15 *Ecology and Society* 4 (2010).

dhi would enable greater analytical clarity on the roadblocks to the transition in the chosen context.

The case of *Jalasamrudhi* has been chosen for three reasons: first, Kerala has been one of the states which has effectively institutionalised decentralized governance in India after the passing of 73rd Constitutional Amendment Act. Local Self-Governments in the state enjoy greater administrative, financial, and political autonomy in India, in comparison to most of the other states.[6] Second, it is also hailed as one of the states where environmental consciousness is high among the people. With a high Human Development Index (HDI), it is a state which has also had its fair share of political struggles which have had an explicit environmental dimension. Kerala has been hailed as a paradigmatic case of social democracy in the Global South that has delivered socially without resorting to conventional capitalist strategies to expand the economic pie. The Kerala 'model of development' is celebrated for its achievements in extension of health, education, and other welfare services by the state. A history of grassroots movements and bottom-up political mobilisations, led by the political left, helped to foster a conducive state-society relationship leading to the institution of a state apparatus that was responsive to needs of people articulated through civil society organisations as well as the political process.[7] In the context of Kerala, the following question becomes an interesting one to explore: what are the challenges to social learning in a context where the local communities and people have a considerable say in decisions that affect their daily lives?

Third, this case lends itself to an interrogation of local planning and governance processes involving multiple stakeholders. In addition to interrogating the capacities, incentives, and dispo-

[6] P. Heller, K. N. Harilal, S. Chaudhuri, *Building Local Democracy: Evaluating the Impact of Decentralization in Kerala, India,* in 35 *World Development* 4 (2007), 626-648. T. Isaac, R. Franke, *Local Democracy and Development: The Kerala People's Campaign for Decentralized Planning*, New Delhi, 2000.

[7] M. Desai, *Indirect British Rule, State Formation, and Welfarism in Kerala, India, 1860-1957,* in 29 *Social Science History* 3 (2005), 457-488; R. Véron, *The "New" Kerala Model: Lessons for Sustainable Development*, in 29 *World Development* 4 (2001), 601-617.

sitions of multiple stakeholders, this case allows us to delve into the role of state bureaucratic agencies in environmental governance. This chapter attempts to understand the influence of these agencies in shaping the way issues are framed, understood, and approached at the local level. It does this by considering the emergent relationship between these agencies and the political class in the state to understand the incentives shaping their organisational culture and practices.

This chapter is based on fieldwork carried out in the Thiruvananthapuram district of the state between January and May 2021. It was done in the Kattakkada legislative assembly constituency (LAC), the area where Jalasamrudhi was implemented. The experience of various stakeholders was captured through detailed semi-structured interviews – elected representatives, civil society representatives, experts from various state agencies involved in local planning and governance, farmers, journalists, and local people.

The chapter begins with reflections on the increasing relevance of social learning in transitioning towards sustainability. It addresses the key analytical issues with the way the term has been deployed in literature and provides greater clarity on how this essay handles it. The subsequent section introduces the broad socio-economic context of Kerala, the site where Jalasamrudhi was conceived and implemented. Historicizing the emergence of Kerala's democratic decentralisation programme, the section delves into the assessments of its successes and failures to understand the configuration of actors and institutions shaping local governance in the state. The chapter proceeds to describe how the project was conceived and implemented, detailing the roles of different stakeholders and their disposition to this programme. The subsequent section reflects on challenges to social learning in the chosen context.

2. *Role of Social Learning in Sustainability*

Social Learning has emerged as one of the critical themes shaping sustainability in general, and natural resource manage-

ment in particular.[8] With an increasing need to cope with the interconnected realities of complexity and uncertainty, exacerbated by climate change, social units are increasingly expected to cultivate adaptive capacities to meet incredibly dynamic social and ecological contexts. Second, the era of governments enacting and implementing policy from the top, relying on technocratic science, to address such contexts is increasingly seen not only as unviable but fundamentally ill-conceived. With multiple stakeholders, across disparate institutional settings and scales – invested in managing the environment as these outcomes affect them – hierarchical modes of governance like command and control are increasingly being replaced by more collaborative, non-hierarchical modes of governance. While the hegemonic status of neoliberal economic thought after the 1990s is partly responsible for this shift, there has been a growing recognition that the problems situated at the intersection of society, environment, and the economy do not easily lend themselves to a conventional way where an impersonal expert delineates the problem neatly which can be followed by positivist science to solve the problem at hand. These are highly complex problems with no definitive problem statement possible owing to uncertainty as well as the possibility of multiplicity of approaches that might be mutually contradictory. When it comes to wicked problems, issues of values, ethics, and questions of social justice are constitutive of the problem.[9]

Simply put, social learning has emerged as a major point of interest when it came to collective action problems. With these requiring the involvement of multiple stakeholders with substantial diversity in values and perceptions across different scales, the focus is on collective rather than individual learning.[10] Social learning is critical to cultivating and deepening adaptive capaci-

[8] C. Pahl-Wostl, E. Mostert, D. Tàbara, *The Growing Importance of Social Learning in Water Resources Management and Sustainability Science*, in 13 *Ecology and Society* 1 (2008).

[9] A. E. Wals, R. Rodela, *Social Learning Towards Sustainability*, cit., 2.

[10] E. Ostrom, *A Diagnostic Approach for Going Beyond Panaceas*, in 104 *Proceedings of the National Academy of Sciences* 39 (2007), 15181-15187.

ties of social units to cope with substantial uncertainty and complexity. Social learning is defined as a process that entails 'developing new relational capacities, both between social agents, in the form of learning how to collaborate and understand others' roles and capacities differently, and also between social-ecological systems'.[11] Another conceptualisation that complements the above views it as a process where different actors in a social unit develop alternative perspectives on a societal issue.[12]

While these definitions are helpful in getting a broad understanding of the term, the way the term has been deployed in literature leaves much to be desired. Along with being vague, the term suffers from a general lack of analytical precision. For instance, social learning has been reduced to participation, leading to mischaracterisation or rather under-characterisation of the term. Similarly, emergence of environmentally conscious behaviour in a social setting has been construed as an instance of social learning leading to a confusion between a specific outcome and the concept. In the case of participation, it is not entirely clear how a condition that is necessary for social learning to occur gets to be characterised as the term itself. For instance, it has been characterised as both the learning process and the outcome.[13]

Additionally, it is important to account for individual and wider social learning and how such learning has occurred to have a more comprehensive sense of whether social learning has occurred in a context. It is important to separate potential outcomes as well as necessary conditions for social learning from the conceptualisation of the term to ascertain whether social learning has occurred in a context and to understand the process in greater detail.

For greater analytical clarity (and precision), Reed et al's con-

[11] C. Pahl-Wostl, E. Mostert, D. Tàbara, *The Growing Importance of Social Learning in Water Resources Management and Sustainability Science*, in 13 *Ecology and society* 1 (2008).

[12] L. T. H. Phuong, G. R. Biesbroek, A. E. Wals, *The Interplay Between Social Learning and Adaptive Capacity in Climate Change Adaptation: A Systematic Review*, in 82 *NJAS-Wageningen Journal of Life Sciences* (2017), 1-9.

[13] C. Pahl-Wostl, M. Craps, A. Dewulf *et al.*, *Social Learning and Water Resources Management*, in 12 *Ecology and Society* 2 (2007).

ceptualisation consciously attempts to overcome the above documented ambiguities in the term.[14] For a process to be construed as social learning, it must be apparent that the individuals involved have had a change in their understanding. While this might or might not entail individuals reflecting on the assumptions that underpin their actions or a shift in understanding challenging values, norms, and prevailing dominant attitudes, it could be construed as social learning if the change in understanding occurs at a sufficiently broad scale through social interaction.

Second, the change in understanding must transcend individual participants and become visible in wider social units or communities of practice. Theoretically, the insight that learning can happen at the level of social units emerged from communities of practice literature. Rather than presuming that all collective understanding is a simple aggregate of individuals learning independently from explicit and abstract knowledge in the form of ideas and concepts, this shift opened up the possibility of seeing learning happen through collective reflection and problematisation. In the context of natural resource management, social learning has been characterised as the ensuing collective reflection and action among individuals and groups when they work to strengthen the interrelationships in a social-ecological setting between the social and ecological domains.[15] The key operational idea is that individuals learn through positive experiences when they actively get involved in addressing a concrete social-ecological problem.

Third, the change in understanding, to be construed as social learning, ought to be through person to person contact through social networks. As links between the individual (and the local) and institutions at a macro level, social networks fundamentally shape individual's perspectives and opinions. More importantly, the specific network structure in which individuals are embedded profoundly shapes the extent and character of learning. For instance, the governance structure mediating decision-making

[14] M. S. Reed, A. C. Evely, G. Cundill *et al*., *What is Social Learning?,* cit.

[15] M. Keen, V. Brown, R. Dyball, *Social Learning in Environmental Management*, London, 2005.

(legal and organisational frameworks as well as the broader cultural milieu) strongly influences the nature of interaction between multiple stakeholders, thus influencing the social learning process. In addition to the character of local institutions, the network structures within which individuals are embedded and more importantly, the epistemological dispositions of actors in the chosen context shapes social learning fundamentally.[16] It has been argued that prospects for social learning improve when different actors with different kinds of knowledge share similar epistemological dispositions.[17]

In addition to established norms within a social context shaping the social learning process, the outcomes are also profoundly shaped by how people with different views and who come from different knowledge systems are brought together. In any social context, it would be pertinent to pay attention to the power dynamics in bringing together people whose worldviews are shaped by different knowledge systems. Not paying attention to the legitimacy (and power) enjoyed by certain knowledge systems would likely lead to subpar social learning outcomes.[18]

3. *The Emergent Contradictions in the Kerala Model of Development*

Kerala has been held up as a unique model of development by academic scholars, for the better part of almost four decades now.[19] Popularly termed as the 'Kerala model of Development',

[16] C. Prell, M. Reed, L. Racin *et al.*, *Competing Structure, Competing Views: the Role of Formal and Informal Social Structures in Shaping Stakeholder Perceptions*, 15 *Ecology and Society* 4 (2010); M. S. Reed, A. C. Evely, G. Cundill *et al. What is Social Learning?,* cit.

[17] C. M. Raymond, I. Fazey, M. S. Reed *et al.*, *Integrating Local and Scientific Knowledge for Environmental Management*, in 91 *Journal of Environmental Management* 8 (2010), 1766-1777.

[18] D. Wildemeersch, *Social Learning Revisited: Lessons Learned from North and South*, in A. Wals (Ed.)*, Social Learning Towards a Sustainable World,* Wageningen, 2007, 99-116.

[19] R. Franke, B. Chasin, *Kerala Development Through Radical Reforms*, New Delhi, 1990.

it is celebrated for bringing about high levels of social development resulting in amelioration of living conditions for the people of the state, especially the poor and the marginalized. The fact that this was achieved with low economic growth and relatively low per capita income made it even more remarkable. Scholars have highlighted the importance of public action in the Kerala development story.[20] Popular mobilizations, beginning with social reform movements in the 19th century to class-based peasant and labour movements in the 20th century, were instrumental in the creation of conditions for state interventions to initiate radical reforms for ensuring social and economic justice.[21] These included land reforms and creation of a comprehensive welfare system for achieving social and economic objectives. The state intervened effectively, in the face of pressure mounted from below by popular movements and a coalition of left-leaning political parties, to extend public health and educational facilities along with creating a robust public distribution system for ensuring food security for all.[22]

Public action, it has been argued, has been instrumental in shaping the development trajectory of the state.

However, questions on the sustainability of the Kerala model began to be raised in the 1990s. While public action continued to shape the development discourse in the state, Kerala's economic failings were masked, to a certain extent, by remittances from foreign shores (especially the middle east). With a faltering economy and constantly rising social expenditure, the Kerala democratic experiment was at a crossroads in the 1990s. It was at this juncture that the state implemented the now celebrated decentralisation reforms.

It would be instructive to keep in mind that India passed its 73rd constitutional amendment act in 1992. Following that, Ker-

[20] J. Drèze, A. Sen, *Hunger and Public Action*, London, 1990.

[21] M. Desai, *Indirect British Rule, State Formation, and Welfarism in Kerala, India, 1860-1957*, in 29 *Social Science History* 3 (2005), 457-488.

[22] V. K. Ramachandran, *On Kerala's Development Achievements*, in J. Dreze, A. Sen (Eds), *Indian Development: Selected Regional Perspectives*, Delhi, 1997, 205-356.

ala was one of the states to take the decentralisation agenda seriously. It passed the corresponding legislation at the state level in 1994, and elections were conducted the subsequent year for the three tiers at the local level: district, block, and village levels. After the elections, the state's alliance of left-leaning political parties, led by the Communist Party of India (Marxist), ushered in decentralised planning with people's participation in a bid to revitalize and deepen democracy. The decentralised planning was launched through a state-wide social campaign in 1996, with thousands of volunteers assisting in the process. This was the People's Plan Campaign (PPC). It was intended to demystify and debureaucratize planning.[23] It did this by familiarizing people to their local environment – biophysical, social and political – through thousands of meetings at the grassroots level. Additionally, these meetings served the important purpose of documenting the 'felt' needs of people. The campaign resulted in the production of comprehensive panchayat development reports that contained socioeconomic and environment assessments of villages. It also contained sectoral chapters including agriculture, energy, sanitation, irrigation etc. These reports, put together by experts and local elected officials, were used by government agencies, NGOs, and experts to plan projects at the local level to address the needs of the community. It is remarkable to note that the state government allocated almost 40% of development plan expenditure to projects designed by the local self-governments, marking a major shift in development planning and governance.[24]

Decentralisation reforms were to address multiple issues: provide a fillip to the economy by ensuring greater efficiency in fiscal allocations, greater representation and role for marginalised communities, ensure greater accountability in governance, and integrate environmental protection objectives in local development planning. More significant was the shift in vocabulary: welfare to participatory growth, and agitation for protecting rights of people was subtly supplanted by strategies to evolve common

[23] T. Isaac, R. Franke, *Local Democracy and Development: The Kerala People's Campaign for Decentralized Planning*, London, 2002.

[24] R. Véron, *The "New" Kerala Model*, cit., 601-617.

interests and build broad alliances on the ground to create greater room for people's participation in local planning and decision making. Along with the other political and social objectives highlighted above, the shift to bottom-up planning was expected to foster an improved regime, especially, for natural resource management.

Decentralisation has undoubtedly strengthened the state's welfare regime by taking the state apparatus to the citizens. The state has fared better when it comes to provision of public goods including drinking water, education, roads, and sanitation.[25] However, the programme has also had its fair share of disappointments. The expected boost in local economy has not materialized as popular consumption needs were prioritized over productive goals.[26]

Substantial sums were expended on road construction, housing, convention centres etc in the plans that got implemented after the PPC in the latter half of the 1990s. More disconcertingly, individual-beneficiary oriented expenditure became the norm during this period. The pre-liberalisation culture of welfare as a collective right was gradually replaced by the emergence of a regime with the individual welfare beneficiary at its centre. This has been termed as 'responsibilised' welfare, a phenomenon that emerged with the increasing penetration of market logic in Kerala's public affairs.[27] The persistence of politicisation of associational life has precluded the emergence of a conducive civic culture in the state. The inability to transcend narrow party, organisational, and personal affinities at the local level has also been cited as a reason for poor planning outcomes at the local level.[28]

The ineffectiveness of deliberative planning and waning quali-

[25] M. S. John, J. Chathukulam, *Building Social Capital Through State Initiative: Participatory Planning in Kerala*, in 37 *Economic and Political Weekly* 20 (2002), 1939-1948.

[26] J. Devika, *Fears of Contagion? Depoliticisation and Recent Conflicts over Politics in Kerala*, in 42 *Economic and Political Weekly* 25 (2007), 2464-2470.

[27] J. Devika, *Participatory Democracy or 'Transformative Appropriation'? The People's Planning Campaign in Kerala*, in 10 *History and Sociology of South Asia* 2 (2016), 115-137.

[28] P. M. Tharakan, *Historical Hurdles in the Course of the People's Planning*

ty of participation cannot be reduced to the growing power of the market and an over politicized civil society. While these are critical, the role of government agencies in local developmental planning and the existing symbiotic relationship between the political class and government bureaucracy in Kerala has been flagged as a major structural issue that has escaped attention.[29] The lack of transparency, cronyism, and corruption with respect to the affairs of local self-governments cannot be seen in isolation. Similarly, instances of increasing bureaucratisation of local planning leading to diminished freedom for local bodies is closely connected to the state's political economy of development and elections.

The ongoing transformation of the political subject in the state, increasing bureaucratisation of local planning, waning quality of participation, growing sterility of political-administrative routines are substantially shaping the decentralised governance regime's capacity to evolve new institutions for transitioning towards sustainability. Civil society organisations (like the KSSP) were expected to take the lead in setting the agenda and mobilise local communities to identify environmental problems and come up with strategies for addressing them. With the state's populace not lacking in environmental awareness, it has been argued that there has been a failure to connect people's overall well-being with environmental protection. This has been cited as a reason for the failure to integrate environmentally sound local planning in the state.

4. Jalasamurdhi*: Towards Water Abundance*

This section of the chapter describes, briefly, the context that led to the genesis, conception, and implementation of *Jalasamru-*

Campaign in Kerala, India, in J. Harriss, K. Stokke (Eds), *Politicising Democracy: The New Local Politics of Democratisation*, London, 2004, 107-126.

[29] G. Ganapathy, *Deepening Decentralisation in Kerala: Community-based Mobilisation, Expert Knowledge, and the Top-Down State in Jalasamrudhi* in *Bureaucracy, Sustainable Development and Decentralization: Reflections on Jalasamrudhi, a Community-based Water Conservation Programme in Kerala,* Thiruvananthapuram, 2023, 23-57.

dhi, the water conservation programme that is the centrepiece of this essay. The subsequent section interrogates the programme from a social learning prism.

5. *The Biophysical Context*

The state of Kerala is located in the South-Western edge of India. It is a thin strip of land that is buffeted by the Western Ghats to its east and the Arabian sea to its west. The state stretches about 550 Kms from the North to the South and has a width of about 70 Km (on an average). The state's geography is divided into three distinct zones: the highlands in the east, a thin midland zone, and the coast to the West. Located east of the Western Ghats, the state receives copious rains during the monsoon season. The state receives an average rainfall of about 3000 mm. There are significant regional variations with stations located favourably in the windward side receiving annual rainfall in the region of 6000 mm. There are also locations that only receive a tenth of this rainfall in the state.

The state has 44 rivers flowing through it and 41 of these are west-flowing ones which drain into the Arabian Sea. The steep descent of rivers from the Western Ghats and the relatively short length results in a substantial portion of rainwater carried by rivers draining into the sea. Kerala continues to rely substantially on traditional water sources (especially rivers, ponds, and wells) for its drinking water needs. According to the last official Census (in 2011), 80% of rural households and 50% of urban households depend on open-well for their drinking water needs.[30] The extensive dependence on groundwater is an artefact of the state's topography and climate where the rivers are in spate during the monsoon and it is groundwater that provides water security during other times of the year. The availability of water in ponds and streams also form the bedrock of the state's irrigation system.

[30] Kerala State Council for Science, Technology and Environment, available at http://www.kerenvis.nic.in/Database/WATER_820.aspx, accessed 10 September 2025.

While multiple irrigation projects do exist in the state, the substantial portion of irrigation also continues to rely on groundwater fed traditional water bodies in the state. Kerala has the highest open-well density in India, demonstrating the critical nature of this infrastructure for water security.[31]

Jalasamrudhi was planned and implemented in Kattakkada Legislative Assembly Constituency (LAC), located in the state's southernmost district, Thiruvananthapuram. This constituency consists of the following panchayats: Vilavoorkkal, Pallichal, Vilappil, Malayinkeezhu, Kattakkada, and Maranalloor (Figure 1).

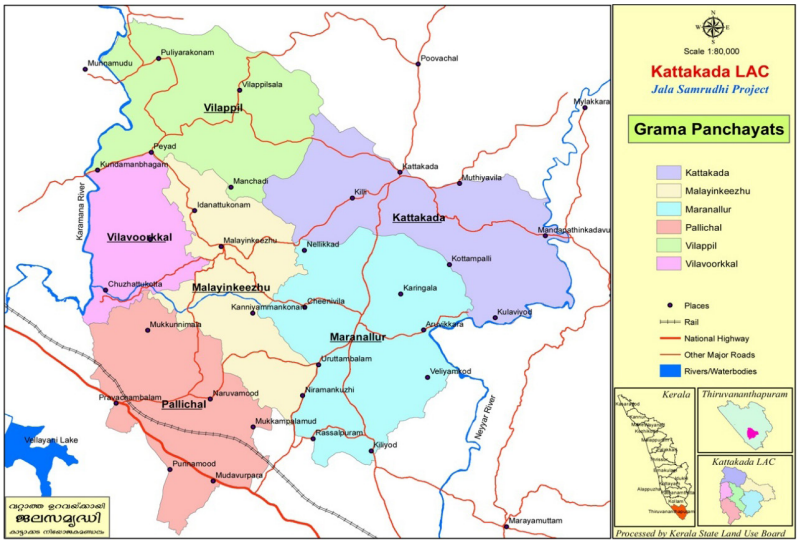

Fig. 1. *Kattakkada LAC (Including constituent Panchayats) Source: Kerala State Land Use Board (KSLUB)*

Thiruvananthapuram district receives an average annual rainfall of about 1800 mm, considerably less than the state average. The topography of Kattakkada LAC is not significantly different from the state's landscape. The panchayats to the West are at higher elevations and the region is also marked by the presence

[31] Ibid. According to Government of Kerala, the open well density in the highlands, midlands, and the coastlands are 70, 150, and 200 per sq. km respectively.

of three distinct geographies: the highlands, midlands and the coastlands. While this constituency does not have a panchayat having a coastline, the regions to the east of the constituency's boundaries are almost at the mean sea level (Figure 2). The two major rivers of Thiruvananthapuram district – Karamana and Neyyar – form the boundaries of this LAC on the Western and Eastern sides respectively.

6. Jalasamrudhi's *Beginnings*

The programme's beginnings can be traced back to severe water shortage in Thiruvananthapuram district in 2016. With a substantial deficit in annual rainfall in 2016, the region faced a severe water crisis with drying up of open wells and ponds severely affecting the residents of the district.[32] With water becoming a major issue of public concern, the newly elected member of the LAC, I. B. Satheesh, actively sought to address the issue after elections that year. The key event that led to conception of the programme was a seminar organized a group of activists associated with the Kerala People's Science Movement (Kerala Sastra Sahitya Parishat – KSSP).[33] This event called *Jala Suraksha Jeeva Suraksha* (Water Security is Life Security) was organized as an awareness generation exercise to conserve water resources. It

[32] In 2015, Kattakkada LAC received 2243.3 mm whereas it received only 1197.8 mm in 2016. Source: Climate Research Center, Thiruvananthapuram.

[33] The KSSP, founded in 1962, began as an organization to promote scientific temper and rational thinking to address social issues through science. While it started as a small group of writers and educators, it emerged as a prominent movement through its involvement in key social and environmental issues in the state over the last six decades. The organization was prominently involved in the Save Silent Valley Movement in the 1960s and 1970s, against a proposed hydroelectric project in the state's Palakkad district. It was also a key player in the People's Plan Campaign (PPC) in the 1990s. Kerala's decentralized and democratic planning exercise was taken up through this campaign that mobilized local communities with the help of thousands of citizen volunteers. The campaign resulted in the production of Panchayat Development Reports that were instrumental in drafting local plans for development.

was recognized in the meeting that addressing the immediate issue of water scarcity was closely tied to the broader changes witnessed in the district, especially in terms of land use change.

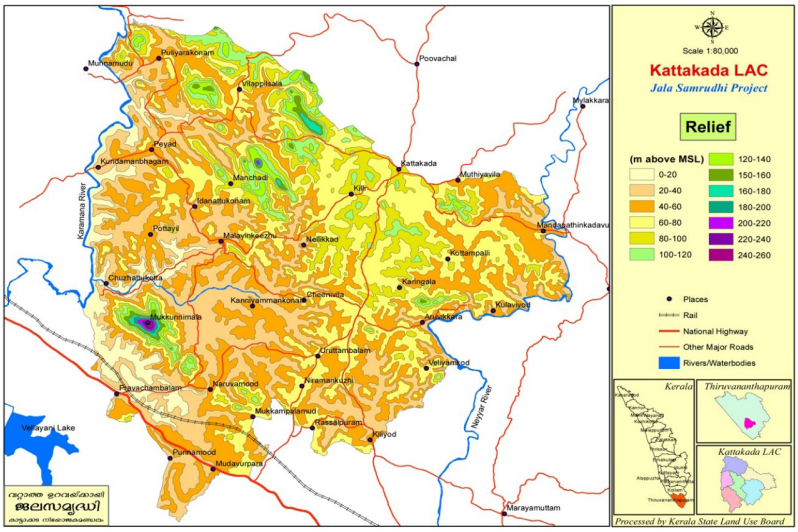

Fig. 2. *Kattakkada LAC (Relief) Source: Kerala State Land Use Board (KSLUB)*

While it was true that biophysical aspects including the type of soil, quantum of rainfall, and the terrain shape aquifers (and groundwater availability), changing land use patterns driven by human activity also had a substantial influence on groundwater availability in the region.

As was their wont, the informal group having ties to KSSP (including the MLA) envisaged a grassroots campaign and social mobilisation to complement a water conservation programme that would address the issue of water scarcity in the region. This was to ensure widespread people's participation in the programme's conception and planning phase. The programme was viewed by the architects as a way to address water availability for agriculture.[34]

Despite the multiple structural issues facing agriculture in

[34] Interview with Mr. I.B. Satheesh, MLA, Kattakkada LAC, 15 Jan 2021.

Kattakkada LAC (high input and labour costs, inadequate agricultural extension services, economic policies pursued by India leading to suppression of agricultural commodity prices etc), farmers in the region cited lack of water availability throughout the year as one of their major challenges. While dams have been built over the two rivers that flow across the district, the lack of effective governance of irrigation infrastructure (the canals networks and the overall management of dam operations) had been a major issue flagged by the farmers to the MLA.[35] While damming of rivers have made flows intermittent, there has not been much focus on the extent to which changing land use in the region has affected subterranean groundwater flows that contribute to the flow in the rivers.

The campaign and social mobilisation were also aimed at addressing another systemic issue plaguing Kerala's decentralised planning and governance: lack of coordination between government agencies and the local self-governments. According to one of the architects of the programme, the rather disappointing outcomes in local development planning (utility, appropriateness, and durability of infrastructural assets; failure to integrate environmental objectives; lack of state accountability) were due to two reasons: lack of inter-departmental (or inter-agency) coordination between various state agencies and the non-existent culture of local elected officials and bureaucracy working in a synchronized fashion.[36] Jalasamrudhi was an attempt to address one of the major issues that held back Kerala's famed decentralisation reforms from achieving their potential.

The early interventions planned as part of Jalasamrudhi set the tone for the programme. The first two activities – digging a rainwater harvesting pit in every household and planting one lakh tree saplings – were taken up through an extensive social campaign involving the people of the constituency, civil society organisations, and members of political parties. Owing to the

[35] Personal Interview with I.B. Satheesh, MLA, Kattakkada LAC, 04 March 2021.

[36] Personal Interview with Mr. L. executive engineer, Irrigation Department, 10 Feb 2021.

prevailing public interest in the issue, meetings organized at various grassroot levels, before the implementation of these projects, saw substantial turnout of the local community (especially women) and elected officials. The coordination committee, working under the leadership of the MLA, liaised with multiple government agencies to pool resources for the project. For instance, the activity of planting one lakh saplings was carried out by the Local Self-Government Department (LSGD) at the state level and various local self-governments on the ground. Resources earmarked under Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) were deployed to plant saplings provided by the state's forest department.[37]

7. *Water Conservation to Sustainability*

While these two interventions (that created assets and doubled up as campaigns to spread awareness about water conservation) got the ball rolling, the coordination committee organized workshops to bring together several government agencies (involved in planning and implementation of development plans and projects) and local elected members. This was to bring these two major stakeholders together. The elected representatives were expected to become more familiar with the role, capacity, and expertise of various state agencies. Bureaucrats from several state agencies were also brought in to provide details on the scope of projects that could be taken by their respective agencies. These workshops also led to local elected members brainstorming in groups and discussing their constituents' needs with various state agencies. The data collected in these workshops (needs of constituents of 108 wards in Kattakkada LAC from local elected members and the projects that could be taken up by various state agencies to address these local developmental issues) became the foundation for various interventions that

[37] Multiple interviews with officials of various government agencies, Thiruvananthapuram, February 2020.

came to be designed and implemented under the banner of Jalasamrudhi.[38]

While the coordination committee under the MLA's leadership was coordinating activities between various stakeholders in the initial stages, Kerala State Land Use Board (KSLUB) took up the mantle subsequently. The agency played a critical role in the following: documented the needs of constituents of 108 wards that emerged in workshops attended by state agency bureaucrats and local elected members; created a baseline for projects by considering the natural resource boundaries rather than political-administrative ones for designing interventions; and followed up with various state agencies in the final design and implementation of various projects under Jalasamrudhi. The KSLUB was also the hub for coordinating with enthusiastic members from various state agencies for ascertaining unused funds that could be put to use under Jalasamrudhi.

The programme began with conceiving and implementing projects that aided in reducing run-off and enhancing recharge of groundwater aquifers. These included rainwater harvesting structures in public institutions, creation of rainwater harvesting pits, desilting and rejuvenating ponds and streams, building check dams across streams etc. Subsequently, the programme evolved into a more holistic community-driven enterprise for creating infrastructural assets for individual end-users as well as the community. These projects were envisaged as extension of the interventions taken up to address the issue of seasonal water shortage. State agencies were roped in to conceive and implement interventions to enhance the income of local communities by introducing fishlings and coir geotextiles in the rejuvenated water bodies. These served to prevent these water bodies from falling into disrepair and disuse by creating an incentive in the community for its upkeep. Hundreds of farm ponds were dug across the panchayats, using irrigation department funds, to improve water availability for farmers. Along with creation of infrastructural assets and structures for water conservation, the pro-

[38] Interviews with Mr. Nizamuddin, Land Use Commissioner, KSLUB, April 2021.

gramme involved school children, civil society organisations, members of political parties from across the ideological spectrum in creating awareness about water resources and environment protection in general. Water Parliaments, street plays on proper solid waste management and conservation of water resources, and other strategies were adopted to enhance environmental awareness and to mobilise the local community.[39]

8. *Discussion*

Jalasamrudhi emerged as a response to acute water scarcity faced by the residents of Kattakkada LAC in 2016. In a region that continues to be substantially dependent on groundwater resources for its water requirements (including agriculture), the seasonal scarcity during the months preceding the monsoon in 2016 ended up having a debilitating effect on the residents of the six panchayats constituting the Kattakkada LAC, especially women and children.[40] The projects implemented under the Jalasamrudhi program improved the groundwater availability, averting a similar crisis in the subsequent years.[41] The programme, as articulated in the previous section, was primarily envisaged as an experiment in convergence. With local governance routines having seen to have descended into perfunctoriness and sterility, the programme was seen an opportunity to address an immediate perceived need of the community as well as a chance to revitalise Kerala's flagging local governance and grassroots democracy.

[39] Interventions under Jalasamrudhi also include installation of scales in ponds for citizens to keep check on water levels; energy audit of all government institutions to ascertain their energy use; Water camps in schools to create awareness about water conservation; initiatives to encourage school children to be citizen scientists through using weather monitoring stations installed in schools etc.

[40] G. Ganapathy, *Deepening Decentralisation in Kerala: Community-based Mobilisation, Expert Knowledge, and the Top-Down State in Jalasamrudhi*, cit.

[41] According to Kerala Groundwater Department, groundwater levels in the block (consisting of areas that came under the programme) witnessed gradual improvement from 2017.

Multiple stakeholders in local governance including various government agencies, local elected representatives, civil society actors, educational institutions, and local communities actively participated in the programme. While the programme did not explicitly envisage social learning as an objective, the conceptual registers deployed during the course of the programme indicated an implicit engagement with the process. People's participation, community-driven, environmental awareness and education, citizen engagement, convergence between different government agencies, sustainability were some of the oft-repeated terms heard from multiple stakeholders who were part of the program.

Considering the broader context of Kerala's experience with democratic decentralisation, the following section reflects on Jalasamrudhi to appraise the challenges to social learning for transitioning towards sustainability.

8.1 *Individuals and Jalasamrudhi: Shifting Perspectives and Ideas on Water*

The widespread participation witnessed in the programme translated into a shift in understanding among individuals that were directly or indirectly involved with it. I was able to gather that transect walks organised as part of the programme helped people become familiar with the local ecological context. Additionally, the programme (and the outcome) made individuals in the constituent panchayats recognize the critical role of traditional water sources in safeguarding the water security of the region. They were disabused of their complacency – of Kerala being a water abundant state – when it came to taking groundwater availability for granted. Similarly, teachers affiliated to schools that actively participated in social campaigns that were part of the programme shared that water clubs set up in schools had enthusiastic participation from children and water literacy became a theme of discussion in school programmes. Local elected members as well as individuals affiliated with government agencies that are involved in local planning and development shared that they became more aware of the roles, responsibilities, and

capacities of other stakeholders.[42] However, it would be disingenuous to assume that such shifts in understanding ensued at a sufficiently broad scale as a result of social interactions. While there was a shift in understanding observed at the individual level among a few stakeholders, this has not become situated in wider social units.

8.2 *Bureaucratic Interests and their Incommensurable Epistemological Dispositions*

While the programme brought together local elected representatives and bureaucrats from several government agencies, the planning and implementation of projects were undertaken by individual agencies, with the facilitating agency (KSLUB) aiding in the process.

The MLA and the coordination committee made it clear that they were conscious of not undermining the authority of these individual agencies, fearing delays and lack of cooperation from these agencies.[43] Additionally, while several individual projects were taken up under Jalasamrudhi, none of these projects saw substantial cooperation or coordination between two or more government agencies. These projects were planned and executed as they would be done in a routine way, precluding cross-learning between these state agencies. In fact, the role of government agencies and their epistemological moorings have not been scrutinized much when it comes to understanding the rather poor local environmental planning outcomes in the state. While the role of experts is seen as indispensable in dealing with complexity on ground in environmental governance, the fragmentation owing to multiplicity of agencies with their distinct epistemological moorings (a vestige of modernist orientation) have precluded cooperation when it comes to local planning and development.

[42] Multiple interviews with officials of several government departments and local elected members, January to May 2021.

[43] Personal Interview with Mr. A., a member of the coordination committee, March 2021.

As agencies that have been in place for decades, they have solidified into strong interest groups in their own right.[44]

While state bureaucratic agencies' authority in local planning and development is reined in by the political class, there is no challenging these agencies' legitimacy from an epistemological standpoint. While it was acknowledged that the multiplicity of agencies and their overlapping mandates end up in suboptimal environmental outcomes, the shake-up of government agencies (beyond traditional disciplinary lines) did not seem to have emerged as a key issue during interactions between different stakeholders during the programme.

8.3 *Missing Sense of Place: Divergent Interests and Identities*

Jalasamrudhi also brought to fore the divergent interests on the ground which shaped and was in turn shaped by identities that mirrored their economic and social interests. For instance, the programme could not cultivate common interests and cultivate broad alliances on the ground that would have qualitatively enhanced the extent and quality of participation. The farmers who I interacted with felt that their voice was not taken seriously in the design and implementation of the programme and they have not gained much from it.[45] This needs to be seen in the light of recent studies that have flagged the deterioration in quantity as well as quality of participation in Kerala's local governance with the emergence of 'responsibilised' welfare – an artefact of greater penetration of the market in shaping the political subjec-

[44] Cf. G. Ganapathy, *Deepening Decentralisation in Kerala: Community-based Mobilisation, Expert Knowledge, and the Top-Down State in Jalasamrudhi*, cit. Ganapathy argues that a symbiotic relationship has evolved between government bureaucracy and the local political class in Kerala. Analyzing Kerala's political economy, the manuscript makes the case for viewing this relationship as not merely buttressing the finances of political parties. It is also closely linked to the patronage structures of political parties in the state.

[45] Multiple interviews with farmers from Malayinkeezh, Kattakkada, and Pallichal panchayats, January 2021.

tivity of citizens in Kerala.[46] From welfare as a collective right to be secured through political mobilisations, there has been a shift where the beneficiary is rather well-behaved one deserving of state support. Similarly, Kerala's politicisation of associational life (that has precluded the emergence of a conducive civic culture) shapes local governance profoundly. The panchayats where the MLA's party was in the majority cooperated with the programme. In one panchayat where an opposition party was in majority, the outcomes of the programme were rather disappointing. All of these factors have meant that the local community is quite an amorphous one without a sense of place (and belonging) characterising the resident's relationship to the local.

8.4 *Challenges to Social Learning*

If we consider the terrain of local planning and development – comprising of local elected representatives, residents of the six panchayats, government agencies, civil society organisations, farmers, and people dependent on local environmental resources for their livelihood and/or wellbeing – as a social unit or a community of practice, the way Jalasamrudhi came to be imagined, planned, and implemented did not create conducive conditions for enabling collective reflection and problematisation. Despite the social cleavages, the absence of a social-ecological register in public articulations of the programme precluded the stakeholders in explicitly acknowledging the delicate interrelationship between the social and the ecological. And more importantly, the wide array of objectives and the rather passive role of community in shaping the contours of projects meant that participation in the programme did not amount to addressing a concrete social-ecological problem. This limited the scope for a shift in understanding that emerges from being part of a collective effort.

Secondly, while the coordinating group earnestly attempted

[46] K. N. Harilal, *Confronting Bureaucratic Capture: Rethinking Participatory Planning Methodology in Kerala*, 48 *Economic and Political Weekly* 36 (2013), 52-60.

to bring various stakeholders together, they did not consciously engage with the different epistemological beliefs and worldviews of different stakeholders. For instance, there was no effort to create conditions for stakeholders with different types of knowledge to converge towards a mutually agreed broad epistemological position. This includes the different government agencies, local citizens, and civil society organisations. The implicit legitimacy afforded to deeply entrenched positivist worldviews of government agencies – that see questions of values, ethics, and justice as irrelevant to problematising an environmental issue – meant that no other worldviews or imaginations were part of the conversation.

The modalities of interaction between different stakeholders in local planning and governance in the context substantially limited the potential of individuals learning from being part of a social network. Along with the broad structural factors highlighted above (party-politicisation of associational life, divergent interests and narrow social identities, greater influence of the market in shaping the relationship between the state and the citizen), the disproportionate influence of government agencies, the weakened status of local governments in planning decisions, and the waning quality of participation undermined the possibilities in evolving new identities and meanings. At the same time, the programme also did not lead to the community of practice challenging the well-entrenched status quo of elected representatives, government agencies, and related interests in local environmental planning and governance.

9. *Conclusion*

This essay made a case for interrogating challenges to social learning by considering the broader social-ecological and political context in which interventions are tried out. The case of Jalasamrudhi and the prospects for social learning from the experiment needs to be examined taking into account the evolution of Kerala's democratic decentralisation reforms that have had a significant effect on local governance spaces over the last few dec-

ades. The essay observes that the character of institutional spaces influencing local planning and governance need to be viewed as dynamic spaces animated by multiple contestations. While not incoherent, they remain a space riven by dissonances as far as epistemological dispositions, worldviews, interests, and identities are concerned.

This chapter argues that the challenge of social learning remains a formidable one in Kerala's Kattakkada LAC for the following reasons: first, the absence of an explicitly social-ecological understanding and articulation of the situation showed that a substantial change in understanding of the individuals or the community has not yet occurred. This is despite the considerable attention to facilitating participation of a wide array of stakeholders connected to the social-ecological context in question. While a significant shift was observed in terms of people recognizing the importance of conserving rainwater, it did not extend to reflecting on the reasons for the region being vulnerable to seasonal droughts. Second, while multiple stakeholders acknowledged the improvement in groundwater availability due to interventions under Jalasamrudhi, there has not been a significant movement in collective understanding, reflected in wider communities of practice. Here, communities of practice include the local decentralised governance regime which remains a key site for collective deliberations. The essay observes that bureaucratisation of local planning and development (a reality of the post-democratic decentralisation years in the state) combined with fragmentation of knowledge (owing to epistemological incommensurability between different government agencies) have significantly undermined the effectiveness of the local planning regime in the state. The emergence of individual beneficiary-oriented welfare programs and the changing modalities of citizen participation in local governance have significantly altered the erstwhile imagination of welfare as collective right. The existing norms in local planning and governance and the structural factors (especially the symbiotic relationship between the elected political class and government bureaucracy) that can be traced to the state's political economy of development in recent years, severely constrain learning through social interaction. This is par-

tially manifested in the failure to evolve new institutions of cooperation between the state and civil society in coproducing knowledge for sustainability. While Jalasamrudhi created a platform for different stakeholders to interact and become familiar with the roles and responsibilities of others, the power and authority wielded by officialdom and the elected officials in delimiting the contours of social interactions significantly affected the quality of participation as well as social learning.

The discourse around Development in the state has revolved around the state being responsive to 'people's needs'. The celebrated people's planning campaign that inaugurated Kerala's decentralisation governance reforms revolved around the idea of understanding people's needs while making them familiar with their surroundings. However, the transactional nature of politics at the local level has reduced development to providing certain provisions like public swimming pools, roads, parking facilities, public lighting etc. The process dimension has completely been overlooked in this transactional mode where electoral calculations are intimately tied to what the representative has 'done' for his constituents during their time in office. While participation is key to sustainability, it has to be aligned with a broader social ethos that supports the shift. Some scholars had argued during the 1990s that the state was close to becoming a model of sustainable development, with its high social achievements and widespread environmental consciousness.[47] It was expected that Kerala's much vaunted social capital and greater people's participation in local planning with democratic decentralisation will mark the dawn of a community-led environment protection regime. However, things have not quite turned out that way. The effect of India's economic liberalisation reforms along with the increasing dominance of narrow sectional interests in Kerala's local governance are certainly limiting effective citizen participation. Additionally, the divergent epistemological dispositions of state agencies spearheading local development planning is exacerbating the situation, further circumscribing the potential for collective

[47] G. Parayil, *The 'Kerala model' of development: development and sustainability in the Third World*, in 17 *Third World Quarterly* 5 (1996), 941-958.

reflection and learning. However, the more fundamental issue in this context is an ontological one. All politics here is adversarial. Reality is reduced to power and interests leaving no room for shared values and principles. In other words, when all values and principles are rigidly viewed as mechanistic manifestations of power and interests, the room for collective reflection, learning, and action evaporate. At a fundamental level, there has been no challenge to this rather bleak vision of things.

The bureaucratic common sense – of the distinctiveness of nature and culture – is also deeply reflected in social attitudes to environment. For such deeply inured presuppositions to get dislodged, there is a need for cultivating contexts where new meanings and identities can be constructed through individual and collective interactions between the people and the environment. Jalasamrudhi, by conjuring spaces for stakeholders to interact with each other, succeeded in allowing the more discerning stakeholders to recognize the formidable challenges in transitioning towards sustainability. Contexts that are conducive for learning that embraces 'diversity, dissonance, social cohesion, and reflexivity' cannot be evolved without an explicit commitment to bring together voices representing different world views and epistemological dispositions. The sustainability debate in Kerala cannot move forward unless the deeply entrenched instrumental view of the environment is challenged and debated in social interactions, in the context of local environmental planning and governance.

THE CHANGING VICISSITUDES OF 'PARTICIPATION' IN THE STATE OF KERALA, INDIA

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Abstract: *This chapter reflects on the historical shifts in the nature of 'people's participation' in Kerala State, India across developmental-political regimes, from the late twentieth century to the present. 'People's participation' is understood here in the broader sense – as the involvement of the ruled in the spaces and activities generated by modern governments to ensure their access to resources, dignity, and voice. Taking a historical approach, I argue that Kerala confirms the many observations in the research literature about the changeable, malleable nature of the concept of 'participation' as it takes shape in concrete historical movements and under specific institutional frames.*

Keywords: Participation, Kerala State, People's Planning, Decentralisation, Invited Spaces.

1. *Introduction*

As is well known by now in research literatures across the social science disciplines and outside, 'participation' has had a long history of development as a concept. Especially noteworthy is the fact that it has acquired quite distinct and even opposing cognitive meanings as it came to be used in different regimes of development, built upon their distinctly different theoretical and political foundations.[1] Nevertheless, what persisted across these different interpretations and the degrees of popular involvement conceded through 'participation' is its affective connotation – always positive and oriented towards expanding democracy. How-

[1] See for instance, J. Lane, *Non-governmental Organisations and Participatory Development: the Concept in Theory versus the Concept in Practice*, in N. Nelson, S. Wright (Eds), *Power and Participatory Development: Theory and Practice*, London, 1995, 181-192; N. Nelson, S. Wright, *Participation and power*, in N. Nelson, S. Wright (Eds), *Power and Participatory Development*, cit., 1-18.

ever, since the late twentieth century at least, the recommendation of 'participation' marks a transition, to some degree, from top-down, technocratic, space-insensitive development imaginations to more bottoms-up, democratised, local-knowledge-oriented alternatives.[2] From the 1990s at least, the definition of 'participation' has always pointed to intense involvement of local people in development decisions that affect them.[3]

In other words, the idea has been to invoke an active sense of the 'people' as agents, against the governmentalizing imperatives of the modern state to treat them as populations acted upon by power invested in the proliferation of life.[4] Viewed as such, 'participation' and 'participatory development' present a difficult, perhaps even paradoxical, approach. Much of the literature on participatory development raises questions, directly and indirectly, on the ways in which the state's efforts to transform social groups identified as governmental categories (this is of course one way of describing development interventions as inherently political) seek to increase their impact and effectiveness by garnering the non-governmental power of the 'people'. The state's efforts to turn the masses into governable, passive populations to be acted on may seem to disagree with the state's own readiness to empower these groups through 'participatory development' so that they may bring to bear the positivity of 'people's' power in the processes of development. Nevertheless, the assumption that non-governmental 'people's' power may always be ignited in local-level civil society for the ends of development can be problematic. Indeed, some advocates of 'participation' point out that

[2] D. Storey, *Issues of Integration, Participation and Empowerment in Rural Development: The Case of LEADER in the Republic of Ireland*, in *Journal of Rural Studies* 15 (1999), 307-315.

[3] See, B. Agarwal, *Participatory Exclusions, Community Forestry, and Gender: An Analysis for South Asia and a Conceptual Framework*, in *World Development* 29 (2001), 1623-1648; R. Eyben, S. Ladbury, *Popular Participation in Aid-assisted Projects: Why More in Theory than Practice?* in N. Nelson, S. Wright (Eds), *Power and Participatory Development*, cit., 192-200; G. Mansuri, V. Rao, *Localizing Development: Does Participation Work?*, Washington, DC, 2013, 4.

[4] See L. Lawlor, J. Nale (Eds), *Population*, in *The Cambridge Foucault Lexicon*, Cambridge, 2014, 370-376.

participatory approaches (understood as the effort to bring together governmental and non-governmental power in development to ensure efficient, equitable, and democratising outcomes) may need to consider not just state and market failures, but also 'civil society failure'.[5]

It has been pointed out that the shift in the meaning of 'participation' from a limited involvement of local communities/beneficiaries with the aim of ensuring acceptance, efficiency and so on in modernization-theory-inspired development[6] to people-centred approaches, democratising procedures, and a greater sense of local ownership coincided with the rise of sharp critiques of the failures of development as modernisation, and recognition of the fact that development seemed to leave the poor more impoverished.[7] Yet the literature reveals much disappointment with the outcomes of participatory development – most often, these critics argue that 'participation' serves often as a mask for the intensified extraction of cheap or unpaid labour from those who are identified as beneficiaries, or as a form of positive power that produces willing and docile subjects of governmental power.[8]

[5] See G. Mansuri, V. Rao, *Localizing Development*, cit.

[6] See S. Kolavalli, J. Kerr, *Scaling Up Participatory Watershed Development in India*, in *Development and Change* 33 (2002), 213-235.

[7] See R. Chambers, *Challenging the Professions: Frontiers of Rural Development*, London, 1993; S. Holcombe, *Managing to Empower: The Grameen Bank's Experience of Poverty Alleviation*, New Jersey, 1995; A. Agrawal, C.C. Gibson, *Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation*, in *World Development* 27 (1999), 629-649; J. Ferguson, *The Anti-Politics Machine: Development, Depoliticization, and Bureaucratic Power in Lesotho*, Cambridge, 1990; D. Kelly, *Community Participation in Rangeland Management: A Report for the Rural Industries Research and Development Corporation*, Barton, 2001.

[8] See F. Cleaver, *Paradoxes of Participation: Questioning Participatory Approaches to Development*, in *Journal of International Development* 11 (1999), 597-612; R. Chambers, *Poverty and Livelihoods: Whose Reality Counts*, IDS Discussion Paper, Brighton, 1995; K. Botchway, *Paradox of Empowerment: Reflections on a Case Study from Northern Ghana*, in *World Development* 29 (2001), 135-153; S. Biggs, G. Smith, *Beyond Methodologies: Coalition-building for Participatory Technology Development*, in *World Development* 26 (1998), 239-248; K. Kelly, H. Van Vlaenderen, *Evaluating Participation Processes in Community Development*, in *Evaluation and Program Planning* 18 (1995), 371-383.

These debates about the politics of 'participation' recur in the humanities as well – for example, about the relevance of 'participatory art'. For example, the art historian and critic Claire Bishop attacks participatory art. For her it can only 'create…submissive citizens who respect authority and accept the 'risk' and responsibility of looking after themselves in the face of diminished public services'.[9] In contrast, Grant Kester who agrees with Bishop that participatory art is to be condemned for 'seek[ing] to acclimate the working class to the forms of subjectivity demanded by capital, but not to question the demands themselves'. He argues that what we need is not 'participatory art' but 'collaborative art' in which artistic practice is shaped by bottoms-up approaches. Kester's research highlights projects which bring together planning, education, political activism, and artistic practice without undermining the singularity of any of these[10] – he recommends 'collaborators' instead of 'participants' in art, reminiscent of Kelly's recommendation of 'collective action' instead of participation in development. Meanwhile, debates in art also problematize 'participation' in contemporary times.[11] Powerful critiques similar to those of the relevance of 'invented' and 'invited' spaces of participation[12] or 'organic' and 'induced' participation[13] in Development Studies[14] have been raised in discussions of the relevance of 'participatory' art. Bishop draws our attention to the manner in which the participant is reimagined at changing historical moments: '…As this ground has shifted over the course of the twentieth century, so the identity of participants has been reimagined at each historical moment: from a crowd (1910s), to

[9] C. Bishop, *Participation and Spectacle: Where Are We Now*?, Lecture for Creative Time's *Living as Form*, New York, May 2011, 14.

[10] G.H. Kester, *The One and the Many: Contemporary Collaborative Art in a Global Context*, Durham NC, 2011, 198.

[11] D. Kelly, *Community Participation in Rangeland Management*, cit.

[12] A. Cornwall, *Locating Citizen Participation*, in 33 *IDS Bulletin* 2 (2002), 49-58.

[13] G. Mansuri, V. Rao, *Localizing Development*, cit.

[14] See for instance, F. Miraftab, *Invited and Invented Spaces of Participation: Neoliberal Citizenship and Feminists' Expanded Notion of Politics*, in *Wagadu* 1 (2004), 1-7, https://www.rrojasdatabank.info/neolibstate/miraftab.pdf, accessed 2 September 2005.

the masses (1920s), to the people (late 1960s/1970s), to the excluded (1980s), to community (1990s), to today's volunteers whose participation is continuous with a culture of reality television and social networking'.[15] Participation as active engagement was often contrasted with the spectacle which demands merely passive spectators; however, as Bishop reminds, the expansion of digital cultures has led to the collapse of participation into spectacle: 'In a world where everyone can air their views to everyone, we are faced not with mass empowerment but with an endless stream of banal egos. Far from being oppositional to spectacle, participation has now entirely merged with it'.[16]

This chapter reflects on the historical shifts in the nature of 'people's participation' in Kerala State, India across developmental-political regimes, from the late twentieth century to the present. 'People's participation' is understood here in the broader sense – as the involvement of the ruled in the spaces and activities generated by modern governments to ensure their access to resources, dignity, and voice. Kerala State, located in the south-western corner of the Indian subcontinent, became the focal point of an important international debate on development in the 1970s and after. With its unique historical trajectory which produced social development comparable to the OECD countries even though its record of economic development was undoubtedly poor, Kerala became a curiosity, a 'paradox' to be explained.[17] If in the 1970s, Kerala was seemed an exemplar of social development, it also came to be much celebrated for high

[15] C. Bishop, *The Social Turn: Collaboration and Its Discontents*, in *Artforum* 44 (2006), 179.

[16] Ibid., 182.

[17] This is usually summarised as the 'Kerala Model' debate. It is '…a *post facto* generalization of an experience historically evolved but promoted by public action (which inter alia includes socio-religious reform movements, a wide and active press, adversarial politics, etc.) and is sustained by social demands' which happened despite the lack of economic growth. See the introduction of the volume by M.A. Oommen (Ed.), *Kerala's Development Experience*, vol. 1, New Delhi, 1996, xvi. In many indicators of social development, Kerala in the 1970s was ahead of even the richest of Indian states in life expectancy, sex ratio, and overall infant mortality rates that compared favourably with middle-income countries in spite of its economic backwardness.

human development achievements in the 1980s, and for participatory development initiatives in the 1990s, under the aegis of the welfarist state and powerful communist parties, the developmentalist vision of which remained hegemonic well into the 1990s.[18] Kerala's experiments with local 'participatory development' democracy from the mid-1990s continued to be lauded in the present; it appears that to Kerala's admirers, the critiques of 'participation' worldwide as it emerged in the post-USSR, 'third-wave democratisation' of the 1990s have seemed mostly inapplicable to the state.[19]

The main argument of the chapter is that the historical experience of Kerala confirms the many observations in the research literature about the changeable, malleable nature of the concept of 'participation' as it takes shape in concrete historical moments and under specific institutional frames. Secondly, given the evolution of institutions and the public engagement they facilitate in Kerala from the mid-1990s to the present, as well as the intensification of capitalism here indicates that even if the larger frame of state-mandated participatory decentralization is not completely dismantled as the nature of the state changes, the 'participation' that may be achieved can change significantly, both in form and substance. The subsequent sections of this chapter demonstrate these through examining the shifts in 'participation' as understood by Kerala's militant left making demands in the mid-twentieth century to a developmentalist-welfarist state, through the 1990s, when Malayali welfarism underwent significant neoliberalisation – and to the present in which an infrastruc-

[18] V.K. Ramachandran, *On Kerala's Development Achievements*, in J. Dreze, A.K. Sen (Eds), *Indian development: Selected regional perspectives*, Delhi, 1998, 205-356; K. Ravi Raman (Ed.), *Development, Democracy and the State: Critiquing the Kerala Model of Development*, London-New York, 2010; G. Parayil (Ed.), *Kerala: The Development Experience: Reflections on Sustainability and Replicability*. London, 2000.

[19] I have deliberately cited critical literature, both empirical and theoretical, on participation mostly from the 1990s and early 2000s, to remind the reader that these criticisms were already being voiced when the dominant Left parties in Kerala, especially the Communist Party of India (Marxist) (CPM) was preparing to initiate the 'People's Planning Campaign' (1996).

tural imagination of growth seems to be leading the Left-led state to make major concessions to capital.

2. *The Twentieth Century: Two Models of 'Participation'*

Broadly speaking about twentieth century Malayali society,[20] one may perceive two distinct models of participation, understood as involvement of the ruled in the spaces and activities opened by modern government to secure visibility, voice, and resources. The first of these was participation through militant self-assertion in the modern political public; the other was through persistent negotiation with government authorities for access to a range of rights and resources.

Both these forms of participation emerged in the southern native state of Travancore, which came under British suzerainty by the early nineteenth century, and were shaped by the transformation of political power there in the subsequent decades. The Brahmanical monarchy of Travancore was committed to the preservation of the Brahmanical social order of *janma-bhedam* ('difference by birth'), a system of graded caste-based inequalities maintained through extremely violent and inhuman practices such as untouchability, institutionalised humiliation through the regulation of the minutiae of life such as dress-codes and living arrangements, and unseeability.[21] This had momentous consequences. On the one hand, with the coming of the British and the loss of economic sovereignty, political power in the Brahmanical monarchy was increasingly 'hollowed out'; on the other

[20] Kerala State was formed in 1956, amalgamating the three Malayalam-speaking areas: the native kingdoms of Travancore and Kochi, and the district of Malabar, directly ruled by the British as part of the Madras Presidency. 'Malayali' refers to a linguistic identity that pre-existed the Kerala State and forms its cultural basis. Here I will use 'Malayali' throughout to refer to the people and institutions of Kerala, and not such usages as 'Keralite' or 'Keralan'.

[21] R. Jeffrey, *Politics, Women and Well Being: How Kerala Became 'a Model',* Delhi, 2003; P. Bhaskaranunni, *Pathonpatham Noottandile Keralam* [The Kerala of the Nineteenth Century], Thrissur, 2015.

hand, revolts by historical-marginalized groups in Travancore openly challenged the monarchy and its defence of the *janma-bhedam* order.[22] As the monarchy in Travancore struggled with this crisis amidst fears of absorption into the British empire, a new conception of political power and a reimagining of the state itself emerged. The kingdom of Travancore sought now to reach out to its subjects as the provider of modern education and basic modern health care, even as it continued to protect caste inequalities, hierarchies, and demeaning caste practices as much as it could.[23] Thus, the description of the Travancore kingdom as *Dharmarajyam* (the land that protects the Brahmanical dharma order) began to be reinterpreted in modern governmental terms, as 'the Land of Charity'.[24] The monarchical regime acquired welfarist overtones and thus looked much less destructive and arbitrary; besides the modernisation of state policy and governance enabled private property and modern markets and market-logic. It was also forced to make some concessions to the expansion of people's voice through the setting up of public spaces such as the modern courts, where people could enter irrespective of caste.

Modern Travancorean subjecthood was reimagined in terms of the ability of individual Travancoreans to produce wealth in a growing colonial-capitalist economy[25] (Raju 1995). The imagination of the ideal subject (*praja*) of the Travancorean monarchy was more cultural than political – for example, a version of 'aesthetic citizenship' based on shared cultural and linguistic sensibilities.[26] In other words, political citizenship rooted in citizen's participation in a modern public was still a distant dream in

[22] R. Jeffrey, *The Decline of Nair Dominance: Society and Politics in Travancore 1847-1908*, Sussex, 1976.

[23] R. Jeffrey, *Politics, Women and Well Being*, cit.; K. Kawashima, *Missionaries, the Hindu State and British Paramountcy in Travancore and Cochin, 1858-1936*, Thesis Submitted for the Degree of Ph.D. School of Oriental and African Studies University of London, 1998.

[24] S. Mateer, *The Land of Charity*, London, 1871.

[25] S. Raju, *Excursus into Anticipated Future in the Wor(l)ds of Nation and Wealth*, Lateral Studies Series No. 13, School of Social Sciences, Mahatma Gandhi University, Kottayam, 1995.

[26] J. Devika, *Womanwriting=Manreading?*, New Delhi, 2013, 22-40.

late-nineteenth century Travancore. The welfarist decisions of the government were still largely top-down, influenced most by the British government functionaries or British missionaries.[27]

This was to change in the twentieth century. The first kind of participation was forcefully claimed by the radical journalist Swadeshabhimani K. Ramakrishna Pillai in the first decade of the twentieth century. Refusing to soft-pedal his criticisms of what he perceived to be a venal and corrupt bureaucracy in Travancore, Pillai ended up being exiled from Travancore, allegedly for raising allegations of sexual license against the Dewan, or the chief minister, of Travancore.[28] Pillai's journalism was passionately committed to the *pothu* – or 'public', and he often used the English word – and the *pothujanam* or 'the people', who he identified as its rightful participants.[29] He argued that even when the people's participation is passive (the grant of consent alone), that does not mean the possibility of their active participation, which might even unseat the ruling authority, is not annulled. Pillai's ideal public is united internally against the boundless power of the monarchical state, and the active self-assertion of citizens – that it, active participation as a possibility seized from monarchical power – alone grans the state its legitimacy.

The second model of participation that emerged in the early twentieth century was best advanced by the visionary leader of the historically-abjected ex-slave castes in Travancore, Ayyankali. Ayyankali's early life was of direct confrontation with caste authorities who, enforcing the unseeability of the members of the ex-slave castes, prevented them from using public facilities like roads and schools. Ayyankali openly defied the humiliating dress-code by dressing like the caste elite, driving a bullock cart, and attempting to enrol a young ex-slave caste girl-child in a public school, and organizing an agricultural labour strike.[30] All these

[27] K. Kawashima, *Missionaries, the Hindu State and British Paramountcy in Travancore and Cochin*, cit.

[28] U. Kumar, *Writing the First Person: Literature, History and Autobiography in Modern Kerala*, Ranikhet and New Delhi, 2020, 40-49.

[29] K. Damodaran, *Swadeshabhimani K Ramakrishna Pillai*, in P.C. Joshi, K. Damodaran (Eds), *Marx Comes to India*, New Delhi, 1975, 81.

[30] T.H.P. Chentharassery, *Ayyankali*, Thiruvananthapuram, 2013.

were acts of self-assertion which expanded the access of the members of historically-marginalized castes to nascent public spaces in Travancore – opening up possibilities of their public participation. Ayyankali soon formed the community organisation *Sadhujanaparipaalini*, and actively negotiated with the Travancore authorities, even becoming a member of the (limited) legislative assembly of Travancore, the Sree Mulam Praja Sabha. This mode of participation was striking different from Pillai's in that it was based not on an ideal, unified public, but on a critical perception of the realities of caste violence and hierarchy – and therefore it foregrounded deprived and oppressed identities. Participation in this frame referred to the work of negotiating with the government, and becoming part of the state even, to obtain the rights and resources necessary to overcome caste violence and inequalities.

The strong push towards democratisation in the subsequent decades of the twentieth century in Malayali society (outside Travancore as well) was forged by bringing together these two modes of 'participation'. On the one hand, participation as militant self-assertion of dignity and citizenship in the political public and in public spaces as a right was forcefully demanded by/on behalf of the 'people'/or the 'masses' or the *pothujanam* /workers; on the other hand, formal trade unions of workers and others negotiated for material resources for even informal sector workers.[31] This formed the crux of what Amartya Sen referred to as the successful model of 'public action' which produced strong welfarist outcomes in an extremely underdeveloped economy.[32]

In the immediate post-independence decades, the communist movement in Kerala opened the first route to public participation to the historically-marginalized working-class poor, while the second route was most successfully pursued by the historically-privileged Malayali elites. Thus, the Malayali working class, as well as such groups as squatters, informal sector workers like

[31] K.P. Kannan, *The Welfare Fund Model of Social Security for Informal Sector Workers: the Kerala Experience*, Centre for Development Studies Working Paper No. 332, Thiruvananthapuram, 2002.

[32] J. Drèze, A.K. Sen, *Hunger and Public Action*, Oxford, 1991.

head-loaders, stigmatized workers such as sanitation workers, and others gained dignity, visibility, voice, in the public as well as material resources through their self-assertion in the political public.[33]

This understanding of 'participation' as well as the structures of feeling associated with it was strongly prevalent in Malayali society between the 1950s and the late 1980s. It rested on the Malayali 'national-popular' at the core of left hegemony here in this period, which imagined the Malayalis not just as Malayalam language-speakers but also as a 'people united in development' with 'egalitarian developmentalism' as the guiding development ideology of the state. A host of global, national, and local developments from the late 1980s, were, however, to bring about slow, if abiding, shifts in state and society in Kerala. The collapse of the USSR-bloc, economic liberalisation in India, the transformation of Kerala into a migration-dependent economy and society and the consequent rise of consumerism and economic inequalities – all of these threw the Malayali leftist-national popular into a crisis. The leading communist party here, the Communist Party of India (Marxist), opted to meet neoliberalism 'halfway' through forging an eclectic version of participatory development, in which both the cognitive and affective senses of the concept of 'participation' changed drastically.

The enthusiastic adoption in Kerala of the national shift towards decentralized local governance through two Constitutional Amendments in the 1990s confirms the insights of the research on 'actually-existing neoliberalisms', that the arrival of full-fledged neoliberal social policy led to crucial shifts in existing social protection policies, safety nets were still in place which

[33] See, for details, T.K. Oommen, *From Mobilisation to Institutionalisation: The Dynamics of Agrarian Movement in Twentieth Century Kerala*, Bombay, 1985; A. Lindberg, *Experience and Identity: A Historical Account of Class, Caste, and Gender among the Cashew Workers of Kerala, 1930-2000*, Lund, 2001; J. Devika, *Aspects of Socioeconomic Exclusion in Kerala, India: Reflections from an Urban Slum*, in 48 *Critical Asian Studies* 2 (2016), 193-214; P. Heller, *The Labor of Development: Workers and the Transformation of Capitalism in Kerala, India*, New York, 1999.

were now redone to fit the neoliberal imaginary.[34] T. M. Thomas Isaac, the leading communist party intellectual who gained prominence as a vocal proponent of 'people's planning', distinguished the CPM's imagination of local-level participatory planning and development from the World Bank's recommendation of local governance. Isaac argued that the World Bank's vision proposed a very limited and impoverishing understanding of 'participation' which would justify the exploitation of local labour and knowledge for efficient implementation of projects, the CPM's vision was a 'resistant struggle'.[35] The 'People's Planning Campaign' (1996) (PPC) launched by the CPM-led Left Democratic Front government in Kerala aimed at moving the management of natural resources and production, and social welfare distribution to the local-level by strengthening elected local bodies at the village, block, and district levels. This was to be done by endowing them with powers and solid financial backing, and further bolstering them with 'invited spaces' of local-level deliberation on development decisions, including the village assembly (Gramasabha), working groups, and development seminars in the local-level planning process.[36] At the same time, the CPM – as well as their rivals, the coalition of political parties led by the Indian National Congress (INC), the United Democratic Front – began to move away from earlier forms of 'participation', notably, the militant self-assertion of deprived groups demanding resources in public politics through mass protests and strikes.

In other words, 'participation' was now shrinking to fit the invited spaces shaped by a version of 'Blairite' neoliberalism. That is, the state did not shrink; on the contrary, it played a major role in laying out the new regime of participation. During the rolling out of the local governance institutional framework over the next five years, neighbourhood groups composed of family

[34] See the introduction of the volume edited by P. A. Hall, M. Lamont (Eds), *Social Resilience in the Neoliberal Era,* Cambridge, 2013, 20.

[35] T.M. Thomas Isaac, *Janakeeyaasootranathinte Rashtreeyam* [Politics of Decentralisation], Kottayam, 2005, 89.

[36] T.M. Thomas Isaac, R. W. Franke, *Local Democracy and Development: Peoples Campaign for Decentralised Planning in Kerala*, New Delhi, 2000.

units, projected to be the microsites of empowered deliberative democracy-based local development, were formed. Simultaneously, the CPM distanced itself from earlier struggles for land by landless labourers that it was closely associated with. In its place, the resource-poor were directed to participate in the local-level development process and receive minimal support for self-help.[37]

Also, the participation of historically-marginalised groups continued to be passive. That is, welfare provisions in the People's Planning Campaign for women (the Women Component Plan) and for the Scheduled Castes (the Scheduled Castes Sub-Plan) and the Tribal Sub-Plan for the indigenous communities did not really create the space for their active participation as political subjects – they continue to be treated as passive governmental categories and not even as liberal interest-groups. As I have argued elsewhere, this is a double jeopardy: 'the limiting of politics to redistribution in terms of well-defined group interests, and the reduction of the inclusionary potential of the liberal framework, through treating groups as passive governmental categories'.[38]

Thirdly, 'participation' now seemed ever more to resemble a process by which the state was enabling the integration of citizens into the market as producers, thus minimizing their need for welfare support. The State-wide network of women's self-help groups formed under the aegis of the Kerala State Poverty Alleviation Mission, which had almost scaled up throughout the Kerala

[37] The land struggles by Dalits and indigenous peoples in the late 1990s and after were met with stiff opposition, threats, and violence from the state, and in the terms of both Left-led and non-Left coalitions in the State. The Muthanga firing on indigenous people who tried to occupy forest lands in 2002, and the CPM's adamantly-hostile response to the Dalit occupation of the abandoned plantation of Chengara in 2008 are only two instances early in this century. See C.R. Bijoy, K. Ravi Raman, *Muthanga: The Real Story*, in 38 *Economic and Political Weekly* 2 (2003), 1975-1982; L. Steur, *Adivasi Workers' Struggle and the Kerala Model: Interpreting the Past, Confronting the Future*, in K. Ravi Raman (Ed.) *Development, Democracy and the State: Critiquing the Kerala Model of Development*, London-New York, 2010, 221-237.

[38] J. Devika, B.V. Thampi, *Mobility towards Work and Politics for Women in Kerala State, India: A View from the Histories of Gender and Space*, in 45 *Modern Asian Studies* 5 (2011), 1170.

by around 2005, popularly known as the Kudumbashree ('the prosperity of the family') primarily aimed at drawing upon lower-middle class women's capacities for absorptive resilience to ensure family sustenance and upward mobility.[39] There was unease even within CPM about this slow drift towards neoliberalism. Isaac's vision of local-level governance differed quite significantly from the far-more radical thinking of M P Parameswaran, especially their conceptions of participation, and its feminisation. Parameswaran repeatedly criticised the conception of neighbourhood groups as linked to financial or economic decision-making; he insisted that they should be political forums. He opposed the abandoning of the neighbourhood group conceived as a collective, and 'turning it first into the self-help group and then distorting it further by calling it the Kudumbashree self-help group'.[40]

What seems important to note at this moment is the near-blindness of the CPM's PPC towards the active civil society of the historically-marginalized sections which had developed in Kerala over the 1980s and after – of feminists, Dalit activists (politicised members of the ex-slave castes who identified as Dalits – the oppressed), and indigenous tribal movements for land[41] who had

[39] This is not to claim that participation understood as working in state-sponsored micro-credit and micro-enterprise in self-help groups disempowered women. Definitely, such a conclusion would be reductive. The formation of the State-wide network of lower middle-class women's self-help groups was an indirect public recognition of their absorptive resilience that they contributed. Also, individual women often made substantial gains as entrepreneurs and public persons. The closeness of the network with the local government ensured that women had unprecedented access to information and contacts outside their own kin and neighbourhood networks. However, there were deep ambiguities in this participation too, for it demands from women a great deal of unpaid or poorly paid governmental labour, and indeed, it makes tremendous demands from them without necessarily encouraging independent voice and anti-patriarchal action. See K.P. Kannan, G. Raveendran, *Poverty, Women and Capability – A Study of the Impact of Kerala's Ku-Dumbashree System on Its Members and Their Families*, Thiruvananthapuram, 2023; J. Devika, A. Ajay, *Family, Women, and Ill-being: A Critique of the Family in Twenty-First Century Kerala*, New Delhi, forthcoming.

[40] M.P. Parameswaran, *Naalam Lokam: Swapnavum Yadharthyavum* [The Fourth World: Dreams and Reality], Kottayam, 2005, 41.

[41] K.T. Rammohan, *Caste, Public Action, and the Kerala Model*, in K. Ravi

claimed an active voice through strong acts of self-assertion in Kerala's political public by then. The assumption about women, the indigenous people, and ex-slave caste communities, underlying the CPM's people's planning, then, was of their passivity – which was born of their deliberate neglect of vocal demands being made by indigenous people, Dalits, and feminists. It is interesting to note that this indicates the substantial difference between the Kerala and the Porto Alegre experiments – given the explicit openness of the later towards all sections of active and politicized civil society. Patrick Heller seems to notice the similarities between the two, but does not spot the differences that are of clear analytic significance. His understanding of civil society in Kerala seems limited to the largely middle-class and privileged-caste-male-dominated Kerala Sastra Sahitya Parishat (KSSP), Kerala's popular science movement.[42] While it did enjoy a degree of independence from the CPM, the KSSP is hardly the voice of marginalized social groups struggling to define participation in Kerala's political public. Not surprisingly, then, the admirers and architects of PPC seem to emphasize the State government's role in not only facilitating people's participation in local planning, but also shaping it closely. And therefore, the already-audible voices of Kerala's oppositional civil society of feminists, Dalits, and indigenous people's movements were shut out in the state-sponsored participatory spaces. The heavy emphasis on cascading training originating in the government and based on middle-class and privileged-caste expertise is not seen as problematic for participation, either.[43]

Raman (Ed.) *Development, Democracy and the State*, cit., 22-37; S.J. Tharu, K. Satyanarayana, *No Alphabet in Sight: New Dalit Writing from South India*, New Delhi, 2011; M. Erwer, *Challenging the Gender Paradox: Women's Collective Agency and the Transformation of Kerala Politics*, Ph.D. thesis submitted to Goteborg University, 2003; T.T. Sreekumar, G. Parayil, *Social Space, Civil Society and Transformative Politics of New Social Movements in Kerala*, in K. Ravi Raman (Ed.) *Development, Democracy and the State*, cit., 237-53.

[42] P. Heller, *Kerala: Deepening a Radical Social Democracy*, in R. Sandbrook, M. Edelmann, P. Heller *et al.* (Eds), *Social Democracy in the Global Periphery: Origins, Challenges, and Prospects*, Cambridge, 2006, 65-92.

[43] Ibid.

The heavy hand of the State government, already visible in Heller's highly favourable assessment (above), seems to have grown only heavier still. Suraj Jacob and Babu Jacob, for example point to three implicit but faulty assumptions about participation in Kerala's experiments with local-level planning and development.[44] The first is discussed above – the assumption that unequal social relations can be easily overcome in participatory spaces and activities. That this is indeed an almost unsurmountable hurdle seems to have been apparent in some of the earliest studies.[45] The impacts of social fragmentation on participation in the early PPC are now recognized in the more recent literature on Kerala.[46] The second assumption that Jacob and Jacob identify is about local autonomy. The autonomy of local bodies has not expanded since the 1990s – and this has impacted participation in the village assemblies, as people realise that the local body can only implement projects according to strict guidelines set from above. The third assumption, rampant in the writings of Western academics and social democrats, about the abundance of commitment to the common good and the willingness to spend time and energy repeatedly on it, remains completely blind to the cultural and political shifts induced by neoliberalism in Kerala. Critical appraisals of Kerala's local governance experiments found it to be making huge concessions to familial individualism against collective ends, and self-help rested on an eminently liberal understanding of collective good.[47] In sum, as Suraj Jacob and Babu Jacob put it, at present in Kerala, participatory planning 'primarily meant following an elaborate state-directed procedure to elic-

[44] S. Jacob, B. Jacob, *Understanding the Career of Kerala's Decentralisation Reforms*, in J. Devika, V.J. Varghese (Eds), *Keep Calm and Carry On? 'The Post-Kerala Model' and the Challenges of the Twenty-First Century*, Hyderabad, forthcoming.

[45] O. Tornquist, P.K.M. Tharakan, *Democratisation and the Attempts to Renew the Radical Political Development Project: Case of Kerala (II)*, in 31 *Economic and Political Weekly* 29 (1996), 1953-1973.

[46] K. Rajesh, *Local Politics and Participatory Planning in Kerala: Democratic Decentralization 1996-2016*, Delhi, 2020.

[47] N. Mannathukaren, *The Conjuncture of 'Late Socialism' in Kerala: A Critique of the Narrative of Social Democracy*, in K. Ravi Raman (Ed.) *Development, Democracy and the State*, cit., 157-174.

it people's needs and to incorporate those vetted by officialdom into the corresponding local government's administrative actions'.[48] Indeed, the sanguine expectations about 'participation' in Kerala's local self-government in the early years of the new millennium sound almost Panglossian now. Indeed, the overemphasis on (weak) participation in the Kerala context seems to cover up for their lack of effectiveness and accountability, and this in turn seems to confirm the insight in the literature on participatory development that the accountability of local bodies cannot be viewed separately from that of higher institutions, nor can their effectiveness be assessed without considering their success in mobilizing pre-existing community agency.[49]

If the blindness to existing mobilisations of the historically-marginalised groups and their demands led to the state leaning on a more or less state-centric vision of developmental civil society, it also induced a forgetfulness of the past. For example, claims regarding the unprecedented participation of women seemed to completely ignore a century-old history of massive participation by women workers in the militant labour struggles of the communist movement in twentieth century Kerala. Nor was there serious effort to include women workers with the experience of militant demand-making as participants in the new institutions of local development. A study on elected women members in the first term of local governments by Radha and Roychowdhury noted that while the surveyed women members did feel empowered through new knowledge about government and exposure to politics, women from the more socially-disempowered and economically-weaker groups were less likely to take up the new public role of elected representatives. 'No fisherwoman, coir factory worker or woman working in the informal sector were found elected to the local bodies'.[50]

[48] S. Jacob, B. Jacob, *Understanding the Career of Kerala's Decentralisation Reforms*, cit.

[49] A. Chhatre, *Political Articulation and Accountability in Decentralisation: Theory and Evidence from India*, in 6 *Conservation & Society* 1 (2008), 12-23.

[50] S. Radha, B. Roychowdhury, *Women in Local Bodies*, Working Paper No. 40, Kerala Research Programme on Local-level Development, Centre for Development Studies, Trivandrum, 2002, 22.

These were also the years in which participatory forms of management, for example of watersheds and forests, were becoming more familiar in the national and regional contexts. The available literature on people's participation in watershed management almost invariably highlights the limited nature of people's participation – as providers of information or labour, their lack of interest in the absence of incentives – and the pervasiveness of bureaucratic interference or non-cooperation. Most of the participatory watershed and forest management cases discussed are decidedly top-down in design and implementation and borne down by the weight of bureaucracy and hierarchy. Wherever local communities are actively involved, for example, when the forest department officials made concerted effort to dial down power hierarchies with local communities and offer protection/enhancement of their livelihoods, wherever the intervention addressed an urgent and widespread need (such as clean water) success was greater.[51] 'Participation' in these contexts, it seems, has continued to be limited – and there has been no spillover of a more expansive notion of participation from Kerala's local governance into these departmental participatory projects. Given the preceding discussions about the limitations of participation enabled by local governance here, this may not be surprising.

[51] See S. Vishnudas, *Sustainable Watershed Management: Illusion or Reality? A Case of Kerala State, India*, Deft, 2006; G. Ganapathy, C.S. Salil, *Bureaucracy, Sustainable Development, and Decentralization: Reflections on Jala Samruddhi, a Community-Based Water Conservation Project*, CDS-RULSG Monograph Series: Ecological Challenges and Local Self-Government Responses No. 5, Thiruvananthapuram, 2023; V. Dhanya, G. Renoy, *Water Governance and Public Participation: What Matters?*, in 112 *Current Science* 4 (2017), 686-687; M. Masuda, J. Mishiba, M. Dhakal, *Implementation of Participatory Forest Management in Kerala, India*, in 14 *Tropics* 4 (2005), 323-334; V. Anitha, P.K. Muraleedharan, A.S. Binilkumar, *Human-Related Constraints in Protected Area Management: Manifestations and Causatives*, in 41 *Economic and Political Weekly* 10 (2006), 919-924; D. Soman, V Anitha, *Community Dependence on the Natural Resources of Parambikulam Tiger Reserve, Kerala, India*, in *Trees, Forests, and People* 2 (2020), https://www.sciencedirect.com/science/article/pii/S2666719320300145, accessed 9 September 2025; E.K. Damayanti, M. Masuda. *Implementation Process of India Eco-development Project and the Sustainability: Lessons from Periyar Tiger Reserve in Kerala State, India*, in 17 *Tropics* 2 (2008), 147-157.

3. *'Participation' in Twenty-First Century Kerala*

Despite the above limitations, the presence of Constitutionally-mandated local bodies seems to have encouraged, rather than discouraged, local-level militant mobilisations of people against threats to their rights and resources (the first mode of participation discussed in the previous section). The village panchayat often became both the Constitutional body around which politicized participation became possible, and also the chief negotiator on behalf of the people with the State government and other agencies.

The best-known instance is the long-drawn struggle against ground water exploitation and pollution in the village of Plachimada, which began in 2002. It was led by the indigenous people (Adivasis) who suffered the worst. Far from being passive beneficiaries of the new local self-government, the adivasis seized 'participation' for themselves and organized strong protests against the Coco-Cola factory. The struggle gained global attention and soon, the Adivasi 'participation' produced a powerful oppositional civil society.[52] The Perumatty Village Panchayat was forced to act under civil society pressure – and it cancelled the factory's license. The factory closed and a prolonged legal battle followed, supported by continuing civil society protests. In other words, people's participation in the first mode had turned the panchayat from being a mere self-help facilitator or welfare-distributor; it became the focal point of people's participation as self-assertion in the public for rights and resources. Also, the swell of public participation in and through the anti-Coco-Cola factory protests was an important factor that encouraged the Perumatty panchayat to challenge the Kerala High Court's refusal of its powers to protect local natural resources, including ground water, and despite the fact that the State government's stance

[52] K. Ravi Raman, *Corporate Violence, Legal Nuances, and Political Ecology: Cola War in Plachimada*, in 40 *Economic and Political Weekly* 25 (2005), 2481-2486; C.R. Bijoy, *Kerala's Plachimada Struggle: A Narrative on Water and Governance Right*, in 41 *Economic and Political Weekly* 41 (2006), 4332-4349.

which seemed to be favouring 'expert opinion' over local people's priorities.[53]

The Perumatty panchayat may be the best-known instance of the persistence of the first mode of participation prevailing over the neoliberalised vision of local self-government, but there are other equally-revelatory instances. For example, the village panchayat of Eloor (which is now a Municipality) on the banks of the Periyar where chemical pollution from large factories had been a problem since decades. An examination of the product of early deliberations there during the PPC, the *Panchayat Development Report* of 1996, shows that this was a leading concern voiced by the local people.[54] That is, the local people had recorded this concern through their participation in the 'invited space' of the Gramasabhas leading to the preparation of the Panchayat Development Report. But the Panchayat Committee of Eloor was dominated by the powerful industrial trade unions in the area, and did not address it. However, when Eloor was badly affected by chemical poisoning by a particularly offensive company, people mobilised outside the local self-government office in 1998 and forced the Panchayat Committee to cancel its licence. Yet the factory was still functioning in 2005, apparently with the permission of 'experts' – the Kerala State Pollution Control Board.[55] Instances of the above sort continue to occur in Kerala despite the State government's efforts to modify the licence-granting powers of the village panchayat committee – for instance, the very recent struggle against a proposed distillery in the wa-

[53] K. Ravi Raman, *Corporate Violence, Legal Nuances, and Political Ecology*, cit.; S. Koonan, *Groundwater: The Legal Aspects of the Plachimada Dispute*, in P. Cullet, A. Gowlland-Gualtieri, R. Madhav *et al.* (Eds), *Water Governance in Motion: Towards Socially and Environmentally Sustainable Water Laws*, New Delhi, 2010, 159-198.

[54] See *Panchayat Development Report of Eloor*, Thiruvananthapuram, 1996. For details, see C. Vijayakumar, J. Devika, N.C, Narayanan, *Why Do People Deny Environmental Destruction? The Pollution of the Periyar at Eloor, and Local-level Responses*, CDS Monograph Series No. 1, Ecological Challenges & Local Self-Government Responses, Thiruvananthapuram, 2019.

[55] M. Suchithra, *Unchecked Pollution on the Periyar*, https://indiatogether.org/periyar-environment, 2004, accessed 9 September 2025.

ter-scarce panchayat of Elappully in which the village panchayat led the popular protests.[56]

Perhaps these instances are more fittingly understood as related to the early-twentieth century Malayali legacy of participation, and not as flowing from the neoliberalised PPC of the 1990s. For the antecedents of local government becoming platforms for active citizen participation against threats to their well-being and rights does not start in the 1990s in Kerala. Indeed, the earliest antecedent in the post-independence period is the anti-pollution struggle to save the Chaliyar River from the massive chemical pollution by the GRASIM factory which extended through the 1960s right up to the 1990s.[57] Though the village panchayats of those decades had much less power and resources compared with the local bodies of the PPC, the Chaliyar struggle grew in strength through the combined support of village panchayats around the polluted area, especially the Mavoor and Vazhakkad panchayats. People in the Vazhakkad panchayat participated in generating alternate information about pollution – led by the panchayat president.[58]

[56] D.V. Kumar, *Plachimada 2.0? Elappully in Kerala Warns of Mass Protest Against Proposed Brewery*, in *The South First*, 25 January 2025, https://thesouthfirst.com/kerala/plachimada-2-0-elappully-in-kerala-warns-of-mass-protest-against-proposed-brewery/, accessed 9 September 2025. In 2017, the Kerala government modified the rules of the Kerala Panchayati Raj Act (1994) in order to improve ease of doing business in the State. See, https://www.legitquest.com/act/kerala-panchayat-raj-issue-of-licence-to-dangerous-and-offensive-trades-and-factories-amendment-rules-2017/DF39, accessed 9 September 2025. These changes increased the weight of expert opinion in ascertaining the impacts of proposed industries in the village panchayat, even though it did not undermine the special village assembly, if convened, on such matters. However, special Gramasabhas themselves have shown themselves to be vulnerable to crony capture; and more importantly, the new rules demand that the applicant for industrial license bear the expense of procuring the expert opinion. While this may be well-meaning, on the ground, it opens the door to manipulation of the expert report in favour of the applicant.

[57] For details, see A. George, J. Krishnan, *River, People, and Industry: The Politics and Pollution of River Chaliyar*, Report submitted to the Kerala Research Programme on Local-level Development, Centre for Development Studies, Thiruvananthapuram, 2002.

[58] Ibid., 157.

Indeed, the most visible shift in participation in the development institutions of twenty-first century Kerala seems negative in character. S. Mohanakumar describes it as the capture of local bodies by crony capital.[59] While corruption in government functioning has certainly a very long history in Malayali society, widespread and almost normalised cronyism is more or less a twenty-first century phenomenon here. Far from making local self-governments a platform for people to self-craft the assertion of their rights and resource-claims (as in the above instances), it does the exact opposite: wherever the regulatory capture of local governments has been achieved, the village panchayat weakens and undermines local 'participation' through militant self-assertion. In his study of the undermining of participatory democracy by illegal quarrying in the Pallichal panchayat in the Thiruvananthapuram district in the twenty-first century decades, Mohanakumar notes:

> … During the last two decades, cronyism has created a disharmony and dissonance between LSGIs [local self-government institutions] and people, and the numerous forms of local protests against such unholy alliance of political leadership, bureaucracy and capital engaged locally have driven people to vehement protests to resist the attack on their human rights. … As the local government prevails over the localised resistance of people, who are less connected with top echelons, they are rendered a hapless lot to undertake such popular movements of resistance irreversibly. At this point of flex, participatory democracy fails and marks the success of cronyism in dis-empowering constitutionally provisioned institutions such as Village Council (Gramasabha)… [60]

Another telling instance is from the Puthukad panchayat in central Kerala. The panchayat president, a woman who entered

[59] S. Mohanakumar, *Cronyism in Local Governments: A Case Study of Pallichal Grama Panchayat in Kerala*, in J. Devika, S. Mohanakumar, A. Ravi, *Cronyism, Development, and Citizenship: A Study of the Effects of Quarrying in Pallichal Panchayat, Thiruvananthapuram*', CDS Monograph Series No. 4, Ecological Challenges and Local Government Responses, Trivandrum, 2022.

[60] Ibid., 30-31.

public life as an idealist development activist in the late 1990s, managed to turn her panchayat into a platform for militant public participation through bipartisan protests against the criminal 'sand mafia' (illegal sand miners) in earlier in her term.[61] But the entry of quarry-capital in 2017 through cronyism and regulatory capture[62] forced her to change track. The Panchayat Committee was compelled by political party higher-ups to support a crusher company that was sure to cause significant environmental damage. With this, the alliance between the local body and people's civil social resistance in Puthukad was broken.[63]

Mohanakumar also points out that regulatory capture of local self-government in Pallichal happened in the heyday of participatory development in Kerala, in the early years of the new millennium:

> The article 233 of the KPR-1994 [Kerala Panchayati Raj Act]… asserts that the Secretary of the GP should enquire and report to the village panchayat as to whether the establishment is objectionable by reasons of density of population in the neighbourhood and the possibility to causing pollution of any sort to the people to Panchayat Committee and within sixty days of the submission of application, the decision of the committee should be communicated to the applicant. …However, Article 236 (3)

[61] B. Harriss-White and L. Michelutti refer to this as typical of the growing post-liberalisation 'criminal economies' of South Asia. See, B. Harriss-White, L. Michelutti (Eds), *The Wild East: Criminal Political Economies in South Asia,* London, 2019.

[62] 'Regulatory capture theory of crony capitalism asserts that the government regulations introduced for public interest are captured and circumvented by the firms with the support of cronies in the government. For capturing regulations, capital forms a concentrated interest group for the furtherance of its interest … Business concerns in the regulatory capture mechanism are better informed about government regulations and over the years the regulatory capture group graduates to concentrated group which empowers them to make own regulations and make the government approve and notify it as government regulations. Regulations tend to favour the regulated than the general public and it enables the regulated to assume the role of regulators'. S. Mohanakumar, *Cronyism in Local Governments*, cit., 31-32.

[63] J. Devika, *Disciplinary vs. Neoliberal Governmentality? Understanding Agency in the Pallichal Panchayat*, in J. Devika, S. Mohanakumar, A. Ravi, *Cronyism, Development, and Citizenship*, cit., 105.

> of KPRA-1994 asserts that if the authority fails to intimate the applicant the response of the Gram Panchayat's decision on the application within 30 days of the submission of the same, it is deemed as granted license. At the Gram Panchayat level, cronies capture the regulation by forming interest groups and seek rent under the provisions of the clause … [64]

In sum, the meaning of 'participation' in twenty-first century local-level development in Kerala has been dynamic, subjected to continual revision from above and below. These struggles are not limited to the instances of natural resource conflicts discussed above. For instance, the past twenty-five years have seen several attempts from below to turn governmental categories from being passive welfare beneficiaries into active participants making demands upon the state and possessing political identities. A striking example is the widows' associations that were active in some parts of Kerala in the early 2000s.[65] We have also seen the reverse – abjected people acquiring new political identities and forcefully asserting themselves in the public demanding that they be made visible to the governmental eye as a category deserving welfare. Interesting examples of these include sickle-cell anaemia patients,[66] transgender people.[67] The successes of these efforts have been quite mixed.[68] Nevertheless, participation in democracy that refuses its confinement in state-created 'invited' spaces of development deliberation, especially by the historically-marginalised sections, Dalits and Adivasis, is now punished quite se-

[64] S. Mohanakumar, *Cronyism in Local Governments*, cit., 38.

[65] J. Devika, A.K. Rajasree, *'Widows' Organizations in Kerala State, India: Seeking Citizenship amidst the Decline of Political Society*, in A. Gudavarthy (Ed.), *Re-Framing Democracy and Agency in India: Interrogating Political Society,* London, 2012, 201-232.

[66] J. Devika, A.K. Rajasree, *Health, Democracy and Sickle-Cell Anaemia in Kerala*, in 43 *Economic and Political Weekly* 10 (2008), 27-29.

[67] S. Partha, *Sex Work, Vexed Work: Transgender Reproductive Labour and the Development Discourse*, in J. Devika, V.J. Varghese (Eds), *Keep Calm and Carry On?*, cit.

[68] J. Devika, A.K. Rajasree, *'Widows' Organizations in Kerala State, India: Seeking Citizenship amidst the Decline of Political Society*, in A. Gudavarthy (Ed.), *Re-Framing Democracy and Agency in India*, cit.; S. Partha, *Sex Work, Vexed Work*, cit.

verely by the increasingly-punitive, crony-capitalism-driven state; the dominant Left in Kerala now favours an infrastructural imagination of capitalist growth, to such an extent that its local self-government-centred vision of development seems highly reduced.[69] In other words, all the social groups involved in these struggles are deemed abject.

4. *Conclusion*

It appears, then, that the combination of the two modes of participation mentioned above underwent a transformation after the establishment of local self-government in the 1990s in Kerala. Public participation to forge active civil society interventions seemed to be undiminished, and these external thrusts from outside governmental spaces pressured the local self-government to act on its behalf. While some of these struggles were successful to some extent, they did not transform the overall drift towards a shrinking of participatory possibilities in the state's invited spaces of deliberation. The autonomy of the village panchayats was already subjected to a great deal of constraints imposed from above;[70]

[69] See for example, the government's approach to protests by coastal people against displacement and the loss of livelihoods because of the Adani Ports in the coastal village of Vizhinjam. One of the earliest moves to disempower the community there was the absorption of Vizhinjam into the Thiruvananthapuram City Corporation in 2010. Though the village bodies that were thus absorbed into the urban body approached the High Court complaining that the village bodies were not consulted before the merger as was mandatory, the Court dismissed their appeal. See https://www.newindianexpress.com/states/kerala/2010/Jul/23/hc-dismisses-petitions-against-merging-panchayat-172251.html, accessed 9 September 2025. The Kerala government has been trying to off welfare – especially housing – and other resources to ameliorate the loss of livelihood, sizeable sections of the coastal communities have continued to protest against significant loss of livelihoods and increased risks in marine fishing because of the port development. The Kerala government's stance has been openly pro-capital, and pro-Adani. See https://www.business-humanrights.org/en/latest-news/india-vizhinjam-fishermens-protest-against-port-construction-highlights-allegations-of-state-repression-environmental-damage-and-corporate-government-collusion/, accessed 9 September 2025.

[70] B. Jacob, S. Jacob, *Governing Locally: Institutions, Policies and Implementation in Indian Cities*, New Delhi, 2021.

the PPC was progressively bureaucratized;[71] and it is also true that the institutional framework of participatory development here has been considerably modified by the State government in the interests of capital.

However, it seems that the shifts in the framework matter less than the entry of crony capital when we consider the reasons for the shrinkage of meaningful and effective citizen participation within or outside the formal institutions of local governance. In the Pallichal panchayat by crony capture of the Panchayat Committee and the institutions of participatory democracy there, loopholes in the framework have been exploited to facilitate hyper-exploitation of natural resources; at Eloor, the local body is powerless to tackle the menace of chemical pollution of the river Periyar by large factories because of similar 'Deemed Provision' in the Water Act.[72] In both places, the Village Assembly is rendered useless as it is overrun by interest groups seeking to capture majorities. Given its inability to make a diverse range of voices and opinions audible in a deliberative process, it can no longer be treated as an institution enabling participatory development and deliberative democracy.

Why is the erosion of the participation-potential of local self-governments worrying? It may be true that the numbers of people who move in the non-elected governmental spaces of self-help and governmental care continues to be substantial. Especial-

[71] K.N. Harilal, *Confronting Bureaucratic Capture: Rethinking Participatory Planning Methodology in Kerala*, in 48 *Economic and Political Weekly* 36 (2013), 52-60.

[72] The Pollution Control Board is given four months to respond to give industrial clearance to applicants. If it does not respond by this period, however, permission is deemed to have been given unconditionally. See C. Vijayakumar, J. Devika, N.C, Narayanan, *Why Do People Deny Environmental Destruction?*, cit., 18. In the case of the granting of quarry licences by the village panchayat too similar loopholes have existed since the Kerala Panchayat Act, 1994 (KPR). The licenses must be granted after the Secretary prepares a report whether the proposed industry is objectionable because of the density of local population or the possibility of it causing pollution to any section of the people, within sixty days (Article 233, KPR). If the applicant does not receive the village panchayat's decision in thirty days, the licence is deemed to have been granted. See S. Mohanakumar, *Cronyism in Local Governments*, cit., 38.

ly, Malayali lower-middle women's participation in the state-centred development civil society, Kudumbashree, as providers of governmental labour and care has been growing; there is little doubt that this has bestowed much visibility to them in both the individual and collective senses. Nevertheless, this cannot compensate for the loss of participatory potential in the village panchayat. It must not be forgotten that the non-elected state-centred civil society may indeed breed subservience and a 'culture of gratitude' instead of citizenship[73] and provide merely absorptive resilience to the system.[74] In contrast, the local self-government is subject to periodic elections and this renders it more accountable to the locals; crony-capture of these institutions therefore is a serious loss to local democracy. This is why we must not be misled by the celebration of local democracy in Kerala that is based on the nearly-touristic admiration of the achievements of its non-elected parts. If local governments are no longer able to function as sites of active, politicised, civil social mobilisation and the kind of engaged participation that it offers to individuals and groups, their relevance to participatory democracy may indeed be quite limited.

[73] J. Devika, A. Ajay, *'Keep Calm and Carry On'? The Gendered Implications of 'Resilience' in Kerala's Development*, in J. Devika, V.J. Varghese (Eds), *Keep Calm and Carry On?*, cit.

[74] The amendments to the Kudumbashree (KS) by-laws in 2008 brought in internal elections for the leadership posts in its three-tier structure, and the chairperson of the panchayat-level Community Development Society (CDS) became a powerful figure, influential in mobilising women. This seems to be mitigated somewhat the subservience of the KS to the elected panchayat committee in at least areas with favourable initial conditions. For a broader discussion of the shift, see j. Devika, *The 'Kudumbashree Woman' and the Kerala Model Woman: Women and Politics in Contemporary Kerala*', in 23 *Indian Journal of Gender Studies* 3 (2016), 393-414. However, in the 2010s, the state government began to introduce changes into the election rules that made the KS leadership vulnerable to capture by political parties – for example, the change from electing the CDS Chairperson through consensus to secret ballot-election. This tendency only accelerated during the two subsequent terms of the LDF rule. The KS elections are now utterly vulnerable to capture and even eruptions of violence – worse, they do not receive enough coverage from the media. See K.G. Balu, *Kudumbasree Therenjheduppil Sangharsham; Oraalkku Parikku*, https://www.asianetnews.com/news/conflict-in-kudumbashree-elections-one-is-injured, 26 January 2018, accessed 9 September 2025.

A CASE OF PARTICIPATORY ENVIRONMENTAL DEMOCRACY: THE INDIAN MODEL OF PANCHAYAT RAJ

Luca Mazza

Abstract: *This paper aims to analyse the role of the Panchayati Raj, a political-organizational system of local self-government spread among villages in rural areas of India, in the field of environmental policy management, as a possible political model capable of involving, according to a multi-level approach, individual communities in environmental governance, this in order to develop environmental awareness in the local realities through effective participation in decision-making processes. In addition, the possible extensibility of such a system will be explored with reference to participatory democracy tools already present in other Western contexts.*

Keywords: Participative Democracy, Local Communities, Environmental Governance, Panchayati Raj, Sustainability.

1. *Environmental Protection in India: a Necessary Constitutional and Jurisprudential Premise*

Over the last fifty years, the phenomenon of environmental constitutionalism has taken on numerous forms of great interest in Asia, particularly in the southern part of the continent, despite the prevalence of traditional models of environmental protection. The flexible Indian Constitution of 1950 can be ideally placed, through the use of the synchronic approach in the study of environmental constitutionalism, in the category of so-called 'Revised Environmental Constitutions', i.e. constitutional texts that were initially characterised by the absence of provisions dedicated to environmental protection, but which have undergone at least one constitutional revision process through which one or more Articles of an environmental nature have been inserted, which, however, must be harmonised within an already established constitutional structure and context.[1]

[1] D. Amirante, *Costituzionalismo ambientale. Atlante giuridico per l'Antropocene*, Bologna, 2022, 90.

In fact, it was only with the 1976 reform, implemented with the Forty-second Amendment to the Constitution, approved with the Constitution Act, did environmental protection become part of the Indian Constitution in the section on the guiding principles of state policy, in Part IV, Article 48-A – also from a social commitment perspective, given that both Indian doctrine and jurisprudence consider these principles to be rules capable of establishing genuine social rights – providing that 'the State undertakes to protect and improve the environment and to safeguard the country's forests and nature'.

Furthermore, as part of the same constitutional revision, Section IV-A was introduced, dedicated to the fundamental duties of Indian citizens, which currently includes, in Article 51-A, letter *g)*, the duty of all citizens to 'protect and improve the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living creatures', as an explicit representation of the influence of religion in the context of eastern environmental culture.[2]

It is essential to note that Article 51-A must be read within the context of the Indian institution of Public Interest Litigation (P.I.L.),[3] namely, 'legal action that can be classified as judicial activism, a term that refers to any initiative aimed at remedying the inefficiencies of the executive and legislative powers, with a view to ensuring the conditions of the rule of law, including through judicial control over the correct interpretation of the rules'.[4] In summary, a procedure for widespread access to constitutional justice for disadvantaged groups, based legally on Arti-

[2] For further information, please refer to L. Mazza, *La tutela degli animali nella Costituzione indiana: la sacralità della vita animale e il riconoscimento della personalità giuridica a 'persone non umane'*, in V. Pepe, C. Petteruti (Eds), *Percorsi di diritto pubblico comparato. Casi di studio*, Vatolla, 2024, 89-100, 89-91.

[3] For further information, see M.S. Bussi, *Courting the Environment: Public Interest Actions in the Global South*, in D. Amirante, S. Bagni (Eds), *Environmental Constitutionalism in the Anthropocene. Values, Principles and Actions,* London-New York, 2022, 201-220.

[4] C. Petteruti, *Il sistema giudiziario indiano ed il controllo dei conti pubblici*, in D. Amirante, C. Decaro, E. Pföstl (Eds), *La Costituzione dell'Unione Indiana. Profili introduttivi*, Torino, 2013, 150-166, 160.

cle 32 of the Indian Constitution, by virtue of the interest in taking action, 'which has assumed such importance in the overall dynamics of the protection of fundamental rights that it can be considered one of the main avenues of innovation in the Indian legal system'.[5]

The spread of this judicial instrument – which, at first glance, might appear to be a 'blank cheque' remedy for appealing to the Supreme Court[6] – stems precisely from the latter's constant activism, which, on several occasions, has expressed itself positively and extensively on the issue of standing to sue, making possible the so-called 'representative standing',[7] namely, the right to take legal action on behalf of both private individuals and NGOs as representatives of collective and widespread interests, regardless of who claims the violation of the right in question.

This possibility has often been exploited by environmental associations in disputes concerning environmental protection. Indeed, the current ecological and climate crisis has led to a rethinking of traditional categories of environmental law in the legal sphere, multiplying initiatives to defend natural elements,[8] especially through incessant recourse to the courts, which has led to the emergence of a true environmental justice, defined – at least in its original form – as those 'popular movements engaged in the demand for 'social justice' in relation to the enjoyment of the environment and related discrimination, especially against disadvantaged social groups',[9] of which climate justice represents its highest evolution.[10] In this context, judicial protection of the

[5] D. Francavilla, *Il diritto nell'India contemporanea. Sistemi tradizionali, modelli occidentali e globalizzazione*, Torino, 2010, 87.

[6] P. Viola, *'Giustizia sociale' e Public Interest Litigation nell'evoluzione costituzionale di alcuni ordinamenti asiatici*, in 37 *DPCEonline* 4 (2018), 977-988, 982.

[7] M. Seghesio, *La tutela degli animali: confronto fra Occidente ed Oriente*, in *IANUS* 14 (2016), 97-119, 117.

[8] S. Bagni, *Le voci (non del tutto inascoltate) della Natura nella recente giurisprudenza colombiana e indiana*, in 37 *DPCEonline* 4 (2018), 989-1003, 989.

[9] D. Amirante, *Giustizia ambientale e green judges nel diritto comparato: il caso del National Green Tribunal of India*, in 37 *DPCEonline* 4 (2018), 955-976, 955.

[10] For further information about climate change litigation and climate con-

environment has taken on (or is taking on) a central role in establishing environmental law principles and institutions, including in South Asia and, in particular, in India.

In India, in fact, the judiciary[11] has historically played a crucial role in the daily application of environmental protection in order to implement a concrete consolidation of environmental law, especially following the constitutional reform of 1976. In this regard, it is worth noting that the aforementioned revision was still anthropocentric in nature, constitutionalising the right of Indian citizens to live in a healthy environment and thus revealing the absence of explicit provisions in the Constitution that openly embraced an eco-centric perspective. This absence, together with the Indian legal system's membership of the common law family with strong Anglo-Saxon and north American influences, led to the emergence of a genuine body of case law, shared between the various High Courts of the member States and the Supreme Court, on the recognition and extension of rights and legal subjectivity, especially with regard to environmental and animal protection.

Primarily, as a pioneering ruling, suffice it to recall that the Supreme Court, in the case of *Samatha v. State of Andhra Pradesh* in 1977, established that the right to life – provided for in Article 21 of the Indian Constitution – also involving philosophical and

stitutionalism, please see F. Gallarati, *Il contenzioso climatico di tono costituzionale: studio comparato sull'invocazione delle costituzioni nazionali nei contenziosi climatici*, in *Rivista di BioDiritto* 2 (2022), 157-181; S. Baldin, P. Viola, *L'obbligazione climatica nelle aule giudiziarie. Teorie ed elementi determinanti di giustizia climatica*, in *DPCE* 3 (2021), 597-630; E. Buono, C. Pizi, *La democrazia climatica tra climate change mitigation e climate change litigation. Spunti comparati per l'elaborazione di strumenti partecipativi*, in 59 *DPCEonline* 2 (2023), 1943-1956; M. Carducci, *La ricerca dei caratteri differenziali della 'giustizia climatica'*, in 43 *DPCEonline* 2 (2020), 1345-1369.

[11] Suffice it to recall the establishment by the Indian Parliament in 2010 of a special jurisdiction for the environment, namely the National Green Tribunal of India (NGT), whose main objective is to ensure the rapid and effective resolution of legal disputes concerning both environmental protection and the conservation of forests and any other natural resources. D. Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, in 29 *Pace Environmental Law Review* 2 (2012), 441-469.

religious issues, cannot be translated into a mere existence on the part of human beings, but must be identified with 'the right to live with human dignity and all that this entails, in particular, the basic necessities of life such as adequate food, clothing and shelter, and the means to read, write and express oneself in various forms, to move freely throughout the territory, mixing and mingling with other human beings',[12] as well as the right to live in a healthy environment. According to authoritative doctrine,[13] Article 21 – given that environmental regulations, due to their highly technical nature and the associated difficulty in disseminating them throughout the socio-cultural fabric, nevertheless require political and social acceptance – represents a clear example of horizontal regulatory circulation, whereby the right to development and the right to a clean and healthy environment are both considered necessary and complementary parts of the right to life.

More than forty years later, in the case of *Salim v. State of Uttarakhand, Writ Petition (PIL) No. 126 of 2014*, based on an appeal filed by an Indian citizen to denounce excavation and construction activities along the Ganges river, the High Court of Uttarakhand, accepting the petitioner's arguments, recognised the legal personality of the Ganges and Yamuna rivers by virtue of the change that the concept of 'person' has undergone over time, given that rivers are considered sacred by the Hindu population and provide physical and spiritual sustenance to half of the

[12] On this basis, therefore, the Indian Supreme Court has, over time, significantly extended the scope of Article 21 in the area of personal freedom, considered in its entirety, thanks to the conceptual connection it establishes between the right to life and the right to personal freedom, protecting its absolute nature from any type of restriction other than that of public order and peace. G. Poggeschi, *I diritti fondamentali in India fra Costituzione, Corte Suprema e diritto tradizionale*, in D. Amirante, C. Decaro, E. Pföstl (Eds), *La Costituzione dell'Unione Indiana*, cit., 169-194, 182-184.

[13] I. Alogna, *La circolazione del modello di sviluppo sostenibile. Prospettive di diritto comparato per un percorso multidirezionale,* in G.C. Ferroni, T.E. Frosini, L. Mezzetti, P.L. Petrillo (Eds), *Ambiente, energia, alimentazione. Modelli giuridici comparati per lo sviluppo sostenibile*, vol. 1, Firenze, 2016, 145-156, 152.

Indian population.[14] Subsequently, in the case of *Lalit Miglani v. State of Uttarakhand and Others, Writ Petition (PIL) No. 140 of 2015*, in relation to the aforementioned case law, the same High Court – reaffirming the intrinsic right of rivers and lakes not to be polluted in any way and equating damage to persons with damage to natural entities – also recognised legal personality for the glaciers from which the Ganges and Yamuna rivers originated.

In line with continuity, albeit in the context of intergenerational justice in climate change litigation, is the 2017 case of *Ridhima Pandey v. Union of India*. In this case, India being one of the largest emitters of CO2, the applicant – a nine-year-old girl acting on behalf of future generations – filed a petition against the Indian government for failing to implement an effective climate policy to combat climate change, invoking, in addition to the constitutional right to life (art. 21) and the constitutional obligation of the State to protect the environment (art. 48-A), the application of the principle of sustainable development and the precautionary principle reinforced by the principle of intergenerational justice and the Public Trust Doctrine (P.T.D.).[15]

Finally, still in the context of climate justice, it should be noted that on 6 April, the Supreme Court,[16] has once again broad-

[14] S. Bagni, *Le voci (non del tutto inascoltate) della Natura nella recente giurisprudenza colombiana e indiana*, cit., 997.

[15] For further information, see L. Colella, *La Public Trust Doctrine e la tutela costituzionale dell'ambiente nell'attivismo giudiziario delle Corti Supreme nel sub-continente indiano. Profili comparativi,* in 66 *DPCEonline* SP. 1 (2025), 659-693.

[16] L. Colella, *'L'uccello e il clima': considerazioni a partire dalla sentenza MK Ranjitsinh & Ors. v. Union of India & Ors*, in *DPCEonline-OCA*, 6 November 2024. That judgment was handed down just three days after the historic ruling by the European Court of Human Rights in the case *Verein KlimaSeniorinnen and others v. Switzerland.* For further information about it, see F. Gallarati, *L'obbligazione climatica davanti alla Corte europea dei diritti dell'uomo: la sentenza KlimaSeniorinnen e le sue ricadute comparate*, in 64 *DPCEonline* 2 (2024), 1457-1478; A. Osti, *A qualcuno (non) piace caldo. Il caso KlimaSeniorinnen c. Svizzera avanti alla Corte europea dei diritti dell'uomo (per non tacer degli altri),* in *Rivista di BioDiritto* 2 (2023), 237-251. On the other two '*twin*' rulings of 9 April 2024 – namely those of inadmissibility issued in the cases of *Duarte Agostinho and others v. Portugal and 32 other States* and *Carême v.*

ened the legal horizons of Article 21 of the Indian Constitution, including the right to defend oneself against the negative impacts of climate change.[17] According to the Indian judges, although it has not yet been established that citizens have the right not to suffer the negative effects of global warming, there is no doubt that this right and the right to live in an unpolluted environment are two sides of the same coin, noting the continuing high frequency of extreme heat waves, heavy rainfall, floods and droughts, which also cause serious difficulties in the supply of food, as well as record peaks in air pollution.[18]

2. *The Local Self-Government Structure of Panchayati Raj: Structural Profiles of a Political Management Model*

Before analysing the degree of development of environmental issues within Indian local authorities, it is necessary to consider, in general terms, the historical and current role of the latter. To this end, it is worth noting that the Indian federal system, which has been highly centralised since its inception due to the system of government adopted by British colonisation,[19] only in the 1970s ensured the gradual and practical emergence of local authorities as real centres of local government, with the aim of fully ensuring coexistence between different ethnic groups, different religions and different social realities that have historically characterised Indian multiculturalism, ensuring the enhancement of

France – and their importance for the study of case law related to anthropogenic climate change, see E. Buono, P. Viola, *Climate Litigation Strategy, alcuni apparenti insuccessi e il talento della Corte EDU: quando una dichiarazione di inammissibilità vale una pronuncia di accoglimento*, in 64 *DPCEonline* 2 (2024), 1397-1414.

[17] L. Colella, *Tutela dell'ambiente e giustizia climatica in India: verso un diritto (costituzionale) al clima?*, in XXV *AmbienteDiritto.it* 1 (2025), 1-26.

[18] On this point, see https://www.ilpost.it/2023/11/03/nuova-delhi-inquinamento/, accessed 10 September 2025.

[19] V. Vijayakumar, *Il governo locale nell'esperienza indiana*, in H. Kudo, G. Ladu, L. Pegoraro (Eds), *Municipi d'Oriente. Il governo locale in Europa orientale, Asia e Australia*, Roma, 2008, 263-283.

local government as an essential element of the world's largest democracy.[20]

Previously, Article 40 of the Constitution stipulated that the central government and member States must take all necessary measures to ensure the organisation and functioning of the so-called *Village Panchayats*,[21] granting them the authority and powers necessary to carry out their functions as self-governing units,[22] had not been properly implemented, although the issue has its roots in Indian historical tradition.[23]

Just think that Mahatma Gandhi advocated a romantic vision of villages as autonomous and complete republics, independent and self-sufficient with respect to the central government for their vital needs, to which only minimal functions are delegated, pillars of Indian political independence and economic development, within the framework of a village democracy.[24] However, with regard to Gandhi's idea of decentralisation, some scholars have critically argued that such a system would have greatly limited state power and, therefore, merely institutionalised the local government structures of antiquity, which, however, appeared to be wholly insufficient.[25]

However, over time, this political model of self-government by local authorities has proven difficult to implement, mainly due to both the low level of participation by the population in local government bodies and a tendency towards opposition from central government, as they are identified as antagonists of the state power system,[26] as well as the problems arising from the

[20] L. Colella, *Il Parlamento indiano: lo 'specchio' della democrazia più grande del mondo*, in D. Amirante, C. Decaro, E. Pföstl (Eds), *La Costituzione dell'Unione Indiana*, cit., 95-115.

[21] D.D. Basu, *Shorter Constitution of India*, Nagpur, 2010, 1615.

[22] K. Mathur, *Panchayati Raj,* New Delhi, 2013, 40-41.

[23] S.R. Maheshwari, *Local Government in India*, Agra, 1984, 11.

[24] For further information on Gandhi's thinking on 'bottom-up democracy', see R.K. Prabhu, U.R. Rao, *The Mind of Mahatma Gandhi. Encyclopaedia of Gandhi's thoughts*, Ahmedabad, 1960.

[25] S. Malik, *Democratic Decentralization and the Panchayati Raj in India: the Gandhian Paradigm*, in S. Singh (Ed.), *Decentralized Governance in India: Myth and Reality*, New Delhi, 2004, 19.

[26] C. Petteruti, *Il sistema di governo locale in India*, in V. Pepe, C. Petteruti (Eds), *Percorsi di diritto pubblico comparato*, cit., 23-30, 24.

overlapping of powers and functions assigned equally to member States and individual Panchayats.[27]

For these reasons, following a setback after the initial momentum that had animated the birth of the Panchayats, this system returned to prominence, as mentioned above, towards the end of the 1970s through a marked propensity for delegation on the part of the political powers. In fact, new legal provisions allowed political parties to participate in elections, and the powers of the Panchayati Raj institutions were extended to include control of land reform initiatives, infrastructure development, the implementation of projects in the fields of education and health, and the distribution of public funds as part of programmes to combat poverty and unemployment.[28]

In the early 1990s, a new attempt was made to strengthen the institutions of Panchayati Raj with the aim of transforming them into fully-fledged, constitutionally recognised elected governing bodies with legislative, executive and financial powers delegated by their respective States. This organisational system – aimed at creating a third institutional level within the Indian federal State – ensured the participation of local authorities in decisions on economic growth, social justice, implementation of central and state government programmes, as well as the possibility of legislating and implementing specific programmes in relation to a list of twenty-nine subjects provided for in Annex XI of the Indian Constitution, including agriculture, livestock, rural planning and conservation of the environment and natural resources, electricity connection in rural areas and the development of renewable energy.

The Panchayat political system is therefore the result of a long process of administrative decentralisation, necessary to curb poverty in rural areas of the Indian Union, which was recognised

[27] D. Amirante, *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*, Napoli, 2019, 127.

[28] A. Mozoomdar, *Pluralismo centrale e istituzioni politiche. Lo stato federale indiano e il suo futuro*, in A. Nandy, J. Singh, V.A. Pai Panandike (Eds), *L'India contemporanea. Dinamiche culturali e politiche, trasformazioni economiche e mutamento sociale*, Torino, 1998, 137-170, 160-161.

as constitutionally legitimate when it was implemented with the 73rd and 74th amendments to the Indian Constitution in 1993,[29] which have designated local authorities as the institutional and natural place in which to pursue the organic development of urban and rural areas, leading, according to authoritative doctrine, not only to a transformation of the role of the state itself, 'from government to governance',[30] but also to a shift from a system of division of powers between the federal state and state government to a model of power distribution across three different levels of government: the Union, member States and local authorities.[31]

Therefore, these local realities fully represent the phenomenon of *glocalisation*, a neologism coined precisely to emphasise how globalisation is pushing towards a strengthening of local powers.[32]

This decentralised organisation of administrative and governmental power has, in some cases, allowed for the immediate and direct participation of citizens in government activities, especially in states with a particularly large territorial area.

As a management model, the Panchayat political system, present in each member State, consists of a three-tier structure devised in the 1950s, which has remained unchanged to this day: the Village Panchayat which, together with the municipalities, represents the basic level of rural and urban autonomy, and is flanked by the Gram Sabha, or village assembly, which has poli-

[29] In fact, in order to put an end to the discretion of states in implementing local self-government provisions and to emphasise the democratic nature of democratic decentralisation, the Constitution (Seventy-Third Amendment) Act was enacted, which provided for the insertion of a new Part IX into the Constitution, and the Constitution (Seventy-Fourth Amendment) Act for the insertion of Part IX-A. Part IX regulated the establishment of multi-level Panchayats 'for the rural areas'. C. Correndo, *Razionalizzazione del pluralismo giuridico e Panchayati Raj in India*, Napoli, 2020, 106.

[30] K. Mathur, *Panchayati Raj,* cit., XII.

[31] C. Petteruti, *Il governo locale nell'ordinamento costituzionale indiano*, in D. Amirante, C. Decaro, E. Pföstl (Eds), *La Costituzione dell'Unione Indiana*, cit., 84-92, 86.

[32] D. Amirante, *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*, cit., 120.

cy-making and supervisory functions and in which all village inhabitants who are eligible to vote can participate;[33] the Mandal Panchayat (intermediate Panchayat), which is only mandatory for states with high population densities; and, finally, the Zila Parishad (district Panchayat).[34]

Elections for individual Panchayats – under the autonomous control of the State Election Commissions throughout the entire electoral process – are held every five years, starting from the date of the first meeting. However, in the event of early dissolution, the legislation of each member state requires that new elections be held within six months of dissolution. The participation of Scheduled Tribes and Scheduled Castes must be guaranteed in the elections, with a quota of seats reserved for them in proportion to their population. An additional quota of seats is reserved for women, whose participation in Panchayat decision-making processes has often been opposed: in some states, such as Kerala, it was legally impossible for women to respond to what men said in local councils.[35]

This also applies to the election of chairpersons, i.e. the presidents of local institutions, as the legislation of each state may stipulate a different quota reserved for these individuals. Such elections, as regards the Samiti Panchayat – the executive body at the intermediate local level – and the Zila Parishad, take place indirectly, through the vote of the members of the respective Panchayat. In relation to the Village Panchayat, on the other hand, state legislation may opt either for direct election by citizens or for individual election by members elected to the Gram Panchayat, i.e. the village executive body.

In such an organisational structure, a fundamental role – recognised constitutionally, albeit its functions being subject to state legislative discretion – is played, as mentioned above, by the

[33] Ibid., 125.

[34] P. Viola, *Stato, sistema di governo, diritti e doveri nello sviluppo costituzionale indiano*, in D. Amirante (Ed.), *Sistemi costituzionali dell'Asia meridionale,* Milano-Padova, 2019, 69-101, 79-82.

[35] B.K. Sharma, *Introduction to the Constitution of India*, New Delhi, 2005, 262.

Gram Sabha,[36] or village Assembly, which oversees the work of the Gram Panchayat. Through regular meetings, the Gram Sabha involves villagers in the governance of the community, giving them the opportunity to actively and directly participate in decision-making processes concerning village life. However, as noted by authoritative doctrine, 'representation and participation are two different dimensions of democracy. It is relatively easy to legislate representation, but a far more complex and challenging task to create the conditions for participation. Proper representation does not automatically lead to proper participation'.[37]

This autonomous model of local government, therefore, although inspired by democratic and participatory principles, as already highlighted, has faced numerous difficulties in its practical implementation caused, firstly, by the control that the rural oligarchy has managed to maintain by invoking the institutional role of the Gram Sabha; secondly, however, due to the historical economic reasons that currently characterise most rural areas in India.[38]

3. *A System that Starts from the Bottom up: the Origins of a Form of Participatory Environmental Democracy?*

With the aforementioned reform of 1993, aimed, as noted, at making the administrative and governmental decentralisation project mandatory, it was constitutionalised through the introduction of Article 243-ZD into the Indian Constitution, which

[36] It has been observed that the central role of the Gram Sabha – as a community organisation responsible for resolving disputes, together with the Paishad, a sort of council of philosophers, and the Samiti, a collegial executive body that deliberates on political issues and aspects of intermediate legislation – derives directly from the tradition of the Veda, the sacred text of the Hindu tradition, which constitutes revealed law. For further information, see C. Petteruti, *Formanti giuridici e pluralismo delle fonti nell'Asia meridionale*, in 50 *DPCEonline* SP. (2021), 543-581, 573.

[37] K. Mathur, *Panchayati Raj,* cit., 86.

[38] P.R. Desouza, *The Struggle for Local Government: Indian Democracy's New Phase*, in 33 *Publius the Journal of Federalism* 4 (2003), 99-118, 115.

also provided for the creation of District Planning Committees (DPCs) to consolidate the plans prepared by the Panchayats with the aim of approving a common development plan for the entire district – the procedure for sharing decisions on land use between municipalities and Panchayats, even when these fall within the scope of environmental matters, emphasising the link between environmental protection and the role of traditional communities in the Indian context,[39] as well as the relationship with widespread economic inequality, noting that the average income and main source of livelihood for families living in rural areas is still, today, agricultural activity, especially following the Green Revolution of the 1970s.

In this regard, it is necessary to focus on analysing a possible form of participatory environmental democracy in India, with particular attention to the role played by the aforementioned Panchayat Raj Institutions (PRIs) in the development of rural areas.[40] Their political and organisational model of local self-government, widespread in villages in rural India, currently plays a fundamental role in promoting, among other things, the management and sustainable development of natural resources and environmental protection. The Indian Union, in fact, as an example of multicultural democracy,[41] provides an interesting example for examining the ways in which local communities participate (and exert influence) in the management of environmental policies, as well as their concrete contribution to progressive sustainable development.[42]

[39] D. Amirante, *Costituzionalismo ambientale. Atlante giuridico per l'Antropocene*, cit., 218.

[40] T. Ramya, *Role of Panchayati Raj Institutions in Rural Development: The Study of a Tribal Village in Arunachal Pradesh*, in 1 *Modern Research Studies* 3 (2014), 503-521, 505.

[41] For further information on multiculturalism in India, also in light of the results of the elections held in June 2024, see L. Colella, *Il Parlamento dell'Unione Indiana. Il 'Tempio del Multiculturalismo' alla prova del nazionalismo Indù*, in V. Pepe, C. Petteruti (Eds), *Percorsi di Diritto Pubblico Comparato*, cit., 42-61.

[42] The Indian Parliament's focus, although sometimes only programmatic in nature, is not uncommon. In fact, in 2006, in order to give concrete expression to sustainable development, India issued the National Environmental

It is sufficient to note that, in relation to the protection of protected areas on Indian territory, an experiment in co-management of parks was implemented in the 1970s.[43] In fact, according to the law on protected areas, parks were established by member States, with the consent of the Federation – which exercised con-

Policy (NEP), a guide for regulatory review of environmental conservation programmes and projects. The NEP advocates the enactment of regulations at the central, state and local government levels, whose objectives correspond to the fundamental elements of sustainable development: conservation of environmental resources and efficient management of their use, intra and intergenerational equity, and integration of environmental awareness with economic and social development I. Alogna, *La circolazione del modello di sviluppo sostenibile. Prospettive di diritto comparato per un percorso multidirezionale*, cit., 152-153.

For further information on the principle of sustainability, particularly on the relationship between sustainable development and contemporary constitutionalism, see D. Porena, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale*, Torino, 2017; T. Groppi, *Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro,* in *DPCE* 1 (2016), 43-78.

[43] In 1972, the Wildlife Protection Act (WPA) was enacted. Despite its conservative approach, which failed to promote 'comprehensive', integrated and participatory management of protected areas, it aimed to protect wild animals, birds and plants by, for example, establishing a list of protected plants and prohibiting the hunting of particular animal species. The Act aimed, in particular, to strengthen wildlife conservation, which was subsequently amplified through the provisions of the 1973 Convention on International Trade in Endangered Species (CITES) and the extension of protection within a comprehensive management framework, seeking to align Indian wildlife laws with international standards, addressing the issue of invasive alien species and improving species protection. Nevertheless, Chapter IV of the legislation is devoted exclusively to the creation, management and administration of protected areas and, in particular, Sanctuaries, National Parks and, with the amendment of 2006, Tiger Reserves. For a historical and legal reconstruction of Indian protected areas, see D. Amirante, *Le aree protette nell'Unione indiana: profili giuridici*, in XV *Rivista Giuridica dell'Ambiente* 1 (2000), 177-191.

This is not the first and last amendment of the Wildlife Protection Act. The first took place in 1991 and increased penalties and fines for wildlife offences. Then, in 2002, another reform introduced the concept of community reserves and conservation reserves as protected areas. In 2006, as is well known, a National Tiger Conservation Authority (NTCA) was established to manage and protect Tiger Reserves. For further information on the amendments, see https://www.drishtiias.com/daily-updates/daily-news-analysis/wildlife-protection-act-1972, accessed 30 October 2025.

siderable economic influence by financing most of their expenses – and were managed by each member State. This centralised administration of parks, concentrated in the ministries responsible for the environment and forests, laid the foundations for a necessary alternative of cooperative management of protected areas, through experiences of direct management of forest resources by local communities,[44] inspired by the model of social forestry, i.e. social deforestation inspired by the model of social forestry.[45] In fact, the Wildlife Protection Act itself, approved in 1972, in its Chapter IV dedicated to the various types of protected areas present on Indian territory, provided, in section 36B, in the part relating to the establishment, by the State Government, of National Parks, the establishment of a nature reserve management committee responsible for advising the wildlife protection officer on the conservation, management and maintenance of nature reserves, whose members shall include a representative of each Village Panchayat in whose jurisdiction the reserve is located. Similarly, section 36D of the WPA also provides for the state government to establish a community reserve management committee, which will be the authority responsible for the conservation, maintenance and management of community reserves, whose members will also include a representative of each Village Panchayat in whose jurisdiction the reserve is located.

Three different models of shared management were proposed for the application of this approach to protected areas: the first involved the establishment of specific committees to represent the interests of tribal and local communities, working alongside the park authorities; the second, on the other hand, envisaged the almost total replacement of the parks' administrative management bodies with local communities; finally, the third and last model promoted the establishment of tribal and village commu-

[44] D. Amirante, *Diritto ambientale italiano e comparato. Principi,* Napoli, 2003, 95.

[45] A striking example was the reforestation of west Bengal in the 1970s and 1980s. By entrusting uncultivated or degraded land to local communities, based on a multi-year site remediation programme, it was possible to revitalise forest resources within a decade.

nities as actual companies, which could be entrusted with the management of park-related services.

Even before the 1993 reform, therefore, with a view to a multi-level approach, through the application of the first of the above cooperative management models with the creation of new Joint Forest Management Committees (JFMCs), local communities were involved in the planning and implementation of environmental projects at the local level, with the aim of ensuring both the sustainable management of forest resources and promoting conservation awareness through environmental education,[46] which also had positive effects from the point of view of local economic development.[47]

Specifically, with regard to the management of natural resources, this issue falls squarely within the scope of what are commonly referred to as 'Common Property Rights' (hereinafter CPR),[48] i.e. new forms of ownership of natural assets,[49] widely present on the Asian continent and, notably, in India, defined as 'resources accessible to the entire community of a country and over which no individual can claim exclusive ownership rights',[50] which include – at least in India – grazing areas, forests, uncultivated land, rivers and, according to some legal scholars, a wide range of basic necessities used by rural families in village communities located in forest areas, both for personal use and for sale.[51]

[46] For further information on forest conservation governance in the Indian federal system, see S. Khanna, *Forest Rights and the Forest Rights Act*, in P. Cullet, L. Bullar, S. Koonan (Eds), *The Oxford Handbook of Environmental and Natural Resources Law in India*, Oxford, 2024, 487-506.

[47] U. Narain, S. Gupta, K. Van't Veld, *Poverty and Resource Dependence in Rural India*, in 66 *Ecological Economics* 1 (2008), 161-176, 174.

[48] M.S. Vani, *Individual and Community Property Rights and Duties in Land and the Environment*, in P. Cullet, L. Bullar, S. Koonan (Eds), *The Oxford Handbook of Environmental and Natural Resources Law in India*, cit., 327-345, 332.

[49] F. Fontanarosa, *Proprietà collettive e risorse naturali: un nuovo modello proprietario per la gestione sostenibile dei commons*, in G.C. Ferroni, T.E. Frosini, L. Mezzetti, P.L Petrillo (Eds), *Ambiente, energia, alimentazione. Modelli giuridici comparati per lo sviluppo sostenibile*, cit., 205-215, 206.

[50] N.S. Jodha, *Common Property Resources and Rural Poor in Dry Regions of India*, in 21 *Economic and Political Weekly* 27 (1986), 1169-1181, 1169.

[51] B. Agarwal, *Gender, Environment and Poverty Interlinks: Regional Va-*

In such contexts, therefore, even from a purely economic point of view, the population's income depends to a large extent on the possibility of using natural resources.

Well, through the use of the JFMC model, the Indian central government, by virtue of initiatives implemented at a global level that involved the participation of local communities in the management of natural resources,[52] with uniform regulations throughout the territory, has adopted a policy that supports the participation of local communities in the forestry sector; this is in order to stem the enormous pressure, in terms of the use and exploitation of natural resources, exerted by the majority of the Indian population who live permanently in forest areas. In fact, under the joint forest management programme, although land ownership rights remain with the state, the Panchayats – whose sources of regulation on natural resource management consist almost exclusively of customary practices[53] – may exercise all the powers necessary to protect and regenerate the forest and, in particular, hold the so-called 'right to fuel and fodder'. The inhabitants of these rural villages, in fact, have access rights only to certain specific categories of land, such as those used for grazing, or the so-called 'village forests'; all other categories of land that are not privately owned, such as 'arid' or uncultivable land, non-agricultural land, forests, etc., belong to the State Department or the Forestry Department.[54] In some states, however, such as Uttarakhand, which are based on an agro-pastoral economy, there are special forms of local control, known as Van Panchayat, which manage village forests through customary rules.

riations and Temporal Shifts in Rural India, 1971-91, in 25 *World Development* 1 (1997), 23-52, 27.

[52] S. Singh, *Diverse Property Rights, Institutions and Decentralisation: Forest Management by Village Forest Councils in Uttarakhand*, in 32 *Policy and Society* 1 (2013), 43-59, 45.

[53] In particular, it should be noted that in some regions of India, such as the state of Uttarakhand, in order to ensure the livelihood of the agro-pastoral economy, villagers have created ad hoc customs to regulate grass harvesting activities.

[54] K. Chopra, P. Dasgupta, *Common Pool Resources in India: Evidence, Significance and New Management Initiatives*, Report from UK Department for International Development (DFID) Project, 2022, 19.

Although the JFMC model represents a virtuous example of natural resource management by local authorities aimed at ensuring productivity and sustainable exploitation of these resources, some scholars have observed that there have been instances of appropriation of common property resources. In fact, the central government's inability to ensure proper local management of these assets has, in some cases, transformed traditional CPRs into freely accessible resources, with the inevitable depletion of the latter.[55]

Furthermore, as noted by authoritative doctrine, the powers reserved for Panchayats under Annex XI of the Indian Constitution, following the constitutional reform of the 1990s, give them a fundamental role in the country's energy development, whose local level ensures awareness of the real importance of the energy issue, especially with regard to renewable energy,[56] considering that the severe shortage of energy and electricity in rural areas of India represents, given the necessary need for energy supply, an opportunity for the prudent management of natural resources as the main source of livelihood.

Despite the recognised competence of each Panchayat to identify the forms of energy investment most in line with their local reality, given the failure of the deeply centralised energy system, villages in rural areas, with rare exceptions,[57] are continually penalised by the scarcity of effective resources.

Finally, moving in the same direction are both the Ecological Development Committee (EDC), which is an additional partici-

[55] F. Fontanarosa, *Proprietà collettive e risorse naturali: un nuovo modello proprietario per la gestione sostenibile dei commons*, cit., 215.

[56] V. Pepe, *Le politiche ambientali ed energetiche in India: la disciplina delle rinnovabili*, in V. Pepe, C. Petteruti (Eds), *Percorsi di diritto pubblico comparato*, cit., 8-22, 17.

[57] This is the case of the Panchayat of Odanthurai, in the district of Coimbatore, in the state of Tamil Nadu, which has created a local model of energy sustainability that has been emulated in other local communities. This has been achieved through the installation of a biomass gas plant that provides sufficient energy to pump water, the installation of a new solar-powered street lighting system, and the construction of a windmill and several biogas plants connected to the village's cesspools, in order to produce the gas needed by local families for their household needs.

patory tool aimed at protecting wildlife and other forms of biodiversity, as well as carrying out eco-development activities in villages, and the Village Green Energy Committee (Village Environment Energy Committee), which is responsible for managing the entire solar energy plant already built, including through the necessary maintenance activities, in return for a specific local tax established *ad hoc.*

Furthermore, by way of example, as part of the implementation of Panchayat in the State of Arunachal Pradesh, having understood the seriousness of the problem of natural resource degradation and the urgency of developing a strategy for land management, various programmes have been launched in relation to the river basin.[58] With the implementation of these projects, vast areas of jhum land lying fallow are being reclaimed for reforestation, horticulture, etc., thus providing livelihoods for farmers and also incorporating various soil and moisture conservation measures into the planning process. Such initiatives formed the basis for the creation of the Integrated Waste Land Management Programme (IWMP), funded by the Ministry of Rural Development, Department of Natural Resources.[59]

Conversely, a particular effort was made in the period immediately following the constitutional reform of 1993, in connection with the management of natural resources in rural areas, in the form of the PESA (Panchayat Extension to Scheduled Areas), a special law passed in 1996. In fact, on the basis of a public interest dispute brought before the Supreme Court concerning the exploitation of natural resources in rural areas of certain member States (in particular, Madhya Pradesh and Andhra Pradesh), the Supreme Court ordered the Indian Parliament to adopt specific measures for local governance in the classified areas. The latter, after appointing a committee chaired by a mem-

[58] For further information on marine and coastal environmental protection, particularly in the State of Kerala, see T.G. Puthucherril, *Protecting the Coastal and Marine Environment*, in P. Cullet, L. Bullar, S. Koonan (Eds), *The Oxford Handbook of Environmental and Natural Resources Law in India*, cit., 433-462.

[59] T. Ramya, *Role of Panchayati Raj Institutions in Rural Development: The Study of a Tribal Village in Arunachal Pradesh*, cit., 515.

ber of parliament from the tribal area of the State of Madhya Pradesh to receive a report on this issue, approved the so-called '*PESA Act 1996*', whose regulatory effect extended to rural areas in nine member States, namely Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand,[60] Maharashtra, Madhya Pradesh, Odisha and Rajasthan.

This new legislation granted Gram Sabha's regulatory and executive powers, among other things, in relation to the management of 'Ownership of Minor Forest Produce, Prevention of alienation of land and Control of local plans and resources',[61] recognising a sort of legislative autonomy and local action on the exploitation of natural resources on which their livelihood depends. This allowed, in derogation from the Land Acquisition Act,[62] for the customary law to be taken into account, according to which land and other natural resources are owned by the local community, which independently regulates their use, obliging member States to respect customary law also with regard to the traditional management of natural resources.[63]

However, PESA never led to the type of decentralisation originally planned, both for political reasons, as the issue of tribal autonomy for the control and management of local resources was never addressed within a proper political programme, and for

[60] In particular, this state took action in 2001 with the Jharkhand Panchayat Raj Act (JPRA), which, albeit not entirely effectively, regulated the governance of natural resources, including through the participation of villagers, with the application of the customary *manki-munda* system. Despite this, the deep militarisation of the territory, rather than encouraging the involvement of families in the management of natural resources, has made industrial extraction more possible, preventing the Village Panchayat from playing a leading role in ensuring that inhabitants participate in decision-making processes regarding the control and exploitation of the (few) natural resources present. S. Sareen, *Resource Extraction in Jharkhand's West Singhbhum: the Continuing Marginalisation of Adivasi Livelihoods Despite Decentralisation*, in K.B. Nielsen, P. Oskarsson (Eds), *Industrialising Rural India: Land, Policy and Resistance,* London-New York, 2017, 140-158, 141.

[61] K. Mathur, *Panchayati Raj,* cit., 103-104.

[62] By virtue of which the State may acquire any land for reasons of public necessity.

[63] C. Correndo, *Razionalizzazione del pluralismo giuridico e Panchayati Raj in India*, cit., 227.

regulatory reasons, given the full centralisation of legislation on mining, forest products, water resources and land acquisition, and given the relentless industrial and economic development that required the full exploitation of local resources that consequently relegated the Gram Sabha to merely executing orders from above or administering minor issues within the village, rendering traditional management activities ineffective, which were subsequently discontinued in most villages.[64]

An example of this is what happened in march 2000 following a licence granted by the Gram Panchayat of Perumatty, in the district of Palakkad, in the State of Kerala, to Coca-Cola to install a bottling plant in the village of Plachimada.[65] As a result, within just two years of Coca-Cola beginning to extract thousands of litres of water, some of which was used for beverage production and some for ancillary activities, local communities living near the plant experienced a total shortage of drinking water, so much so that in May 2003, the Panchayat decided to revoke the aforementioned authorisation.[66] However, given Coca-Cola's appeal against this decision, the Indian central government ordered the Panchayat to appoint a committee of experts to examine the impact of the plant on the health of the communities involved.

With regard to water management governance, a relevant piece of legislation is the 2005 Maharashtra Water Resources Regulatory Authority Act (MWRRA), which sought to separate land rights from groundwater rights without redefining property rights. The MWRRA Act stipulates that every landowner has a right to water and, in times of scarcity, every landowner will receive a sufficient share of water to irrigate one acre of land. This legislation was sometimes preceded by experiments in cooperation and water resource sharing, such as that implemented in the

[64] N.S. Jodha, *Common Property Resources and Rural Poor in Dry Regions of India*, cit., 1176-1177.

[65] This case is perhaps one of the most debated, including with regard to the use of the Public Trust Doctrine. R. Madhav, *Public Trust Doctrine*, in P. Cullet, L. Bullar, S. Koonan (Eds), *The Oxford Handbook of Environmental and Natural Resources Law in India*, cit., 235-251, 247.

[66] C. Correndo, *Razionalizzazione del pluralismo giuridico e Panchayati Raj in India*, cit., 107.

1970s by the Pani Panchayat in State of Maharashtra. However, despite the Pani Panchayat's efforts to separate land rights from water rights and ensure equitable distribution (including to the landless), their rather small scale led to 'free riding' by individual users who pumped groundwater, drilled deeper and switched to water-intensive crops, negating the conservation benefits created by the Pani Panchayat.[67]

Subsequently, the High Court of Kerala, to which the Panchayat appealed, ruled that water was a public resource and that its excessive extraction by a private entity could not be permitted in any way by the State, despite its role as the primary administrator of the resource, thereby preventing Coca-Cola from continuing its industrial process of extracting groundwater. Nevertheless, as further evidence of the continuing difficulty for local authorities to play a leading role in the management of their natural resources, following a new appeal by the US company, the same High Court – with a different panel of judges – ordered the Panchayat to renew the licence that had previously been suspended as a precautionary measure,[68] although a few years later the plant was completely dismantled.

4. *Closing Remarks in a Comparative Perspective*

Through the study of Panchayat in the Indian experience of decentralised self-government, implemented following the constitutional reform of 1993, the effects of the practical application of this system were observed, particularly with regard to the management of environmental policies, as a possible unique political model capable of involving, according to a multi-level approach, both urban and rural contexts, with the specific aim of developing environmental awareness within local communities through effective participation in decision-making processes.

[67] H. Kulkarni, K. Satyam, *Groundwater Law. Protection and Use*, in P. Cullet, L. Bullar, S. Koonan (Eds), *The Oxford Handbook of Environmental and Natural Resources Law in India*, cit., 591-610, 601-602.

[68] K. Mathur, *Panchayati Raj,* cit., 108.

As has been noted, concrete implementation is often opposed by the central leadership, generating widespread discontent within local communities, even though it is necessary in light of both the economic inequality and chronic poverty that characterise certain areas and the multi-ethnic nature that makes the Indian Union one of the leading examples of multiculturalism in the world. In fact, although access, control and the degree of participation of tribal families in the exploitation of natural resources continue to be one of the vital issues for rural villages, the process of privatisation of these resources and rapid industrialisation still involve, even today, the exploitation of natural resources, in the absence of a prior and equitable balance between economic development and the livelihoods of tribal populations, skewed in favour of the production of high-market-value goods at the expense of environmental protection and the vulnerability of village inhabitants.[69]

In this regard, it has been observed that decentralisation mechanisms have not been able to mitigate the industrial exploitation of natural resources, effectively increasing the quantitative and qualitative degradation of indigenous populations.[70] This analysis is mostly part of a complex socio-political framework – permeated by tribal organisation and aimed at promoting the values of indigenous populations living in rural areas of India – which, with the introduction of environmental issues related to indigenous matters, has addressed the problem from the point of view of the uncontrolled exploitation of land and forests, traditionally considered tribal, and the impact that development policies outlined at federal and state level have had on these realities and, in particular, on families located in rural areas at risk of environmental deterioration.

In accordance with this, given the intrinsic correlation be-

[69] S. Sareen, *Resource Extraction in Jharkhand's West Singhbhum: the Continuing Marginalisation of Adivasi Livelihoods Despite Decentralisation*, cit., 141.

[70] It should be noted that the deterioration of India's natural resources, with varying territorial incidence, has historically manifested itself through the disappearance of forests, soil degradation and drought, as well as the depletion of water resources. B. Agarwal, *Gender, Environment and Poverty Interlinks: Regional Variations and Temporal Shifts in Rural India*, cit., 24.

tween the management of natural resources and respect for the value system of Indian tribes, the concept of *eco-romanticism* has developed, i.e. a tendency to idealise the innate environmentalist spirit of indigenous communities, which are closely linked to the land and its rhythms and, therefore, more respectful of natural cycles. This ecological romanticism 'has its roots in opposition to the industrial revolution that developed in England, which lamented the loss of nature due to the hyper-modernisation of society and the economy'.[71] Subsequently, this ideological legacy was reshaped according to the reality of tribal India, anchoring it to the defence of customs and traditions as tools for rebuilding an alternative modernity in harmony with nature.

Therefore, both the existence of a cumbersome central administration at federal and state level and the presence of numerous indigenous populations in Indian areas, which characterise the multicultural nature of the Indian Union, constitute a clear and distinct difference between the Panchayat model – understood as a democratic-participatory tool capable of involving local communities in environmental decision-making processes – and western examples, from a comparative perspective, of participatory mechanisms as a new paradigm for environmental protection.[72]

In fact, in light of the continuous expansion of examples of climate constitutionalism and, consequently, climate democracy, the active participation of citizens in climate change issues has become necessary. This evolutionary process has led to the creation of a series of participatory assemblies on climate change, made up of citizens tasked with discussing and formulating recommendations for climate protection, considered new instruments of participatory democracy.[73] From a regulatory point of

[71] C. Correndo, *Razionalizzazione del pluralismo giuridico e Panchayati Raj in India*, cit., 150.

[72] C. Pizi, *Assemblee cittadine e climate change mitigation: spunti dall'esperienza francese e irlandese*, in *Italian Papers on Federalism* 2 (2024), 90-105, 105.

[73] L.A. Nocera, A. Fiorentino, *Declinazioni innovative della democrazia partecipativa e integrazione dei gruppi deboli: riflessioni comparate e conclusive*, in 59 *DPCEonline* 2 (2023), 1957-1974, 1966.

view, this requirement arose, in particular, following the entry into force of Regulation (EU) 1119 of 30 June 2021, the European framework legislation for achieving climate neutrality by 2050, whose Article 9 stipulates that 'the Commission shall involve all social components to offer them the opportunity, and invest them with the responsibility, to commit to a just and socially equitable transition towards a climate-neutral and climate-resilient society'. The regulation, in fact, identifies the possible participants (e.g. social partners, academia, the business community and civil society) to be involved at various levels of governance (national, regional and local) and the objectives, with a view to facilitating inclusive and accessible processes, with the possibility for the Commission to make use of public consultations and multi-level dialogues on climate and energy with the assemblies established by the Member States.

An early model appeared in Ireland, where the Citizens' Climate Assembly was established and ran from 2016 to 2018, thanks to the use, in particular, of the mini-public tool as a support for political decision-making.[74] At the local level, deliberative processes took place in the cities of Leeds and Lancaster, as well as in citizens' assemblies in Camden and Oxford.

A virtuous example of the application of such citizens' assemblies is represented, on the other hand, by the French experience, where a group of citizens was directly involved in the preparation of a climate law, representing, according to recent literature, an unprecedented instrument of deliberative democracy.[75] In fact, the *Convention citoyenne pour le climat*, composed

[74] For a review of the Irish experience, as well as for an examination of the relationship between the mini-public instrument and political power, see D. Courant, *Deliberative Democracy, Legitimacy, and Institutionalisation. The Irish Citizens' Assemblies*, Lausanne, 2018; D. Courant, *Les assemblées citoyennes en Irlande. Tirage au sort, référendum et constitution*, in *La Vie des idées*, 5 March 2019; N. Curato, M. Hammond, J.B. Min, *Power in Deliberative Democracy. Norms, Forums, Systems*, UK, 2019; O. Doyle, R. Walsh, *Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy*, in 20 *International Journal of Constitutional Law* 1 (2022), 398-427.

[75] L. Colella, *La 'transizione ecologica' nella Loi climat et résilience in Francia. Brevi note introduttive*, in *Amministrazione e contabilità dello Stato e degli*

of 150 citizens selected at random and established in 2019, set itself the goal of drafting a legislative text originating at the local level and resulting from the direct demands of citizens.[76]

In the Italian legal system, the amendment of Article 9 and 41 of the Constitution and the fundamental inclusion of environmental protection, from an intergenerational perspective, among the fundamental principles of the Constitution,[77] has encouraged

enti pubblici, 27 September 2021; F. Gougou, S. Persico, *Décider ensemble. La convention citoyenne pour le climat et le défi démocratique* in *La vie des idées*, 29 May 2020. For a review of the French experience, see A. Duffy-Meunier, M.L. Paris, *Quelles règles de fonctionnement pour les Assemblées citoyennes? Regards croisés francoirlandais*, in M. Fatin-Rouge Stefanini, X. Magon (Eds), *Les Assemblees citoyennes: nouvelles utopie democratique?*, Aix-en-Provence, 2022, 133-162; D. Hedary, *The Citizens' Climate Convention: A New Approach To Participatory Democracy, and its Effectiveness on Changing Public Policy*, in *French Yearbook of Public Law* 1 (2023), 271-280; R. Romi, *Radiographie de la loi Climat et résilience*, in 31 *Droit de l'environnement. La Revue du développement durable* 303 (2021), 310-326; M. Fleury, *Des citoyens pour relever le défi du changement climatique, est-ce vraiment sérieux?,* in *Cahiers Droit, Sciences & Technologies* 14 (2022), 117-132; J. Kervasdoué, *Convention citoyenne pour le climat: une brillante manipulation*, in 5 *Paysans & Société* 383 (2020), 16-21.

[76] E. Buono, C. Pizi, *La democrazia climatica tra climate change mitigation e climate change litigation. Spunti comparati per l'elaborazione di strumenti partecipativi*, cit., 1945-1947.

[77] About the constitutional reform of Articles 9 and 41, see M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune,* in *Forum di Quaderni Costituzionali* 3 (2021), 285-314; L. Cassetti, *Salute e ambiente come limiti 'prioritari' alla libertà di iniziativa economica,* in *federalismi.it,* 23 June 2021; T. E. Frosini, *La Costituzione in senso ambientale. Una critica*, in *federalismi.it,* 23 June 2021; I. A. Nicotra, *L'ingresso dell'ambiente in Costituzione, un segnale importante dopo il Covid*, in *federalismi.it*, 30 June 2021; R. Bifulco, *Primissime riflessioni intorno alla l. cost. 1/2022 in materia di tutela dell'ambiente,* in *federalismi.it*, 6 April 2022; A.L. De Cesaris, *Ambiente e Costituzione*, in *federalismi.it,* 30 June 2021; F. Rescigno, *Quale riforma per l'articolo 9*, in *federalismi.it,* 23 June 2021; G. Di Plinio, *L'insostenibile evanescenza della costituzionalizzazione dell'ambiente*, in *federalismi.it,* 30 June 2021; L. Cassetti, *Riformare l'art. 41 della Costituzione: alla ricerca di 'nuovi' equilibri tra iniziativa economica privata e ambiente?* in *federalismi.it* 4 (2022), 188-201; A. Mitrotti, *Territorio, interessi in contesa e modifiche agli articoli 9 e 41 Cost.: Prime riflessioni sul 'permitting' ambientale*, in VII *Società e diritti* 13 (2022), 82-120; G. Vivoli, *L'eterna provvisorietà di misure straordinarie è (ed era) incostituzionale: la doppia chiave di lettura della sentenza n.*

the establishment of climate democracy instruments at the local level, in line with the participatory mechanisms emerging at the primary source level, such as, for example, the Environmental Impact Assessment (EIA), provided for in the body of legislation of Legislative Decree No. 152/2006, or, within the scope of application of the principles governing the action of the Public Administration, the right of access to environmental information.[78]

In fact, first and foremost, we should mention the experience of the Municipality of Milan, thanks to the activities of a civic participation body set up specifically to give the population a voice on climate change, air quality and ecological transition, which met for the first time in December 2022. Instead, the initiative implemented by the Municipality of Bologna takes a different approach. In 2023, a citizens' assembly was established on the initiative of the municipality to discuss issues relating to climate change and energy transition.[79] Finally, last February 2025, the Citizens' Climate Assembly was established in the Municipality of Parma as a new sharing tool that seeks to ensure that citizens become part of the Parma Climate Neutral path, i.e. the European Union project that aims to make 100 cities climate neutral by 2030. The Assembly was attended by 60 citizens who, supported by experts, technicians and facilitators, worked in four thematic groups to propose concrete solutions for the future of the city in various sectors: mobility, energy, circular economy and urban environment. The ambition of the Citizens' Climate Assembly is to make the ecological transition more participatory,

105/2024 sul c.d. 'Decreto Priolo' alla luce della riforma degli artt. 9 e 41 Cost., in *AmbienteDiritto.it* 4 (2024), 1-22; M. Ceruti, *Bilanciamento governativo degli interessi e sindacato giurisdizionale per gli impianti industriali di interesse strategico. Le due facce della prima pronuncia della Consulta sulla riforma degli artt. 9 e 41 della Carta*, in *Rivista Giuridica dell'Ambiente online* 57 (2024), 1-18.

[78] For a historical review of participatory democracy in Europe and Italy, see U. Allegretti, *Democrazia partecipativa: esperienze e prospettive in Italia e in Europa*, Firenze, 2010.

[79] For further information on the experiences of the citizens' assemblies for climate action in Milan and Bologna, see G. Pavani, *Le assemblee cittadine per il clima: una nuova sfida per le città collaborative ed ecosostenibili*, in *Nomos. Le attualità nel Diritto* 3 (2024), 1-25.

fair and transparent by initiating a debate on the long-term vision for the protection of future generations.[80]

In conclusion, it is clear that the system of local government constitutionally promoted with the introduction of the Panchayats, precisely because of its political and institutional nature, as well as the priority objectives it pursues in terms of sustainable management of natural resources, is a tool that differs greatly from western paradigms of participatory democracy originating in citizens' assemblies for climate transition, even though it shares the same inclusive nature of citizens in decision-making processes concerning commonly understood environmental protection. Citizens' assemblies, in fact, are characterised by specific distinctive features, which can be found in the principle of random selection, the decision-making process and the binding nature of the results obtained.[81] Rather, through a system of opposition to traditional nationalisation, which therefore takes place from the 'bottom up', the aim is to mitigate the negative effects associated with the degrading use of natural resources, in order to protect families located in vulnerable areas that are most at risk from an environmental point of view.

[80] In this regard, it is worth noting that on 21 March 2024, Parma became the first Italian city to obtain the Climate Label, the official recognition from the European Commission that certifies the value and effectiveness of the city's action plan. Activities already underway include sustainable mobility measures, the expansion of renewable energy, urban reforestation initiatives, the promotion of the circular economy, and the redevelopment of urban spaces with a view to sustainability and inclusion.

[81] G. Mannarini, *Citizens' Assemblies as Articulations of Democratic Participation between Criticalities and Perspectives*, in *DPCE* 4 (2023), 943-976, 945.

THE ROLE OF COMMUNITIES IN NATURE RESERVES AND IN CLIMATE CHANGE POLICIES IN VIETNAM: CONSTITUTIONAL CHALLENGES

Anh Duc Nguyen

Abstract: *Vietnam has declared the beginning of the 'era of national rise' with significant legal and institutional reforms. The chapter aims to illustrate the changing context in Vietnam, which is posing challenges for the implementation of the Constitution's provisions relating to nature reserves and dealing with climate change for both the government and the people. In fact, some issues have existed and are becoming more challenging in the new context under the impact of technology. Besides, the chapter indicates that civil society in Vietnam is facing new constitutional obstacles, which are arising from the new policy to enhance commercial relations.*

Keywords: Vietnam, Community, Constitutional Challenges, Nature Reserves, Climate Change.

1. *Introduction*

Vietnam is home to a diverse range of natural reserves that protect its unique biodiversity. These reserves are vital for preserving ecosystems and provide significant ecological benefits.

As of 2020, Vietnam has 178 conservation areas (national parks, nature reserves, species-habitat conservation zones, landscape protection zones). Vietnam identifies biodiversity as the foundation of a green economy; biodiversity conservation is one of the key solutions to adapt to and mitigate the impacts of climate change. Vietnam, ranked 16th among the world's most biodiverse countries. Vietnam's natural reserves include diverse ecosystems such as forests, wetlands, and marine areas, each with its unique wildlife. Vietnam's natural reserves are not only ecological treasures but also cultural landscapes shaped by generations of indigenous and local communities. These communities possess deep-rooted knowledge of forest cycles, wildlife behavior, and

sustainable harvesting techniques. Integrating this traditional ecological knowledge into modern conservation strategies can enhance resilience and foster inclusive environmental governance.

Despite biodiversity's critical role, it is gradually degrading. These reserves support ecological balance by maintaining natural processes and habitats that sustain life in diverse environments. Furthermore, the intersection between biodiversity conservation and climate change adaptation is increasingly recognized in global frameworks such as the Convention on Biological Diversity (CBD) and the Paris Agreement. Vietnam's commitment to these frameworks necessitates a holistic approach that empowers communities as both beneficiaries and stewards of nature.

Vietnam has implemented various environmental laws and regulations that promote the conservation of natural reserves. Besides two basic laws: Law on Forestry; Law on water resources; Law on Marine and Island Resources and Environment; Law on Fisheries, etc. These laws outline the rights of communities to participate in the management and improvement of nature conservation.

Several national policies encourage community participation in environmental conservation, emphasizing the importance of local knowledge and involvement in decision-making processes. Biodiversity conservation must improve the livelihoods of local residents. If local people can improve their lives through the protection of forest resources and have the right to enjoy the benefits of biodiversity, they will be willing to protect it.

This chapter begins with an introduction to natural reserves in Vietnam, highlighting their significance and current status. Next, the legal framework that supports community involvement, followed by an exploration of the role communities play in conservation efforts. We will also discuss the challenges these communities face and their impact on climate change mitigation.

2. *Vietnam in a Changing Context*

Vietnam stands at a pivotal crossroads in its constitutional journey in the background of institutions are the 'bottleneck' of

'bottlenecks' that hinder and inhibit the country's development process.[1] With the declaration of the 'era of national rise', the country has embarked on a sweeping transformation of its legal and institutional landscape.[2] This ambitious vision is not merely rhetorical – it is backed by substantive reforms, including amendments to the 2013 Constitution, restructuring of the administrative apparatus across all levels of government, and a reimagining of the local governance model.[3]

These reforms reflect Vietnam's strategic ambition to modernize its governance system in line with global trends, particularly the shift toward digital government, decentralization, and citizen-centered public services. The 2025 constitutional amendment is not only a legal milestone but also a political statement affirming the country's readiness to embrace institutional innovation.

The centerpiece of Vietnam's reform agenda is the 2025 amendment to the 2013 Constitution. This amendment fundamentally reconfigures the country's administrative structure. Most notably, it abolishes the district-level government, collapsing the traditional three-tier system (province - district - commune) into a streamlined two-tier model: provinces and communes. The number of provinces and centrally governed cities has been reduced from 63 to 34 through mergers, while over two-thirds of communes have been dissolved or consolidated.

While the intention behind this restructuring is to enhance efficiency and reduce bureaucratic redundancy, it has also triggered concerns about the erosion of local representation and the

[1] V. Van Long, *Vietnam after 40 Years of Renovation - Achievements and Challenges*, in *Journal of State Management*, 31 July 2025, available at https://www.quanlynhanuoc.vn/2025/07/31/viet-nam-sau-40-nam-doi-moi-thanh-tuu-va-nhung-thach-thuc/, accessed 25 August 2025.

[2] T. Lam, *Institutional and Legal Breakthroughs for the Country to Rise Up*, in *Communist Review*, 4 May 2025, available at https://www.tapchicongsan.org.vn/media-story/-/asset_publisher/V8hhp4dK31Gf/content/dot-pha-the-che-phap-luat-de-dat-nuoc-vuon-minh, accessed 25 August 2025.

[3] N.S. Dung, *Institutional Reform - The Driving Force for the era of Rise*, in *Nhan Dan*, 2025, available at https://special.nhandan.vn/caicachtheche/index.html, accessed 25 August 2025.

weakening of intermediary governance. District-level governments traditionally played a crucial role in coordinating between provincial policies and commune-level implementation. Their removal creates a vacuum that may affect policy coherence, especially in sectors like environmental management that require multi-level coordination.

After the reform, the country grapples with uneven infrastructure development,[4] a shortage of qualified personnel at the local level,[5] and the need to harmonise thousands of legal documents with the newly amended Constitution and the need for development in the new era.[6] These factors complicate the implementation of constitutional provisions and raise critical questions about the future of the rule of law in Vietnam.

Moreover, the rapid pace of reform has outstripped the capacity of many local governments to adapt. Commune-level officials, often undertrained and overburdened, face mounting pressure to deliver services and enforce laws in a dramatically altered institutional landscape. This mismatch between reform ambition and administrative capacity risks undermining the legitimacy and effectiveness of constitutional governance.

From the government's perspective, the transition has introduced both opportunities and dilemmas. Expectantly, institutional reforms promise greater efficiency and transparency. However, the rapid pace of change has led to confusion in the execution of official duties, especially at the local level. The merger of

[4] Y. Nhi, *Projects that Brought the Country into a New Era*, in *Vietnam News Agency*, 19 August 2025, available at https://happyvietnam.vnanet.vn/nhung-cong-trinh-dua-dat-nuoc-vao-ky-nguyen-moi/45619.html, accessed 25 August 2025.

[5] C.T. Van, *Overcoming the Shortage of Commune-Level Officials, Removing Obstacles for Effective Operation of Two-Level Local Government*, in *Vietnam News Agency*, 7 September 2025, available at https://happyvietnam.vnanet.vn/khac-phuc-tinh-trang-thieu-can-bo-cap-xa-go-vuong-de-chinh-quyen-dia-phuong-2-cap-van-hanh-hieu-qua/46204.html, accessed 25 August 2025.

[6] T. Dung, *Perfecting the Structure of Vietnam's Legal System to Meet the Requirements of National Development in the New Era*, in *Journal of Democracy and Law*, 20 August 2025, available at https://danchuphapluat.vn/hoan-thien-cau-truc-he-thong-phap-luat-viet-nam-dap-ung-yeu-cau-phat-trien-dat-nuoc-trong-ky-nguyen-moi-7308.html, accessed 25 August 2025.

administrative units has placed unprecedented pressure on the civil service due to a complex legal environment with limited resources and training.[7] This institutional strain risks undermining the goals of the reform agenda.

In the context of environmental governance, these institutional strains are particularly acute. Nature reserves often span multiple administrative boundaries, and their effective management requires coordination across sectors and levels of government. The abolition of district governments and the consolidation of communes may disrupt existing conservation networks, delay decision-making, and reduce the responsiveness of local authorities to environmental challenges.

3. *Community's Status and Rights to Protect their Environment*

Currently, the 2020 Law on Environmental Protection (Law No. 72/2020/QH14) explicitly defines residential communities as subjects in environmental protection activities. Under Chapter XIII of the law, communities are granted several important rights:

- Right to Information: Communities have the right to access environmental information, including environmental impact assessments (EIAs), pollution data, and waste management plans;
- Right to Participate: They can contribute opinions during the preparation of EIAs and strategic environmental assessments (SEAs) for projects that may affect their environment;
- Right to Supervise: Communities can monitor environmental protection activities and report violations to authorities.

[7] N. An, *Civil Servants Under Great Pressure when Operating a Two-Level Government, Will Perfect Regulations on Payroll*, in *Tuoi Tre*, 24 July 2025, available at https://tuoitre.vn/cong-chuc-ap-luc-lon-khi-van-hanh-chinh-quyen-hai-cap-se-hoan-thien-quy-dinh-ve-bien-che-20250724112857991.htm, accessed 25 August 2025.

These rights mark a significant shift in Vietnam's environmental governance, moving from a top-down model to a more participatory framework. However, the practical realization of these rights remains uneven across regions. In many rural areas, communities lack the technical capacity, legal literacy, and institutional support to exercise these rights effectively. This disparity is particularly evident in ethnic minority regions and mountainous provinces, where access to legal documents, internet connectivity, and trained facilitators is limited. Without targeted interventions, the legal recognition of community rights risks becoming symbolic rather than transformative. Furthermore, the implementation of these rights depends heavily on the responsiveness of local authorities. In some cases, commune-level officials are unaware of the law's provisions or lack the mandate to facilitate community participation. This administrative bottleneck highlights the need for inter-agency coordination and training at the grassroots level.

Moreover, the law does not yet provide a clear mechanism for communities to enforce their rights when they are violated. For example, while communities may request environmental data, there is no penalty for agencies or businesses that fail to respond. This legal gap undermines the accountability of environmental governance and weakens public trust. The absence of enforcement mechanisms also discourages communities from engaging with environmental processes. When requests for information are ignored or delayed, it reinforces a perception that participation is futile. To counter this, Vietnam could introduce administrative sanctions or judicial remedies for non-compliance. Additionally, establishing independent environmental ombudsman offices at the provincial level could provide communities with a neutral channel to resolve disputes and report violations. These offices could also serve as watchdogs to monitor compliance and promote transparency.

Another challenge lies in the definition of 'community' itself. The law refers to 'residential communities' but does not specify whether this includes informal settlements, ethnic minority groups, or mobile populations. This ambiguity can lead to exclusion and unequal access to environmental rights. In practice,

this vague terminology has led to inconsistent interpretations. For example, migrant workers living in industrial zones or seasonal farmers in forested areas may not be recognized as part of a 'residential community,' despite being directly affected by environmental decisions. Clarifying the legal definition to include diverse forms of community organization would ensure broader inclusion. A good experience from the Philippines' Indigenous Peoples' Rights Act (IPRA) explicitly recognize ancestral domains and customary communities as legal entities with environmental rights.[8] Vietnam could draw lessons from such frameworks to better reflect its own demographic and cultural diversity.

To address these issues, Vietnam could consider adopting a legal framework similar to the Aarhus Convention, which guarantees public access to environmental information, participation in decision-making, and access to justice. Although Vietnam is not a party to this convention, its principles could serve as a model for domestic reform.

In addition, capacity-building programs are essential to empower communities. These could include legal training, environmental education, and support for community-based monitoring initiatives. Partnerships with NGOs, universities, and international organizations can play a vital role in bridging the gap between law and practice. Furthermore, digital tools such as mobile apps for reporting pollution or accessing EIA documents could democratize information and make participation more accessible. Vietnam's growing digital infrastructure presents an opportunity to innovate in environmental governance.

4. *Community's Efforts in Nature Reserve and Dealing with Climate Change-Constitutional Challenges ahead*

Many communities in Vietnam actively engage in conservation projects, leveraging their local knowledge to promote sustainable practices and protect natural resources. Several case

[8] Sec. 7 and Sec. 58.

studies highlight successful community initiatives in Vietnam, showcasing how local efforts have led to significant conservation outcomes and enhanced biodiversity. Community initiatives in Vietnam demonstrate the power of local involvement in conservation efforts and their impact on biodiversity.

In fact, many community-based nature protection models have been deployed in many localities across Vietnam with diverse scales and methods.[9] The implemented community models can be based on some core groups such as youth union, women's union, etc. In October 2025, at the IUCN World Conservation Congress (WCC 2025), Ms. Ka' Thị Ngọc Hương shared stories of community-led conservation, linking culture with sustainable livelihoods to promote the implementation of the Global Biodiversity Framework (GBF) and the National Biodiversity Strategy of Vietnam. Another example at this forum is the model of Hiep Thuan Cooperative in Quang Nam (now Da Nang) with households building a sustainable supply chain, planting forests according to international FSC certification and now continuing to be more ambitious by intercropping native trees in their FSC acacia forests to contribute to the restoration of biodiversity in the area.[10]

These examples underscore the importance of integrating conservation with economic incentives. When communities see tangible benefits – such as increased income, food security, or cultural preservation – they are more likely to invest in long-term environmental stewardship. The Hiep Thuan Cooperative model, for instance, demonstrates how international standards like

[9] N.D. Hoe, *Policy Mechanisms to Mobilize Community Participation in Environmental Protection*, in *Tap Chi Moi Truong*, 23 October 2025, available at https://tapchimoitruong.vn/phap-luat--chinh-sach-16/C%C6%A1-ch%E1%BA%BF-ch%C3%ADnh-s%C3%A1ch-huy-%C4%91%E1%BB%99ng-s%E1%BB%B1-tham-gia-c%E1%BB%A7a-c%E1%BB%99ng-%C4%91%E1%BB%93ng-trong-b%E1%BA%A3o-v%E1%BB%87-m%C3%B4i-tr%C6%B0%E1%BB%9Dng-19361, accessed 24 October 2025.

[10] WWF-Viet Nam, *Showcasing Community-Led Conservation Models at the IUCN World Conservation Congress*, 14 October 2025, available at https://vietnam.panda.org/en/?394097/Showcasing-Community-Led-Conservation-Models-at-the-IUCN-World-Conservation-Congress, accessed 14 October 2025.

FSC certification can be localized and scaled through community participation.

Moreover, community-led conservation aligns with global trends in environmental governance that emphasize decentralization, equity, and inclusivity. The UN's Decade on Ecosystem Restoration (2021-2030) calls for bottom-up approaches that empower local actors. Vietnam's experience offers valuable lessons for other countries seeking to balance conservation with development.

While a bottom-up approach may align with Vietnam's tradition of protecting the natural environment, several major challenges remain, limiting community-based efforts to localized, small-scale, and short-term initiatives. These challenges include legal gaps, bureaucratic inefficiencies, imbalances in authority, and a lack of genuine education and empowerment.

4.1 *Legal Gaps*

From the legal view, the above rights of communities are specific illustrations of some provisions of the 2013 Constitution, but they are not really adequate. The Constitution defines that 'everyone has the right to live in a clean environment and has the obligation to protect the environment'. However, 'everyone' here is understood as individuals instead of groups or communities. This approach appears to stem from the views of Vietnamese lawmakers on the ownership of land – a natural resource considered as a 'special means of production'. In Vietnam, land is property belonging to 'the entire people', that is, owned by the collective of the Vietnamese people, of which the State is the representative to exercise the rights of the owner. In essence, this is a concept of national ownership, not ownership of an aggregate group of the total population of the country. This approach is not traditional in Vietnam but has only been officially established since the 1980 Constitution. Before that historical point, the Vietnamese State, across different periods, recognized land ownership by individuals and communities.

This constitutional ambiguity creates a disconnect between legal theory and practical governance. While the law recognizes

the community's role in environmental protection, it does not grant them full legal standing as collective rights-holders. This limits their ability to claim land use rights, initiate legal actions, or negotiate with external actors such as corporations or government agencies. In comparison to other legal systems, such as those in Latin America, have begun to recognize the legal personality of communities and indigenous groups in environmental matters. Ecuador and Bolivia, for example, enshrine the rights of nature and community guardianship in their constitutions.

This reality inevitably led to difficulties in managing and effectively exploiting land resources because the State 'lacked experience'.[11] In particular, the most significant challenge is the lack of clarity on the scope of authority as well as the responsibility regime of the State when acting as the owner's representative. The lack of clarity in the State's representative role also affects accountability. When environmental degradation occurs on public land, it is often unclear which agency is responsible. This institutional vagueness hampers enforcement and allows violations to persist without remedy. Vietnam could consider establishing an independent oversight body tasked with monitoring land use and ensuring compliance with conservation laws. Such a body could serve as a bridge between communities and the state, enhancing transparency and trust.

Based on the owner's representative status, the State proceeds to assign or recognize individuals and organizations with the right to use a certain area of land. The 2013 Constitution does not have any provisions on whether the State can assign or recognize the land use rights of residential communities. However, the Land Law of Vietnam has expanded to the extent of recognizing residential communities with the right to use land for specific purposes. This is one of the differences between the Constitution and the provisions of the law, which reflects the constitutional basis for the rights of the community to land in general and to nature conservation areas in particular, which still needs to be adjusted in the coming time.

[11] Vietnamese Government, Submission No. 302/TTr-CP, dated 24 October 2012, on the Draft Law on Land Amendment, 3.

The second issue is the provisions on the right to access information. Current law only recognizes the right to access information of individuals who are Vietnamese citizens, and residential communities, as a special subject in legal relations, are not yet considered to have a separate status in accessing information created by state agencies. Although the Constitution defines 'citizens' as having the right to access information, the provisions of the Law on Access to Information have a rather narrow approach, including only individuals. Moreover, the definition of accessible information is also quite narrow, only including information 'created' by state agencies and not including information created by non-state entities that the state collects. The Law on Environmental Protection also provides that the community has the right to request organizations and businesses investing in projects that have an impact on the community's living environment. However, the law's determination that the community representative directly requests the project owner to provide information is not feasible due to the lack of coercive power and cannot be effective if the investor evades or avoids the community's request for information.

The third issue is that the community's right to complain and denounce violations by public authorities or private entities related to damage to the natural environment is still a gap. Vietnamese law still only allows individuals and organizations to make complaints, or individuals to denounce violations of the law. The role of the communities is not mentioned in cases where a complaint or denunciation can be submitted to the authorities.

Besides challenges from communities' side the legal and bureaucratic frameworks can be complex and overwhelming for local communities due to the overlapping of authority between central and local levels; between management sectors and lack of personnel with expertise in nature conservation and biodiversity in grassroot government level.

4.2 *The Bureaucratic Administration, Institutional Confusion and Risk of Over-Centralization*

Vietnam's 2025 bureaucratic reforms represent a bold attempt to modernize the state apparatus, but they have also introduced

a host of challenges for the government itself. As ministries are merged, administrative tiers are eliminated, and responsibilities are redistributed, the civil service is grappling with a new reality marked by institutional confusion, personnel shortages, and mounting pressure. These internal strains threaten to undermine the very constitutional provisions the reforms aim to uphold.

One of the most immediate consequences of the 2025 restructuring has been widespread institutional confusion. The merger of ministries into 'super-ministries' has blurred the lines of authority and created overlapping mandates. In the field of food safety testing, the Ministry of Agriculture and Environment and the Ministry of Industry and Trade delegate authority to the Chairman of the Provincial People's Committee, but the Ministry of Health assigns it directly to a specialized unit under the Provincial People's Committee, causing difficulties in implementation.[12]

This fragmentation of authority is particularly problematic in environmental governance, where cross-sectoral coordination is essential. For example, managing a nature reserve may require input from forestry, water resources, tourism, and local government – all of which may now fall under different super-ministries with unclear boundaries. Without a unified framework, efforts to protect biodiversity and respond to climate change risk becoming disjointed and ineffective.

At the local level, the abolition of district governments has shifted a significant administrative burden onto communes and provinces. Yet many local officials report a lack of guidance on how to manage newly inherited functions.[13]

Commune-level officials often lack the legal training and tech-

[12] Ministry of Agriculture and Environment, *Ministry of Agriculture and Environment Removes Difficulties in Operating Two-Level Government in the Mekong Delta*, 2025, available at https://www.mae.gov.vn/bo-nong-nghiep-va-moi-truong-thao-go-kho-khan-van-hanh-chinh-quyen-2-cap-o-bscl-19225.html, accessed 27 August 2025.

[13] B. Thang, *The Commune's Economic Department is Confused in Handling Industrial and Commercial Procedures*, in *Agriculture and Environment*, 31 July 2025, available at https://nongnghiepmoitruong.vn/phong-kinh-te-xa-lung-tung-xu-ly-thu-tuc-cong-thuong-d765494.html, accessed 27 August 2025.

nical expertise needed to interpret and implement complex environmental regulations. This gap leads to inconsistent enforcement, delays in project approvals, and missed opportunities for community engagement. In some cases, local governments have resorted to informal practices or delegated responsibilities to non-state actors, raising concerns about transparency and accountability.

The reforms have also exposed a critical shortage of qualified personnel, particularly in rural and newly merged provinces. With the elimination of district-level administrations and the consolidation of local units, thousands of civil service positions have been cut.[14] While this downsizing is intended to reduce costs and improve efficiency, it has left many local governments understaffed and overwhelmed.[15] Many civil servants lack specialized training in constitutional law, digital governance, or policy implementation. This skills gap undermines the enforcement of constitutional rights and deepens regional disparities in public service quality.

Reports from provincial administrative centers indicate rising absenteeism and turnover rates, particularly among mid-level managers.[16] If left unaddressed, this erosion of morale could lead to a decline in service quality and a weakening of constitutional enforcement at the grassroots level.[17] In order to cope with the

[14] V. Trần, *Nearly 130,000 Provincial and Communal Level Cadres and Civil Servants were Reduced After the Apparatus was Reorganized and Merged*, in *Lao Động*, 3 May 2025, available at https://laodong.vn/thoi-su/giam-gan-130000-bien-che-can-bo-cong-chuc-cap-tinh-cap-xa-sau-sap-xep-sap-nhap-1500891.ldo, accessed 5 September 2025.

[15] T. Chung, *Upgrading Cadres' Ability at the Communes to Operate the Apparatus Smoothly*, in *Tuoi Tre*, 27 July 2025, available at https://tuoitre.vn/nang-tam-can-bo-xa-de-van-hanh-bo-may-thong-suot-202507270846489.htm, accessed 27 August 2025.

[16] N. Tùng, V. Sơn, *Ho Chi Minh City Chairman Nguyen Van Duoc Explains why 'Some Chairmen Resign for no Reason'*, in *Tienphong*, 9 September 2025, available at https://tienphong.vn/chu-tich-tphcm-nguyen-van-duoc-ly-giai-viec-khong-tu-nhien-ma-mot-so-chu-tich-xin-nghi-post1776839.tpo, accessed 9 September 2025.

[17] D. Chì, *Ho Chi Minh City: There are Cadres and Public Employees who have Resigned Due to Work Pressure*, in *Dân tộc và Phát triển*, 30 July 2025,

situation of many cadres and civil servants taking leave, the authorities have requested to implement measures to 'prevent widespread resignation'.[18] Besides the objective reasons for work pressure, there is a conclusion that 'a number of cadres, civil servants and public employees still show signs of being afraid of difficulties, afraid of change, and have low awareness and responsibility'.[19]

To address this, Vietnam could invest in a national training program for civil servants and focused on environmental governance and constitutional law. Such training programs can be short or long term and are certified, continuing education, and leadership development tailored to the needs of local officials. Additionally, digital platforms could be used to disseminate best practices and facilitate peer-to-peer learning across provinces.

While the reforms aim to streamline governance, they also carry the risk of over-centralization. The creation of super-ministries and the reduction of administrative tiers concentrate power in provincial capitals. This shift may weaken local autonomy and reduce the ability of communes to tailor policies to their unique contexts.

In environmental governance, local autonomy is crucial for responding to site-specific challenges such as deforestation, water pollution, and biodiversity loss. Over-centralization may lead to one-size-fits-all policies that fail to account for ecological diversity and cultural nuances. For example, conservation strategies in the Mekong Delta may differ significantly from those in the northern highlands, yet centralized planning may overlook these distinctions.

available at https://baodantoc.vn/tp-ho-chi-minh-da-co-can-bo-vien-chuc-xin-nghi-vi-ap-luc-cong-viec-1753873377218.htm, accessed 7 September 2025.

[18] P. Đông, *100,000 Civil Servants Quit According to Decree 178, Not Allowing Widespread Resignations*, in *Lao Dong*, 23 August 2025, available at https://laodong.vn/thoi-su/100000-can-bo-cong-chuc-nghi-theo-nghi-dinh-178-khong-de-nghi-viec-tran-lan-1562477.ldo, accessed 7 September 2025.

[19] T. Hằng, *77,278 Cadres and Civil Servants Quit their Jobs After Restructuring the Apparatus*, in *Thanh Nien*, 25 August 2025, available at https://thanhnien.vn/77278-can-bo-cong-chuc-nghi-viec-sau-sap-xep-bo-may-18525072509420168.htm, accessed 7 September 2025.

In addition, checks and balances within the system are also under strain. Many civil servants were transferred from the Party and mass organizations to the government without receiving specialized training.[20] The transfer may blur the line between political leadership and administrative execution.

This blurring of roles can compromise the neutrality and professionalism of the civil service. When administrative decisions are influenced by political considerations, it undermines the rule of law and erodes public confidence. To safeguard constitutional integrity, Vietnam should clarify the boundaries between party leadership and administrative authority, ensuring that civil servants operate within a transparent and accountable framework.

Furthermore, the rapid pace of reform has left little room for public consultation or legislative debate. This top-down approach risks alienating citizens and undermining the legitimacy of constitutional enforcement.

Inclusive governance requires meaningful participation from civil society, academia, and local communities. Vietnam could institutionalize mechanisms for public consultation, such as citizen associations or assemblies, stakeholder forums, and online platforms for feedback. These tools not only enhance legitimacy but also improve policy outcomes by incorporating diverse perspectives.

Along with that, the removal of the district level while there is no guidance on adjusting the monitoring activities under the authority of the People's Council at the district level has created a gap in monitoring the activities of the administrative apparatus at the grassroots level.[21]

Strengthening oversight mechanisms is essential to prevent abuse of power and ensure accountability. Vietnam could con-

[20] P.D. Khương, *Quickly Resolve Difficulties for Grassroots Level after Merger*, in *Tin Tức*, 11 July 2025, available at https://baotintuc.vn/thoi-su/som-giai-quyet-kho-khan-cho-cap-co-so-sau-sap-nhap-20250711123312790.htm, accessed 7 September 2025.

[21] B. Nguyên, *Answering Concerns in Exercising the Right to Supervise the People's Council at the Commune Level,* in *Dai Bieu Nhan Dan*, 18 July 2025, available at https://daibieunhandan.vn/giai-dap-ban-khoan-trong-thuc-hien-quyen-giam-sat-hdnd-cap-xa-10380068.html, accessed 7 September 2025.

sider establishing independent audit bodies or ombudsman offices at the provincial level to monitor the implementation of environmental and constitutional policies. These institutions should be empowered to investigate complaints, publish reports, and recommend corrective actions.

4.3 *Imbalance of Authority*

The issue of power imbalance within Vietnam's state apparatus is often discussed at the macro level, for example, between branches of power or between central and local agencies. However, another important aspect is the structure of power distribution between the head of an agency and the civil servants performing specialised tasks within the same unit.

The concept of 'authority' in Vietnamese has two meanings. Popularly, it can be understood in the first sense as 'the ability to consider, conclude and decide on a matter according to the law'[22] – often applied to cases where the subject of authority is an agency, leaders or management positions in a state agency or units. This is called '*leadership authority*'. This type of authority is comprehensive within the scope of the agency or individual leader's responsibility, associated with the management, direction and operation tasks of the agency or individual leader. Therefore, leadership authority is often associated with the responsibility of the agency or individual leader regarding guidelines and policies or approving plans in the implementation of public duties. There are some exceptions where leadership authority also applies in the case of recruitment, appointment and disciplinary action against individuals under the leader's management.

The second meaning of 'authority' (in Vietnamese) is 'recognized professional qualifications to have a decisive opinion on an issue'[23] – this is the type of authority required of civil servant positions that do not hold leadership or management roles but have the function of collecting, processing, and providing profes-

[22] H. Phe, *Vietnamese Dictionary*, Đà Nẵng, 2003, 922.
[23] Ibid.

sional advice for leaders at all levels to make decisions. With this type of authority, professional civil servants are able to rely on their own professional knowledge to come up with the most effective solutions in solving work and are not subject to unprofessional pressure from those with leadership authority to make decisions. In Vietnamese law, there are also a number of regulations related to the professional authority of civil servants who do not hold leadership or management positions. For example, when there is reason to believe that a leader's decision is illegal, it must be promptly reported in writing to the decision maker; In case the decision maker still decides to execute, there must be a document and the executor must execute but is not responsible for the consequences of the execution, and at the same time report to the direct superior of the decision maker.[24]

In Vietnam, while the types of leadership authority of agencies, leadership and management positions are regulated quite clearly and going to details, the authority of specialized civil servant positions has not been detailed to the necessary extent.

It must be affirmed that administrative procedures are public service process chains that are carried out in many steps, even at many functional levels, and at each step, each functional level must be associated with the '*professional authority*' or '*leadership authority*' of specific people. Separating the legal authority of public service positions at each step and each functional level will help the 'flow' of administrative procedures to be smooth without depending too much on the leadership's will and their work schedule. Even when professional positions or leadership positions are replaced (mobilized, rotated, seconded, etc.), that flow is still less disturbed.

The trend shows that legal documents on the organization of the apparatus and public service authority in Vietnam are increasingly 'streamlined' to focus on leadership and management positions. Accordingly, heads of agencies and units in the public sector are given more and more authority, along with the responsibilities of the leaders. Such an approach has the benefit of cre-

[24] Clause 5, Article 7 of the Law on Cadres and Civil Servants 2025.

ating initiative and flexibility in handling public affairs, but on the other hand, it leads to a situation of 'overload' of authority when any large or small task must depend on the approval and decision of the head/leaders. When the overload of authority of the head becomes serious, the consequences are 'inflation' of deputies with authorized authority. Even when combined with a number of other factors, it will lead to worse consequences such as the situation of 'stagflation' in handling public affairs as in recent times.[25] Although leaders may be talented at the moment they are assigned/hired, they are also eroded by an overload of statutory authority and responsibility.

Meanwhile, the authority and responsibility of civil servant positions that are not leaders or managers in agencies and units are often given little attention. The Law on Cadres and Civil Servants also has only one principled provision that cadres and civil servants 'are assigned authority commensurate with the assigned tasks'.[26] This principled provision is detailed by Decrees and Circulars for each sector and field of state management but is still unclear. The situation where specialists process documents and propose solutions to work (according to their expertise) but when problems arise, the responsibility belongs to the head will promote subjective psychology in low-level positions in the apparatus. The lack of regulations on the authority of low-level positions leads to two consequences. One is that for those who are capable and responsible, they will often be 'burdened' with more tasks than their colleagues in the same job position. This leads to work overload, less time to improve self-development and gradually lose motivation. They may even have to take responsibility when small mistakes occur (because there are no detailed regulations on their authority and responsibility). The second consequence is that a group of incompetent personnel will tend to rely on, pushing responsibility to those with authority to sign and is-

[25] T. Huyen, *Causes of Slowness and Delay in the Public Administration System*, in *Nhan Dan*, 29 April 2025, available at https://nhandan.vn/nguyen-nhan-cham-muon-tren-he-thong-hanh-chinh-cong-post875907.html, accessed 10 September 2025.

[26] Clause 1, Article 9 of the Law on Cadres and Civil Servants 2025.

sue decisions without paying much attention to their own professional responsibilities. They may even try to connect to propose advice for personal gain or avoid consequences.

The imbalance between leadership authority and professional authority may lead to a situation where many directives and instructions from leaders at all levels are issued but their implementation is ineffective because professional positions are not yet linked to legal responsibilities and have not been determined in terms of authority enough to proactively handle necessary procedural relationships. Meanwhile, grassroots government leaders do not have enough time to properly perform their leadership, direction and management responsibilities.[27]

In addition to the lack of clear and specific distinction between leadership authority and professional authority that has long existed in the administrative system, Vietnam's reform of the local government apparatus from three levels (province - district - commune) to two-level local government (province - commune) and the merger of many administrative units together has raised new and big questions about the effectiveness and efficiency of the administration according to the new model.

The second problem lies in the cumbersome and overlapping administrative procedure system itself in legal documents. Although the spirit and direction of streamlining administrative procedures has always been a consistent step in the administrative reform process of our country, the review and assessment of the administrative procedure system is still localized within a narrow scope of sectors, even in each unit. Based on the Survey

[27] 'In many other wards and communes in Ho Chi Minh City and the whole country, grassroots People's Committee leaders are 'tied up' by the obligation to sign hundreds of administrative documents a day. This leads to the time fund to manage, supervise, and handle key tasks, serving the socio-economic development of the locality being almost 'suffocated'. When the leader is caught up in such administrative tasks, it is very difficult to fulfill the role of managing, leading, and solving problems arising in the area or thinking about solutions to improve the process of serving the people'. See at T. Huong, *Reduce the Burden on Commune Level, Build a Creative Government*, in *Saigon Giai Phong*, 21 July 2025, available at https://www.sggp.org.vn/giam-tai-cho-cap-xa-xay-dung-chinh-quyen-kien-tao-post804641.html, accessed 21 July 2025.

Results Report published by the Private Economic Development Research Board (Board IV - under the Prime Minister's Advisory Council for Administrative Procedure Reform), 'up to 44.4% of enterprises assess difficulties in implementing administrative procedures and complying with legal regulations. Of which, the group of non-state enterprises accounts for 84.6%, small and micro enterprises are the ones facing the most obstacles'.[28] According to the summary of the Administrative Procedure Reform Working Group in 2023:

> there are still 688 business regulations that have been approved by the Prime Minister for reduction and simplification, but are still in the process of researching, amending and supplementing legal documents for implementation; the reception and handling of difficulties and problems in implementing regulations and administrative procedures for people and businesses is still slow.[29]

The third problem with administrative procedures is that most online public services are currently still being implemented based on procedural regulations that are applied in real life. The method of collecting and processing documents is still mainly implemented according to traditional procedures. It seems that only the 'returning results' stage of administrative procedures (for online public services that have been fully implemented) has a significant difference that demonstrates the nature and advantages of digital transformation. Some civil servants and public employees are not yet fully aware of the effectiveness of using electronic documents with digital signatures. There is no awareness of changing the habit of using electronic documents instead

[28] N. Minh, *More than 44% of Businesses Face Difficulties in Carrying Out Administrative Procedures*, in *Doanh Nghiệp*, 24 March 2025, available at https://doanhnghiepvn.vn/doanh-nghiep/hon-44-doanh-nghiep-gap-kho-trong-thuc-hien-thu-tuc-hanh-chinh/20250324043321110, accessed 19 July 2025.

[29] Administrative Procedure Reform Working Group, *Official Dispatch No. 97/TCTCCTTTHC on Continuing to Promote the Implementation of the Program to Reduce and Simplify Regulations Related to Business Activities in the Period 2020-2025*, 2023, available at https://chinhphu.vn/?pageid=27160&docid=208953&classid=0, accessed 19 July 2025.

of paper documents, including the leaders of some agencies and units who are not really interested in applying digital signatures on electronic documents, have not deployed personal digital signatures in sending and receiving electronic documents and processing work on the network environment, leading to additional work for clerical staff when having to process documents on both traditional and electronic environments.[30] On another note, civil servants still require in-person administrative procedures alongside online ones, possibly because of their limited ability to identify forged documents in the electronic environment. Therefore, they still need to verify through traditional paper documents.

4.4 *Role of Education and Empowerment*

Most communities and residents still focus on their current livelihoods rather than the need for conservation for future generations. Improving this state of awareness does not depend on pure education. This observation reflects a broader challenge in environmental governance: the tension between short-term survival and long-term sustainability. In many rural areas of Vietnam, communities depend on forest resources for fuel, food, and income. Without viable alternatives, conservation may be perceived as a threat to livelihoods.

Therefore, awareness must be linked to tangible benefits. Payment for ecosystem services (PES), community forestry, and sustainable agriculture are examples of models that align conservation with economic incentives. When people see that protecting nature improves their quality of life, awareness becomes action.

Environmental education is crucial for fostering community engagement and effective participation in conservation efforts.

[30] S. Hà, *Transition from Paper-Based Administration to Electronic Administration*, in *Dai Bieu Nhan Dan*, 22 January 2024, available at https://daibieunhandan.vn/chuyen-tu-nen-hanh-chinh-dua-tren-giay-to-sang-nen-hanh-chinh-dien-tu-post358184.html, accessed 20 September 2025.

General education levels mainly introduce policies and orientations on nature conservation in theory, there are very few training facilities that conduct practical activities to help learners understand the practical issues of nature conservation. In Vietnam, environmental education is often embedded within broader subjects such as biology or civic education, which limits its depth and practical relevance. There is a lack of interdisciplinary programs that connect ecological science with law, economics, and community development. This gap hinders the ability of students and citizens to understand the systemic nature of conservation challenges.

Moreover, most environmental education initiatives are concentrated in urban centers and formal institutions, leaving rural communities – who are often closest to nature reserves – without access to tailored learning opportunities. Mobile education units, community workshops, and experiential learning in protected areas could help bridge this divide.

Communities and youth are less empowered to proactively develop and implement nature conservation projects. This lack of empowerment stems not only from limited education but also from structural barriers such as restricted access to funding, absence of legal recognition, and minimal representation in decision-making bodies. Youth and community groups often lack the institutional support to scale up successful pilot projects or advocate for policy change. To address this, Vietnam could establish a national fund for community-led conservation, with simplified application procedures and technical assistance. Youth networks could be mobilized through platforms like the Ho Chi Minh Communist Youth Union to lead biodiversity monitoring, reforestation, and eco-tourism initiatives. Legal empowerment is equally important. Training communities in environmental law, land rights, and administrative procedures would enable them to engage more effectively with government agencies and private investors. Partnerships with law schools and NGOs could facilitate this process.

Cultural narratives also play a role. In Vietnam, traditional beliefs such as animism and ancestor worship often include reverence for nature. Reviving and integrating these cultural values

into conservation messaging can deepen emotional connections and foster intergenerational responsibility.

5. *Conclusions*

In general, the legal system related to the field of environmental protection in Vietnam still has many limitations, failing to meet the requirements of environmental protection and ensuring the right to live in a clean environment of the people. Some major limitations can be summary as follows.

The legal regulations on environmental protection are still not comprehensive and lack specificity. Research on the current legal system shows that most of the legal regulations on environmental protection only mention general principles, with a framework. The reason is that the legal system in this field is built mainly from the perspective of state management, without paying full attention to the perspective of the regulated subjects, which are entities that can cause environmental damage, such as enterprises. In particular, the law has not been built on the basis of the human rights-based approach, so there are still many issues related to the people's right to live in a clean environment that have not been regulated by law or have been mentioned but are too formalistic.

Furthermore, due to the lack of a correct approach, current environmental laws in Vietnam today mainly focus on prohibited acts, sanctions or regulations related to state management of the environment, but have not paid attention to ensuring conditions for people to be informed and to complain, denounce as well as to be compensated for damages caused by environmental violations. The role and participation of the state and society in environmental protection have only been determined in principle, without specific and reasonable regulations.

In general, the law has not really clarified the rights and obligations of relevant entities in environmental protection. The content of the law has not yet shown that environmental protection is not only the obligation and responsibility of the State but also the right and responsibility of the whole society, especially busi-

nesses, organizations, communities and all citizens. The law also does not have specific and clear regulations on processes and procedures so that all organizations, communities and individuals can participate in monitoring the environmental status, participating in environmental impact assessment, law making and law enforcement in the environmental field. Currently, in the environmental impact assessment (EIA) process – a very important process in environmental protection – the relevant subjects have mainly only consulted with the People's Council and the Fatherland Front at the local level and have not implemented it fully and seriously. Therefore, this consultation in reality does not reflect the people's aspirations on environmental issues.

Second, Vietnam's legal regulations on environmental protection are scattered in many different legal documents, some of which are inconsistent or overlapping. The scattering is most evident in legal regulations related to enforcement tools for environmental pollution control. These regulations are currently in many legal documents, associated with many levels and agencies in the administrative management system, so enforcement efficiency is low. The complex overlap also creates conditions for harassment in state management of the environment.

Third, some of legal regulations on the environment are not suitable for reality, do not cover and update the issues that are happening in practice, thus causing difficulties for state management agencies in applying the law. For example, currently, tools to control environmental pollution behaviors, including treatment technology, discharge licenses, standards, inspection and monitoring, etc., depend mainly on recommendations in environmental impact assessments, while legal regulations on environmental impact assessments are still heavily predictive, sometimes with great differences from reality. In addition, the fact that tools are established based on recommendations of environmental impact assessments can cause major consequences but are very difficult to identify and prosecute. Fourth, legal regulations related to administrative sanctions for industrial waste discharge are not yet deterrent enough. This leads to cases where businesses deliberately violate and are willing to pay fines to discharge waste into the environment, because the fines are much lower

than the costs incurred to meet environmental protection requirements.

Vietnam's journey toward constitutional reform and environmental governance is both ambitious and complex. The country has made significant strides in recognizing the role of communities in nature conservation and climate change mitigation. Legal frameworks such as the 2020 Law on Environmental Protection have begun to acknowledge community rights, and grassroots initiatives have demonstrated the transformative potential of local engagement.

However, constitutional ambiguities, institutional fragmentation, and over-centralization pose serious challenges. To realize the full potential of community-led conservation, Vietnam must align its constitutional provisions with practical mechanisms that empower communities, clarify administrative responsibilities, and ensure legal accountability. The Aarhus Convention's emphasis on procedural rights aligns well with Vietnam's constitutional commitment to a clean environment. By integrating its principles into national law, Vietnam could strengthen the legal standing of communities and enhance the legitimacy of environmental governance. Moreover, joining or aligning with international frameworks would signal Vietnam's commitment to global environmental standards, potentially attracting more support from development partners and international NGOs.

By embracing these reforms, Vietnam can build a resilient, inclusive, and sustainable governance model that honors both its constitutional commitments and ecological heritage. The path ahead is challenging, but with political will and civic engagement.

PERSPECTIVES ON GRASSROOT ENVIRONMENTAL DEMOCRACY: AN OVERVIEW OF VIETNAM

Sergio Messina - Thuy Duong Nguyen

Abstract: *In Vietnamese cities, rapid urbanization is leading to negative environmental consequences and social disparities. Growing civic activism is pushing toward a progressive shift for more deliberative State policies in local communities and territories, especially villages. Based on tools offered by both decentralization system existent in the 2013 Constitution and the recent 2022 law on grassroot democracy, the purpose of this paper is to analyze the relationship between these legal instruments, to subsequently determine to which degree institutional innovations of the Socialist Republic of Vietnam are developed in relation to Goal 11 of the UN's 2030 Agenda.*

Keywords: Vietnamese Urban Agenda, Alternative Environmental Sustainability, Environmental Conflicts, Grassroot Democracy, Deliberative System.

1. *Introduction*

Socialist Republic of Vietnam environmental policies have gone through a deep metamorphosis during the last 40 years. Despite a previous presence of some environmental consciousness, country's policies were primarily focused on economic development, industrialization and modernization, mostly due to the conditions of poverty that its population lived through, inherited from the 70-year Resistance war against the United States.

Also, there was a notable absence of social movements organized around environmental causes, which were seldom found amongst the list of Vietnamese people's civic priorities. However, by the mid-1980's, the 'environmental question' rose to public and governmental awareness through a policy called *Đổi mới* ('renovation'), which consisted in a shift from a planned economy to more market-oriented aims. At this point, the environment became a more frequent topic in State policies, since it was on par with the new economic course set out for the country.

Furthermore, in this period the country ratified most of the UN treaties regarding human rights, and adhered to several environmental conventions, including United Nations Framework Convention on Climate Change. At the national level, Vietnam saw the rise of environmental protection to constitutional levels in 1980, with the subsequent 1992 Constitution representing an important step toward an awarness of environmental impacts on economic development, all of which represented a transitional phase resulting in the promulgation of its first truly 'environmental' Constitution, in 2013.

Since then, there have been increasing obligations toward the international community which have been implemented, beginning with the 'Vietnam National Plan for Environment and Sustainable Development 1991-2000'. Then, in 2004, Vietnam's Agenda for 2021 promulgated the Oriented Strategy for Sustainable Development, which later led to the Office of Sustainable Development creation, articulated within the Ministry of Planning and Investment. In 2005, National Council on Sustainable Development was established, tasked with leading the Agenda. Further progress in environmental policies was made by the last Green Growth Strategy and National Action Plan for the Implementation of the 2030 Sustainable Development Agenda, adopted on 10th of May 2017 to pursue Vietnam's 17 Goals of the 2030 Agenda.

Amongst these, the present contribution will pay special attention to Goal 11, which concerns city development, and is currently at the focus of numerous studies, particularly regarding the environmental and socioeconomic challenges posed by extra-urban areas. A number of conflicts have arisen in these regions, partly as a result of differing views on 'environmental sustainability' that have emerged from the debate on environmental justice and political ecology.

Thus, governance of different territorial socio-environmental and economic structures has led scholars to focus on the growing role of environmental activism and grassroots democracy regulations. Indeed, there is an increasing sense of need to involve citizens in public decisions and specifically in topics of sustainable development, at both social and political levels. This change can

lead not only to the realization of the ideal in a socialist democracy (revolving around the mastery of the people) but to the avoidance of conflicts, which in turn represent factors destabilizing and delegitimizing Vietnamese institutions, linked in this case to Communist Party leadership.

The aim of this chapter is to understand whether and to what extent institutional innovation has occurred in terms of democratic deliberation and participation in the context of both Vietnam's authoritarian and socialist market-economy politics. In particular, it will delve into an analysis of the extent to which a top-down, dirigiste approach has changed in relation to local politics, using public Law instruments such as constitutional provisions on local autonomy, the Environmental Protection Law, and 2022 Law on Grassroots Democracy.

The first section will explore the institutional context of sustainable development concerns in Vietnam, with particular reference to the local 'urban agenda', the 2030 Agenda's Goal n11, and National strategies aiming to pursue it. The second will highlight some of the frictions between state-led economic policies and any local population conceptions and practices about the relationship with the environment, which have led to a lively environmental activism and conflicts over the management and use of natural resources.

The third and final section will examine the interplay between current environmental protection legislation and the aforementioned grassroots democracy regulations regarding citizen and social groups participation in making, evaluating and planning environmental impacts, and the extent to which these reforms have responded to the needs for a greater involvement of local communities in decision-making regarding sustainable development politics. The following concluding remarks will lead to a consideration about an overall improvement in the institutional framework of 'grassroot institutions', considered from a perspective that simultaneously eschews from a Western paternalistic political culture vision and seeks to clarify how new deliberative and participative democracy conceptions can try to be created and developed in a specific context like that of a 'socialist democracy'. In this category, it will also inquire how Vietnam, a State in which

the government continues to play an important role in society, can maintain a fundamental steering action that reconciles urgent environmental policies with essential popular sovereignty.

2. *The Vietnamese Urban Agenda*

Among the 2030 Agenda's 17 Sustainable Development Goals (SDGs) and 169 targets, Goal 11 ('make cities and human settlements inclusive, safe, resilient and sustainable'), also known as the 'urban SDG', represents the first-ever international agreement on urban-specific development since the international community recognized urbanization and city growth as a precondition for a transformative force in pursuing sustainable development. Furthermore, through an organic reading of the document it is clear that its implementation, monitoring and reporting should enhance the coordination mechanisms of national and local authorities and, in some cases, it could represent a drastic change of governance with higher participation of local authorities in this process.

In this sense, Goal 11 is intrinsically linked with Goal 16 (promoting 'peaceful and inclusive societies for sustainable development, provide access to justice for everybody and build effective, accountable and inclusive institutions at all levels). This is especially true for its specific target 16.6 that mentions good governance practices such as citizen participation, transparency, accountability, as strongly recommended to be integrated into political practices around the world in order to make every government transparent and accountable to its people.

In other words, Goal 16.6, along with Principle 10 of Rio Declaration on Environment and Development, are institutions for public accountability in nations, implying that every country should improve their governance systems, transitioning from traditional public participation towards increasingly activated policy windows for socially and politically active citizens. Vietnam is one country who has strongly committed to the implementation of SDGs since the issuance of Sustainable Development Strategies in the 21st century: the first strategic framework was issued

in 2004, followed by a second for the period of 2011-2020, and, most recently, for the Period 2020-2030.

These soft law instruments are part of a wider economic restructuring toward sustainable development, interpreted as 'green growth' or 'ecological modernization', where resource-intense sectors are required to adopt new ways of production to make better use of natural resources, assume greater control of waste management and lower emission in developing a new green industries and products, generating opportunities for increased competitiveness, global connectivity and job creation. The most recent 'Green growth strategy for 2021-2030 period with a vision by 2050' highlights the general objectives to accomplish the model of 'green growth', thereby promoting the aforementioned economic restructuring to reduce among many things global warming while assuring social equality. These objectives are especially relevant to pursue Goal 11 in promoting urban development based on smart and sustainable cities[1] and on a new style of rural areas, equipped with adequate technical sustainable infrastructure and services compliant with environmental protection requirements, in harmony with protection enhancement either landscape or living standards.

The link with Goal 16.6 is evident in National Action Plan to implement the 2030 Agenda for Sustainable Development and its following Roadmap issued by Decision No. 841/ QD-TTg dated July 4, 2023. This plan, the first one to combine aforementioned Goals (11 and 16.6) has stated several strategies like: improving management mechanisms for urban development, while at the same time widening processes for communities to participate in the preparation of urban planning schemes, urban development and projects and urban management work generally

[1] Smart and sustainable cities 'must be resilient to climate change, ensure economic-ecological efficiency, facilitate development of public transport, increase attractiveness, competitiveness and environmental friendliness, and save travel time; give priority to development of urban public transport systems with the participation of all economic components in investments in vehicles and operation of public passenger transport'. See Decision No. 1658/ QD-TTg Approval for National Green Growth Strategy for 2021-2030 period, with a vision by 2050, Hanoi 1th of October 2021.

(Target 11.3); promoting participation of social organizations, communities in conservation and protection of world natural and world cultural heritage (11.4); encouraging investment, mobilizing increased resources from society at large increasing green spaces of green spaces in improving urban and population areas (11.7) and in planning sustainable rural development, encouraging also reasonable urbanization of rural areas in order to ensure sustainable development of both rural and urban areas, as well their mutual exchange and reciprocal support.

All these objectives are inserted in a more general in a more general ecological modernization politics including urban development strategies (better known as City Development Strategy-CDS) which are considered a useful tool for policy-makers and companies in dealing with the emerging issues faced by fast-growing cities, such as urbanization, climate change impacts, energy preservation and the development of competitive economic advantages. This is based on the assumption that urbanisation can offer strong opportunities for economic growth, having enormous potential for job creation in technological, digital and green innovations, concomitantly maximising benefits for population needs.

Despite this, Vietnam cities and towns (as in several other countries of Southern East Asia and in the developing world in general) are facing not only traditional urban challenges such as urban sprawl, traffic congestion, abandoned districts and poverty, but tackling environmental challenges in ensuring adequate services access like sanitation, drainage, solid waste management (for all urban households), in controlling air, water and soil pollution (caused by rapid economic growth at the local and regional level) and in afford mitigation and adaptation to the impacts of global climate change. In this regard, significant progress have been made been made in urban planning, like Hanoi's Master Plan 2045-2065 aims to balance infrastructure modernization with environmental sustainability, issuing new standards for 'green cities' and developing planning for suburban areas. Albeit many quarters have felt the need to highlight some contradictions about the side effects of rapid urbanization (income gap, housing access, social segregation shrinking rural green corridors

etc.) and to solve it by adopting appropriate policies to identify the capabilities and strengths of each locality ensuring that modernization and international economic integration would be truly inclusive and sustainable.

From this perspective, despite some decentralized procedures like community consultation in urban planning that were kept in the new Vietnamese Law on Urban and Rural Planning (issued in November 2024 and came into force on July 1, 2025), planning still operates within a highly hierarchical framework designed to conduct urban growth projects with obvious environmental and socio-economic shortcomings.

For instance, as it is been observed in the OECD Review 2018 Report:

> some cities in Viet Nam have expanded their boundaries to rezone villages outside the city to 'boost' population growth. While this process may be predicated on the idea that increases in autonomy and financial transfers will benefit the absorbed areas as well as the original city, in reality there are no guarantees that the social and physical infrastructure will be adequate for what may now be a greatly expanded and more complex area. This is especially the case, as changes in the city classification are not synchronised with any new assessment of changing needs with respect to administrative capacity. Besides, the classification system, while embracing in principle the need for healthy and sustainable urban growth, [should strongly and better be considered criteria like] living quality, adequacy of infrastructure, the creation and preservation of green areas that may also contribute to food security, preservation of cultural heritage, or any other form of environmental safeguard. In this way, the classification system may also have an impact in limiting longer-term economic investments that may suit the particular characteristics of a given city. Certain cities [indeed] have cultural or heritage attributes – or scenic endowments – that with appropriate investment could become the basis for an ongoing tourist industry.[2]

[2] OECD, *Urban Policy Reviews: Viet Nam*, Paris, 2018, 77-78.

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In other words, new peripheral development hubs (as in the case of Hanoi where there now are interspersed green corridors to protect environment while ensuring efficient transportation and employment connectivity) should be either economically independent (in generating job opportunities, attract investment beyond real estate development) or be harmonized with the unique characteristics of provincial cities, towns, urban districts, wards and townships and of agricultural ecosystems and landscapes, giving them or keeping a special status. In addition, it has been emphasized that, despite a greater administrative decentralization, it was precisely the narrative of 'sustainable development' (understood in terms of 'green growth') that allowed the State to legitimize itself. On the one hand, *vis-à-vis* the business world as a privileged interlocutor for the use of 'green' market instruments and low-impact technological solutions; on the other, in relation to civil society, by portraying climate and environmental crisis as a security threat tied to society's material prosperity.

This way, political leaders have embraced specific knowledge frameworks linked to 'security' and to economic green growth, to ensure regime security and strengthen societal control, through an 'eco-authoritarian' approach consisting in top-down management of environmental policies, while leaving individuals and businesses some room for manoeuvre in terms of participation in the decision-making process. In this juncture, since Vietnam started on a new economic course and initiated the 'Open Door' Policy, the population's standard living conditions have seen improvement, it has caused major conflicts throughout the country. This is also due to the growing activism that has developed in response to several companies' anti-environmental behaviour. At the same time, it has been identified problems inherent to the lack of transparency and accountability in the decision-making process, particularly with regard to trade agreements between the State and the business community.

This therefore raises the issue of establishing a form of 'environmental democracy' in Vietnam, as opposed to 'eco-authori-

of the Regional Development Policy Committee and its Working Party on Urban Policy.

tarian' theories, according to which an enlightened tyranny would be the best and most effective form of government for imposing correct behaviour and legal sanctions on offenders, in line with the current single-party structure of the hierarchically organized Vietnamese state.

However, the focus of institutional expertise is primarily on the harmful effects of pollution and a market economy can simply pretend to be more 'aware' of the problems associated with the exploitation of natural resources, effectively depoliticizing these issues, obscuring in this way other important causes that generate and exacerbate them, namely the *a priori* rejection of the different perspectives emerging within Vietnamese society regarding the interaction between economic development and environmental protection. The following sections will analyse these different narratives.

3. *Alternative Narratives in Environmental Conflicts*

The Confucian-inspired philosophical foundation that permeates Vietnam's history (not only the legal one) is also reflected in the provisions adopted by 2013 Constitution, which, in addition to streamlining environmental policy frameworks, maintains the two-way relationship between State and its citizens, ingrained in its cultural roots. Whereas Article 43 provides that 'everyone has the right to live in a healthy environment and the duty to protect it', Article 63 mentions the State's duties and policies in 'protecting the environment; managing and using natural resources effectively and stably; protecting nature and biodiversity; taking initiatives to prevent and resilience to natural disasters and responding to climate change', while also encouraging 'all environmental protection actions, the development and use of new and emerging energies', and finally recognizing environmental damage as a source of obligation for responsible organizations and individuals, who will be required to restore and compensate for the damage caused.

Article 63, however, recognizes that environmental damage constitutes a source of obligation for responsible organizations

and individuals, who will be required to restore and compensate for the damage caused by and finally 93 paragraph 3 ensures its unitary management. Yet, as it is known, a formal constitution can hardly provide operational solutions that indicate in more detail how to push industrialization and modernization towards a 'strongly' sustainable direction from a socio-environmental point of view, since this task falls into realm of specific policies or, in other words, in the 'material' constitution.

As we have seen above, Vietnam, like other Asian countries (such as China and Laos), raises particular questions, since in combining socialism and market-oriented economic growth they find themselves having to be very prudent in addressing those already present risks of pervasive environmental degradation, which could worsen in pushing for modernization. During the last decades progressive economic development was indeed accompanied by a growing environmental impact on natural resources such as deforestation and soil depletion, caused by the expansion of coffee monoculture plantations, progressive increase in tons of plastic waste poured into the ocean every year, air and water pollution.[3]

To meet industrialization challenges and achieve significant progress in environmental protection, thanks to the growing awareness of the degradation affecting Vietnam's rich natural heritage, the National Assembly approved Vietnam's first 'green' law, namely Environmental Protection Law, on December 27, 1993. Until its approval, there were only a series of legislative acts regulating specific sectors relating to soil, forests, aquatic resources, minerals, oil and gas, flood and storm prevention, etc., but comprehensive legal regulations were still lacking to create a comprehensive, centralized, and unified system to improve effectiveness of environmental protection.

Nonetheless, progressive economic development was also accompanied by a growing impact on natural resources, prompting the revision the text several times (in 2005, 2014, and finally in 2020), with an added aim of avoiding burdensome pressures on

[3] Water pollution levels due to increased industrial activity have put land, and economic activities near the *Mekong* River Delta particularly at risk.

the economic system by negative externalities. The regulatory framework significantly improved compared to the past, as the 'sustainable development' objective of the previous Agenda 21 which was implemented in 2005, and remedial measures were introduced, like the polluter-pays principle. Nevertheless, the greater focus on economic growth over 'strong' environmental sustainability objectives has been the main cause of the ineffectiveness of these policies' implementation measures, due both to insufficient monitoring, effective prevention and enforcement functions and the lack of integrated planning for land and resource management.

As a result, in the last decade, conflicts over the management of natural resources have become more frequent (especially in areas of natural resources and air and water pollution) because of a concrete and differently perceived imbalance between economic development and environmental protection. In particular, numerous case studies have revealed that, due to two main causes (namely high levels of pollution and/or environmental injustice, i.e. the unequal distribution of the benefits and harms caused by businesses), policy decisions and research on environmental protection in Vietnam currently focus mainly on the former (i.e. reducing the harmful effects of pollution), underestimating the importance of the latter.

As seen above, since the start of market reform in the late 1980s, the Socialist Republic of Vietnam has experienced rapid economic development, accompanied by urbanization and industrialization. And in this historical and socio-economic context, while the cost of pollution has not been underestimated, it has been widely accepted as the price to pay for economic growth. Conversely, there is currently a growing awareness not only of a need to balance economic development and environmental protection, but of the importance of grassroots participation in social and environmental issues, often hindered by a top-down approach adopted by the one-party State guide, due to the persistence of a Leninist structure. This model has persistently hindered grassroots initiatives as well as the reported repression of numerous environmental activists, which has been reported by many international media outlets.

Despite the regulatory developments that will be discussed in the following section, these reports reveal continuing obstacles to active engagement in the environmental movements and civil society, many of which have resulted directly from economic reforms. To this end, growing institutional awareness of environmental issues has been accompanied by a reluctance on the part of several powerful economic interest groups, who have repeatedly demonstrated their unwillingness to comply with new regulations (including those related to environmental taxation), contributing to the ineffective implementation of state regulations and also generating cronyism and corrupt practices.

In this light, the new economic and political direction inaugurated by *Đổi Mới* has not only attracted foreign investors but led to the growing involvement of donors from across the border. For the first time, external funding has fostered the emergence of local civil society actors other than those promoted by the VCP (Vietnamese Communist Party), ranging from groups completely antagonistic to the State to highly professionalized and institutionalized NGOs (non-governmental organizations) which provide services and conduct advocacy through informal networks within the government system.

The role of international NGOs and international donors has been emphasized in applying pressure to involve more people and societal actors in the environmental movement, in order to pursue sustainable development politics. In several studies where interviews of many workers in NGOs were conducted and collected, it has been argued that, considering the context of Vietnam, it is more important for NGOs to secure deliverables than to unnecessarily 'create conflict'. In consequence, these kinds of actors work within the norm of knowledge-based and 'non-political' civil society in Vietnam and they often promote a pragmatic and sometimes acritical 'expertise approach', based on sustainable development as a 'neutral topic' and on the 'ecological modernization' narrative that, in the light of an authoritarian regime, are not perceived by institutions as a threat, since they not question the current governance system.

However, although NGOs define their advocacy in relation to institutional alignment processes, they do not adapt exclusively

to a consensus-based logic, since they sometimes contribute to 'co-shaping' the meaning of 'sustainable development', for example by using certain burocratic terms in official documents to then obtain benefits aimed at exercising local organizational practices rooted in local peasant knowledge and territorial specificity. The latter has not a neutral meaning but leaves space for activism or resistance, while causing other subjects' conceptions and practicing other 'narratives'; in particular linked to the 'environmental justice' and 'political ecology'.

Although strongly linked to each other in challenging the existent power relations and pursuing systemic changes, the first is a theoretical and political approach which takes into account uneven distributed benefits and harms caused by industrialization and modernization, while the second promotes critical thinking and a movement which considers not only economic and ecological perspectives, but also cultural ones, as emancipatory in respect of economic positions. In this vein, many environmental conflicts occurred because the differences in perceptions among governments, businesses, and citizens in how to balance economic development and environmental protection.

According to a 'socio-cognitive' approach, environmental disputes are essentially a communication process in which perceived dissonance can turn into a dispute between two or more parties involved with environmental resources. This approach suggests that resolving environmental disputes involves not only the application of clean technologies and scientific processes but also finding ways to resolve cognitive differences in the appropriate allocation of environmental benefits and harms. In other words, pushing forward different narratives of 'environmental sustainability' based on the socio-cognitive approach (without, however, losing sight of the universal and distinct meaning of 'nature' as an agent independent of human action) means demystify the strategic use of 'expert knowledge' in politics and society, revealing its relativistic character.

For instance, in the case of a severe drought and salinisation in the Mekong Delta between late 2015 and mid-2016, whose impacts would exacerbate the already-unbalanced population distribution between urban and rural areas, local farmers and

fishermen did not necessarily problematize neither environmental conditions nor the government's responses in providing with economic compensation measures. This conducted the latter to be commonly portrayed by newspapers as persistent 'adaptors' to environmental hardship, glorifying the local population's ability to adapt and mentioning that:

> local residents also cited a lack of attachment to the environmental cause. They expressed similar views on NGOs about the multiple causes of drought and other environmental problems, stating that, as long as the government was able to provide them with a compensation program, they would continue to try and adapt to changing conditions. This perhaps reflects how the diffusion of the idea of adaptation as a solution by the government, academia, and newspapers has influenced the mentality of the local population [as a result that] in this case, local activism led by communities and citizens was lacking.[4]

This demonstrates how the universal rhetorical efficacy of 'sustainable development' (accepted in Vietnam as the 'official' one) is actually functional to 'strategic' objectives such as 'adaptation', which shift the environmental problem from causes to effects, increasingly overshadowing the notion of a 'strong' ecological sustainability whilst founded on the precautionary principle. Therefore, different 'environmental narratives' can lead to different forms of activism (for example those already coming from several Vietnamese rural villages) that reverse the process of depoliticizing the expert approach and instead 're-politicizing' environmental issues and grievances.

For all these reasons, as will be reiterated in the next session, the most recent political decisions in Vietnam have shown how it has been crucial in the last five years (2020-2025) to channel dissent into cooperative and collaborative forms of 'sharing power' within an institutional framework, geared toward a more democratic evolution of the local legal system. This juridical frame-

[4] T. N. Van-Quoc, E. Turhan, R. Holzhacker, *Activism and Non-Activism: The politics of Claiming Environmental Justice in Vietnam*, in 6 *Environment and Planning E: Nature and Space* 2 (2023), 976-1006.

work opens the decision-making process to monitoring and participation by citizens and affected communities in political decisions regarding social-environmental topics while simultaneously ensuring their involvement in environmental plans and programs, as well as in adopting solutions to mediate environmental disputes. This is in order to prevent both legal action (often costly, especially for village communities), and potential explosive conflicts that risk degrading the dialogue process.

4. *How Environmental Issues Can Meet Grassroot Democracy*

The literature review of several environmental conflicts case studies in Vietnam[5] has highlighted, first and foremost, that the State's administrative management system alone is insufficient to control environmental pollution and afford environmental issues in general. It has been underlined that for a long time, public policy instruments (planning and permitting tools) constituted the environmental Vietnamese policies' operational core on natural resource management.

This is because they were considered to be the most suitable for both a dirigiste policy and for ensuring targeted prevention of pollution risks to human health and environmental quality by the National Assembly and the Government, while providing large-scale planning of human activities relating to the specific uses of a given resource. Nevertheless, this approach also appeared to be effective for a number of reasons.

The first one is the fact that relevant management agencies could lack the resources, knowledge, and expertise needed to

[5] UNDP VIỆT NAM, ĐẠI HỌC KINH TẾ QUỐC DÂN (Hanoi), *Quản trị và Tham gia Loạt báo cáo nghiên cứu thảo luận chính sách Xung đột môi trường, tác động xã hội, và công lý môi trường ở Việt Nam: Nghiên cứu trường hợp, phân tích và ý nghĩa chính sách*, 2018. This Report examined 17 environmental conflict situations in the government database and conducted in-depth research on five environmental conflict situations between companies and citizens. The cases were selected based on two main criteria: they occurred since 2012 until 2018 and went through several stages of conflict, including complaints, negotiations and resolution.

monitor and enforce standards. Obligations and standards should be capable of taking into account numerous other contextual factors, such as local environmental conditions, information asymmetries between public and private sectors, differences between among operators in terms of pollution abatement costs, and the risk of undermining valid incentives for businesses in terms of technological and productive innovation.

The second regards social trust in government officials (especially local ones) that can vary greatly from province to province in terms of reliability in monitoring business compliance or in objectivity and independence when working with companies. Furthermore, what is often been alerted in this research about the Vietnamese environmental management context is the lacking in effective citizen participation and a shortage of support by socio-political professional, independent and competent organizations, while underlining the impact of mass media, social networks, in spontaneous demonstrative action.

The case study of tree-felling disputes, which occurred in Hanoi in 2015,[6] showed how a combination of street protests and criticism on social media surprised public officials, because civil disobedience actions opened a political space that enabled citizens to voice their concerns, while the same officials refused to engage with deliberative claims for urban citizenship and right to participate in governance. Moreover, the same case drew attention to the ineffectiveness of administrative dispute resolution, causing tendencies in people to take spontaneous actions in order to attract the attention of authorities despite it carrying high legal risks. All this to avoid social, political or professional support and in trying to calm disagreements through debate and sharing objective and rational arguments has been increased.

For all these reasons, Vietnam is giving particular attention to the problem of exercising grassroot democracy in the last years,

[6] In early April 2015 start a campaign protest the City Government's decision to fell 6,700 street trees and was wide-spread by social media where online petition attracted over 22,000 signatures. The case-study conflict represents one of the most important to represent the 'right to the city' topic in Vietnam.

especially in the field of environmental Law, in order to remedy the lack of trust in authorities, and the sparse participation by non-state organizations, socio-political organizations, professional organizations, stakeholders and communities in general (necessary to acquire a 'lay knowledge' by the authorities). The framework for an 'environmental grassroot democracy' in Vietnam can be drawn at the international level from the well-known Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which was signed on 25 June 1998 in Aarhus, Denmark, and entered into force on 30 October 2001. At the domestic level, it extends from the combined provisions of the latest revision of the Environmental Protection Law in 2020, paired with the Law on Basic Democracy that came into force on July 1, 2022.

The former provides a legal basis for an 'environmental democracy' and has considered by international environmental Law scholars as a cornerstone for several other regulatory developments in this area and, at the same time, a tool in updating the interpretation of other international treaties, so as to promote their global dissemination in regulating access to information, in encouraging public participation and in guaranteeing access to justice in case of violations of Convention's dispositions. Even if Vietnam has not signed the Convention, it could nevertheless be considered as a reference point due the systematic interpretation that it offers in relation to other treaties, especially on human rights.

In the same direction at the national level, in order to highlight that the most up-to-date domestic legislation in Vietnam that complies with the contents of the Convention, this section proposes to carry out a parallel and systematic reading between the Environmental Protection Law of 2020 (LEP), with the Law on Grassroot Democracy (LGD) of July 1, 2022. The right of access, as the essential starting point for any awareness of public involvement in decisions, the information is held and available at all levels of government (Article 114 LEP, similarly in accordance with Article 6 of United Nations Framework Convention on Climate Change) by a developing, digital, synchronized system that provides support and incentive for the application of informa-

tion technology advances and science. It also incentivizes the use of technical instrumentalities or equipment, and other necessary conditions for implementation of grassroots democracy, in line with the progress in building e-government, digital government and digital society (Article 8, c. 5 LGD) or by the other ways provided by Article 12 LGD.

In order to confront the aforementioned problems about mending trust for the institutions and facilitate participation of socio-political organizations and communities in administrative procedures such as authorizations and licenses for projects with a significant environmental impact, a very important norm is Article 159 LEP (Entitlements and obligations of residential communities). It provides that:

> Representatives of residential communities in areas under environmental impacts made by investment projects, businesses, dedicated areas for production, business operation and service provision and industrial clusters are entitled to request investment project/business owners to provide information about environmental protection through face-to-face meetings or in writing; shall conduct fact-finding visits to collect information about environmental protection by investment projects, businesses and dedicated areas for production, business operation and service provision and industrial clusters; collect and provide information to competent authorities and take responsibility for the information provided,

while the following paragraph states that they are also entitled to request that relevant regulatory bodies provide results of the inspection and handling.

However, even if everyone has the right and freedom of access to information, there is an exception concerning data or information classified as State secrets or those that may be not be disclosed in accordance with law (Article 11 LGD). Regarding the participation aspect, in the National Green Growth strategy for 2021-2030 (also in line with Article 4 of Climate Change Convention) it is stated that the State will 'encourage the participation of the whole society in the implementation of the Strategy, inspection and assessment of the implementation of Strategy and green-

ing level of economy'. Past studies and research had reported the ineffectiveness of practical citizen participation in environmental policymaking as well as the scarce opportunities to influence land-use planning regarding the location of pollution-prone production activities or the standards used for EIA (Environmental impact assessment) activities.

These gaps were filled through the latest amendment to the Law on Environmental Protection in and in some part by the recent Law of Urban and Rural Planning and Law on Grassroot Democracy.

In considering the first legislative act, greater attention has been given to participation of residential communities in having to be consulted during the EIA procedure (Article 36 LEP) and, in case of environmental emergency, those affected are entitled to be informed, to participate and supervise the environmental emergency response (Article 129 LEP).

The second Law according to the 'Aarhus model' (Article 8 Participation of the Public to Plans, programs and politics in environmental subject) establishes that, for planning activities, individuals and communities have to be consulted by the organizations that shall collect comments from them (Article 20). In addition, this disposition should be coordinated with Article 56 LEP which states that every craft village must have an environmental protection plan, an autonomous environmental protection organization and environmental protection infrastructure.

Lastly, the LGD contemplates municipalities, neighbourhoods, cities, and residential communities at the municipal level as well as public service units of the Party and the State, socio-political organizations enterprises, cooperatives, and other organizations that hire and employ labour under labour contracts grassroot agency. These units directly organize the dissemination of information, gather opinions and comments, and implement decisions in accordance with the Constitution and laws, and are inspected and supervised by the same citizens, cadres, civil servants, public employees, and workers in a mutual interaction.

In light of this systematic reading, it may be possible to contribute in filling the systemic shortcomings of the Vietnamese State's environmental grassroot management, these which have

been highlighted overall by past and present environmental conflicts. Although it is noteworthy to recognize that even though the analysed reforms are more adherent with the Arhus Convention model, it does not requires States to transfer decision-making power from public bodies to civil society, nor provide them to implement deliberative mechanisms in decision-making, nor can it definitely be said that the law on grassroots democracy represents a true model of deliberative democracy.

Nonetheless, an important step forward has been taken by the Vietnamese State, which would seem to confirm at first glance its role as a 'trustee', thanks to its notable legal basis for the better exercising of popular power at the local level, and also in contributing as a 'bridge' of Party and central institutions in general. In this sense, the results of this reform will only be seen through concrete implementation of the Law, which would require more transparent mechanisms to ensure greater decision-making power and control by those involved in the participatory process, as well as stronger coordination with central institutions in terms of financial flows, representation and cooperation in joint actions. A further progress forward could imply a more decisive shift from a mere dirigiste ethical legitimacy to a democratic one, which would entail that government itself would open the decision-making process to a plurality of visions on how to organize public life.

5. *Conclusions*

Currently, citizen participation in Vietnam is affected by changes in the relationship between the State and its citizens, which involve the tight link between institutional accountability in one hand and administrative participation on the other. The requirement of citizen consultation in the 2020 Environmental Protection Law and the 2022 Law on Grassroot Democracy denotes the State's recognition of limitations of a top-down approach. A shift towards a bottom-up method of civil, social, economic and environmental management would likely guarantee an healthy coexistence of stability and 'trust', despite the persis-

tent concerns on the capacity in diffusing environmental campaigns conducted by spontaneous civil society organizations.

From a general judicial framework and socio-political implication, either before or after changes introduced by the previously mentioned Laws, it is possible to establish two 'guidelines' on potential of the democratic asset in Vietnam at the grassroot level. Paying special mind to environmental concerns, and to Confucian and Marxist cultural influences on the country's institution and people, the 'shared power' approach further refines these two paths. Regarding the first one, it can be noted, at a general level, the constitutional rights of East Asian countries consist in an overlapping of Confucianism and socialism.

For both these ideologies, the central role of the ruler is to care for the people, in accordance with a conception of the human being as part of a larger community that denotes the inseparability of individuals within the social context. This in turn implies an emphasis on collective interests and the submission of individuals to the State, where people entrust their well-being to a morally correct power which is built on a paternalistic trusteeship (or soft authoritarianism).

Based on the latter, it could be possible to adapt the Gramscian theory of the 'integral State' consisting in a mutual and organic compenetrating institution in the social body beyond the static liberal division between State and civil society. Through all the possible interaction between these sectors it is possible to indefinitely reproduce a defined cultural 'hegemony' in turn understood as a consensual dimension of political control. This vision allows for a possibility of a better 'democratic centralism' within which the harmony of social-political participation in local governance could be combined, but whose implementation in terms of socio-environmental politics renovation is hindered by current hegemony of market-oriented 'ecological modernization'. This in turn is gradually moralizing the development process and transforming social citizens into individualized, capitalist self-entrepreneurs.

However, in parallel with modification of the preexisting economic model, gradual institutional adaptations concerning Vietnam's *Đổi Mới* have not changed core components of the coun-

try's political system, since liberal market economy principles continue to coexist with both a single-party institutional architecture and an ideological conception belonging to socialist democracy. Indeed, even if for three decades a substantial variety of social and organisations have blossomed in Vietnam they are influenced by the Party and the State apparatus such that relative connections are actually in accordance with the orthodox Marxist model of state-society relations. Yet these relations are also continuously pushing the Party to a certain degree of inclusionary corporatism in the direction of a gradual broadening of the political base.

From this perspective, whether the recent reforms about Environmental Protection Law and the Law on Grassroots Democracy have represented genuine innovation in the area of deliberation and participation remains an open question, open to further discussion both with the concept of 'socialist democracy' and according to International Law and praxis here only mentioned. Consequently, in light of the 'integral State' paradigm the main question concerns are not only the improvement of legal institutions but also the creation of guarantees for democratic practices (that is 'material constitution') besides the guidelines for people to exercise their democratic formal rights.

In this regard, one of the most useful concepts to embrace is understanding of the degree to which political institutions incorporated into the State apparatus communicate with community or 'self-managed' activism (as a form of public power in which the subjects and objects are the same and activities are carried out on the basis of self-regulation, such as codes of conduct developed by villagers). Thus, the People's rule, through the exercise of popular political power, can be considered a true manifestation of democracy.

Besides this, the present contribution explored the important role of NGOs in either filling the gaps in tools for local communities to facilitate the participation of its citizens, or in handling environmental issues as function of their expertise, their diplomacy and the adaptation of acts according to State laws and institutions. Nevertheless, beyond non-profit organizations there is an increasing number of individuals and groups

which fall outside party sanctioned organizational structures that have questioned the hegemonic assumptions taken for granted by the State. These assumptions include the balance between economic development and environmental sustainability, putting at the very heart of the debate alternative 'environmental narratives' coming from environmental justice and political ecology topics.

Thus, in light of the question posed earlier regarding if recent reforms to the Environmental Protection Law and the Law on Grassroots Democracy could represent a form of institutionalization of deliberative practices (as has happened in other Asian countries, i.e. China and Indonesia), it is not possible to find an answer without considering the authoritarian decision-making context and how it responds to persuasive influences posed by participant interaction with public official powers. In this sense even if any theoretical and practical influences about deliberative democracy came from the North/West political culture, developments in these fields have to be considered in the light of Confucianism that places its assumptions on consensus and social harmony to suppress conflicts.

Considering the new legal framework in Vietnam, the State has responded by regulating formal deliberative procedures[7] either to manage and reduce abovementioned social conflicts, or to ensure social harmony by providing space for people's demands to be heard in the administrative system. The new regulations however fail to create a new mechanism of 'co-decision' making, keeping the monopoly of the party-state political power[8] through the adoption of a 'sharing-power' approach even allowing implementation of some pilot projects to be carried out in cooperation with foreign bodies and associations.

[7] For instance, Law of Grassroot Democracy, Article 17, clause 1b) states that the President of the commune-level People's Committee, the Head of a village or residential quarter shall take charge of getting population living in that village or residential quarter involved in the public consultation process have to consult residential community even by survey forms handed out to family households.

[8] At the same time, survey procedures are under the strict control of People's Committee (Article 23 LGD).

One of the missed opportunities identified here is how current consultation mechanism, regulated by the recent Law on Uban and Rural planning, operates without any other greater 'participatory institutionality', which could be crucial in planning urban management. For example, by using the classification system in more a flexible and dynamic way to develop, monitor and evaluate mechanism of city performance, incentivizing the quality of the urban environment, with public green and functional peripheral spaces improvement, preservation of cultural heritage and interconnections between cities and villages or within a metropolitan area, which greatly help cities to make more right, sustainable and effective investment decisions on urban infrastructure.

Moreover, the centralization of power has also been emphasized, since the decision-making process could help to reduce functional overlap, improve the effectiveness of policy implementation through better coordination of environmental management, minimize conflicts of interest at the local level and avoid limiting to merely providing a 'legal cover' for the free action of economic actors. However, to avoid the shortcut of choosing between bureaucratic centralism and the possible withdrawal of public intervention typical of a mere 'managerial state' (which would undermine the foundations of social and 'environmental' citizenship), it may be urgent to regulate and implement more effective institutionalized deliberative and participatory procedures, especially in rural and peri-urban contexts.

Citizen-led activism, as an emerging form of civic engagement plays an increasingly crucial role in effecting a shift toward reshaping State-society relations in Vietnam by skilfully leveraging existing legal instruments and pushing for further renovation of direct democracy institutions even if the central State still holds the leading role. Currently, the process of participation is based on a negotiation between citizens and the State that is not directed against its basic structures but rather aims at improving it through accountability, transparency, and the creation of a public sphere.

Even if this results in 'environmental subjectivities' (often localized and rooted in local networks and identities) suggesting

how future grievances can be more politicised, it could explicate also a powerful 'constructive dissension' over environmental injustice by means of their alternative socio-ecological visions. Perhaps in the long run, this could gain greater leverage to counter poorly sustainable policies lead by elites with legitimate and effective civic action toward more deliberative and accountable politics and institutions for a greener, more just State.

SOCIAL INDICATORS AND SUSTAINABLE DEVELOPMENT IN THE KINGDOM OF BHUTAN: THE GROSS NATIONAL HAPPINESS MODEL

Emilia Morra

Abstract: *Starting from a reflection on the current meaning of sustainable development, this article analyses Bhutan's experience as an alternative model to traditional development paradigms, which are mainly based on Gross Domestic Product. Through the concept of Gross National Happiness, Bhutan proposes a holistic approach that integrates economic, social, environmental and spiritual dimensions, placing the protection of ecosystems and collective well-being at the centre of public policy. The article examines this system in the context of the debate on sustainable development and multidimensional indicators of progress, questioning its transferability to other legal systems and the contribution it offers to the redefinition of contemporary constitutionalism.*

Keywords: Sustainable Development, Gross Domestic Product, Bhutan, Gross National Happiness, Social Indicators.

1. *The Composite Nature of the Concept of Sustainable Development*

When we talk about sustainable development, we are referring to a variable concept that has been interpreted differently over time, depending on the historical, social and political context, and therefore on the needs felt by the community at any given time. In short, it is a multidisciplinary and multidimensional 'container concept' that needs to be filled with content.

The starting point for theorising the notion of sustainable development is the report Our Common Future, better known as the Bruntland Report of 1987, presented by Norwegian Prime Minister Gro Harlem Bruntland during the World Commission on Environment and Development, established in 1983 by mandate of the United Nations General Assembly. The report states that sustainable development is the one that 'meets the needs of

the present without compromising the ability of future generations to meet their own needs'.[1] This concept of sustainability comes from the natural sciences as a principle of balance between the three Es, ecology, equity and economy, and refers to the 'carrying capacity' of the environment, which measures the maximum level of crowding beyond which ecosystems can no longer reproduce,[2] and the need to use the natural resources of present generations without compromising the ability of future generations to meet their own needs, according to a logic of intergenerational equity.

Historically, this definition has represented a meeting point between the different positions in the debate on the environment and the economy, which has been characterised since its inception by a strong polarisation between those who argue that the market mechanisms of liberal economic theories are capable of providing the necessary remedies to address the environmental problems generated by economic growth, and those who consider current production and consumption models to be the main causes of environmental degradation and propose alternative solutions.[3] In this debate, the definition outlined above became the guiding principle in the relationship between the environment and development, which was then enshrined in the 1992 Rio Declaration. During the Rio Conference, sustainable development was officially defined as the only alternative for 'improving the quality of life without exceeding the carrying capacity of ecosystems',[4] emphasising that economic and social development must be achieved in a compatible way with environmental protection.[5] The link between environmental, economic and social sustainability was then reaffirmed at the World Summit on Sus-

[1] World Commission on Environment and Development (WCED), *Our Common Future,* United Nations, 1987.

[2] F. La Camera, *Sviluppo sostenibile. Origini, teoria e pratica,* Roma, 2003.

[3] D. Amirante, *Costituzionalismo ambientale. Atlante giuridico per l'Antropocene*, Bologna, 2022, 25.

[4] United Nations Conference on Environment and Development (UNCED), *The Rio Declaration*, 1992.

[5] M. Silvestri, *Sviluppo sostenibile: un problema di definizione*, in 2 *Gentes* 2 (2015), 215-219.

tainable Development (WSSD) in Johannesburg in 2002, through the fundamental documents of the Declaration on Sustainable Development and, in particular, the Plan of Action, which emphasises the relationship between environmental, economic and social issues such as the defence of human rights, the fight against poverty, the equitable distribution of resources and the protection of health. Sustainable development is identified as the only element capable of satisfying all three aspects, building a more equitable social structure for future generations.

After this initial phase of theorisation in the form of a non-binding international principle, the principle of sustainable development then took on a binding character, expressly defined in Community treaties as a guiding principle of a legal nature, and was incorporated into numerous documents that followed, starting with the 1957 Treaty of Rome establishing the European Economic Community,[6] up to the 2000 Charter of Fundamental Rights of the European Union[7] and the 2007 Treaty of Lisbon.[8]

However, in order to understand the concept of sustainable development, it is not enough to analyse its evolution in legal terms; it is also necessary to examine its multidimensional nature, i.e. the principle that involves economic development, environmental protection and social development.

[6] Article 2 of the Treaty of Rome (1957) includes among the Community's objectives 'to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living'.

[7] Article 37 of the Charter of Fundamental Rights of the European Union (2000) states: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

[8] Article 21 of the Treaty of Lisbon (2007), in the chapter dedicated to the Union's external action, states that: 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to […] foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' and 'to help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'.

We will therefore focus on the meaning of the three forms of sustainability that contribute to defining the current concept of sustainable development.

Ecological sustainability is directly linked to major contemporary environmental issues such as biodiversity protection, safeguarding ecosystem balance and the possibility of reproducing the resources used. It is often associated with the term 'ecosystem', understood as a natural environment that is eco-sustainable to the extent that it manages to maintain its characteristics unchanged in relation to space and time. In general, behaviour can be considered sustainable if the balance between the consumption of the population of an area and the available resources is positive. Otherwise, we are faced with an abuse of resources and ecological reproducibility, in which the ecosystem is unable to reabsorb the waste generated by the consumption of those resources. Today, we know that the Earth's environment is affected by human activity, which is capable of producing substantial alterations to the natural balance. This is what Amirante defines as the 'Anthropocene', i.e. the contemporary geological era in which 'the ecological impact of humanity is causing a radical change in the atmosphere and, more generally, a degradation of the natural foundations of life on earth'.[9] It follows that the rational use of natural resources becomes an essential objective for achieving true sustainability, also taking into account the relationship with the economy.

Economic sustainability refers to the joint assessment of three different forms of capital: monetary, social-human and natural. Identifying the limits of economic growth means assessing it in relation to its impact on the environment and favouring activities that have a low impact on it.

Finally, the term *ethical-social* sustainability refers to issues of social equity between individuals, groups and larger social aggre-

[9] The term 'Anthropocene' was coined in 2000 by Nobel Prize winner for chemistry Paul Crutzen but is now used in both the exact sciences and the humanities and social sciences, as well as, very recently, in the legal sciences. For further information on this point, see D. Amirante *Costituzionalismo ambientale,* cit.

gates, the equitable distribution of human well-being and equal access to services in order to increase opportunities for the population. This dimension of sustainability aims to achieve intragenerational equity, which implies equal access to resources for all, and intergenerational equity, which aims to ensure that future generations have the same opportunities for development as past generations, which is the core of sustainable development policies.[10]

In this context, legal professionals are tasked with exploring the concept of sustainable development in depth, recognising its interdisciplinary nature. Each of the dimensions involved (economic, environmental and social) aims to pursue different objectives, and favouring only some of them at the expense of others means only partially achieving a sustainable reality for future generations. Understanding the meaning of sustainable development in today's world, and its implications, also means questioning the systems and tools historically used to evaluate it, such as traditional indicators of social development, such as Gross Domestic Product (GDP). GDP, in fact, only measures the total value of goods and services produced in a country, without taking into account fundamental aspects in measuring a country's growth. What emerges, therefore, is only a partial representation of the growth of society, which values purely economic aspects without taking into account the environmental and social components that contribute to defining the concept of sustainability as we understand it today. In the current paradigm, in which development is conceived in integrated terms, GDP does not take into account income distribution, natural capital, the environmental impact of productive activities or social cohesion. Furthermore, GDP can grow even in the presence of environmental degradation, increasing inequality and irreversible consumption of resources, thus proving inadequate to represent the real progress of a society in broader terms than purely economic ones. On the other hand, can the increase in a country's wealth really be considered positive if it is not accompanied by progress in its

[10] M. Silvestri, *Sviluppo sostenibile: un problema di definizione,* cit., 215-219.

society and an improvement in the quality of life for present and future generations?

Hence the need, which has become particularly apparent in recent decades, to supplement GDP with additional alternative or complementary indicators that also integrate social and environmental dimensions and thus enables to assess, in a more comprehensive and realistic manner, the degree of sustainability of a country's development.

2. *Beyond GDP: New Perspectives on Measuring Development*

For a long time, the idea of progress was based on growth in production, traditionally measured using Gross Domestic Product. Since the 1930s, GDP has become an expression of the economic model typical of a historical period in which the economic activity of nations was the priority. Today, although economic growth still plays an important role in determining a country's living conditions, its limitations have become apparent, and questions have been raised as to whether it is still capable of providing a comprehensive and accurate representation of a nation's level of development.[11]

A first limitation of GDP as an indicator of development is that it is calculated as the sum of goods and services produced in a year, with the result that production not directly linked to the market or that escapes the specific measurement procedures used is inevitably excluded from the calculation. A further criticism of the per capita national product indicator concerns its inability to represent the distribution of income within the population. An increase in average GDP per capita could, in fact, conceal an increase in economic inequality, with the result that a significant proportion of citizens may in fact find themselves in worse conditions despite the growth in average income. In other words, GDP can grow without the overall well-being of the pop-

[11] S. Rugiero, *Energia e sostenibilità ambientale come fattori del benessere. Un'analisi dei principali indicatori,* in 1 *La Rivista delle Politiche Sociali* (2011), 175-197.

ulation actually improving, which is why many scholars question its adequacy as a measure of a society's well-being.

On the subject of well-being and the increase in Gross domestic product, it should be noted that some phenomena that threaten the quality of life of citizens can actually increase GDP: producing a good that causes a lot of pollution can in fact raise the level of GDP more than producing the same good with less pollution. The reference, therefore, is to the issue of the sustainability of economic production, an essential aspect in defining and assessing people's well-being. In fact, if, as previously stated, the concept of sustainability is based on maintaining the quantity and quality of capital reserves (environmental, social, human) enjoyed by current generations over time, we cannot fail to note that these aspects are not taken into account at all by GDP. This means that environmental degradation, due to the loss of natural capital, should be included in the measurement of economic performance, especially if we consider that GDP growth is often accompanied by an increase in quality of life up to a certain threshold, beyond which these increases are outweighed by the costs associated with environmental damage.[12]

It is therefore a question of critically rethinking the current model of development and seeking a better understanding of the factors on which to base an idea of 'sustainable human well-being' that focuses on people's quality of life and its sustainability in the future. The observations made so far highlight the multidimensional nature of the concept of development, expressed in terms of economic, social and environmental sustainability, which is the basis of people's quality of life. Furthermore, since the notion of well-being is composed of a wide range of information, it is necessary to take into account both quantitative and qualitative indicators, allowing the perception of well-being of members of society to be integrated with traditional measurement methods. It is only through this comparison that we can observe the gap between traditional indicators of a population's economic well-being and perceptual elements. If we think, for

[12] Ibid., 4.

example, of the concept of happiness, it is easy to see how people in poorer countries often declare themselves happier than those living in countries with a high GDP per capita: this is the so-called 'happiness paradox' or 'Easterlin paradox', which shows that the perception of well-being increases as income rises, but only up to a certain level (the '*turning* point') beyond which the correlation decreases until it disappears.[13] These considerations confirm the importance of using alternative development assessment tools that replace or complement traditional ones and enrich the conceptual and interpretative framework of the phenomena we are analysing.

On the other hand, since the 1960s, many studies, based on multidisciplinary approaches just as the concept of sustainable development is multidisciplinary, have attempted to quantify the concept of 'quality of life' and identify indicators capable of capturing more objective elements of well-being. According to the objective approach theorised in the 1980s by Nobel Prize winner Amartya Sen, an individual's well-being derives from what they can do and be using the resources available to them (*capabilities set)*, and from the individual's ability to exploit those resources to achieve the goals they can actually achieve (*functionings set)*. This theory is accompanied by another flourishing strand of literature known as 'economics of happiness', which adopts a subjective point of view, referring to the positive or negative emotions that individuals associate with different aspects of life (job satisfaction, perceived health) or life in general. In any case, whatever concept of individual and social well-being one wishes to adhere to, the idea of well-being as a multidimensional phenomenon,

[13] The Easterlin paradox is an economic theory formulated by the American Richard Easterlin in 1974. Easterlin observed that, at an aggregate level, there is a positive correlation between income and happiness, but that this correlation is very weak: while happiness initially varies directly with income, both between countries and within countries, over time the long-term growth rates of happiness and income are no longer correlated. According to Easterlin, the main reasons for this contradiction are to be found in the speed with which people adapt to their new income level, in the social expectation that it will continue to grow, and in the fact that happiness is strongly influenced by other factors such as interpersonal relationships, health and freedom.

encompassing both monetary and non-monetary aspects, appears to be shared in the literature.[14]

In fact, since the 1990s, numerous international initiatives have attempted to promote the development of indicators to complement GDP, which could represent distributional, sustainability or, more generally, social aspects. Examples include the MEW (Measure of Economic Welfare) proposed by Nordhaus and Tobin in 1972, the ISEW (Index of Sustainable Economic Welfare) which later became the Genuine Progress Indicator (GPI), or the much more famous Human Development Index (HPI) proposed by the United Nations in 1990, which is based on three elements: per capita GDP, literacy rate and life expectancy. A 'corrected' version of the HPI was also developed, which takes inequality into account (Inequality-adjusted HDI). In reality, in order to define the set of indicators to be used to measure well-being and social progress, it is also essential to consider their integration with the different stages of the public policy cycle, from the identification of priorities for action to planning, from monitoring to cost-benefit analysis of alternative strategies, to the evaluation of results. In this regard, consider, for example, the 2030 Agenda for Sustainable Development, signed in 2015 by the governments of the 193 member countries of the United Nations in order to define a global framework for sustainable development, divided into 17 Sustainable Development Goals (SDGs) to be achieved in the environmental, economic, social and institutional fields by 2030. The goals are globally valid, but require proper contextualisation at national level through the selection of a coherent set of indicators to monitor progress towards their achievement. Furthermore, consider the creation of the Social Scoreboard, a system of indicators that accompanies the implementation of the European Pillar of Social Rights,[15] assessing

[14] E. Romano, *Dimmi cosa misuri e ti dirò che politiche fai (superare il PIL per combattere le disuguaglianze),* in 2 *MicroMega* (2019), 92-104.

[15] The European Pillar of Social Rights is a set of 20 principles and rights, whose aim is to strengthen the social dimension of the EU while increasing the quality of working and living conditions among Member States. The Pillar encourages Member States to update their social and employment standards and laws in order to reflect an inclusive and equitable society. For more infor-

trends and results in different countries and acting as a compass to guide socio-economic convergence among EU Member States. The Social Scoreboard indicators complement the macroeconomic indicators that guide the *ex ante* coordination of economic policies within the European Semester and thus contribute to integrating the social dimension into the economic governance of the Union.

This series of initiatives represents an attempt to move towards a new way of measuring a country's progress and is indicative of a widely felt need to develop alternative or complementary methods to GDP in order to ensure a more comprehensive assessment that is consistent with the principles of sustainable development and social justice. The measurement of progress can no longer be limited to purely economic parameters but must reflect the multidimensional nature of well-being by including social, environmental and institutional aspects. From this perspective, the integration of new indicators into public decision-making is important because it allows economic and social policies to be geared towards objectives of intergenerational equity, environmental protection and the promotion of fundamental rights, creating a model of development that is truly sustainable and allows us to move away from the logic of 'well-having' to that of 'well-being'.[16]

3. *The Case of Bhutan: Environmental Protection and Happiness in the Constitution*

Bhutan is a small kingdom located in the eastern part of the Himalayan region, nestled between the People's Republic of China and the Indian Union, known for its philosophy based on the pursuit and preservation of the happiness of its citizens. Unlike

mation, visit https://employment-social-affairs.ec.europa.eu/policies-and-activities/european-pillar-social-rights-building-fairer-and-more-inclusive-european-union/european-pillar-social-rights-20-principles_en accessed 12 September 2025.

[16] S. Rugiero, *Energia e sostenibilità ambientale come fattori del benessere*, cit., 175-197.

many other countries in South Asia, Bhutan did not experience a true period of colonisation, but only interference in its foreign policy by the British Empire first and then the Indian Union. Traces of this influence can be seen, for example, in the tendency to use the conceptual and terminological apparatus of the common law tradition, accompanied by the choice to use the English language for the drafting of legislative texts and in the training of legal practitioners.[17] If we add to this the complex debate about the existence or otherwise of a specifically Buddhist law and its possible interference in the Bhutanese legal system, what emerges, from a public law perspective, is a composite picture, characterised by a mixture of different features, which is difficult to fit into the traditional categories of Western constitutionalism.[18] On the other hand, Bhutan's constitutional history is fairly recent, and is the result of a long journey characterised by monarchy and a close link between temporal and religious power.

However, despite its recent constitutional history and a young constitution, enacted in 2008, Bhutan is a successful example of measuring well-being and moving beyond Gross Domestic Product. Since the 1970s, the small Himalayan kingdom has developed an alternative model based on the concept of Gross National Happiness[19] and the idea that a nation's true progress cannot be measured solely in economic terms, but must take into account the overall well-being of the population, including spiritual, cultural, social and environmental dimensions.

A distinctive feature of the Bhutanese system is the close interrelationship between human well-being and environmental protection: collective happiness is conceived as inseparable from ecological balance and the preservation of natural resources. Far from being a mere accessory objective, environmental protection

[17] A. Cenerelli, *Il sistema costituzionale del Regno del Bhutan*, in D. Amirante (Ed.) *I sistemi costituzionali dell'Asia meridionale,* Padova, 2019, 252.

[18] For further information on legal comparisons with South Asian legal systems, see D. Amirante, *Al di là dell'Occidente. Sfide epistemologiche e spunti euristici nella comparazione "verso Oriente",* in 1 *DPCE* (2015), 1-36.

[19] W. Bates, *Gross National Happiness*, in 23 *Asian-Pacific Economic Literature* 2 (2009), 1-16; M.S. Givel, *Gross National Happiness in Bhutan: Political Institutions and Implementation*, in XLVI *Asian Affairs* 1 (2015), 102-117.

is an essential condition for the realisation of individual and community well-being in the Bhutanese legal system, so much so that it is included in the 2008 constitution (in Article 5) as a founding principle of the legal system.[20]

The article in question does not establish either a right or a duty, but rather defines environmental protection in terms of responsibility, attributed to the various subjects identified in each paragraph. At the beginning of the evocative Article 5, we read that 'Every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of present and future generations'. As trustees, the citizens of Bhutan assume certain duties, such as 'to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan and prevention of all forms of ecological degradation including noise, visual and physical pollution through the adoption and support of environment-friendly practices and policies'. This is followed by the duties of the government, which is responsible for safeguarding biodiversity, preventing pollution and ecological degradation, and ensuring ecologically sustainable and balanced development, while promoting 'justifiable' economic and social development (para. 2). Emblematic for the purposes of this discussion is the formulation relating to the relationship between the environment and development which, as Amirante observes, 'reverses the terms of the traditional notion of sustainable development, giving priority to ecological sustainability on which forms of development defined as *justifiable* must be structured',[21] giving priority to sustainability over the economy in an unprecedented manner.

Of interest, in the context of biodiversity protection, is the obligation, contained in paragraph 3, to reserve at least 60% of Bhutan's territory for forests in perpetuity.[22]

The article then continues, in paragraphs 4 and 5, with a gen-

[20] P. Cullet, L. Bhullar, S. Koonan (Eds), *The Oxford Handbook of Environmental and Natural Resources Law in India*, Oxford, 2024, 67.

[21] D. Amirante, *Costituzionalismo ambientale*, cit., 220.

[22] Bhutan was the first country to establish a '*Quantitative Environmental Standard*' within its national constitution.

eral legal reserve on environmental matters, also with a view to ensuring intergenerational equity and 'declaring any part of the country to be a National Park, Wildlife Reserve, Nature Reserve, Protected Forest, Biosphere Reserve, Critical Watershed and such other categories meriting protection'.

The duty of citizens to preserve the environment is also confirmed in Article 8, on the subject of 'Fundamental Duties', which equates the environment with the culture and heritage of the nation, stating that 'A Bhutanese citizen shall have the duty to preserve, protect and respect the environment, culture and heritage of the nation'.

The constitutional text also contains an explicit reference to both happiness and Gross National Happiness, which will be discussed in more detail in the following paragraphs. The reference to happiness is contained in the preamble, which states that the people of Bhutan solemnly pledge 'to strengthen the sovereignty of Bhutan, to secure the blessings of liberty, to ensure justice and tranquillity and to enhance the unity, happiness and well-being of the people for all time'.

Article 9, on the other hand, dedicated to the 'principles of state policy', states in paragraph 2: 'The State shall strive to promote those conditions that will enable the pursuit of Gross National Happiness'. Its placement within this article, alongside the principles that the State must strive to implement in order to ensure a good quality of life for the Bhutanese people, allows us to understand the real commitment made by the kingdom to achieve social well-being.

From this perspective, the concept of Gross National Happiness therefore identifies development with the growth of human happiness, understood in a holistic perspective, encompassing both material and spiritual aspects, and also collective, i.e. implying the growth of well-being not only of the individual but of society as a whole.[23]

It follows that its achievement depends not only on increasing the production and income parameters on which traditional de-

[23] A. Cenerelli, *Il sistema costituzionale del Regno del Bhutan*, cit., 267.

velopment indicators are based, but also on strongly promoting factors that are not of immediate economic relevance, such as good governance, environmental quality and the preservation of cultural heritage. Furthermore, the collective connotation of the concept of Gross National Happiness suggests that raising its level cannot be left to individual initiatives but requires specific public policies geared towards this goal.

3.1 *Origin and Evolution of Gross National Happiness*

The institution of GNH began in 1972, when the fourth hereditary king, Jigme Singye Wangchuck, stated that Gross National Happiness was more important than Gross Domestic Product. He knew that the changes arising from modernisation and capitalism were inevitable, but he wanted to balance them with the historical origins and principles of Bhutan's traditional culture. Actually, GNH has been Bhutan's guiding directive for development since the 1970s, but the introduction of quantitative indicators for GNH did not happen until 1998, when Prime Minister Jigmi Thinley spoke to an international audience at the Asian-Pacific Millennium meeting in Seoul, South Korea.

At the heart of GNH is the belief that the market ideology embodied by GDP will not provide deep ethics or profound happiness, because these are achieved through liberation from delusions, desires, and aggression. GNH promotes a proper balance between material prosperity and spiritual fulfilment through its four pillars: equitable economic development, cultural and religious preservation, environmental protection, and good governance.[24] These four pillars were developed as a state approach to achieving happiness based on acts of good karma. This system takes into account not only the material needs of every person, but also seeks to encourage deeper mental satisfaction and the pursuit of absolute truth, based on the idea that happiness is something all humans want, and so it should be the main goal of every country. The philosophy of GNH essentially derives from

[24] M.S. Givel, *Gross National Happiness in Bhutan,* cit., 109.

Buddhist teachings, according to which focusing solely on material concerns and greed, typical of the GDP approach, only leads to unhappiness and misery.[25] This perspective is perfectly captured in the words of the Secretary of the Royal Government of Bhutan's Planning Commission in 2000: 'Gross National Happiness rejects the idea that there is a direct and unequivocal relationship between wealth and happiness'.[26]

GNH holistically combines external material conditions with inner satisfaction: inner activities would include, for example, helping all sentient beings achieve enlightenment, or in any case helping others; external activities, on the other hand, would include promoting basic human needs through government, adequate healthcare for all, equitable economic development, and environmental protection. Through this holistic approach aimed at establishing a state based on GNH, Bhutan intends to create a supportive society founded on collective happiness, mitigating the conflict between modernisation and capitalism on the one hand, and traditional cultural values and those of Buddhism on the other.

Initially, Bhutan had no intention of developing quantitative indicators of Gross National Happiness, because Bhutanese people did not believe it was necessary to implement a policy based on their religious doctrine. However, due to the common belief that anything that cannot be measured is not worth pursuing, and that GNH could be useful for the whole world and not just for their state, Bhutan began to develop quantitative indicators to guide GNH policy. The first Gross National Happiness indicators are the four pillars, currently implemented by the Gross National Happiness Commission, which was established in 2008. The four pillars (1. Equitable economic development; 2. Cultural and religious preservation; 3. Environmental protection and 4.

[25] K. P. Tashi, *The Role of Buddhism in Achieving Gross National Happiness,* in K. Ura, K. Galay (Eds), *Gross National Happiness and Development,* Thimphu, 2004.

[26] Royal Government of Bhutan, *Bhutan National Human Development Report 2000; Gross National Happiness and Human Development – Searching for Common Ground,* Planning Commission Secretariat, 2000.

Good governance) have been divided into nine domains: psychological well-being, time use, cultural diversity and resilience, community vitality, education, health, good governance, ecological diversity and resilience, and living standards (fig. 1).[27] These domains were then subdivided in 2010 into 33 measures of happiness, which are obtained by the Centre for Bhutan Studies in periodic national opinion polls of Bhutanese citizens.

The pillar of sustainable and equitable development has as its

Fig. 1 *Nine domains and indicators of the GNH index (reprinted from K. Ura et al. n. 27)*

main objective the reduction of poverty and the redistribution of wealth, but at the same time, given the Bhutanese people's focus on Buddhist development and growth for all the people,

[27] K. Ura, S. Alkire, T. Zangmo *et al.*, *A Short guide to Gross National Happiness Index,* Thimphu, 2012.

this pillar also includes the ability of individuals to pursue leisure time.

Equitable economic development also includes a focus on human resource development in areas such as education and health, and the maintenance of roads, telecommunications, energy and air transport. In fact, Bhutan is involved in programmes to invest in the growth of tourism, energy and agriculture.

Particularly interesting is the fact that Bhutan considers the quality of the natural environment to be linked to good physical, mental, emotional and spiritual health. Underlying this strong sensitivity is the traditional Buddhist respect for the environment, which is important for economic development in sectors such as energy and tourism.

In the Bhutanese vision, cultural preservation and good governance are also essential elements that help individuals achieve happiness and well-being. In this regard, the words of the Gross National Happiness Commission in 2002 are enlightening: 'Good governance is rooted in the democratic desires for a tolerant and peaceful existence. Good governance describes a government that promotes the greatest well-being and happiness for its citizens, and it also entails integrity, accountability, and transparency in governmental practices'.[28]

3.2 *The Gross National Happiness Commission*

The establishment of the Gross National Happiness Commission in 2008, which is the main national planning agency for the implementation of GNH, stems from the Planning Commission, which was abolished in 2003 and transformed into the Planning Department within the Ministry of Finance. In January 2008, following an executive order by the Prime Minister, the Planning Commission was renamed the Gross National Happiness Commission, with the main purpose of ensuring collective happiness and a balance between material and spiritual needs. The members of this commission include the Prime Minister as chair, the

[28] M.S. Givel, *Gross National Happiness in Bhutan,* cit., 111.

Cabinet Secretary as vice-chair, the heads of ten government ministries, the head of the Bhutan National Environment Commission and the secretary of the Gross National Happiness Commission as secretary member.[29]

It is within this commission that important national programmes and policies are decided and initiated. In fact, this commission is considered the top strategic body for defining the government structures and policies that inspire the GNH philosophy in accordance with the Bhutanese constitution. Indeed, the main tasks of the Gross National Happiness Commission are to discuss how government policies and programmes can strengthen the four pillars and nine domains of Gross National Happiness, and to ensure that Bhutan realises itself as a GNH state.

Another fundamental role of the Gross National Happiness Commission is to develop a GNH index to guide and monitor the correct and efficient implementation of all policies and plans relating to development, happiness and well-being, including through the planning of research and assessments. Precisely for this purpose, the Centre for Bhutan Studies is tasked with assisting the Gross National Happiness Commission by creating an index to measure the growth of the collective happiness of the Bhutanese people.[30] The commission is also responsible for monitoring national, regional and local government budgets.

To ensure the development of the GNH state, the Commission applies the indicators derived from the four pillars and nine domains to each government project in order to assess whether these projects contribute in any way to increasing GNH.

4. *The Relationship between Gross National Happiness and the Cultural-Religious Factor: Concluding Considerations*

The adoption of Gross National Happiness as an alternative to Gross Domestic Product made Bhutan appear as the 'happy' country par excellence in recent years, standing out in the con-

[29] Ibid., 113.
[30] Visit the website https://www.gnhcentrebhutan.org.

text of modern constitutionalism for its hybrid nature, where religion has a significant influence on the Western-style legal system. The Constitution, as seen above, is perhaps the clearest example of this phenomenon, considering that it also includes traditional law in its system of sources and that the principles and values of local communities are elevated to a general level. On the other hand, numerous Asian hybridisation processes are characterised precisely by the grafting 'onto indigenous regulatory bodies, of traditional or divine legitimisation, of forms of law production clearly borrowed from Western archetypes'.[31] The Bhutanese Constitution moves, indeed, between the preservation of traditions and the pursuit of sustainable economic development, in an attempt to outline a 'middle way' that allows for scientific and technological progress while keeping the kingdom's cultural and environmental heritage intact. The search for this balance animates the entire constitutional text, in a mix of formants ranging from Buddhist morality to Western-style human rights principles.[32]

For Western jurists, accustomed to the state as the source of law, it is difficult to understand systems in which tradition and religion take on their own independent significance in law, and in which the religious-philosophical formative element therefore has its own importance.

Bhutan is considered a unique example of Asian constitutionalism because it presents itself as a mixture of different characteristics, both indigenous and derived from other models. The Bhutanese concept of the environment is, in fact, an expression of a holistic and integral vision, which is also inspired by religious principles. Although the Constitution guarantees freedom to profess other faiths, the state religion of Bhutan is Buddhism: emblematically the Constitution requires the King to be a Buddhist but also a 'protector of all religions'. Furthermore, during

[31] L. Pegoraro, A. Rinella, *Costituzioni e fonti del diritto*, Torino, 2018. See also C. Petteruti, *Formanti giuridici e pluralismo delle fonti nell'Asia meridionale*, in 50 *DPCEonline*, SP. (2021), 547-581.

[32] M. Rafaniello, *Una filosofia dell'ambiente: cosa il Bhutan può insegnare all'Occidente,* in 58 *DPCEonline*, SP. 2 (2022), 937-952.

the drafting and finalisation of the Constitution, the Fourth King, the then Crown Prince, the chairman of the drafting committee and other officials stated that the Constitution and its new form of government were consistent with Buddhism. Indeed, Buddhism and Bhutanese social and cultural life are difficult to separate.[33] In the context of the so-called Global South, the relationship between religion, happiness and the environment constitutes a triad of interdependent values, attributable to a unique and singular model, namely that of Gross National Happiness, which also becomes an interesting case study in terms of sustainable development, due to the convergence of the three dimensions (economic, social and environmental) in a single holistic development paradigm, in which collective well-being is not measured in terms of material growth but as the result of a balance between economic progress, social cohesion and environmental protection of ecosystems.

Bhutan demonstrates that it is possible to take into account the principles of sustainable development and environmental protection in political decisions, and thus serves as an inspirational model for industrialised and modernising countries. Moreover, the kingdom's decision to invest in clean energy production, particularly hydroelectric power, is proving to be a forward-looking choice given the challenges posed by globalisation: according to UN estimates, the world's population could reach 9 billion by 2050,[34] with consequent repercussions in terms of large-scale energy requirements. In fact, with increasing demographic pressure and improved living standards, energy demand will inevitably grow, and hydroelectric power could be a valuable resource. In this regard, Karma Ura, one of Bhutan's leading scholars, stated that 'The Himalayas as we have seen in our childhood will not exist for long. A hotter world will not only drown assets and land but make global farm output fall heavily. The negative impact of

[33] R. Whitecross, *The Zhabdrung's Legacy: Buddhism and Constitutional Transformation in Bhutan*, in T. Ginsburg, B. Schonthal (Eds) *Buddhism and Comparative Constitutional Law*, Cambridge, 2022, 73.

[34] Visit the website https://www.un.org/en/desa/world-population-projected-reach-98-billion-2050-and-112-billion-2100.

climate change will fall heavily on those nations and places that have used fossil fuels relatively less and have played less of a role in causing climate change. Thus, the ecological creditors are the ones who could be devastated more than the ecological debtors'.[35]

What the author means is that the impact of climate change will affect developing countries even more than developed ones, despite the fact that the former are far less responsible than the latter. Furthermore, Ura discusses the relationship between the present generation and future generations, highlighting the imbalance and emphasising that the ecological and financial debts accumulated today will weigh heavily on future generations, who will be burdened with 'arbitrary burdens'.

'The awareness of living beyond means in moral and material senses found in these two debts should reorient our consciousness' writes the author, with a clarity that leaves little room for interpretation. Ura' s appeal is, in fact, clearly directed at modern capitalist economies, which strive for profit, losing sight of the values that should guide political action as well as individual consciences, and which constitute the cornerstones of Bhutanese culture and Buddhist religion.[36] On the other hand, the main obstacle to the spread and export of the Bhutanese model is, at least from a Western point of view, precisely the cultural-religious factor, which is unlikely to find resonance in the Atlantic world due to a structural difference in the way of understanding the relationship between man and nature, which the Western world, despite scientific evidence and the advent of the Anthropocene, struggles to see as interconnected and interdependent.[37]

[35] K. Ura, *Spirituality in Management Education,* in 38 *Journal of Bhutan Studies* (2018).

[36] Ibid., 21*:* 'Key methods of Mahayana included not only the threefold system of ethics, meditation and wisdom, but also additional virtues such as generosity, energy, persistence and patience while practising the Bodhisattva path. In a Bodhisattva path, which is the path of collective action towards enlightenment, concentration, patience, endeavour and long-term commitment are needed. None are possible without focus, and that is not possible without concentration'.

[37] M. Rafaniello, *Una filosofia dell'ambiente*, cit., 943; R. Schroeder, K. Schroeder, *Happy Environments: Bhutan, Interdependence and the West,* in 6 *Sustainability* 6 (2014), 3521-3533.

In conclusion, the Gross National Happiness model is an expression of the secularisation of the principles of Mahayana Buddhism,[38] yet it presents secular concepts that are abstractly applicable to the whole world. For the comparatist, therefore, Bhutan is an interesting case study but also an important test case because, like all comparisons of non-Western systems, it requires 'a specific methodological toolkit that partly abandons functionalist models in favour of a 'contextual' approach, thus privileging historical aspects, the analysis of the political dimension and, above all, the cultural dimension'.[39] In the Bhutanese context, as in those characterised by a strong religious influence on the legal system, we see that Buddhist principles related to good governance are, as a result of a process of secularisation, bent to the needs posed by the political and economic problems that plague every part of the world, providing general maxims for their resolution. An essential prerequisite is clearly a policy that is attentive to the preservation of tradition as well as socio-economic development. On the other hand, the particular harmony between *the Rule of God* and *the Rule of Law,* which characterises the Bhutanese experience, is also linked to the geographical and historical specificities of the kingdom. On the one hand, the conformation of Bhutan, often emblematically referred to as the 'Kingdom of Forests', makes environmental conservation a real necessity, rooted in ancient spiritual and religious traditions that, over the centuries, have amplified the population's reverence for nature; on the other hand, the low population density and small population facilitate the control and containment of dynamics that could potentially distort economic development.[40] It follows that in order to ensure the functioning of this system, the underlying

[38] D.E. Van Norren, *The Sustainable Development Goals Viewed Through Gross National Happiness, Ubuntu, and Buen Vivir,* in 20 *International Environmental Agreements* 3 (2020), 431-458.

[39] D. Amirante, *Oltre la tradizione giuridica occidentale: questioni e problemi dei sistemi normativi in "Eur-Asia" e Africa. Riflessioni di sintesi. Gli "acquis" della comparazione oltre-occidente fra pluralismo giuridico e formanti,* in 50 *DPCEonline* (2022), 1721-1725.

[40] L. Colella, *Ambiente, religioni e tradizioni giuridiche. Profili di comparazione*, Napoli, 2025, 250.

variables must be safeguarded. Bhutan has succeeded in this endeavour and still preserves the small microcosm created within the kingdom's borders, sheltered from globalisation, modernity and the insatiable economic ambitions that drive governments in the rest of the world. However, urbanisation, progress and the influences of other cultures will inevitably exert increasing pressure on this system: it therefore remains to be seen whether and how Bhutan will manage to resist and preserve itself.

The future of Bhutan will therefore depend on its ability to protect the spiritual identity that constitutes its essence, translating it into legal instruments and environmental policies capable of resisting change and keeping alive the relationship between religion, law and economics. Western scholars, on the other hand, must accept the challenge posed by this model as an opportunity to rediscover and enhance a pluralistic conception of constitutionalism and to critically rethink the relationship between religions, lifestyles and the constitutional system.

ALTERNATIVE ENVIRONMENTAL POLICIES IN CHINA: REFORESTATION THROUGH PUBLIC ENGAGEMENT

Darya Pereira Rega

Abstract: *This article examines Ant Forest, Alipay's gamified afforestation initiative, through the lens of environmental constitutionalism in China. While constitutionalism is often associated with liberal constraints on power, China's constitutional order embeds ecological imperatives as state duties, most notably in Article 26 and the 'Beautiful China' vision. Ant Forest illustrates how these directives are operationalized beyond state institutions, mobilizing private innovation and public participation in support of national reforestation goals. At once symbolic and practical, the project demonstrates both the strengths and limitations of constitutional environmentalism in China's non-liberal context, bridging state policy, societal engagement, and ecological governance.*

Keywords: China, Environmental Constitutionalism, Reforestation, Ant Forest, Environmental Law.

1. *Introduction*

China's constitutional framework has long been viewed through the lens of the dominance of the Chinese Communist Party (CCP) and the absence of liberal checks and balances, yet its provisions on environmental protection demonstrate how ecological concerns have become embedded within the State's highest legal text. Article 26 of the Constitution declares that 'the State shall organize and encourage afforestation and protect forests', an injunction that forms part of the broader constitutional narrative of building an 'ecological civilization' and a 'Beautiful China'. These constitutional commitments are not merely rhetorical, they provide the normative basis for a range of State-led initiatives in reforestation, pollution control, and ecological governance. In this context, environmental constitutionalism in China functions less as a liberal safeguard against arbitrary power and more as a framework that legitimizes and man-

dates proactive environmental action by State (and non-State) institutions.

Against this backdrop, the Ant Forest project, launched by Ant Group's Alipay in 2016, represents an illustration of how constitutional environmental directives can extend beyond State action to encompass private-sector innovation and mass public engagement. By gamifying low-carbon behaviours and linking digital participation to tangible tree planting, Ant Forest has reportedly mobilized hundreds of millions of users in support of the constitutional directive to protect and expand China's forests. Its integration into national reforestation goals, particularly within the framework of the country's Five-Year Plans, highlights the capacity of environmental constitutionalism to permeate both State and societal domains. At the same time, the project underscores the dual character of China's constitutional order: while it departs from Western liberal models, it demonstrates how constitutional provisions can function symbolically and practically to embed ecological imperatives across multiple spheres of governance.

2. *Environmental Constitutionalism in China (?)*

In order to discuss environmental constitutionalism in China, it is necessary to first establish if constitutionalism exists there at all. To ascertain whether that is an accurate description of the constitutional system in China, this subsection aims at relating the Constitution of China, its constitutionalism and the constitutionalisation of environmental matters as conceptualized by Louis J. Kotzé.

To start, Kotzé quotes Wiener *et al.* to 'distinguish between constitutions, constitutionalisation and constitutionalism':

> while a constitution is established to keep politics and power in check; constitutionalisation is a phenomenon that evinces the need to put innovative regulatory or principled practices into place in a political and legal order. Because an unconstitutional political order is considered illegitimate and therefore devoid of a right to exist, constitutionalism is an ongoing project related to

> fostering greater legitimacy in law and of political orders, acting as a 'normative pull' and as a mechanism that has the ability to bestow legitimacy on a political system.[1]

If constitutions are meant to keep power in check, a country with a one-party system can mean an extrapolation of the limits of power. However, the Constitution has been the highest law of the Chinese state since the promulgation of its first iteration in 1954, a document in which the Communist Party established the fundamental system and basic principles, which 'laid a foundation for the democracy construction and institutional construction in the country at a later stage'.[2] The present Constitution, the fifth of its kind, promulgated in 1982, is described as 'fundamental law with Chinese characteristics', in line with the socialist system with Chinese characteristics, and it followed the 1954 Constitution closely, breaking from the 3 Constitutions that separate them, and proclaimed a democratic dictatorship for the people. Its goal is to 'set out the political system, economic system, rights and obligations of citizens, the setup of state organs and the scope of their respective responsibilities, and the fundamental tasks of the country'.[3]

This constitution has gone through 5 amendments, which have brought to the constitution aspects that are common in the West. For example, the 1999 amendment added to the preamble that 'The People's Republic of China shall implement the rule of law and build a socialist country under the rule of law'.[4] Similarly, the protection of many human rights is present, such as freedom to vote, freedom of speech, freedom of religious beliefs, and others, all of which have been in this Constitution since its original promulgation in 1982.[5]

[1] L. J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene*, Oxford, 2016, 47.

[2] J. Zhu, T. Meng, H. Peng *et al.*, *China's Legal System: An Interpretation of Its Structure, Principles and Institutions*, London, 2023, 32.

[3] Ibid., 33.

[4] https://www.reuters.com/article/背景资料：中华人民共和国宪法历次修改梳理-idCNL3S1PE3K4.

[5] 维基媒体项目贡献者 17 October 2024, 中华人民共和国宪法 *(1982年)*. 维基文库，自由的图书馆. https://zh.wikisource.org/zh-hans/%E4%

Furthermore, the Constitution of China can be categorized as an Environmental Constitution (EC) by way of Domenico Amirante's seminal work, in which ECs are categorized as those that contain environmental provisions from its inception,[6] which is the case with the promulgation of 1982. Albeit the articles on the environment enclosed in this law do not mention 'rights' per se, they are present, which would be sufficient to establish a version of environmental constitutionalism based on Kotzé's writing in China.[7]

But before we move on to constitutionalism, see that we can speak of a constitutional state in China, because it fulfils the minimum core requirements of a constitution.[8] Also, because China is:

> a state which, through its constitution, provides its people with a principled guarantee to establish the rightful and legitimate objectives of the political community; an organizational guarantee that the exercise of power is limited, controlled, effective, rational and proportionally corresponds to the proper ends of the political association; a representational guarantee providing equal participation and representation in political life; and a substantive guarantee that fundamental rights are respected, protected and fulfilled.[9]

While these safeguards are present in the letter of the law, they are often unactable, since there is no standalone constitutional court.[10] Nonetheless, this does diminish the Constitution

B8%AD%E5%8D%8E%E4%BA%BA%E6%B0%91%E5%85%B1%E5%92%8C%E5%9B%BD%E5%AE%AA%E6%B3%95_%281982% E5%B9%B4%29?, accessed 10 May 2025.

[6] D. Amirante, *Costituzionalismo ambientale: Atlante giuridico per l'Antropocene,* Bologna, 2022, 90.

[7] E. L. Wang, *Environmental Constitutionalism in China: A Constitution without Constitutionalism?* in 36 *Journal of Environmental Law* 2 (2023), 187-202, 188.

[8] L. J. Kotzé, *Global Environmental Constitutionalism,* cit., 56.

[9] Ibid.

[10] See that the National People's Congress has the power to amend and to supervise the enforcement of the Constitution, as per article 62, clauses 1 and 2. Furthermore, the Standing Committee of the National People's Congress

to the status of 'dead letter', because it still serves a function in Chinese society: to preserve CCP[11] influence. While it differs from the Western expectation of constitutional review and judicial independence, this formalistic constitution falls in the fundamental rationale of 'prevention of tyranny[12] on the one hand and the prevention of anarchy on the other'.[13]

And still, if the Constitution did merely describe a 'a system of limitless and unchecked power', it could still not be regarded as a dead letter. According to Kotzè, 'it is only that this letter is irrelevant to the telos[14] of constitutionalism'.[15]

The Constitution of China also fits into a category of documents with alternative functions:

(NPCSC) – the other, concomitant, but not bicameral, chamber of legislatives in China – has the function of interpreting the Constitution and supervising its enforcement, as prescribed by article 67, clause 1, of the Constitution itself, in theory allowing for the existence of constitutional reviews and of a constitutional court in China. However, this power has remained unexercised to date, with the NPCSC choosing to remain silent even in cases where this interpretation would have been beneficial. For a more specific dissection of the peculiarities of the Chinese system of Constitutional review (or lack thereof) see Q. Zhang, *The Constitution of China: A Contextual Analysis*, London, 2012.

[11] Communist Party of China.

[12] While true that the CCP retains the power of approval, China runs on a dual-legislative system in which each chamber has independent legislative power.

For more on the proposed State-Party System, see L. C. Backer, *The Communist Party as Polity and the Chinese Party-State Constitutional Order*, 7 November 2021. The published version of this contribution is submitted for inclusion in N. Son Bui, S. Hargreaves, R. Mitchel (Eds), *Handbook of Constitutional Law in Greater China,* London, 2022.

[13] L. J. Kotzé, *Global Environmental Constitutionalism,* cit., 49.

[14] Another relevant point of contention in the discussion of constitutions and constitutionalism in China refers to the fact that there are two constituting documents of almost the same standard operating in the country: the Constitution of the People's Republic of China and the Constitution of the Chinese Communist Party (CCP). Larry Backer affirms that 'The State constitution is an affirming rather than a constituting document. The constituting occurs elsewhere'. For the purposes of this contribution, only the State Constitution is being analyzed because it is the only one that refers to the environment.

For more on the separation of State and Party, see L. C. Backer, *The Communist Party as Polity and the Chinese Party-State Constitutional Order*, cit., 7.

[15] L. J. Kotzé, *Global Environmental Constitutionalism,* cit., 52.

> Some of the more esoteric functions of constitutions are that they could provide stability in functionally differentiated societies; they could provide psychological stability in morally pluralistic societies; and they could, and often do, replace morality and religion as sources of normative validity. Constitutions could be said to also perform a symbolic function by transforming abstract ideas of political theory into concrete terms; by affirming and representing the identity of a polity; and, by denoting certain political conflicts as 'constitutional', actually elevate them as being of special value and interest, not only in law, but in other contexts as well: 'The symbolic power of constitutions accordingly lies in shaping and directing the debates through which political communities reinterpret their past, negotiate their present and plan their future'.[16]

This is especially true in a country wherein the majority of the population is atheist and has been culturally indoctrinated into a firm set of beliefs that are now set in the Constitution (i.e. through the Cultural Revolution of Mao Ze Dong). Qian Jinyu, Associate Professor of Constitutional Studies and Executive Director of the Human Rights Laws Research Center, Northwest University of Politics and Law, China, discusses the reality of a 'political state' and a 'cultural state', stating that 'the realization of the national dream is the purpose for writing the constitution and the goal for the founding the People's Republic' and that 'the national dream is the soul of the Constitution'.[17] He also recognizes that 'only when the entire nation recognizes the Chinese Dream will they feel obligated to obey authority'.

This 'symbolic power' is recognized by Chinese constitutional scholars, and it is relevant to consider it when addressing the preamble. In the Chinese constitutional system, the preamble is presented as surpassing an introductory role and is an actable piece of legislation, a component of the Constitution that is taken as a whole and possesses integral effect. It 'can be generally and

[16] Ibid., 49.

[17] 颜培 J. Qian, *Constitution Preamble, National Dream and Political Systems: A Constitutional Interpretation of the Chinese Dream,* in China.org, 2013, http://www.china.org.cn/china/Chinese_dream_dialogue/2013-12/06/content_30819272, accessed 13 May 2025.

effectively implemented and observed in the legislative procedures, judicial procedures and administrative procedures', and the 'Constitution and constitutional interpretation cannot conflict with the Preamble to the Constitution'.[18]

Considering, then, that China does enjoy a Constitution and a constitutional state, it is worth considering whether we can talk about constitutionalism in China, and specifically of environmental constitutionalism in the Chinese legal tradition. As previously seen, constitutionalism is a constitutional project that aims at bringing increasing positive normative legitimacy to law itself and to the political order, as well as a mechanism to legitimize the political system.

The elevation of the rule of law and of human right to constitutional status suggests that yes, there is something to be said of constitutionalism in China. However, since it is not a liberal state and the questions of the CCP's maximum authority distance it from the liberal constitutionalism of the West. Zhang admits, in the chapter called 'Why Revolutions Fail to Bring About Constitutionalism', that, in the case of China, 'the enactment of the Constitution was not to be confused with the beginning of constitutionalism'.[19] Because 'China's constitutionalism and rule of law are surely limited by the functioning of its judiciary, which has been excessively politicized at least since 1949'.[20]

For these reasons and more, China's Constitution is posed as one without constitutionalism, by Western liberal standards. But is does not prevent it from exhibiting other categories of constitutionalism, such as Party-state constitutionalism,[21] Confucian

[18] Publicity Department of the Chinese Communist Party (CCP), *What is the Significance of the Preamble to Constitution?* in China Daily, 16 June 2017, https://www.chinadaily.com.cn/m/chinalic/2017-06/16/content_29768962, accessed 30 August 2025.

[19] Q. Zhang, *The Constitution of China: A Contextual Analysis*, London, 2012, 33.

[20] Ibid., 172.

[21] Barry Lacker coined this term to explain how constitutionalism with Chinese characteristics consciously starts from an entirely different point of view in comparison to liberal constitutionalism, in that constitutionalism in China 'the sovereign authority and its normative framework are themselves bound by their own rules'. It is a constitutional order where the written Con-

constitutionalism,[22] populist constitutionalism,[23] and authoritarian constitutionalism.[24] Alas, for the time being, this contribution will concede to the theory of a constitution without constitutionalism, since, while it achieves the goals of providing of 'frame of political society' which is 'organized through and by the law', it does not do so with the 'purpose of restraining arbitrary power'[25] with 'an independent judiciary's ability to oversee the power of the [legislative and executive] powers', but to legitimize and reinforce the power of the CCP.

With that, the question falls to the existence (or lack thereof)

stitution functions not to limit State/Party power but to codify and legitimize the CCP's leadership, guiding governance and development under socialism. For more, see L. C. Backer, *The Communist Party as Polity and the Chinese Party-State Constitutional Order*, 7 November 2021. The published version of this contribution is submitted for inclusion in N. Son Bui, S. Hargreaves, R. Mitchel (Eds) *Handbook of Constitutional Law in Greater China*, cit.

[22] As per author Tom Ginsburg, Confucian constitutionalism is a culturally adapted practice of constitutional review (which may not look like the Western expectation of that word) that reconciles modern constitutional constraint with Confucian legal norms. For more, see: T. Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan* in 27 *Law and Social Inquiry* 763 (2002).

[23] Qian Zhang describes instances in Chinese history where actions and protests led by the people resulted in the defense of their constitutional rights, and that in our current internet age the mobilizing of the populace and their power in demands could increase, therefore instituting the people as a form of 'checks and balances for' the State/Party. He also argues that change will never come to establish a stronger form of constitutionalism in China without the publics active support. For more, see Q. Zhang, *The New Constitutional Order of the People's Republic: The Rise of 'Rights Consciousness' and 'Populist Constitutionalism' in an Inchoate Civil Society* in *The Constitution of China: A Contextual Analysis*, cit., 39-74.

[24] Günter Frankenberg defines authoritarian constitutionalism as a system where constitutions are used not to limit power but to entrench it. Authoritarian regimes adopt constitutional texts, rights catalogues, and institutions, yet hollow them out by subordinating law to political leadership, expanding state powers, and strategically amending constitutions to secure control. In this way, constitutionalism becomes a tool of governance and legitimation, masking authoritarian rule under constitutional form. For more, see G. Frankenberg, *Authoritarian Constitutionalism: Coming to Terms with Modernity's Nightmare*, in H. Alviar Garcia, G. Frankenberg (Eds), *Authoritarian Constitutionalism: Comparative Analysis and Critique*, Cheltenham, 2019.

[25] L. J. Kotzé, *Global Environmental Constitutionalism,* cit., 51.

of environmental constitutionalism in China. While the environmental provisions in the preamble and the body of the Constitution will be analyzed later in this contribution, see that there are no environmental rights addressed in the law. Instead, the preamble includes as what is understood as the 'Chinese dream', the construction of an ecological civilization and the achievement of a Beautiful China in the preamble, and duties of the State to protect the environment and natural resources. Meaning that all matters of the environment are manifested as duties of the State and therefore does not rely on the actions of courts but in policies of the State.[26]

From this, Wang ascertains that, because of the Party's supremacy within the country, their inclusion of environmental principles in the Constitution leads to the mandatory absorption of these into public institutions, including the National People's Court (NPC) with legislative power, all of the People's councils with executive power, and the judiciary system as whole.[27] Therefore, 'environmental constitutionalism in China is enforced through the help of the legislature, the executive, and the judiciary'.[28]

Also, with public institutions – and even segments of the private sector, as this contribution will seek to expose – being so inclined to act on behalf of the Party in environmental actions, and courts being so politicized, acting in defense of Party ideals, the country has special encouragement to defend environmental constitutionalism. In this context, Wang paraphrases Zhu in saying that 'following the constitutionalisation of 'ecological civilization', courts have become more active in deciding environmental cases and safeguarding environmental interests'.[29]

Returning to Kotzé, we can see a break between the concepts of constitutionalism and environmental constitutionalism because of the values they defend. While constitutionalism 'seeks to provide a stable and legitimate framework for making possible

[26] E. L. Wang, *Environmental Constitutionalism in China*, cit., 197.
[27] Ibid., 197.
[28] Ibid.
[29] J. Zhu, T. Meng, H. Peng *et al.*, *China's Legal System*, cit., 198.

interaction between a polity's citizens by means of restrictions on power the provision of legal limits', doing so through the recognition and protection of rights expected in the liberal Constitution, such as an independent judiciary, the power of the rule of law, constitutional review, among other,[30] environmental constitutionalism touches on the subject of 'open world problems'.[31] And because of the broadness and cross-border nature of these problems, regular, State-bound and one-polity-centered constitutionalism may not be enough to address them.

Kotzé devises a contemporary description of environmental constitutionalism, stating through 10 listed conclusions: that environmental constitutionalism 'part of the larger constitutional paradigm'; that it elevates environmental care to the highest judiciary level, granting it 'protective umbrella of a constitution'; that it 'renders the issue of environmental care a matter of justice' even to 'intra- and inter-species and inter-and intra-generational terms of equity, dignity and integrity'; that it has a transformative approach that relies on constitutional tutelage to establish environmental governance and to use the many of its features 'such as fundamental rights and duties, the rule of law and enduring aspirational values such as ecological sustainability'; that it redefines the relationship between the environment, the state and the people; that it 'sets environmental care as a condition for all other functions of the state, the law and of society, and renders environmental care a primary obligation and function of the state'; that it provides all possible remedies to environmental care; that it can reform the way a society thinks of its responsibility towards the environment, bringing it to a similar level of respect towards human rights, life and dignity, for example; that, through this reformation, it can achieve societal paradigm shift 'while deeply entrenching within the political, social and juridical spheres en-

[30] L. J. Kotzé, *Global Environmental Constitutionalism,* cit., 53.

[31] Kotzé quotes Kobayashi in listing these problems as: global environmental degradation, unprecedented population growth, natural resource scarcity, armed conflict (often as a result of the foregoing) and the development of science and technology. See L. J. Kotzé, *Global Environmental Constitutionalism,* cit., 134.

vironmental care as a common ideology and moral/ethical obligation'; and that there is a deep sense of urgency with environmental constitutionalism.[32]

While the same issues that lead to the assertation of the lack of constitutionalism in the broad sense in China – no real separation of powers, lack of constitutional review and application, etc. – based the items above, this does not reach environmental constitutionalism. The idea of an 'ecological civilization' existing in the preamble of the constitution by itself achieves most of these conclusions, like elevating environmental care to constitutional level, reforming and redefining the meaning and importance of the environmental on all societal levels of the polity assuring that this transformative new definition reaches all governmental and judiciary levels of action within the country. And the liberty of the CCP to fast-track these changes in the courts and through government policy, while not liberal in nature, attests to the urgency that environmental constitutionalism evokes, and broadens 'the scope of traditional state governance functions to deliberately include environmental concerns'.[33]

Therefore, see that Wang accurately concludes that:

> Environmental constitutionalism in China is instead of liberal ideals, characterised by the requirement to construct ecological civilisation that is realised through state-based approaches. Under the state mandate to construct ecological civilisation, state institutions including the legislature, the executive and the judiciary are under constitutional mandates to interpret and uphold environmental laws, policies and values in all instances. The Party-rule is omnipresent but through the constitutionalism of ecological civilisation, it permits and empowers all state-bodies to enforce environmental state objectives.[34]

Having established the presence of environmental constitutionalism in China, in whichever unconventional form it may

[32] L. J. Kotzé, *Global Environmental Constitutionalism,* cit., 152-153.

[33] Ibid., 153.

[34] E. L. Wang, *Environmental Constitutionalism in China: A Constitution Without Constitutionalism?*, cit., 201.

present itself in, the following subsections aim to expose the concrete environmental aspects of the Constitution, in the preamble and the body of the law, to understand which are the Constitutional provisions that ultimately led to the Ant Forest project.

2.1. *The Preamble: Chinese Ecological Civilization and Beautiful China*

Following the esoteric, symbolic power that can emanate from constitutions, see that the preamble of the Constitution of China is a prime example. It serves as both a political manifesto and a normative foundation for the state's constitutional order. It establishes the historical narrative of China's revolutionary struggle, affirms the leadership of the Communist Party of China (CPC), and sets forth the guiding ideology of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the 'Three Represents', the Scientific Outlook on Development, and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era. Beyond ideological commitments, it articulates the state's core objectives, including the pursuit of socialist modernization, national unity, and the building of an 'ecological civilization'. As previously discussed, scholars widely recognize it as having binding constitutional force, although Chinese courts rarely invoke the Preamble directly, providing the justificatory framework within which the Constitution and all laws must be understood.

Thinking of law as a mirror to culture, the induction of the term 'ecological civilization' in the 2018 amendment reflects the deepening relationship of Chinese society with environmental care. The term itself came from a mistranslation of a former-USSR's *Scientific Communism* article in 1984, which originally spoke of an 'ecological culture', but got reported by *Guangming Ribao* as 'ecological civilization'.[35] However, it only came into political and ideological center stage when first spoken about by then-president Hu Jintao in 2007, and more concretely

[35] M. Marinelli, *How to Build a 'Beautiful China' in the Anthropocene. The*

presented in 2012 in Hu's final Report at the 18th National People's Congress.[36]

In this report, Hu details how 'promoting ecological progress is a long-term task of vital importance to the people's wellbeing and China's future', also stressing that ecological progress must be purposefully pursued by the CCP. He further posed that they should improve development of China's geographical space, promote all-around resource conservation, intensify protection of the ecosystem and the environment and enhance system building to promote ecological progress, with a goal to 'contribute [their] share to global ecological security'.[37]

Overall, the idea of a Chinese ecological civilization comes with the recognition that there is no economic advancement without the environment, and the embodiment of a harmonious coexistence between humans and nature without sacrificing technological and economic advancement. As Wang, He and Junfeng put it, 'in short, the idea of ecological civilization is spoken of as a responsibility of the Chinese government to future generations and to the natural world'.[38]

Evelin Wang also highlights how the concept of a community of life between humans and nature aligns with traditional Chinese philosophies and with Confucianism, leading to the ecological civilization being suggested to the Central Committee of the Party as a way to prioritize 'conservation and [environmental] protection while focusing on natural recovery'. She adds that this is 'seen as a novel, non-anthropocentric approach to addressing environmental problems'.[39]

Political Discourse and the Intellectual Debate on Ecological Civilization in *Journal of Chinese Political Science* (2018), 365-386, 373.

[36] Ibid.

[37] J. Hu, *Full Text of Hu Jintao's Report at 18th Party Congress in Embassy of the People's Republic of China in the United States of America*, 2012, http://us.china-embassy.gov.cn/eng/zt/18th_CPC_National_Congress_Eng/201211/t20121127_4917578.htm, accessed 6 June 2025.

[38] Z. Wang, M. Fan, W. Junfeng, *Ecological Civilization, Organic-Process Thinking and the Future of China in the Global Context* in 5 *Ecopoiesis: Eco-Human Theory and Practice* 1 (2024).

[39] E. L. Wang, *Environmental Constitutionalism in China: A Constitution without Constitutionalism?*, cit., 196.

The ecological civilization is not the only mention of the environment in the preamble, on the contrary, it is paired with the defense of a Beautiful China. It was similarly discussed in the 18th National Congress of the CPC, not by Hu Jintao, but by his successor Xi Jinping. President Xi shifted focus from Hu's construction of an eco-civilization to its advancement, defining his initiative as 'the sum of the beauty of the environment, the beauty of the times, the beauty of life, the beauty of society and the beauty of the common people'.[40]

These two environmental policies often go hand-in-hand, with one being the actualizing force of the other. For example, one commonly reads about how building a Beautiful China leads to the evolving of an ecological civilization. However, the latest Chinese scheme has come not only with ample goals, but with concrete targets. In 2024 the Chinese government issued guidelines on the path to be taken towards a Beautiful China, in the macro areas of accelerating the transition to a model of green development, continuously promoting pollution prevention and control, enhancing the stability and sustainability of ecosystem diversity, safeguarding the bottom line for ecological safety, building a model for the construction of a 'Beautiful China', and actions to build a 'Beautiful China' for all.[41]

From these categories, specific objectives were also put forth: by 2027, China will continue to see increase in green developments and decrease of major pollutants and enhance ecological security through optimized land use, improved ecosystems, and strengthened governance systems. By 2035 it aims to live with a widespread 'green production lifestyle', with emissions having peaked and started to decline, and a fundamentally improved ecological environment supported by resilient ecosystems and balanced land use, at which stage ecological governance will be modernized, with ecological security consolidated. Finally, by

[40] M. Marinelli, *How to Build a 'Beautiful China' in the Anthropocene*, cit.

[41] Y. Wu, *Understanding the "Beautiful China" Initiative: Key Business Prospects*. In China Briefing News, 30 January 2024, https://www.china-briefing.com/news/embracing-sustainability-how-businesses-can-contribute-to-the-beautiful-china-initiative, accessed 8 June 2025.

2050 (called in the report as 'mid-century') China aims to complete its ecological civilization, achieving deep decarbonization, full green development, modernized governance, and the full realization of 'Beautiful China'.[42]

These are some of the stage-based approaches of the construction of an eco-civilization that the Beautiful China initiative proposes, and to which all Constitutional articles and policies must align to. In which, there are specific addresses for reforestation. While the specific goals in this area will be further discussed with the presentation of the Five-Year Plans, the Beautiful China and eco-civilization proposals are the mechanisms that promote these actions.

Going forward, this contribution will explore the articles concerned with environmental matters that are present in the Constitution, highlighting the path to reforestation initiatives such as the Ant Forest Project.

2.2. *The Body: Forests and Resources*

The Constitution of China is mostly formalistic, aimed at maintaining the CCP in power. But it does broach environmental protection in to dedicated articles and one instance of environmental governance. Beginning with the latter, see that the State Council is the central government of the People's Republic of China and functions as the highest executive and administrative authority under the National People's Congress (NPC). Article 89 bestows upon the State council the function and power of 'directing and managing economic work, urban and rural development and ecological conservation'.[43]

Neither this article nor the next provide innovation in envi-

[42] Renmin Ribao, 中共中央国务院关于全面推进美丽中国建设的意见, People's Daily Friday, 12 January 2024, http://paper.people.com.cn/rmrb/html/2024-01/12/nw.D110000renmrb_20240112_1-01.htm, accessed 8 June 2025.

[43] Constitution of the People's Republic of China 1982, revised as of 2019.

ronmental constitutionalism,[44] merely posing environmental protection as a duty of the state, without stating as a right. In order of appearance (and importance to this discussion), first see Article 9:

> The State ensures the rational use of natural resources and protects rare and precious animals and plants.
> It is prohibited for any organization or individual to appropriate or damage natural resources by any means.[45]

The State is positioned as the sole manager of natural resources, along with a notable specification of which animals and plants are to be protected, meaning that this is not an umbrella-type protection and is reserved for the 'rare' and the 'precious', although no definition for this word is provided within the Constitution itself. See, then that while supra-Constitutional policies such as Beautiful China aim to preserve and improve biodiversity, this is not reflected in Constitutional articles, and rational use is similarly left at the discretion of the State.[46]

Finally, Article 26 establishes a clearer duty towards the environment itself, and to forests specifically:

> The state shall protect and improve living environments and the ecological environment, and prevent and control pollution and other public hazards.
> The state shall organize and encourage afforestation and protect forests.[47]

The word 'ecological' is preferred over 'environmental', in line with the construction of an ecological civilization, also, issues such as pollution are categorized as a 'public hazard', meaning that the focus of prevention is on the people, not on the environment itself. Remarkably, unlike the rest of this article and most of the contents of the Constitution as a whole, this article includes in the paragraph an opening for non-State action in the

[44] D. Amirante, *Costituzionalismo ambientale,* cit. 228.
[45] Constitution of the People's Republic of China, cit.
[46] Y. Zhao, *Chinese Environmental Law*, Cambridge, 2021, 16-17.
[47] Ibid.

pursuit of environmental protections. The use of the terms 'organize' and 'encourage' provide a Constitutionally recognized possibility for the private sector to act in reforestation initiatives. This, along with the goals set out by the Five-Year Plans which will be discussed in following subsection clear the stage for different actor to propose alterative reforestation policies in China.

3. *Reforestation Goals*

China is no novice in terms of reforestation, with it being a global leader in these efforts. In the northwestern region alone, the forested net area has grown from 10% in 1949 to 25% in 2024.[48]

The pinnacle of these efforts is the Three-North Shelterbelt program (TNSP). Launched in 1978, the TNSP is the largest ecological engineering initiative in human history, spanning 13 provinces across northwest, north, and northeast China, covering around 4 million square kilometers, which equates to nearly half of the country. It is structured into three stages and eight construction phases, with a projected completion date of 2050.[49]

This long strip of newly-established green land is colloquially known as the Great Green Wall, mimicking China's world wonder, also because it intends to impede the further desertification of the country, creating a barrier around it. This is just one example of China's commitment to reforestation, through an initiative of the State.

The objectives concerning forest growth are clearly laid out in the nation's Five-Year Plans (FYP), which are vital for China's policy enactment. This structure was somewhat adapted the Soviet 'Big Push' model, starting from 1953, with the objective of

[48] Reuters, *China Completes 3,000-km Green Belt Around its Biggest Desert, State Media Says*, 29 November 2024, https://www.reuters.com/world/china/china-completes-3000-km-green-belt-around-its-biggest-desert-state-media-says-2024-11-29, accessed 10 May 2025.

[49] United Nations, Department of Economic and Social Affairs, *Three-North Shelterbelt Program*, https://sdgs.un.org/partnerships/three-north-shelterbelt-program, accessed 10 June 2025.

picking up the pace of China's transformation.[50] From the beginning, the implementation of FYPs led to 'regional distribution and the attempt to move the industrial center of gravity away from the coastal enclaves' (such as Beijing and Shanghai).[51]

Conversely, while the first FYP was written 'half in Moscow, half in Beijing', this model did not last long. By 1964, the 'Big push' model had been abandoned and China pulled away from the Soviet Union, no longer relying on it, and focused on fixing China's isolation from the world and on emancipating China's industrial capabilities from the USSR's and the USA's military pressure. Under these new objectives, Mao Zedong led the 'Third Front' of policy making and executing from 1964 to 1975, including the period of Mao's Cultural Revolution, and after his death with the Maoist model. [52]

Ultimately, the FYPs in its most current form appeared in 1978 with the covenant of the Third Plenum of the 11th Central Committee of the Communist Party of China, which saw the establishment China's 'Reform and Opening Up' era.[53] Since 1953, counting all models and macro-objectives, China has had 14 plans, with the 15th to begin in 2026. Effectively, 'five-year plans serve as a comprehensive blueprint for China's economic and social advancement, outlining goals, strategies and priorities for each planning cycle'.[54]

The Sixth FYP, from 1981-1985, was the first to talk about environmental matters, in line with the promulgation of the current Constitution, which also had environmental articles in 1982. It has as a general objective to 'strengthen environmental protection efforts'.[55] Since then, every plan has included aspects of environmental protection, but this contribution will expose only

[50] B. Naughton, *The Chinese economy: Transitions and Growth*, Cambridge (Massachusetts), 2007, 65-66.

[51] Ibid., 676.

[52] Ibid., 72-75.

[53] Ibid., 78.

[54] Huaxia, *Explainer: How do Five-Year Plans Drive China's Comprehensive Development?* in Xinhua, 5 March 2025, https://english.news.cn/20250305/ddc5fe84d09a480ab8233ba6441452c8/c.html, accessed 11 June 2025.

[55] *The 6th Five-Year Plan (1981-1985), Five-Year plans* in *chinadaily.com.*

the 13th and 14th plans, which are contemporary to the Ant Forest Project, in order to focus on forest coverage goals and the impact that the Project had in completing them or not.

3.1. *13th FYP*

The 13th Five-Year Plan spanned from 2016-2020, resulting from the recommendations of the Central Committee of the Communist Party of China (CPC). As cited in the plan itself, the guiding principles are: Uphold the principal position of the people; Remain committed to an appropriate development approach; Continue to deepen reform; Maintain commitment to the law-based governance of China; Keep in mind both the domestic and international situations; and Uphold leadership by the CPC.[56]

From those, the major objectives were listed as: Maintain a medium-high rate of growth; Achieve significant results in innovation-driven development; Further coordinate development; improve standards of living and quality of life; Improve the overall caliber of the population and the level of civility in society; Achieve an overall improvement in the quality of the environment and ecosystem; ensure all institutions become more mature and better established.[57]

Under 'overall improvement' for the environment, and in the 'resource and the environment' section of Main Economic and Social Development Indicators for the 13th Five-Year Plan Period, forest growth features among 10 objectives. All of the goals in this section are marked as 'Obligatory', since they are legally binding targets for all levels of government, as opposed to 'Antic-

cn, 2011, https://www.chinadaily.com.cn/china/2012npc/2011-02/23/content_14689649.htm, accessed 13 June 2025.

[56] *The 13th Five-Year Plan for Economic and Social Development of the People's Republic of China* (Compilation and Translation Bureau, Trans.), Central Committee of the Communist Party of China, 2016 https://en.ndrc.gov.cn/policies/202105/P020210527785800103339.pdf, accessed 13 June 2025.

[57] Ibid.

ipatory' goals, which are non-binding, guiding targets meant to indicate desired direction and encourage progress.

As shown in the image below, the indicator for Forest Growth is divided by coverages (in percentages) and growing stock (in billions of cubic meters), each of which has a stat for 2015 (first year of the plan, in the first column), the expected stat for 2020 (the last year of the plan, in the second column), and the 5-year cumulative total (shown in the third column).

• Resources and the environment					
22. Forest growth	Forest coverage (%)	21.66	23.04	[1.38]	Obligatory
	Forest growing stock (billions of m^3)	15.1	16.5	[1.4]	

Fig. 3. *Cfr. The 13th Five-Year Plan for the Economic and Social Development of the People's Republic of China*

In conclusion, the 13th FYP demanded a 1.38% increase in forest coverage in China, which was to be achieved by local and national government, and against which their performance was evaluated. To achieve this, the 'National plan for the forestry sector development for the "13th Five-Year" period (2016-2020)' was launched, which divided the goal in 4 parts: '[to make] the land ecological security barrier more stable, the forestry ecological public service more perfect, more powerful protection of people's livelihood, and forestry governance capacity improved significantly'.[58]

In December 2020 the country announced that this goal was met, and, in the case of forest growing stock, surpassed, hitting the 17.3 billion m^3 mark.[59] Liu Dongsheng, who was then vice administrator of the National Forestry and Grassland Adminis-

[58] *National Plan for the Forestry Sector Development for the "13th Five-Year" Period (2016-2020), UNEP Law and Environment Assistance Platform*, 1 May 2016, https://leap.unep.org/en/countries/cn/national-legislation/national- plan-forestry-sector-development-13th-five-year-period, accessed 13 June 2025.

[59] C. Can, *China Meets Afforestation Targets in 13th Five-Year Plan* in *The State Council Information Office of the People's Republic of China*, 17 December

tration, also announced that reforestation efforts and programs 'helped more than 3 million people to shake off poverty through related ecological poverty-relief efforts'.[60]

3.2. *14th FYP*

The 14th Five-Year Plan shows a significant difference from its predecessor, by taking on the ostensive name of the 'People's Republic of China 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Long-Range Objectives for 2035'. This addition of objectives 15 years in the future is a reflection of the announcement in 2021 that China had achieved the first of Xi Jinping's centennial goals. They were announced by the president in 2017 in his report to the 19th National Congress of the Communist Party of China and were set to be achieved 100 years after the founding of the CPC (1921) and the establishment of the People's Republic (1949).[61]

The first goal, aimed and reportedly achieve in 2021, was to build a moderately prosperous society in all respects, which the CPC described as 'making sure that China's development improves the lives of all its people, particularly those who are below or near the country's poverty line'. The second, deadline 2049, is to build a modern socialist country that is prosperous, strong, democratic, culturally advanced and harmonious.[62] However, this latter goal has two subdivisions, aiming to 'basically realize socialist modernization' by 2035, and 'build China into a great modern socialist country', by 2049.[63]

2020, http://english.scio.gov.cn/pressroom/2020-12/17/content_77023372, accessed 13 June 2025.

[60] Ibid.

[61] Xinhua, *CPC Q&A: What Are China's Two Centennial Goals and Why Do They Matter?* in New China, 17 October 2017, http://www.xinhuanet.com/english/2017-10/17/c_136686770.htm, accessed 13 June 2025.

[62] Ibid.

[63] *Business Review of China's 19th Party Congress*, in *PwC*, 2017, https://www.pwc.com/kz/en/publications/new_publication_assets/19th-party-congress.pdf, accessed 13 June 2025.

However, the goals for 2035 set out in the plan are not presented in quantitative terms, but as a long paragraph of intentions. Within it, there is one line about the environment: 'Green modes of production and living will broadly take shape, carbon emissions will decline steadily after reaching a peak, the ecological environment will have fundamentally taken a turn for the better, and the goal of building a beautiful China will basically be achieved'.[64]

Following the 13th FYP, the 14th announces the guiding principles used to establish these goals, and which will be used to complete them, phrased as: Persist in the Party's total leadership; Persist in being people-centered; Persist in the new development concept; Persist in deepening reform and opening; Persist in systematic concepts.[65]

From these principles, the main objectives are put forth as: 'New results in economic development will be achieved'; 'New strides will be made in reform and opening up; The level of civility in society will rise to new heights'; 'New gains in ecological civilization construction will be achieved'; 'The people's well-being will reach new levels'; 'New gains will be made in the effectiveness of national governance'.

Unlike the previous plan, the 14th FYP held only 5 environmental goals, classified under 'green ecology', although once again all are binding (or obligatory). Under the column for 2020 numbers (although this percentage is marked by an asterisk because it is from 2019), forest coverage was at 23.2%, with the objectified goal for 2025 being 24.1%. Therefore, while this was not explicitly mentioned in the plan, the expected forest coverage growth for this 5-year period is 0.9%. The third column in this table served to inform the reader of Annual averages, but

[64] Central Committee of the Communist Party of China, *Outline of the People's Republic of China 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives for 2035*, 2021, in B. Murphy, CSET Translation Lead (Ed.), Etcetera Language Group, Inc. (Trans.), *Center for Security and Emerging Technology*, https://cset.georgetown.edu/wp-content/uploads/t0284_14th_Five_Year_Plan_EN.pdf, accessed 12 May 2025.

[65] Ibid.

this information was not featured for forest coverage. Forest growth in billions of cubic meters was not analyzed in this plan.

Green ecology	14. Reduction in energy consumption per unit of GDP (%)	--	--	(13.5)	Binding
	15. Reduction of carbon dioxide emissions per unit of GDP (%)	--	--	(18)	Binding
	16. Proportion of days with good air quality in cities at prefecture level and above (%)	87	87.5	--	Binding
	17. The proportion of water bodies with good surface water quality (I-III) (%)	83.4	85	--	Binding
	18. Forest cover rate (%)	23.2*	24.1	--	Binding

Fig. 4. *Cfr. Outline of the 'The People's Republic of China's 14th Five Year Plan (2021-2025) for National Economic and Social Development and Long-Range Objectives for 2035'*

In a press conference on the 9th of July, 2025, the chairman of the National Development and Reform Commission (NDRC), Zheng Shanjie, announced that China hit the 25% mark of forest coverage as of the end of the 14th Five-Yar plan. This and the other goals reached are described as 'high-quality achievements', and the reforested area is 'one-quarter of the world's new green coverage'.[66]

4. *Alipay's Ant Forest*

Lastly, to understand how Chinese environmental constitutionalism can be implemented not only though State actions but with private involvement, the Ant Forest project will be exposed, along with the impacts it has had on National goals for afforestation. Later, the correlation will be drawn between the two concepts.

The Ant Forest project is a phone application within the fintech giant Alipay's online payment platform that effectively 'gam-

[66] S. Zheng, C. Li, H. Zhou, *SCIO Briefing Series on "High-Quality Achievements During the 14th Five-Year Plan period": Economic and Social Development* in *The State Council Information Office of the People's Republic of China,* 2025, http://english.scio.gov.cn/m/pressroom/2025-08/12/content_118021792.html, accessed 13 June 2025.

ifies' public engagement in green behaviors. The initiative rewards users with 'green energy points' for engaging in low-carbon activities such as walking, taking public transport, or paying bills online; these points can then be used to cultivate virtual trees which correspond to the planting of real trees in arid regions of northwestern China.[67]

Regarding the operation of the app, the user opens an Ant Forest account and receives a virtual sapling to nurture into a grown tree. To promote this growth, one must accumulate said 'green energy points', which can be done by conducting offline low-carbon activities. These constitute daily life actions that directly reduce carbon emissions and are tracked through mobile sensors, QR codes, or partner integrations. They include walking and cycling instead of driving, using public transport, and participating in shared mobility services such as carpooling or bike-sharing.[68] In addition, Ant Forest encourages behaviors such as recycling and reuse of materials through Alipay-linked recycling machines or partner collection points.[69] Mi et al. describe how these actions fall into 5 major categories: 'green travel, travel reduction, paper and plastic reduction, efficient energy saving and recycling'.[70] Each offline action is assigned an estimated carbon reduction value based on Ant Group's internal methodology and is translated into a corresponding amount of green energy.[71]

As described by a joint report by Data-Pop Alliance (Harvard

[67] M. Ashfaq, Z. Zhang, A. U. Zafar *et al., Understanding Ant Forest Continuance: Effects of User Experience, Personal Attributes and Motivational Factors* in 122 *Industrial Management & Data Systems* 2 (2022), 471-498.

[68] C. Xiong, H. Liu, J. Li *et al., How does Ant Forest Influence Low-Carbon Consumption Behavior: An Analysis Based on the S-O-R Model* in 16 *Sustainability* 5, 2024.

[69] Cfr. M. Ashfaq, Z. Zhang, A. U. Zafar *et al.*, *Understanding Ant Forest Continuance*, cit.

[70] L. Mi, T. Xu, Y. Sun *et al.*, *Playing Ant Forest to Promote Online Green Behavior: a New Perspective on Uses and Gratifications*, in 278 *Journal of Environmental Management* (2021).

[71] Data-Pop Alliance, Green Digital Finance Alliance, United Nations Environment Programme (UNEP), *Digital Technology Shaping Green and Sustainable Lifestyles: Exploring Alipay's Ant Forest.* In *Datapop Alliance*, 2021, ht-

Humanitarian Initiative, MIT Connection Science, and Overseas Development Institute joint laboratory), Green Digital Finance Alliance, and United Nations Environment Programme, Ant Forest 'aims to unlock the power of individual behavior change and bottom-up approaches for climate change mitigation and poverty reduction'.[72] Similarly, Ant Forest's product manager recognizes that 'it is hard to insist that people do something without giving them positive feedback', especially in terms of wide-reaching problems such as carbon emissions and environmental protections that depend on collective action. Because one seldom sees the result of their low-carbon action in everyday life, Ant Forest proposes itself as an 'attempt to influence consumer behavior and motivate green consumption via the Internet' in which 'seeks to constantly raise the awareness of users for the protection of the environment by setting goals […] and interacting with friends'.[73]

As an added reward for these behaviours, beside the in-app achievements, since 2018 the National Forestry and Grasslands Administration will award user with a certificate for each planted tree with Ant Forest (this occurs after the tree has effectively been planted). This system interconnects with the voluntary tree planting scheme that is offered by the government directly.[74]

4.1. *Impacts*

The program garnered international acclaim in 2019, when the United Nations Environment Programme (UNEP) conferred

tps://datapopalliance.org/wp-content/uploads/2020/09/Ant-Forest-Report-final-version.pdf, accessed 7 June 2025.

[72] Ibid., 6.

[73] ESC Editorial Team, *Ant Financial's Ant Forest is more than Just Ecological Investment* in *EcommerceStrategyChina.com*, https://www.ecommercestrategychina.com/column/ant-financials-ant-forest-is-more-than-just-ecological-investment, accessed 16 May 2025.

[74] *Cfr. Alipay Integrated Into National Tree-Planting Scheme – China Development Brief*, 26 October 2018, https://chinadevelopmentbrief.org/reports/alipay-integrated-into-national-tree-planting-scheme/, accessed 16 May 2025.

it the Champions of the Earth award, in the 'Inspiration and Action' category.[75] To further expose the impacts made by Ant Forest, this subsection will explore what impacts have emerged from this use. The data that supports these findings is primarily sourced in the Alipay/Ant Group Sustainability Reports (hereby referred to as 'report') and will be taken at face value, as all other information procured from official Chinese outlets. Later, dissenting foreign findings will be presented for transparency. Additionally, only impacts directly related to reforestation will be discussed, excluding impacts on carbon emissions, biodiversity conservation, preservation efforts, and any other reported results of Ant Forest use, for the sake of topic relevance.

The 2019-2020 report stated that over 500 million users planted 200+ million real trees, covering an area of 2.74 million mu[76] (roughly 1830 square kilometers).[77] [78] The following report, from the latter half of 2020, spoke of 550 million users and 100 million trees planted in that period (which were included in the previous 200+ figure).[79] In 2021, while there was no data on the number of users, the data stated that 110 million trees were planted, bringing the total to a reported 326 million trees. The area cov-

[75] United Nations Environment Programme. *Chinese Initiative Ant Forest Wins UN Champions of the Earth Award*, 26 September 2019, https://www.unep.org/championsofearth/news-and-stories/chinese-initiative-ant-forest-wins-un-champions-earth-award, accessed 5 May 2025.

[76] Mu is a Chinese measuring unit, with one mu being equivalent to 666.67 square meters, or 0.000667 square kilometers. This is the number used for calculation of mu-to-m² in this contribution.

[77] It is unclear by the reports data alone if this measurement speaks on forest coverage are or if it also includes Ant Group's Philanthropic Preserved Areas, which at the time were located in: Pingwu, Sichuan Province; Heshun, Shanxi Province; Deqin, Yunnan Province; Yangxian, Shaanxi Province; and Wangqing, Jilin Province.

[78] Ant Financial Services Group Co. Ltd., *Alipay Sustainability Report 2019-2020: Towards a Better Society for the Future* in *Ant Group*, 2020, https://gw.alipayobjects.com/os/bmw-prod/a3021706-995e-4988-8662-2dad8cb85297.pdf, accessed 19 June 2025.

[79] Ant Financial Services Group Co. Ltd., *Ant Group 2020 Sustainability Report: Digital Responsibility and Green Development* in *Ant Group*, 2021, https://gw.alipayobjects.com/os/bmw-prod/8caf4a3a-2b4e-456d-940a-f918a86c786e.pdf, accessed 19 June 2025.

ered by this total (exclusively of new forest coverage) was 3.97 million mu, or 2650 square kilometers. [80]

Next, in 2022, the cumulative numbers were 650 million users and 400 million trees planted, and 4.5 million mu of planting area under Ant Forest (3000 square kilometers).[81] In 2023, 690 million users, 475 million trees, no specific data for planted area.[82] And as of 2025,[83] 700 million users, 548 million trees (which are explicitly stated as a contribution to the Beautiful China initiative), throughout 5.8 million mu (3870 square kilometers).[84]

Correlating this data with the reforestation goals of the previously presented Five Year Plans, see that from 2016-2020 (the objective period of the 13th FYP), considering the Mainland China covers an area of approximately 9.6 million square kilometers, and the goal was to increase forest coverage of this area by 1.8% (which would be 172,800 km²), and Ant Forest claims to have planted 1830 km², this alternative reforestation initiative contributed about 1.06% to the FYP goal. Doing the same for 2021-2025, under the 14th Five Year Plan, considering the goal was to increase forest coverage by 0.9% (86,400 km²), and Ant Forest

[80] Ant Financial Services Group Co. Ltd., *Ant Group 2021 Sustainability Report* in *Ant Group*, 2022, https://gw.alipayobjects.com/os/bmw-prod/df-8fcbe5-e60b-4ce7-9be4-55fb408b6f67.pdf, accessed 19 June 2025.

[81] Ant Financial Services Group Co. Ltd., *Ant Group 2022 Sustainability Report* in *Ant Group*, 2023, 74, https://mdn.alipayobjects.com/huamei_f5zjmk/afts/file/A*cR_MTrn5_ocAAAAAAAAAAAADgx7AQ/Ant%20Group%202022%20Sustainability%20Report.pdfhttps://mdn.alipayobjects.com/huamei_f5zjmk/afts/file/A*cR_MTrn5_ocAAAAAAAAAAAADgx7AQ/Ant%20Group%202022%20Sustainability%20Report.pdf, accessed 19 June 2025.

[82] Ant Financial Services Group Co. Ltd., *Ant Group 2023 Sustainability Report* in *Ant Group*, 2024, https://mdn.alipayobjects.com/huamei_f5zjmk/afts/file/A*lLkpSadSmHsAAAAAAAAAAAADgx7AQ/Ant%20Group%202023%20Sustainability%20Report.pdf, accessed 19 June 2025.

[83] The data pertaining to Ant Forest provided in the 2024 Ant Group Sustainability Report was collected up to June 2025, as per the report itself.

[84] Ant Financial Services Group Co. Ltd., *Ant Group 2024 Sustainability Report* in *Ant Group*, 2025, 5, https://mdn.alipayobjects.com/huamei_f5zjmk/afts/file/A*RJ33TKBILXIAAAAAgXAAAAgAegx7AQ/Ant%20Group%202024%20Sustainability%20Report.pdf, accessed 19 June 2025.

claims to have planted in an area of 2040 km²,[85] Ant Forest contributed about 2.36% of the FYP goal.

Despite its widespread popularity and international recognition, the Ant Forest project has been subject to criticism that question its effectiveness and long-term sustainability. A first concern relates to the ecological quality of the afforestation efforts: observers have noted the risk that many of the plantations may become 'green deserts', characterized by low biodiversity, poor resilience, and high mortality rates of saplings in hostile environments.[86] Furthermore, the system has shown vulnerability to fraud and manipulation, as some users have exploited step-counting applications or created multiple accounts, thereby inflating participation metrics and raising doubts about the reliability of the reported outcomes.[87] Additionally, concerns persist over the transparency of carbon accounting and the actual additionality of the afforestation projects: it remains difficult to demonstrate whether the trees would have been planted anyway, and whether they will survive long enough to deliver significant climate benefits.[88]

4.2. *Ant Forest and Environmental Constitutionalism*

The Ant Forest project can be understood as contributing directly to the goals articulated in the 'Beautiful China' framework, particularly under the stage of 'enhancing the stability and sustainability of ecosystem diversity'. In this context, the Chinese Communist Party has emphasized the construction of a solid nat-

[85] This figure comes from the total reported planted are of 2025 (3870 km²) minus the amounts reported up to 2020 (1830 km²).

[86] BBC, *China's Ant Forest: Users Cheat in Game that Helps the Climate*, BBC Future, 20 November 2024, https://www.bbc.com/future/article/20241120-chinas-ant-forest-users-cheat-in-game-that-helps-the-climate, accessed 21 June 2025.

[87] Ibid.

[88] H. Zhang, M. Li, X. Chen, *Assessing Carbon Sequestration Additionality in Digital Environmental Platforms: The Case of Ant Forest* in 16 *Sustainability* 5 (2024), https://doi.org/10.3390/su16051736.

ural ecological barrier, an ambition long associated with the North Shelterbelt Program, also known as the 'Great Green Wall'. The homepage for the Ant Group itself (the mother company to Ant Forest) states how this app is 'raising awareness, which leads to repeated actions, we facilitate the society's green transformation and the Beautiful China initiative'.[89]

Ant Forest's integration of afforestation efforts into this national program provides evidence of how digital platforms can complement state-led ecological infrastructure. By enabling millions of users to participate virtually in afforestation campaigns, Ant Forest extends the reach of these national initiatives, thereby reinforcing China's ecological security agenda at scale. It also helps bridge the gap between urban and rural communities, since the trees earned in App Forest by urban users are planted by rural workers in remote areas. As per the Alipay 2019-2020 Sustainability Report, the people who plant and preserve trees for Ant Forest are 100% local farmers and headsmen, these jobs which are evenly distributed among young and 40+ year-old workers.[90]

More broadly, Ant Forest can be interpreted as an example of the practical realization of environmental constitutionalism in China, because it embodies the constitutional directive found in Article 26 of the Constitution, which declares that 'the State shall organize and encourage afforestation and protect forests'. Although this provision originates in the constitutional framework of state responsibility, its execution through a private enterprise reveals the capacity of environmental constitutionalism to permeate social and economic life beyond the boundaries of government action. In this sense, Ant Forest demonstrates how constitutional directives are not merely aspirational but can be operationalized through the combined efforts of state policy, private innovation, and mass public engagement.

[89] Ant Group, *Green & Low-Carbon Development*, https://www.antgroup.com/en/esg/lowcarbon, accessed 18 June 2025.

[90] Ant Financial Services Group Co. Ltd., *Alipay Sustainability Report 2019-2020: Towards a Better Society for the Future* in *Ant Group*, 2021, 14, https://gw.alipayobjects.com/os/bmw-prod/a3021706-995e-4988-8662-2dad8cb85297.pdf, accessed 19 June 2025.

The significance of Ant Forest as a private-sector initiative is especially notable in the Chinese context, where environmental governance has traditionally been associated with top-down state control. Its existence illustrates that the principles of environmental constitutionalism are sufficiently robust to stimulate private initiatives that operate in harmony with state objectives. By gamifying low-carbon behavior and rewarding individuals with the symbolic act of tree planting, Ant Forest also aligns with the 'Beautiful China' directive to cultivate green habits and foster environmentally conscious patterns of daily life among urban populations.

A further contribution of Ant Forest lies in its capacity to expand environmental participation into the urban context. Historically, environmental initiatives in China have often been situated in rural or resource-dependent regions, where access to nature is direct and the ecological impacts of human activity are visibly apparent. Ant Forest, however, allows urban residents (many of whom are far removed from sites of ecological degradation or restoration) to engage meaningfully with environmental goals. In doing so, the project brings ecological thought and behavior into the routines of urban citizens, maintaining the environment at the forefront of their consciousness even when their immediate surroundings may not reflect natural ecosystems. This expansion of participation not only builds awareness but also creates pathways for future collective action, bridging the gap between urban lifestyles and rural ecological realities.

5. *Conclusions*

This contribution has sought to situate Alipay's (or Ant Group's) Ant Forest project within the broader framework of environmental constitutionalism in China. While China does not conform to Western liberal notions of constitutionalism, the presence of environmental provisions in its Constitution (particularly Article 26) demonstrates how ecological concerns are embedded within its constitutional order. The integration of 'Ecological Civilization' and the 'Beautiful China' vision into the

constitutional narrative underscores the symbolic and practical force of environmental governance in China's legal system.

Ant Forest exemplifies how constitutional directives can be operationalized not only through State-led action but also via private-sector initiatives that align with State objectives. By gamifying low-carbon lifestyles and linking digital behavior to tangible afforestation, the project contributes to the forest coverage targets of China's Five-Year Plans and to the broader pursuit of ecological civilization, although in a small scale.

However, the direct inclusion of public engagement in the achievement of State goals and the aim to change Chinese culture into a lower-carbon, green action community though gamified influence is notable in terms of new-age environmental governance. Importantly, it extends environmental engagement into urban spaces, thereby democratizing participation in reforestation efforts traditionally confined to rural areas, further involving the Chinese people, wherever they may be.

Nevertheless, the project's limitations cannot be overlooked. Concerns regarding ecological quality, additionality, and the integrity of its behavioral incentives highlight the risks of over-reliance on technological solutions for complex environmental challenges. These critiques emphasise the need for transparency and long-term monitoring to ensure that Ant Forest's contributions are both meaningful and sustainable.

Ultimately, Ant Forest illustrates the dual character of environmental constitutionalism in China: it reflects the state's ability to embed ecological imperatives within its constitutional framework, while also demonstrating the potential for private innovation and public participation to complement national policy. In this sense, Ant Forest stands as both a practical manifestation of constitutional environmental directives and a symbolic bridge between state-driven ecological objectives and societal engagement in the pursuit of a 'Beautiful China'.

SUSTAINABILITY, CLIMATE POLICIES AND PUBLIC ADMINISTRATION. WHAT ARE THE IMPLICATIONS FOR ADMINISTRATIVE FUNCTIONS?

Francesco Merenda

Abstract: *Climate sustainability has become a central issue. Each state has a duty to implement supranational obligations, but it also adopts its own organisational solutions. Italy is distinguished by its specific approach, whereby climate law measures, rules and actions are primarily embedded within organisational plans. Italian public administrations are therefore obliged to implement these plans, which, however, present a significant challenge. Administrative functions are therefore called to move towards climate sustainability, but in relation to the broader framework of environmental and ecological reforms.*

Keywords: Public Administration, Sustainability, Italian Climate Governance, National Integrated Energy and Climate Plan, Environmental Reforms

1. *Introduction: the Challenge of Climate Sustainability for the Law*

Climate policies have become central to almost all national legal systems, alongside the spread of climate change law. This area of law is an evolving field that has emerged from the intersection of several well-established legal disciplines, including environmental law, energy law, business law, and international law,[1] in particular importance is attached to the no-harm principle.[2]

The nexus between scientific issues and law characterises the

[1] J. C. Dernbach, S. Karkade, *Climate Change Law: an Introduction*, in 29 *Energy Law Journal* 1 (2008), 1.

[2] B.M. Ayer, *The Relevance of the No-Harm Principle to Climate Change Law and Politics*, in 19 *Asia Pacific Journal of Environmental Law* 1 (2016), 79-104; B. Mayer, A. Zahar (Eds), *Debating Climate Law*, Cambridge, New York, 2021.

approach of climate change law,[3] particularly regarding the actions to be taken by public decision-makers and subsequently implemented by public administrations.[4] Indeed, the role of data is fundamental to both the understanding of the phenomenon and the adoption of laws and other legal acts that regulate the administrative systems entrusted with the concrete implementation of the measures.[5]

This paradigm shift is evidenced by the evolution of climate change law from its historical position within the domain of environmental law and its subsequent emergence as a distinct subject of legal study. Indeed, climate law has come to be recognised as an autonomous field, and environmental law is now considered a component of this expanded field.[6]

However, a new principle has emerged whereby an emerging trend in climate scholarship suggests that certain freedoms may increasingly be subject to limitations where their exercise significantly contributes to greenhouse gas emissions.[7] This is an emerging trend in jurisprudence and scholarship, but it is not yet a widely established principle.

While the framework is defined by supranational and international regulations, the implementation of these measures is predominantly undertaken by the states. The relationship between climate change and the law has intensified in recent decades,[8]

[3] R. Ferrara, *Scienza e diritto nella società del rischio: il ruolo della scienza e della tecnica*, in *Diritto e processo amministrativo*, 2021; M. Torre-Schaub, *La construcción del régimen jurídico del clima Entre ciencia, derecho y política económica*, in 10 *Revista Catalana de Dret Ambiental* 1 (2019), 1-35.

[4] A. Bonomo, *L'approccio science-based sul cambiamento climatico: quale spazio per il decisore pubblico?* In *Rivista quadrimestrale di diritto dell'ambiente* 1 (2024), 53-99.

[5] M. Cavalcanti, *Fonti del diritto e cambiamento climatico: Il ruolo dei dati tecnico-scientifici nella giustizia climatica*, Europa, in 58 DPCE 2 (2023), *Diritto Pubblico Comparato ed Europeo* 2 (2023), 329-344.

[6] L. Butti, S. Nespor, *Il diritto del clima*, Milano, 2022.

[7] A. Lalli, *Implicazioni istituzionali ed economiche delle regolazioni e dei programmi del green deal europeo*, in 24 *Ambientediritto* 2 (2024), 1-23.

[8] E. J. Hollo, K. Kulovesi, M. Mehling *Climate Change and the Law*, Dordrecht, 2013, 229-72.

leading to the development of specific measures and initiatives.[9] The influence of this relationship on international law has been significant, as evidenced by the rapid development of principles, agreements and protocols, as well as the establishment of the UN climate regime, rules and measures.[10]

The European Commission has recently exhibited a shift in focus towards a greater emphasis on the ecological dimension of sustainability,[11] with the adoption of the *Green New Deal* (COM/2019/640 final).[12]

The national dimension is pivotal in this regard. National legislators are not only tasked with transposing international directives on this topic, but also with formulating their own strategy and planning that is in alignment with the prerogatives of the legal system and commensurate with their public administrations.

The subject has been of interest to scholars of public policy[13] and public law[14]for more than a decade, who have anticipated the first international and domestic legislative interventions. Consequently, the scientific literature about climate litigation has grown exponentially. However, a significant aspect that has not

[9] M. Mehling, *Implementing Climate Governance: Instrument Choice and Interaction*, in E. J. Hollo (Ed.), *Climate Change and the Law*, Dordrecht, 2012, 11-30.

[10] D. Bodansky, J. Brunnée, L. Rajamani, *International Climate Change Law*, Oxford, 2017.

[11] E. Chiti, *Legal Changes: Ecosystem Health and the Redefinition of Sustainability*, in 3 *Green Deal European Law Open* 1 (2024), 190-8.

[12] Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and social Committee and the Committee of the Regions the European Green Deal (COM/2019/640 final).

[13] A. Wellstead, R. Stedman, *Addressing the Challenges of Adaptation to Climate Change Policy: Integrating Public Administration and Public Policy Studies*, in 37 *International Journal of Public Administration* 14 (2014), 999-1010; J. Knieling, W. Leal Filho, *Climate Change Governance: The Challenge for Politics and Public Administration, Enterprises and Civil Society*, in Id. (Eds), *Climate Change Governance*, Berlin-Heidelberg, 2012, 1-5.

[14] J. Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, in 119 *Yale Law Journal* 6 (2009), 1122; J. McDonald, *The Role of Law in Adapting to Climate Change*, in 2 *Climate Change* 2 (2011), 283-295.

yet been analysed extensively concerns the impact of these policies on the organisation of public administrations, except for a few significant recent contributions.[15]

The focus on aspects such as the environment, landscape and climate in the Italian public law framework has seen considerable growth, particularly following the 2019 constitutional reform. This has led to the adoption of Article 9, which emphasises the protection of the landscape, environment, biodiversity and ecosystems, with a particular emphasis on the interests of future generations. Constitutional reform on climatic issues has been observed to be lacking,[16] a phenomenon that has also been identified in other legal systems.[17] Two interpretations of this phenomenon can be proposed: first, the new Article 9 encompasses climate change and the efforts to combat it; second, it does not include climate change and consequently establishes a regulatory gap with considerable implications.

Article 9 does not expressly mention climate,[18] but the latter is generally accepted as one of the protected goods under landscape and environmental legislation. In line with Italian scholarship, it is true that, until a few years ago, these resources (water, air and land) were covered by different disciplines and regulations.[19] Today, however, integration between these policy areas and regulatory disciplines is required to ensure these actions are

[15] M. Magri, *Lineamenti dell'amministrazione pubblica del clima*, in 30 *Diritto pubblico* 2 (2024), 321-348.

[16] R. Bifulco, *Ambiente e cambiamento climatico nella Costituzione italiana*, in *Rivista AIC* 3 (2023), 1-17.

[17] U. Suratno, *Constitutional Law and Social Change: A Global Perspective*, in 3 *Journal of Law and Social Politics* 2 (2025), 71-79; J. R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, in 85 *Denver University Law Review* 4 (2008), 919; K.A. Tomaier, *How States Can Adapt to Climate Change Through State Constitutional Amendments*, Master's thesis, Harvard Extension School, Cambridge (MA), 2020.

[18] F. Gallarati, *Tutela costituzionale dell'ambiente e cambiamento climatico: esperienze comparate e prospettive interne*, in *52 DPCEonline* 2 (2022), 1085-110; M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune*, in *Forum di Quaderni costituzionali* 3 (2021), 300.

[19] M. S. Giannini, *Ambiente: saggio sui diversi suoi aspetti giuridici*, Milano, 1973.

aligned and to achieve the common goals of sustainability and the One Health approach.

The aim of this paper is to investigate which rules, measures and actions Italian public administrations should adopt to comply with international rules on climate policies, and to consider what further administrative measures should be taken in the context of climate sustainability.[20]

More specifically, this article seeks to determine whether climate governance is merely generating additional regulatory obligations for public administrations or whether it is fostering the emergence of a new model of administrative function. The central hypothesis advanced here is that climate policies are progressively reshaping the purposes, instruments and responsibilities of public authorities, thereby contributing to the development of a climate-oriented administrative paradigm.

The organisational dimension of the climate in public administration in Italy is a topic which is part of a broader dynamic of widespread administrative reforms.[21] The National Recovery and Resilience Plan (NRPP) has introduced a wide range of extensive changes in almost all areas of the public sector through several missions.

The ecological transition, in conjunction with all measures including climate neutrality, has given rise to a series of new organisational arrangements.[22] Indeed, Italy has adopted plans for the

[20] F. Fracchia, *Il giurista deve tacere sul climate change, ma deve irritarsi: problemi di confine e indicazioni metodologiche*, in *Rivista quadrimestrale di diritto dell'ambiente* 1 (2024), 39-52; M. Ramajoli, *Il cambiamento climatico tra green deal e climate change litigation*, in *Rivista giuridica dell'ambiente* 1 (2021), 53-65.

[21] B. G. Mattarella, *The Administrative Reform Trajectory in Italy: 1993-2023*, in E. Ongaro, C. Barbati, F. Di Mascio, F. Longo, A. Natalini (Eds), *Public Administration in Italy in Political and Historical Context: The Craft of the Italian State*, Cham, 2025, 95-111.

[22] F. Fracchia, M. Occhiena, *Climate change: la risposta del diritto*, Napoli, 2010; R. Ferrara, *Il cambiamento climatico e il Piano Nazionale di Ripresa e Resilienza (PNRR): un'introduzione al tema*, in *Diritto e Società* 2 (2021), 271-292; S. Lazzari, *La transizione verde nel piano nazionale di ripresa e resilienza «Italia domani»*, in *Rivista quadrimestrale di diritto dell'ambiente* 1 (2021), 198-220.

measures that are useful for ecological transition and climate neutrality. The context of climate policy for public administrations should also be interpreted in a reform phase that, based on emerging political guidelines, has led to the affirmation the following paradigms: simplification, modernisation, efficiency and digitalisation.

Consequently, climate policies can be regarded as a novel set of interventions that engender innovation in administrative organisation. Conversely, the adoption of plans that align with the prevailing political orientation can give rise to a series of consequences that are often challenging to comprehend.

It is therefore fundamental to understand how the Italian legal system has transposed and adopted the measures envisaged at supranational level in the field of climate, but it is also important to assess the impact that these choices will have on the Italian public administration in the future.

2. *Climate Policies and Law: a Pyramidal Framework*

The establishment of legal and policy frameworks to deal with climate change is an example of multi-level governance at work in the contemporary era.[23] Climate law (objective) and the right to climate (subjective) require that legislative activity be governed by the reception of rules not only produced by associated life, but by nature;[24] more specifically by 'science', which is the guardian of the qualified knowledge on how human beings can make the consequences of naturalistic laws less strict.

In accordance with scholars who advocate for the legal existence of the 'climate system' and its potential inclusion within

[23] J. Peel, L. Godden, J. R. Keenan, *Climate Change Law in an era of Multi-Level Governance*, in 1 *Transnational Environmental Law* 2 (2012), 245-280.

[24] M. Carducci, *Cambiamento climatico (diritto costituzionale)*, in R. Bifulco, A. Celotto, M. Olivetti (Eds), *Digesto delle discipline pubblicistiche*, Torino, 2021; B. Tonoletti, *Il cambiamento climatico come problema di diritto pubblico universale*, in *Rivista giuridica dell'ambiente* 1 (2021), 37-51.

the realm of public goods,[25] a comprehensive understanding of the role of public administration in this domain emerges as crucial. Whilst the contribution to climate neutrality calls for consideration of the actions of all stakeholders, the distinction between public and private actors[26] is a key element in comprehending the role of public administration in this complex process.

The term 'climate' is not defined in a specific legal sense. European law and the environmental laws of each national system refer to it, but do not develop it. The fundamental distinction between positive environmental policies and disciplines lies in the recognition that climate does not constitute a distinct conceptualisation of the environment. In consideration of the intricacy inherent to the issues at hand, climate policies encompass a multitude of domains, including but not limited to air pollution and artificial greenhouse gas emissions. It is evident that a legal distinction between climate and environment exists. Indeed, the Italian regulatory framework enables the identification of legal references that can assist in this distinction.

Legislative Decree No. 152 of 2006, which regulates the environment, does not include any reference to climate change obligations and responsibilities. At the European level, a clear distinction is observed between environmental and climate law. Regarding liability, environmental damage is recognised in law as a permanent consequence of a wrongdoing, whereas climate damage and climate change damage are recognised and regulated as permanent consequences of wrongdoing.

Considering the climate change, an unparalleled question has emerged regarding the legitimacy of the measures undertaken to deal with the emergency. The fundamental issue concerns the theory of administrative decisions that validates the sequence of

[25] A. Lupo, *Il diritto alla sostenibilità climatica. La questione ecologica nella prospettiva dei diritti umani*, Napoli, 2025.

[26] M. Di Paola, W. D. Jamieson, *Cambiamento climatico, liberalismo, e la distinzione pubblico/privato*, in *Teoria e Critica della regolazione sociale* 2 (2020), 61-85.

contingent choices that are subordinated to the interest in ecological integrity, thereby constituting a breach of duty.

Consequently, the field of public administration is undergoing an unprecedented shift in both its theoretical underpinnings and its organisational dimensions. Despite this, the approach to the climate dimension, oriented towards the interests of future generations, requires public administration to act in accordance with its own legality with respect to the climate emergency.

The climate-based legality, which is the basis for the legitimisation and enforcement of the administrative functions in this area, is founded on both environmental constraints and the provisions set out in Article 97 of the Constitution and Article 1, Paragraph 1 of Law 241 of 1990. However, the new position that should be emphasised is that the role of public administration in climate-based legality should not be understood as being confined to compliance with national and supranational laws. Indeed, it is the transformative role attributed to public administrations by the Constitution (Art. 3, paragraph 2 of the Constitution) that legitimises specific functions, powers and actions in relation to climate matters.

The concept of climate legality should not be understood merely as compliance with climate-related legislation. Alternatively, it may be defined as a particular manifestation of the principle of legality, entailing administrative action to be substantively oriented towards the achievement of climate objectives established by constitutional, European and international norms. In this sense, legality does not merely function as a formal constraint on public power; rather, it is also a positive obligation to pursue climate-related public interests through effective administrative action.

The climate-substantial legality is result-oriented in terms of quantitative and quantitative-temporal results: what is required of public administrations is to implement and comply with aims and parameters that find their justification in a purely scientific purpose. For this reason, it is easy to argue that the climate law framework for the public administrations neither can nor should be experienced as a mere regulatory constraint but as a dynamic function whose purpose continues to be the concrete care of col-

lective interests, but the addressees are not the citizens in the capacity of users of public services but the person in the fullest sense.

The concept of climate-substantive legality, however, introduces an alternative approach by emphasising outcomes rather than adherence to pre-existing legal rules. Public authorities are increasingly required not only to comply with procedural and formal requirements, but also to contribute effectively to the achievement of climate objectives that can be measured. Consequently, the legitimacy of administrative action is not exclusively evaluated in relation to legal compliance, but also considering its capacity to support climate mitigation and adaptation objectives.

The international dimension constitutes the starting point, with the agreement adopted by the international community to address climate change being the United Nations Framework Convention on Climate Change (UNFCCC).[27] The initiative was first established at the United Nations Conference on Environment and Development, which was held in Rio de Janeiro from 3 to 14 June 1992, and came into effect on 21 March 1994. The treaty has been ratified by 198 parties, including Italy, which ratified it with law no. 65 of 15 January 1994, and the European Union, which formally approved it on 21 December 1993. Firstly, there is the necessity to identify legal instruments that will reduce the factors that have a negative effect on the climate (Art. 2). Despite the evident disparities between the participating nations, the Convention meticulously delineates both the principles (Art. 1) and the obligations incumbent upon states (Art. 4).

The European context of climate change then is defined by the concept of sustainable development, as outlined in the two EC and EU Treaties. The EU's accession to the Kyoto Protocol constituted a significant commitment to the implementation of mechanisms designed to achieve climate targets for member states. The European commitment can thus be summarised as consisting of three elements: the Green Deal (COM/2019/640

[27] P. Sands, *The United Nations Framework Convention on Climate Change*, in *Review of European Community & International Environmental Law* 1 (1992), 270.

final[28]); the European Climate Act;[29] and the Programme for Climate Neutrality by 2050 (COM (2018) 773).

The legal basis for EU intervention in environmental and climate matters is Article 192 TFEU,[30] which requires the European Parliament and the Council to act in accordance with the ordinary or special legislative procedure for the realisation of the objectives set out in these matters in Article 191 TFEU. According to Article 193 TFEU, the provision of higher levels of protection than those of the EU by Member States is permissible, provided that such measures are compatible with the Treaties.

The Green Deal constitutes a political and regulatory project underpinning various legislative and administrative actions and binding regulatory measures.

The Climate Act constitutes one of the initial measures of the Green Deal,[31] with a primary objective of achieving climate neutrality by the year 2050, thereby imposing a legal obligation upon the European Union. According to the stipulations of the law, each member state is obligated to implement it in its entirety and with immediate effect.

It is evident that the European Union's Next Generation EU (NGEU)[32] initiative has allocated a pivotal role to the climate and the transition towards a green economy, encompassing a comprehensive array of specific targets, measures and actions. The

[28] Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and social committee and the Committee of the Regions the European Green Deal.

[29] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[30] L. Antoniolli, *Climate Change Litigation and the Rule of Law in the European Union*, in L. Antoniolli, C. Ruzza (Eds), *The Rule of Law in the EU: Challenges, Actors and Strategies*, Cham, 2024, 279-303.

[31] R. C. Fleming, R. Mauger, *Green and Just? An Update on the 'European Green Deal'*, in 18 *Journal for European Environmental & Planning Law* 1-2 (2021), 164-180.

[32] See European Commission: Directorate-General for Budget. (2021). The EU's 2021-2027 long-term budget and NextGenerationEU: facts and figures. Publications Office of the European Union. https://data.europa.eu/doi/10.2761/808559.

NGEU incorporates the Recovery and Resilience Facility (RRF), which allocates a substantial proportion of its financial resources to objectives related to climate change. Specifically, 37% of the RRF's EUR 672.5 billion is earmarked for climate action.

It is imperative that the Italian regulatory framework be based on Articles 9, 3 and 41 of the Constitution. The incorporation of a reference to ecosystems within Article 9(3) of the Constitution signifies that their protection is inextricably linked to the mitigation of climate change, and consequently, climate protection.[33] Indeed, a relationship of interdependence and finality between ecosystems and climate is evident: the preservation of ecosystems, under current conditions, is inextricably linked to the protection of the climate and, consequently, the mitigation of climate change. The provision introduced in 2022 within Article 9 of the Italian Constitution appears to offer a constitutionally relevant basis for the protection of the environment, biodiversity and ecosystems, since it recognises that ensuring the stabilisation of the climate is a fundamental condition for safeguarding the planet.

It is evident that, as enshrined in Article 3, paragraph two, the removal of obstacles is incumbent upon the Republic. Climate change may be interpreted as one of the structural conditions capable of hindering the effective enjoyment of fundamental rights and the full development of the individual. Article 3(2) of the Constitution may provide a basis for action to reduce climate-related vulnerabilities and inequalities.

In the climate context, public administration has a transformative function. Public authorities must guide long-term societal transitions through planning, coordination, monitoring and implementation activities. Climate governance reinforces the proactive and transformative dimensions of administrative action.

In the aftermath of the constitutional reform of 2022, Article 41.3 of the Constitution underwent amendments, thereby establishing two constraints on economic activity regarding the environment. It has been demonstrated that the public interest focus

[33] R. Montaldo, *La tutela costituzionale dell'ambiente nella modifica degli artt. 9 e 41 Cost.: una riforma opportuna e necessaria*, in *Federalismi.it* 13 (2022), 196.

enables individuals in positions of public authority to rationalise economically green-oriented economic policy decisions, thereby legitimising the measures and actions that are expected of public officials.

The constitutional framework establishes administrative law as an instrumental in the formulation of environmental policy in the context of ecological transition.[34] Administrative decisions are required to address several elements, including the factors subject to protection, the various levels of government, the formulation of regulations, the mounting centrality of environmental concerns in positive law, and the high degree of technicality inherent in the measures and objectives involved.

In Italy, a climate framework law has not been adopted yet, in contrast to the situation in many other European countries where such legislation has been enacted. Nevertheless, several measures and strategies have been adopted at the national level, such as the National Integrated Energy and Climate Plan (NIECP), the Italian Long-Term Strategy (LTS) and the National Recovery and Resilience Plan (NRRP).

In accordance with the methodological approach adopted by Mario Nigro in his seminal work on administrative law, the relationship between the administration and the citizens is not confined to the formal aspects of the act and procedure but extends to a more extensive and complex dimension.[35] The role of public administration in climate governance cannot be reduced to the mere observance and implementation of national and international regulations, and nor can it be limited to the administrative procedure. It is evident that public administration action is also influenced by extra-procedural administrative action; in this context, it is important to consider climate measures and the plans containing them.

[34] J. H. Adler, *The Legal and Administrative Risks of Climate Regulation*, in 51 *International Journal of Multidisciplinary Research and Development* (2021), 10290-301.

[35] M. Nigro, *Giustizia amministrativa*, Bologna, 2002.

2.1 *The Italian Approach on Climate Sustainability*

Italy is one of a few European countries that has not yet established a comprehensive legislative framework on climate change. In the following section, several of the primary state planning tools designed to protect the environment in the face of the climate emergency are outlined. The National Strategy for Adaptation to Climate Change (2012)[36] is a document that outlines the national vision on the common pathways to be taken to deal with climate change, as well as counteracting and implementing its impacts.

The National Climate Change Adaptation Plan (2023) is an instrument for implementation of the SNACC. The objective of the Plan is to reduce the vulnerability of natural, social and economic systems.

At the present time, there are four proposals for the adoption of a climate framework law: two are under discussion in the Chamber of Deputies (No. 1082 and No. 1339) and two in the Senate (No. 743 and No. 1007). Additionally, the *Proteggi Italia Plan* for the 2019-2021[37] three-year period should be referenced. The National Plan for Hydrogeological Risk Mitigation (2023) and the Climate Decree (2023) address adaptation aspects.

In addition to the acts, there are further general initiatives of significance. For instance, the ItaliaMeteo Agency was established in 2022 with the objective, amongst other things, of systematising the existing mass of data and sources on meteorology and climatology.

Furthermore, in 2021, the National Adaptation Platform was realised as a web portal for administrations to both accessing data and exchanging best practices. This platform was designed following the model of the EU Adaptation Platform, which was launched in 2014.

[36] See S. Nespor, *L'adattamento al cambiamento climatico: breve storia di un successo e di una sconfitta*, in *Rivista giuridica dell'ambiente* 1 (2018), 29-57.

[37] National plan for the mitigation of hydrogeological risk, restoration, and protection of environmental resources, adopted by Prime Ministerial Decree on February 20, 2019.

The Regions' role in this process is multifaceted, encompassing contributions during the territorial and urban planning phases, as well as in the implementation phase. These contributions take various forms, including the formulation of Regional Energy Plans, Coastal Protection Plans, Forestry Plans, Water Protection Plans, and Air Quality Plans, among others.

In certain instances, the intervention of the regions is necessitated by the fulfilment of legal obligations, as evidenced by the adoption of regional sustainable development strategies, which is stipulated in the Consolidated Law on the Environment. The implementation of adaptation measures can be executed through a variety of approaches. These include individual measures or coordinated and more structured actions, which are categorised as 'system actions'. The definition of these system actions is derived from the central levels of territorial government and are subsequently implemented by the peripheral bodies. For instance, the actions relating to the construction of adaptation governance can be cited as an example. The development of general guidelines on organisation, roles and functions is expected to guide regional and local authorities in the establishment of defined and permanent organisational structures. These are designed to facilitate the autonomous and effective planning and implementation of adaptation measures, as well as to facilitate collaboration with other structures, both horizontally such as through coordination between several regional governance structures, and vertically such as through coordination of a regional structure with more centralised levels of government, or through the performance of a liaison function by local authorities. Furthermore, in accordance with the distribution of legislative powers established in Article 117 of the Constitution, some Regions have established their own laws to address issues related to ecological transition and climate change. These laws include programmes for the definition of interventions, as evidenced by the examples of Friuli-Venezia Giulia, Tuscany and Basilicata.

The climate objectives of local authorities[38] are pursued with-

[38] N. Bertuzzi, F. Cittadino, T. A. Felber, *Policy recommendation: integrazione della politica climatica a livello subnazionale in Italia e in Austria. Rifles-*

in the scope of the functions attributed to them under Articles 114, 118 and 119 of the Constitution. In this regard, particular emphasis should be placed on the fact that, in the field of climate change adaptation, municipal and local community levels have proven to possess the greatest capacity to devise context-specific responses to the impacts of climate change. Such interventions are characterised by a high degree of heterogeneity, as they are tailored to the distinctive needs of individual local communities, and encompass incremental, transformational, preventive, autonomous, as well as planned forms of adaptation.

The territorial system within climate actions and policies could be an essential element of the future in national climate change governance,[39] within the broader context of the global and national dimensions.[40]

2.2 *Climate Change and Administrative Activity: the Impact on Public Administration*

Regulation based on the transposition of supranational sources is not the only consequence of the holistic approach to climate policy. Administrative activities and administrative decisions (Monteduro, 2018[41]) are subject to this change, which takes the form of new rules, actions and measures to be taken in every public administration. Administrative action is undoubtedly required to ensure the optimal implementation of the principle of sustainable development, in accordance with the provisions of

sioni sulle Province Autonome di Trento e Bolzano e sui Länder Vorarlberg e Tirolo, Eurach research, 2022, available here: https://www.eurac.edu/doi/10-57749-bfpy-ng75.

[39] T. Bonetti, *Il cambiamento climatico tra città e territori: verso nuovi paradigmi pianificatori?* in *Rivista giuridica dell'ambiente* 1 (2021), 109-19.

[40] M. C. Rizzuto, *Cambiamento climatico: un problema di intreccio tra globale e locale. Spunti di riflessione dalla filiera agroalimentare quale modello virtuoso di circolarità e sostenibilità*, in *BioLaw Journal-Rivista di BioDiritto* 2 (2023), 235-75.

[41] M. Monteduro, *Le decisioni amministrative nell'era della recessione ecologica*, in *Rivista AIC* 2 (2018), 1-74.

the Environmental Code (Art. 3 *quater*, co. 2, Legislative Decree No. 152/2006).[42]

Nevertheless, administrative activity is required to extend beyond the scope of sustainable development, a concept that is also reaffirmed and directly associated with the One Health paradigm. The object of protection dictates the procedural scans of the administrative inquiry, which is informed by the principle of the office initiative and the power-duty of the person in charge of the procedure in view of art. Article 97 of the Constitution.

To comprehend the relationship between public administrations and climate change law, it is necessary to consider the distribution of administrative functions.[43]

Within the current legal framework, two complementary strands of administrative instruments operate in this area: on the one hand, general acts of policy orientation and planning; on the other, specific measures and procedural mechanisms designed in relation to activities and interventions. Among the former, priority is accorded to the National Integrated Energy and Climate Plan (NIECP) and the National Climate Change Adaptation Plan (NCCAP), both of which are aimed at enhancing the resilience of natural, social and economic systems to the impacts of climate change. Reference should also be made to the National Recovery and Resilience Plan (NRRP),[44] to the application of the Do No Significant Harm (DNSH) principle.[45] Pursuant to this principle, measures financed under the Recovery Fund must not cause significant harm to the environment. The DNSH principle appears to possess a broad and far-reaching normative capacity,

[42] F. Fracchia, *I principi generali nel codice dell'ambiente*, in *Rivista quadrimestrale di diritto dell'ambiente* 3 (2021), 4-73;

[43] D. Pappano, *Inquinamento atmosferico e clima*, in *Diritto dell'ambiente*, 2022, 344-368.

[44] R. Ferrara, *Il cambiamento climatico e il Piano Nazionale di Ripresa e Resilienza (PNRR): un'introduzione al tema*, in *Diritto e società* 2 (2021), 271-92.

[45] P. L. Petrillo, A. Zagarella, *La transizione ecologica nel PNRR tra climate tagging* e *do not harm*, in *18 Diritto Pubblico Europeo-Rassegna online* 2 (2022); F. Cusano, *Il principio do not significant harm (DNSH) e il fischio del merlo*, in *Munus: rivista giuridica dei servizi pubblici* 3 (2023), 859-873.

capable of informing and guiding all interventions that produce direct or indirect effects on the interests safeguarded by Articles 9 and 41 of the Constitution.

Programming and planning instruments must therefore be consistent with international and national environmental and climate commitments and be suitable for the attainment of the relevant objectives. Considering their foundational role, the demonstration of such consistency is of particular importance, since these commitments underpin all subsequent administrative action, the legal validity of which may be undermined by deficiencies in the underlying planning instruments. Of central relevance in this respect is the National Integrated Energy and Climate Plan (NIECP), which sets out the strategic framework for the energy transition and climate action by identifying the requisite objectives, policies and measures. The submission of the NIECP constitutes an obligation arising under Regulation (EU) 2018/1999[46] on the Governance of the Energy Union and Climate Action, and the Plan currently covers the period up to 2030.

At the national level, climate change adaptation is specifically addressed by the National Strategy for Adaptation to Climate Change (SNAC).[47] This instrument was adopted by the Italian Government through Directorial Decree No. 86 of 16 June 2015, issued by the Director General of the former Directorate-General for Climate and Energy of the Ministry for the Environment and the Protection of Land and Sea (now the Ministry of Ecological Transition).

The mandate of the SNAC is to identify the principal impacts of climate change on environmental resources and on a range of socio-economic sectors of national relevance, with a view to providing a coherent national strategic vision and proposing initial measures aimed at adapting to such impacts. Within the frame-

[46] A. D. Dumitrescu, *Study on the European Regulatory Framework in the Field of Electricity*, in 2 *International Investment Law Journal* 1 (2022), 4-13.

[47] F. Crupi, *Le Strategie nazionali per lo sviluppo sostenibile, la biodiversità, l'energia, l'adattamento ai cambiamenti climatici e la coesione territoriale*, in Id. (Ed.), *Territorializzare il PNRR. Strategie, strumenti e progetti per la rigenerazione della città e dei territori contemporanei*, Milano, 2024, 72-84.

work of the SNAC,[48] adaptation is conceived as a general objective articulated into a set of interrelated specific aims, namely the reduction of the vulnerability of natural, social and economic systems to climate change impacts, the enhancement of their adaptive capacity, the improved enhancement of opportunities arising from climate change, and the coordination of actions across the various levels of governance.

The overarching purpose of this instrument is to foster the systematic integration of climate change adaptation measures within planning and decision-making processes at the national, regional and local levels. In a complementary perspective, the Italian Long-Term Strategy for the Reduction of Greenhouse Gas Emissions, adopted in January 2021 by the competent ministries, was developed in compliance with the commitments undertaken under the Paris Agreement. In accordance with that framework, by 2020 the Parties were invited to submit their Long-Term Low Greenhouse Gas Emission Development Strategies with a time horizon extending to 2050.[49]

The Strategy is structured around a set of fundamental guiding principles, which include a substantial reduction in energy demand, largely attributable to declining private mobility and consumption in the civil sector, a significant acceleration in the deployment of renewable energy sources and hydrogen production, and the expansion and qualitative enhancement of green areas, resulting in increased carbon dioxide absorption capacity. The document contains numerous references to climate change adaptation, including a chapter specifically devoted to adaptation policies and measures, thereby confirming the relevance of adaptation within the broader decarbonisation pathway.

Further relevance is assumed by the Plan for the Ecological Transition, approved by the Interministerial Committee for the Ecological Transition through Legislative Decree No. 1 of 8

[48] S. Nespor, *Quando mitigazione e adattamento non bastano: i danni derivanti dal cambiamento climatico*, in *Rivista giuridica dell'ambiente* 3 (2018), 449-464.

[49] https://www.mase.gov.it/portale/documents/d/guest/lts_gennaio_2021-pdf

March 2022[50] and closely integrated with the National Recovery and Resilience Plan. This Plan constitutes a coordinating and updating instrument for a range of environmental policies, including those relating to climate change mitigation and adaptation. Within this framework, climate change adaptation is expressly identified as one of the principal macro-objectives of environmental policy shared at the European level.

2.3 *The Regional Level*

At the regional level,[51] a wide range of legal and administrative instruments may contribute to the attainment of climate change adaptation objectives. These include, first, acts expressly devoted to climate-related matters, such as regional strategies, plans and action documents specifically addressing adaptation, as well as instruments combining mitigation and adaptation objectives. Alongside these, spatial planning and sectoral instruments play a significant role where they directly address adaptation concerns or define measures and interventions capable of influencing adaptive processes. In this category fall, inter alia, regional energy plans, forest management plans, water protection plans, multi-hazard and risk prevention plans, social and health plans, strategies and plans to combat desertification, and landscape or landscape-adaptation plans, as far as they incorporate climate-related considerations.

Climate change adaptation may also be integrated into regional sustainable development strategies. In this respect, Article

[50] Its main functions are: ensuring the coordination of national policies for ecological transition and related planning; approving the Ecological Transition Plan; deliberating on the restructuring of environmentally harmful subsides; monitoring the implementation of the PET; updating the National Strategy for Sustainable Development.

[51] P. Urbani, *Tutela del paesaggio: verso una disciplina negoziata tra Stato, Regioni (e autonomie locali)?*, in 27 *Le Regioni* 6 (1999), 1123-1140; A. Galletti, *Il coinvolgimento delle regioni alla formazione del diritto ambientale: l'iniziativa delle Marche per la partecipazione al meccanismo di" allarme rapido" in merito alla proposta di direttiva sulla riduzione dell'incidenza di determinati prodotti*, in *Rivista giuridica dell'ambiente* 2 (2021), 533-561.

34 of the Environmental Consolidation Act entrusts regions with responsibility for coordinating planning activities, promoting the decoupling of economic growth from environmental degradation, and meeting social needs linked to the development of individual potential, all of which are identified as essential preconditions for enhancing competitiveness and employment. Within this normative framework, adaptation objectives may be pursued through economic and financial planning instruments and through the allocation of regionally managed funds, such as Regional Operational Programmes and regional economic and financial planning documents, which may be used to support initiatives aimed at the territorial localisation of adaptation measures and the response to specific climate-related challenges.

Further instruments include regional guidelines and other regulatory or soft-law initiatives, notably the adoption of guidance for the integration of climate change and adaptation criteria into regional planning processes. Relevance attaches to guidelines intended to ensure the systematic incorporation of adaptation considerations within environmental impact assessment and strategic environmental assessment procedures, as well as, more broadly, within climate consistency assessments of plans and projects at both regional and local levels.

Beyond individual regional instruments, the regulatory landscape may also encompass conventions and cooperative agreements of various kinds between regions sharing the same geographical area, including cross-border contexts and mountain regions such as the Alpine and Apennine areas. In addition, planning and intervention programmes concerning functionally interconnected territories, such as river basins, wetlands and inland waters, protected areas and other ecologically sensitive zones, may further contribute to the coherent and integrated pursuit of climate change adaptation objectives.

3. *Focus: The National Integrated Energy and Climate Plan (NIECP)*

Italy adopted its first National Integrated Energy and Climate Plan in December 2019 to coincide with the approval of Law No.

141 of 12 December 2019 (the so-called Climate Decree Law) and Law No. 160 of 27 December 2019 (the 2020 Budget Law). The plan identified nine macro-objectives to be achieved through a series of horizontal policies and measures of an organisational nature, which identify more specifically the actions to be implemented. Prior to the approval of the final text, the European Commission had recommended the adoption of several measures that were scarcely or not at all presents in the first draft. Despite this, the final 2019 version was in line with the approach of the 2018 Regulation and the economic and social sustainability commitments linked to the objectives of environmental protection. In addition to the numerous measures and objectives set out in the plan, from the organisational point of view, the 'NRRP-NIECP Technical Commission'[52] was introduced with Article 50, paragraph 1, letter d), number 1) of Decree-Law 76/2020, through the introduction of paragraph 2-bis to Article 8 of Legislative Decree No. 152/2006 (the so-called Environment Code). The decision to merge the NIECP with the National Recovery and Resilience Plan is indicative of the fact that the integrated plan, although it was adopted earlier, is coordinated with the NRRP and fully falls within the logic of simplification and rationalisation of environmental regulations.

Although the first version of NIECP introduced actions and objectives in line with European indications, it did not overcome certain restrictions which, especially from a legal point of view, can be seen in the lack of organicity of the administrative measures adopted in the energy field3. In fact, although the overall design of the plan is overall appreciable, what is still struggling to get off the ground is the actual implementation due to several factors, including the fragmentary nature of the energy legislation. due to new regulatory interventions both at a European level (Next Generation Eu, Regulation 2021/1119/EU, Fit for 55) and at a national level (Constitutional Law no. 1 of 11 February 2022). Considering these new developments, the 2019 NIECP

[52] L. Pergolizzi, *Il d.l.n. 76/2020 nel processo di attuazione del Piano Nazionale Integrato per l'Energia e il Clima*, in *Rivista Giuridica AmbienteDiritto.it* 4 (2020), 1-14.

targets are inadequate with respect to the new objectives. In particular, the plan does not indicate the possible consequences of energy produced with Renewable Energy Sources (RES); moreover, the risks associated with the hypothesis that this type of energy is not implemented have not been indicated either. Another criticism is the failure to set clear targets in one of the most sensitive components, namely energy poverty. Finally, the first version was determined, albeit partially, by a decree law (Decree-Law no. 76 of 16 July 2020), which defined the composition of the NIECP Commission.

For this reason, it is hoped, put forward by many, that in future this area will be regulated organically and not by a decree-law, which, in that case, was justified by the urgency of the pandemic phase.

Interest in national plans has recently been rekindled in conjunction with the Member States' review phase. In fact, there has recently been an increased focus on environmental issues in the public debate, as there is a growing awareness that NIECP will be essential for reducing emissions and promoting the transition evenly across the European continent. In fact, compared to the dynamics that led to the adoption of the previous plan, the 2024 plan was marked by the experience of the pandemic and the recent dynamics of war (in particular, the Russian Ukrainian conflict), because of which the need to adopt measures in the energy field is an overriding prerogative. Unlike many other legal systems, Italy's NIECP was updated in accordance with the planned timetable and the delivery deadline of 2023.

Italy adopted the latest version in June 2024, following the sending of the document by the Ministry of the Environment and Energy Security to the European Commission and the subsequent recommendations communicated by the latter in December 20234. The element that characterised the drafting of the new plan at an early stage is to be found in the need to bring the Italian objectives into line with the new European targets, which, as mentioned, have been modified following the most recent regulatory developments. In fact, a hugely different approach is denoted in the transition from the executive of the former Prime Minister M. Draghi to the current one led by G. Meloni. The

orientation on environmental and energy issues is clearly at odds with the previous policy direction, since transition is seen by the current executive as an objective to be pursued, but without giving it any significant political value. It is no coincidence that the slogan chosen by the Ministry of the Environment and Energy Security, i.e. 'NIECP marked by a realistic and technologically neutral approach', seems to mark a clear dividing line with the fully pro-Green Cause orientation that dominated the 2019 version and that, for this very reason, was judged by the current governmental team as a document characterised by an overly optimistic and ideological approach.

Moreover, it is frequently asserted that such measures must not have adverse economic consequences. This suggests that, in the event of an appropriate balancing of the interests involved, the enforcement of the green transition will not compromise the economic and productive structure of the country. A comparison of the two texts reveals that the latest version is more extensive than the 2019 version, despite the structure and division into sections being almost identical. A review of the new – and absent – elements that characterise the new plan indicates that, in the writer's opinion, the updated version is still inadequate with respect to the actual pursuit of the objectives related to the green transition. Most of the critical issues are related to the narrow definition of financial resources and the failure to define objectives clearly and precisely.

Another aspect that cannot be overlooked is the total absence of even the slightest reference to the Constitutional Law of 2022, which, although it concerns environmental protection, has introduced important changes to Articles 9 and 41 of the Constitution that cannot be ignored in a document of such scope as the NIPEC. The guiding principle of the new Plan, namely technological neutrality, is particularly perplexing. This seems to clash with the need for access to technologies to achieve the objectives (decarbonisation) as widely as possible.

However, it also clashes with the other great transition, namely the digital transition, with the consequent lack of an overall vision of the so-called 'twin transitions'. The new plan has several positive aspects in comparison with both the previous version

and some recent European regulatory interventions. In the interim period, the 2024 Piec has witnessed the participation of numerous other ministries (MEF, MIT, MUR and MASAF). This development can be regarded as a favourable occurrence, as it signifies a comprehensive involvement of the ministries, aligning with the intricacy of the environment theme and the necessity to solicit expertise across all domains pertinent to the transition process.

As with other European indications, the intention to establish infrastructures for the purpose of establishing connections with other states has been expressed, with a view to strengthening the internal energy market.

It is evident that the plan under scrutiny fails to articulate a coherent and well-defined concept of the desired energy transition. This deficiency is evident from the outset, as it does not address the pressing issue of fossil fuels, and extends to the nation's economic and productive transformation, a pivotal aspect in effectively confronting the profound and far-reaching changes that are unfolding on a global scale. This imperative necessitates the implementation of comprehensive public policies by national policymakers, who are charged with the responsibility of shaping these responses.

4. *Towards a 'Climate-Oriented' Public Administration?*

The impact of climate policy implementation on Italian public administrations is characterised by several factors. Firstly, the measures enshrined in the plans have yet to be implemented in any significant degree. One potential explanation for this phenomenon is the significant role that public administrations have been assigned in the global effort to combat climate change. However, this responsibility is often accompanied by a relative lack of emphasis on the interconnection with other policy areas. The latter is attributable to the necessity of conceptualising climate policies within the ambit of the green transition, as delineated in the national recovery and resilience plan, whilst also accounting for the interrelated nature of policies in general. In-

deed, the primary impact on administrative functions is the creation of supplementary rules and measures that are to be adhered to. Nevertheless, there is no concomitant alteration in the activities of civil servants.

As previously mentioned, administrative action plays a pivotal role in facilitating the transition towards a green economy and ensuring compliance with climate policies. Nevertheless, the mere introduction of the actions, obligations and procedures, although indispensable, follows a logic of fulfilment that not only does not produce the desired results, but creates an unnecessary burden for the same administrative activity.

In the context of the Italian legal system, the adoption of an ad hoc climate law appears to be of pressing urgency. Firstly, it is imperative to recognise the necessity of prompt and efficacious public action in response to the challenges posed by climate change. Furthermore, the distribution of administrative activity in relation to climate-related matters appears to be disproportionate and is influenced by the degree of political engagement exhibited by the respective regions. The development of climate policies should be accomplished through a robust and consolidated direction at the national level, whilst concurrently incorporating the regulatory and administrative participation of regions and local authorities.

In anticipation of the implementation of Presidential Decree 81 of 2023,[53] which involved the revision of the code of conduct for public servants, it was deemed appropriate to incorporate environmental regulations into the scope of duties for public servants. This aspect was initially examined and subsequently excluded from the definitive version of the text. This finding lends further credence to the notion that the strict compliance approach is indeed effective. However, it is important to note that the scope of this approach is constrained by the broader context of climate policy. While it is evident that codes of conduct play a pivotal role in orienting administrative operations towards compliance with climate measures, there is a risk of

[53] F. Merenda, *L'anticorruzione tra l'integrazione con le altre politiche e la prospettiva della nuova Direttiva Europea*, in *Federalismi.it* 1 (2025), 39-74.

adopting a merely compliance-based approach. While the establishment of regulations in this domain is undoubtedly essential, it is also imperative to allocate resources towards the education and training of public administration personnel in adopting environmental and climate measures.

In conclusion, the consequences of supranational and international climate policy in the Italian legal system are characterised by a modest balance. The implementation of climate policy-oriented public administration remains a challenging objective, despite the emergence of initiatives within the public administration sector that demonstrate a shift towards the consideration and promotion of these measures. Although climate constitutionalism[54] is now a well-established notion, research in the field of climate-oriented public administration requires further development.

The advent of climate governance has led to a paradigm shift in conventional administrative law theories, which have historically been centred on legal principles, procedural frameworks, and sectoral regulation. Climate objectives are increasingly requiring public administrations to adopt a strategic and transformative role with a view to ensuring long-term sustainability. It is within this context that climate-oriented public administration can be conceptualised not as a distinct administrative sector, but rather as an evolving paradigm with the capacity to transform the objectives, instruments and responsibilities of public action. The evolution of this theoretical framework signifies a pivotal challenge confronting contemporary administrative law.

[54] J. Jaria-Manzano, S. Borras, *Introduction to the Research Handbook on Global Climate Constitutionalism*, 1-16; L. Kotze', *A Global Environmental Constitution for the Anthropocene*?, in 8 *Transnational Environmental Law* 1 (2019), 11-33; P. Viola, *Climate Constitutionalism Momentum: Adaptive Legal Systems*, Cham, 2022.

CLIMATE DEMOCRACY REDUX. CITIZENS' ASSEMBLIES AND SUSTAINABILITY GOVERNANCE

*Enrico Buono**

Abstract: *Citizens' assemblies on climate change (CACC) have evolved from deliberative experiments into established governance tools, yet concerns persist about their transformative impact. This contribution – grounded in two years of NESUS-G research – aims to advance beyond descriptive accounts to analyse the concrete governance mechanisms emerging from CACC recommendations across Europe. Drawing on recent evidence of policy implementation rates – notably the French Citizens' Convention on Climate's 70% recommendation uptake five years post-Assembly – this study will assess how complementary democracy is reshaping sustainability governance. Through impact evaluation and comparative analysis, the research demonstrates that embedding citizen participation drives the transition from litigation-dependent responses to anticipatory models institutionalising citizen-driven climate constitutionalism.*

Keywords: Climate Democracy, Deliberative Mini-Publics, Citizens' Assemblies on Climate Change, Constitutional Change, Sustainability Governance.

1. *'Ameliorative' or 'Complementary'? Deliberative Democracy for Climate Change*

Climate change is not an opinion, but a fact. Nevertheless, rising climate denialism empowers the US President to declare before the UN General Assembly that 'it's the greatest *con job*

* The author wishes to thank Delphine Hedary, Head of the Legislative Committee for the *Convention Citoyenne pour le Climat*, and Aoibhinn Ní Shúilleabháin, Chairperson of the *Citizens' Assembly on Biodiversity Loss*, for their invaluable contributions during semi-structured interviews conducted on 14 October 2024 and 10 October 2024 respectively, within the framework of the NESUS-G research project. Notwithstanding the above, the views expressed herein remain solely those of the author.

ever perpetrated on the world'.[1] By contrast, irrefutable scientific evidence demonstrates not only the dramatic reality of climate change, but also that Europe is feeling its effects faster than anywhere else. Copernicus data indicate that Europe has warmed at 0.53°C per decade since the mid-1990s – double the global average – with 2024 marking the first breach of the Paris Agreement's 1.5°C threshold.[2] Actually, the IPCC has confirmed the existence of a persistent gap between projected emissions from implemented policies and those required by nationally determined contributions,[3] a gap widened by populist backlash and legislative short-sightedness.

In light of this, it is crucial to understand why democratic systems have so far failed to align political decision-making with the multi-decade timescales needed to meet the EU's climate targets. When political systems remain 'carbon locked' in short-term cycles perpetuating a 'tragedy of the time horizon,[4] and constitutional sustainability clauses run the risk of amounting to little more than 'legal greenwashing',[5] what instrument can provide concrete content to intertemporal obligations? In fact, it is of paramount importance to 'anchor' climate commitments at a historical moment when political rollbacks and geopolitical crises divert attention from what Ana Toni – CEO of COP30 – has termed 'the biggest war'.[6] An urgent need emerges for sustaina-

[1] F. Grillo, *Trump Calls Climate Science a 'Con Job'. That Could Make Tackling the Crisis a Whole Lot Easier*, in *The Guardian*, 13 October 2025.

[2] C3S, WMO, *Copernicus Climate Change Service (C3S) and World Meteorological Organization (WMO) European State of the Climate 2024*, 2025.

[3] IPCC, *Summary for Policymakers*, in *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (Eds)], Geneva, IPCC, 1-34.

[4] M. Carducci, *Climate Change and Legal Theory*, in G. Pellegrino, M. Di Paola (Eds), *Handbook of the Philosophy of Climate Change*, Cham, 2023, 320-322.

[5] J. Yao, *Spatial Order: Territoriality, Internationalism, and Resistance*, in S.E. Goddard, G. Lawson, O.J. Sending (Eds), *The Oxford Handbook of International Political Sociology*, Oxford, 2025, 523.

[6] F. Harvey, *Climate is Our Biggest War, Warns CEO of COP30 Ahead of UN Summit in Brazil*, in *The Guardian*, 29 June 2025.

bility governance[7] mechanisms that can bridge the *chronopolitical* gap between electoral cycles and climate obligations, without further undermining democratic legitimacy.

Against this backdrop, citizens' assemblies on climate change (CACC) are proliferating as a response to the 'democratic dilemma' of environmental governance.[8] Since 2019, more than 200 CACC have been conducted across Europe, including nearly twenty at the national level.[9] The OECD refers to this phenomenon as a 'deliberative wave',[10] bringing together citizens from all walks of life to learn about, discuss, and make recommendations on climate policy. Deliberative mini-publics[11] – the broader category comprising CACC – seek to refine democratic institutions through structured deliberation among representative cross-sections of society, with particular attention to marginalised groups.

[7] B. Bornemann, P. Lange, P. Burger, *Toward Systematic Understandings of Sustainability Governance. A Conceptual Meta-Framework*, in P. Hamman (Ed.), *Sustainability Governance and Hierarchy*, London, 2019, 60-78.

[8] A. Dobson, *Representative Democracy and the Environment*, in W. M. Lafferty, J. Meadowcroft (Eds), *Democracy and the Environment*, Cheltenham, 1996, 124-139. R. Eckersley, *The Green State: Rethinking Democracy and Sovereignty*, Boston, 2004.

[9] G. Smith, *Climate Assemblies: Emerging Trends, Challenges and Opportunities. A Report of the Knowledge Network on Climate Assemblies*, 19 June 2025.

[10] OECD, *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave*, 10 June 2020.

[11] While proto-deliberative models emerged during the 1970s and 1980s, the expression 'deliberative mini-public' was coined only twenty years later by Archon Fung (A. Fung, *Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and their Consequences*, in 11 *Journal of Political Philosophy* 3 (2003), 338-367). The first *citizens' jury* was famously convened in 1974 in Minnesota to address healthcare plans (N. Crosby, *Citizens Juries: One Solution for Difficult Environmental Questions*, in O. Renn, T. Webles, P. Wiedemann (Eds), *Fairness and Competence in Citizen Participation*, Dordrecht, 1995, 157-174). Robert Dahl's *mini-populus* (R. Dahl, *Democracy and its Critics*, New Haven, 1989) clearly influenced James Fishkin's vision of deliberative polls (J.S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford, 2009). By the early 2000s, Fung's analysis had established deliberative mini-publics as a key feature of democratic practice. See also: M. Setälä, G. Smith, *Mini-publics and Deliberative Democracy*, in A. Bächtiger, J. Dryzek, J. Mansbridge *et al.* (Eds), *The Oxford Handbook of Deliberative Democracy*, Oxford, 2018, 300-314.

Ryan and Smith characterise such assemblies as 'a broadly inclusive and representative sub-group of an affected population engage[d] in (…) structured deliberation enabled by independent facilitation (…) with the aim of aligning political decision-making with the considered views of citizens'.[12] CACC are implemented through stratified random sampling (ensuring intersectional demographic representation), and collaboration between participants and independently appointed experts – generating non-binding proposals through iterative deliberative processes.

While our previous work[13] extensively analysed the theoretical distinction between participatory and deliberative democracy – 'two 'adjectives' that are frequently attributed to democracy today but often left in a condition of indeterminacy, confusion and overlap'[14] – the present contribution aims to adopt a different perspective. Having already established CACC as deliberative practices distinct from broader participatory mechanisms, we proceed to evaluate their transformative potential through policy implementation assessment.

Notwithstanding growing scholarly attention to the procedural design of CACC and their immediate outputs, a significant research gap persists in the assessment of subsequent policy implementation.[15] While it is established that assembly members propose 'far more progressive climate action than existing government and party policy',[16] we have limited data on whether and how their recommendations translate into legislation, constitutional change, or governance mechanisms. Do CACC merely

[12] M. Ryan, G. Smith, *Defining Mini-Publics*, in K. Grönlund, A. Bächtiger, M. Setälä (Eds), *Deliberative Mini-Publics: Involving Citizens in the Democratic Process*, Brussels, 2014, 150.

[13] E. Buono, *Citizens' Assemblies on Climate Change: Climate Democracy in the Anthropocene*, in V.E. Albanese, S. Fanetti, R. Minazzi (Eds), *Social Mobilisation for Climate Change*, London, 2024.

[14] A. Floridia, *Participatory Democracy Versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, Some Intersections*, in *7th ECPR General Conference Sciences Po*, Bordeaux, 4-7 September 2013, 2.

[15] A relevant exception is represented by I. Lorenzoni, A.J. Jordan, C. Sullivan-Thomsett *et al.*, *A Review of National Citizens' Climate Assemblies: Learning from Deliberative Events*, in *Climate Policy*, 2025.

[16] G. Smith, *Climate Assemblies*, cit., 11.

clarify or actively *build* consensus capable of overcoming carbon lock-in?[17] Furthermore, a question posed in our earlier work acquires new urgency: can CACC *drive* constitutional change? After all, 'too many expectations are often placed on a novel democratic institution that is yet to be fully embedded within our political systems'.[18]

Drawing on two years of NESUS-G research, we examine these questions through longitudinal analysis of two paradigmatic national-level CACC – the French *Convention Citoyenne pour le Climat* (CCC, 2019) and Ireland's *Citizens' Assembly on Biodiversity Loss* (CABL, 2022-2023). Recent evidence from the *Knowledge Network on Climate Assemblies* (KNOCA) indicates that the French government has responded to around 70% of recommendations from the CCC – 'a figure much higher than generally assumed'[19] – though demands for constitutional reform went unanswered. On the other hand, Ireland's CABL advanced ambitious constitutional amendment proposals, with the *Oireachtas Joint Committee on Environment and Climate Action* endorsing a referendum which, if approved, would realise a 'counter-colonial'[20] circulation of constitutional paradigms from Ecuador to Europe. Despite official claims that over 90% of CABL's recommendations have been implemented or are in progress,[21] recent political turmoil and a change in government leadership have brought these processes to an abrupt halt.

The chapter proceeds as follows. Throughout the remainder

[17] O. Doyle, R. Walsh, *Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy*, in 20 *International Journal of Constitutional Law* 1 (2022), 398-427, 406; E. Carolan, S. Glennon, *The Consensus-Clarifying Role of Deliberative Mini-Publics in Constitutional Amendment: a Reply to Oran Doyle and Rachael Walsh*, in 22 *International Journal of Constitutional Law* 1 (2024), 191-203, 193.

[18] G. Smith, *Climate Assemblies*, cit., 6.

[19] Ibid., 3. See also A. Averchenkova, A. Koehl, G. Smith, *Policy Impact of the French Citizens' Convention for the Climate: Untangling the Fate of the Citizens' Recommendations*, KNOCA Briefing No. 13, April 2025.

[20] E. Buono, *Citizens' Assemblies on Climate Change*, cit., 151.

[21] Department of Housing, Local Government and Heritage, *Government Publishes Response to Recommendations of the Citizens' Assembly on Biodiversity Loss*, 31 October 2024.

of this section (§1), we establish a theoretical framework for 'ameliorative' and 'complementary' correctives to traditional representative democracy; §2 presents a five-year policy follow-up assessment of France's CCC, examining implementation rates across sectors and analysing the factors that hindered policy uptake and constitutional reform; §3 examines Ireland's trajectory towards the constitutionalisation of the Rights of Nature (RoN), contextualising this development within Ireland's decade-long tradition of deliberative constitutionalism; §4 offers some concluding remarks on legitimacy concerns – particularly the risk of creating an 'oligarchy of the enthusiastic'[22] within CACC – while suggesting that institutionalised deliberation may represent a democratically robust path to sustainability governance.

The theoretical 'promises' of deliberative environmental democracy have been aptly articulated by Baber and Bartlett, identifying five potential benefits: empowerment of marginalised voices through discursive inclusion; embeddedness of local knowledge; fair representation of future generations; better environmental decisions grounded in scientific and experiential evidence; and consensual legitimacy that renders policies politically sustainable through broader support.[23] The authors have also cautioned against five 'perils', of which *elite co-optation* – i.e., political actors instrumentalising deliberative bodies while imposing their own agendas – is most likely to materialise in light of recent developments. Deliberative democracy thus figures as 'a necessary (though not sufficient) element of environmental sustainability',[24] not least 'for addressing the challenges that environmental governance must continue to confront given the circumstances that constitute the Anthropocene'.[25]

Deliberative mini-publics have notably evolved through sustained democratic experimentation. Unlike other open public

[22] E. Carolan, S. Glennon, *The Consensus-Clarifying Role*, cit., 202.

[23] W.F. Baber, R.V. Bartlett, *Deliberative Democracy and the Environment*, in A. Bächtiger, J. Dryzek, J. Mansbridge *et al.* (Eds), *The Oxford Handbook of Deliberative Democracy*, Oxford, 2018, 755-767.

[24] Ibid., 762.

[25] Ibid., 764.

fora, mini-publics employ stratified random sampling to create a 'microcosm' of the wider population in order to balance inclusiveness with deliberative rigour.[26] Elstub's work demonstrated that the legitimacy of citizens' assemblies depends on how they navigate trade-offs between participation breadth and deliberative depth; mini-publics address this tension by employing a representative sample sufficiently small for effective deliberation, yet diverse enough to encompass the full range of perspectives within the polity.[27]

Accordingly, our methodological framework rests on two interconnected concepts. *Ameliorative engagement*, as theorised by Taylor,[28] denotes a transformative democratic process where citizens exchange views that may reshape ground-level projects and substantive identities; *complementary democracy*[29] transposes this logic institutionally, enhancing (rather than substituting) existing representative structures through mechanisms that augment democratic supply and thereby legitimacy. In other words, complementary democracy seeks to 'add "daring more" democracy'.[30]

The pertinent question is no longer whether CACC can fulfil their ameliorative and complementary function, but how they might effectively engage with political systems to produce sustainable climate governance outcomes. Scholarly inquiry should consequently shift from matters of internal design – sortition, deliberation, expertise – toward substantive dimensions such as (*inter alia*) *designed coupling*[31] with formal decision-making institutions.

[26] M. Setälä, G. Smith, *Mini-Publics and Deliberative Democracy*, cit., 302.

[27] S. Elstub, D.M. Farrell, J. Carrick *et al.*, *Evaluation of the Climate Assembly UK*, Newcastle University, 2021.

[28] K.A. Taylor, *Neither a Populist Nor a Vanguardist Be! Respecting the Wisdom and Will of the People*, in 45 *Philosophy & Social Criticism* 9-10 (2019), 1222-1238.

[29] M. Qvortrup, D. Vancic (Eds), *Complementary Democracy: The Art of Deliberative Listening*, Berlin-Boston, 2022.

[30] M. Qvortrup, D. Vancic, *Introduction: Complementary Democracy. The New Frontier in Theory, Research, and Practice*, in M. Qvortrup, D. Vancic (Eds), *Complementary Democracy: The Art of Deliberative Listening*, Berlin-Boston, 2022, 4.

[31] *Designed coupling* refers to the inter-institutional linkages between deliberative mini-publics and legislative bodies, obliging sponsoring authorities to

A fundamental tension resurfaces: CACC promise to overcome representative democracy's failures while depending on those same institutions for implementation. Unsurprisingly, Ejsing cautions that mini-publics are no 'silver bullet'[32] solutions for climate governance, as their success remains contingent on the very political will whose absence necessitated their creation.

Such critiques suggest the need for empirical evaluation. Does it still hold true that 'no one has yet imagined practices better suited than those of deliberative democracy for addressing the challenges that environmental governance must continue to confront [in the] Anthropocene'?[33] Do CACC, in practice, exhibit the ameliorative effects predicted by theorists of complementary democracy, or do they function primarily as 'safety valves' – directing climate concerns into institutionally controlled deliberation, with no substantive policy change? The French and Irish cases examined below seem to address these questions directly.

When properly embedded, deliberative practices may indeed anchor climate commitments against political short-termism and democratic backlash – though not without confronting the 'perils' identified in the literature.

2. *'With no Filter': a Five-Year Policy Follow-up Assessment of the French Citizens' Convention on Climate*

The *gilets jaunes* movement that paralysed French cities from late 2018 through early 2019 created the political conditions for France's *Convention Citoyenne pour le Climat* (CCC).

Protests initially targeting fuel tax increases broadened into

formally respond to mini-public recommendations within agreed timeframes. See C.M. Hendriks, *Coupling Citizens and Elites in Deliberative Systems: The Role of Institutional Design*, in 55 *European Journal of Political Research* (2016), 43-60.

[32] M. Ejsing, A. Veng, I. Papazu, *Green Politics Beyond the State: Radicalizing the Democratic Potentials of Climate Citizens' Assemblies*, in 176 *Climatic Change* (2023), 72.

[33] W.F. Baber, R.V. Bartlett, *Deliberative Democracy and the Environment*, cit., 764.

wider contestation of climate policy measures, as demonstrators called for a sortition-based citizens' assembly tasked with deliberating on the ecological transition. President Emmanuel Macron's response – to convene precisely such an assembly – sought to channel social unrest into deliberative practice. As a consequence, the government – along with the *Economic, Social and Environmental Council* (*Conseil économique, social et environnemental*, henceforth CESE) – organised what would become the most ambitious climate assembly in Europe to date.

Bringing together 150 citizens selected through sortition, the CCC was mandated to formulate proposals for reducing greenhouse gas emissions by at least 40% before 2030. Convening over seven weekends between October 2019 and June 2020, the assembly produced 149 recommendations spanning five thematic areas: consumption; production and work; food; housing; transport.

The President's engagement resulted in a far-reaching commitment: he would adopt the resulting proposals *sans filtre* (with no filter) and submit them either through parliamentary vote, referendum, or direct regulatory implementation. Yet the expression *sans filtre* proved more ambiguous than its rhetorical force suggested.[34] As Reber recounts, Macron specified multiple conditions: proposals would not be 'manipulated, behind the curtain, by people with vested interests', though they would necessarily pass through 'filters' of an administrative, political, and legal nature. According to Macron, convention members would need to deliver 'legal texts, with *precise* things, and *in accordance with our Constitution*': only then would transmission occur *sans filtre*. Reber aptly observes that this response amounted to a 'contract between the Convention members and the President himself'.[35] Prime Minister Édouard Philippe further reinforced these constraints on 6 October 2019, acknowledging that the first filters are 'the Constitutional Council and Article 11 of the

[34] B. Reber, *Ambiguities of the Phrase 'With No Filter' and the Necessary Filters*, in D. Courant, B. Reber (Eds), *Deliberative Democracy and Ecological Transition. The French Citizens' Convention for Climate*, London, 2025, 387 ff.

[35] Ibid., 392.

Constitution'.[36] Rhetorical commitment thus concealed substantial gatekeeping mechanisms – what Reber identifies as 'false honesty'.[37]

The *Loi Climat et Résilience* (enacted on 22 August 2021) served as the primary legislative vehicle for CCC recommendations. The law comprises 305 articles across six titles, addressing all five thematic areas identified by the Convention. However, scholarly assessments have questioned whether this legislative translation preserved the Convention's ambition. Savin and Romi argued that the law's 'reliance on voluntary measures might fall short of achieving the desired outcomes', calling for more stringent actions to address the ecological crisis.[38] The disconnect between the CCC's progressive recommendations and the law's underwhelming provisions led some Convention members to express public disappointment, with guarantor Cyril Dion declaring that the government had 'betrayed' the citizens' work.

Five years on from the CCC's conclusion, critical scholarship has questioned not only its policy outcomes but its very legitimacy. Courant voiced 'strong reservations about the impartiality of deliberations and the legitimacy of influences on these works', pointing out the 'non-collective character'of the assembly's proceedings.[39] Arguably, Macron's *sans filtre* rhetoric functioned as a performative commitment that allowed the executive to claim democratic legitimacy while retaining ultimate control over policy implementation, in a dynamic that recalls Baber and Bartlett's warning about elite co-optation.[40]

Contested though its deliberative legitimacy may be, CCC's

[36] Ibid., 393.

[37] Ibid., 422.

[38] P. Savin, R. Romi, *Radiographie de la Loi Portant Lutte Contre le Dérèglement Climatique et Renforcement de la Résilience Face à Ses Effets*, in *Droit de l'Environnement. La Revue du Développement Durable*, 2021, 311-312.

[39] É. Legendre, *Cinq Ans Après, le Chercheur Dimitri Courant Émet de 'Fortes Réserves sur L'impartialité des Délibérations' de la CCC*, in *AEF Info*, 8 October 2024.

[40] W.F. Baber, R.V. Bartlett, *Deliberative Democracy and the Environment*, cit., 757: '[elites] are able to exploit the dialogic character of deliberative environmental democracy by using their 'storylines' to shift the dynamics of deliberative systems'.

policy uptake seems to present a different picture: in its June 2025 briefing,[41] the KNOCA documented that – contrary to widespread assumptions – the French government has responded to around 70 percent of the Convention's recommendations.

Breaking down this figure reveals relevant distinctions. Of the 149 recommendations, four categories of uptake can be identified: *full implementation*, where recommendations were enacted substantially as proposed; *partial implementation*, where core elements were adopted but with modifications; *administrative action*, where regulatory changes occurred without legislative intervention; and *rejection or inaction*, where recommendations were explicitly dismissed or ignored. The 70% uptake encompasses these first three categories, though the quality and ambition of implementation vary considerably.

Transportation measures achieved particularly high implementation rates. The CCC's recommendation to ban domestic flights where train alternatives under 2.5 hours exist was enacted through Article 145 of the *Loi Climat et Résilience*, albeit with significant loopholes for connecting flights. Similarly, recommendations to expand cycling infrastructure and create low-emission zones in major cities received substantial funding and regulatory support. By contrast, housing renovation measures – despite being identified as crucial for emissions reduction – faced implementation delays due to administrative complexity and insufficient financing mechanisms. The food sector recommendations encountered the most resistance. The CCC's proposals to reduce meat consumption through public procurement rules and to regulate advertising for carbon-intensive products were either substantially watered down or rejected outright.

Our earlier work characterised CACC as potential 'drivers of constitutional change', capable not merely of influencing legislative policy but of reshaping fundamental constitutional commitments. While Ireland's deliberative path suggests cautious optimism, France provides a crucial – and decidedly more negative – test of this theory.

[41] See A. Averchenkova, A. Koehl, G. Smith, *Policy Impact of the French Citizens' Convention for the Climate*, cit.

Among the CCC's few recommendations to achieve near-consensus, the most symbolically dense one called for a constitutional referendum amending Article 1 of the French Constitution to inscribe the fight against climate change as a core principle of *la République*. Macron initially embraced this idea, announcing his intention to submit the amendment to referendum. However, the referendum never materialised. After the Senate rejected the constitutional amendment in July 2021, Macron abandoned the proposal, claiming that the political conditions for success were absent. An outcome that exemplifies what Lorenzoni identifies as the central vulnerability of advisory mini-publics: their dependence on political institutions.[42] The French government has selectively implemented recommendations aligned with pre-existing preferences, while citing procedural obstacles to dismiss more transformative proposals.

The CCC's constitutional failure extended beyond the abandoned referendum. Convention members had also proposed more ambitious institutional reforms: transforming the CESE into a 'Chamber of Civil Society'or a 'Council of Citizen Participation', thereby giving deliberative democracy permanent constitutional status. These proposals aimed to institutionalise what our earlier analysis termed 'complementary democracy' by creating formal linkages between deliberative mini-publics and legislative processes, yet these recommendations encountered parliamentary resistance.

Rather than pursuing constitutional revision, the executive ultimately employed organic law (*loi organique*) to reform the CESE – a choice that legal scholars deemed 'highly contestable' given the absence of constitutional authorisation for such profound institutional changes. The resulting reform fell far short of the CCC's vision. While the modified CESE gained authority to 'associate the public with the exercise of its missions' through sortition, it remained a consultative body lacking any binding deci-

[42] I. Lorenzoni, A.J. Jordan, C. Sullivan-Thomsett *et al.*, *A review of National Citizens' Climate Assemblies*, cit., 9. See in this volume A.M. Lecis Cocco Ortu, *The French Charter for the Environment in the European Context: From High Ambition to Profound Disillusionment?*, (…) ff.

sion-making power. In other words, this *manoeuvre* circumvented the requirement for constitutional referendum while claiming to implement the CCC's recommendations. The resulting reform preserved the CESE's purely consultative character: it gained procedural authority to convene citizen assemblies, but no capacity to compel governmental action on assembly recommendations, no constitutional standing to challenge legislative omissions, and no enforceable mandate beyond advisory opinions.

Nevertheless, both the KNOCA and the French government classify this proposal as 'partially implemented', adopting a formalist criterion of evaluation: legislative uptake occurred regardless, incorporating elements of the original recommendation. However, this classification masks the substantive hollowing-out of the CCC's constitutional vision. The CESE reform represents institutionalisation in its weakest form: a symbolic gesture that acknowledges deliberative democracy's legitimacy while preserving existing power distributions.

Despite these legitimacy concerns, the CCC's 70% implementation rate remains historically significant. No previous deliberative mini-public in Europe had achieved comparable policy uptake. The question is whether this represents genuine democratic empowerment or sophisticated co-optation. Yet the CCC's outcomes suggest a more ambiguous conclusion: citizens can indeed generate ambitious climate policy recommendations, but their translation into law remains contingent on alignment with elite preferences and electoral calculations.

On the other hand, the constitutional failure and weakened implementation of structurally transformative recommendations lend weight to scepticism about deliberative democracy's capacity to challenge entrenched power relations. The CCC succeeded in generating policy change precisely to the extent that its recommendations could be absorbed within existing political-economic frameworks. Where recommendations threatened fundamental interests – constitutional power balances, agricultural lobbies, fossil fuel dependencies – they encountered resistance that procedural legitimacy could not overcome.

For all these apparent failures, the CCC's precedent has catalysed more deliberative experiments in France. The *Convention*

citoyenne sur la fin de vie (2022-2023) assembled 184 sortition-selected citizens at CESE's initiative, with resulting legislative proposals adopted in May 2025. Concurrently, Rights of Nature discourse has entered parliamentary debate: senator Monique de Marco's *Proposition de loi constitutionnelle* n° 891 (12 September 2025) aims to amend the *Charte de l'environnement* to provide that 'Nature and its constituent elements have the right to exist and evolve as an ecosystem' and 'are entitled to protection, conservation, maintenance, and, where necessary, restoration'. Meanwhile, deputy Charles Fournier's budget amendment – establishing a €5 million fund for river rights, with the Loire as primary focus – seems to point towards a shift in favour of ecological legal personhood.

France thus joins a 'counter-colonial' circulation of constitutional paradigms, originating in Ecuador's 2008 Constitution and migrating 'northward'. Ireland, as the recommendations of the *Citizens' Assembly on Biodiversity Loss* demonstrate, has advanced even further.

3. 'Cearta an Dúlra'*: Ireland towards the Constitutionalisation of the Rights of Nature*

On 8 March 2024 – coinciding with International Women's Day – Irish voters delivered a crushing rebuke to their government in a dual constitutional referendum.

The *family amendment*, which proposed widening the definition of family from relationships founded on marriage to 'durable relationships' such as cohabiting couples and their children, was rejected by 67.7% of voters. The *care amendment*, which sought to replace constitutional references to 'a mother's duties in the home' with language recognising care provided by family members, suffered an even more devastating defeat: 73.9% voted against. *Taoiseach* Leo Varadkar, who had characterised the referendums as opportunities to eliminate 'very old-fashioned, very sexist language about women' conceded defeat within hours, acknowledging that both amendments had been 'defeated comprehensively on a respectable turnout'.

Just twelve days after the referendum, Varadkar announced his resignation as leader of *Fine Gael* and *Taoiseach*, citing reasons that were 'both personal and political'. Simon Harris, aged 37, succeeded Varadkar as the sole candidate for *Fine Gael* leadership on 24 March 2024, becoming Ireland's youngest-ever *Taoiseach* on 9 April. Harris's tenure proved remarkably brief: despite coalition partners' stated desire to see the government complete its full term, general elections were called for November 2024. The elections resulted in *Fianna Fáil* emerging as the largest party, and on 23 January 2025, Micheál Martin was elected *Taoiseach* in a vote following coalition negotiations between *Fianna Fáil*, *Fine Gael*, and several independent TDs.

The March 2024 referendum failures thus represent the critical vulnerability of deliberative mini-publics: even when citizen recommendations receive formal governmental endorsement, their translation into constitutional change remains contingent on successful campaigning and favourable political conditions. The *Citizens' Assembly on Gender Equality* (2019-2021), which had advocated precisely for the constitutional amendments that voters rejected, aptly exemplify what Walsh terms *very weak political impact*: recommendations that ultimately fail to reshape the constitutional text.

Yet this failure risks obscuring Ireland's unparalleled track record of successful deliberative constitutionalism. As Doyle and Walsh observe, 'deliberative mini-publics are an increasingly common feature of constitutional change processes worldwide (…) This reflects a broader participatory and deliberative turn within constitutionalism',[43] and Ireland represents the paradigmatic case of this turn. Since the 2012 *Convention on the Constitution*, mini-publics have been increasingly convened before significant constitutional referendums. This practice achieved success in the 2015 same-sex marriage referendum and the 2018 abortion referendum, both of which followed extensive citizen assembly deliberations.

Against a backdrop of both accomplishments and setbacks,

[43] O. Doyle, R. Walsh, *Constitutional Amendment and Public Will Formation*, cit., 399.

the *Citizens' Assembly on Biodiversity Loss* (2022-2023) presents a potentially transformative case for evaluating whether CACC can genuinely function as drivers of constitutional change. Established following Ireland's declaration as the second nation (after the UK) to recognise a *National Climate and Biodiversity Emergency* on 9 May 2019, this Assembly represented Ireland's first 'single-issue' deliberative mini-public focused exclusively on the ecological crisis. Comprised of 99 randomly selected citizens plus one chairperson – Aoibhinn Ní Shúilleabháin, a distinguished theoretical physicist from University College Dublin – the Assembly met from May 2022 through April 2023, producing a 136-page report containing 159 recommendations.

The policy uptake of the CABL's recommendations has been substantial – significantly higher than the French CCC's 70% implementation rate.[44] Following the CABL's proposals, the *Oireachtas Joint Committee on Environment and Climate Action* undertook a comprehensive review, culminating in an April 2024 report declaring that the Government is 'exploring the ways in which the rights of nature could be formally recognised, including the potential for constitutional change'.[45] In so stating, the report addresses *Recommendation 31*, perhaps the CABL's most ambitious proposal, which calls for

> a referendum to amend the Constitution with a view to protecting biodiversity. The proposals to amend the Constitution should include: (a) Human substantive environmental rights, e.g., a right to a clean, healthy, safe environment; a right to a stable and healthy climate; rights of future generations to these or other environmental rights. (b) Human procedural environmental rights, e.g., the Aarhus rights regarding access to environmental information, public participation in environmental decision-making and justice in environmental matters. (c) Substan-

[44] According to the National Parks and Wildlife Service '[o]ver 90% of recommendations are 'In progress' or 'Implemented': see National Parks and Wildlife Service, *Government Publishes Response to Recommendations of the Citizens' Assembly on Biodiversity Loss*, 1 November 2024.

[45] M. Noonan, *Foreword*, in National Parks and Wildlife Service, *Report on the Recommendations and Calls to Action of Citizens' Assembly and Children and Young People's Assembly on Biodiversity Loss*, June 2024, 1.

> tive rights of nature, recognizing nature as a holder of legal rights, comparable to companies or people e.g., to exist, flourish/perpetuate and be restored if degraded; not to be polluted/harmed/degraded. (d) Procedural rights of nature, e.g., to be a party in administrative decision-making, litigation, etc. where rights are impacted/likely to be impacted.[46]

This recommendation garnered extraordinary support: 83% of Assembly members voted in favour of its inclusion in final recommendations to government. More remarkably, the substantive rights of nature component might represent what we have previously termed a 'counter-colonial'[47] turn in constitutional discourse, explicitly drawing inspiration from Article 71 of Ecuador's 2008 Constitution, as most recently reaffirmed when 62% of Ecuadorean voters rejected constitutional revision in November 2025.

The circulation of constitutional paradigms from the Global South to the Global North requires careful analysis. As Rachel Killean and her co-authors observe, 'in Europe, this move to decolonize approaches to the environment encourages engagement with other ways of relating to the natural world, including those that can be found in Europe's former colonies and outside the European context'.[48] Yet this process also raises 'valid concerns about cultural appropriation and new forms of 'green orientalism', whereby Indigenous peoples are framed as 'noble savages' whose worldviews can be extracted and simplified as a counter to Western industrialization ideologies'.[49]

[46] Recommendation 31 – Rights of Nature, Citizens' Assembly on Biodiversity Loss.

[47] A September 2022 submission to the Assembly titled *Rights of Nature in Ireland: Towards a Living Island of Rights-bearing Communities*, prepared by the Environmental Justice Network Ireland, articulated this connection directly, advocating for RoN enforcement 'inspired by and in solidarity with Ecuador's pioneering example'. See also E. Buono, *Citizens' Assemblies on Climate Change*, cit., 151.

[48] R. Killean, J. Gilbert, P. Doran, *Rights of Nature on the Island of Ireland: Origins, Drivers, and Implications for Future Rights of Nature Movements*, in 13 *Transnational Environmental Law* 1 (2024), 35-60, 45.

[49] Ibid., 46.

In the Irish context, however, proponents have grounded RoN in Ireland's own pre-colonial legal traditions. Multiple Assembly participants referenced *Brehon Law* – the indigenous legal system that governed Ireland until complete colonial conquest by England in the mid-seventeenth century – as precedent for environmental personhood. The *Bretha Comaithchesa* ('judgments of neighbourhood') contained detailed provisions, listing twenty-eight trees and shrubs alongside penalties for damaging them, while the *Bechbretha* ('bee-judgments') demonstrated ecological awareness by imposing heavier fines for tree damage during growing seasons.[50] Pre-Christian Irish culture understood trees as sacred temples, homes of spirits possessing souls; cutting down a sacred tree associated with royal inauguration sites carried penalties reflecting the seriousness of potentially releasing harmful spirits that would manifest in poor crops and general misfortune.[51]

A legal heritage that represents what Kimmerer terms 'traditional ecological knowledge' – 'an ethic of reciprocal respect and obligations between humans and the nonhuman world' arising 'wherever people are materially and spiritually integrated with their landscape'.[52] As Field acknowledges, grounding RoN in a white European context that has also experienced colonisation 'could help disenfranchised members of the current industrial growth society to, in essence, begin belonging to our home places and acting more responsibly towards them'.[53]

Doran frames the RoN campaign explicitly within Ireland's history of civil rights movements and anti-colonial struggle: 'If the next Irish Government respects its mandate to restore regard for Nature and our island home as a living subject of our history – we'll bring together two great movements: the movement for

[50] L. Place, *Cearta an dúlra: A new chapter for ireland's constitution?*, in *Global Alliance for the Rights of Nature (GARN) Europe*, 14 August 2025, 2.

[51] Ibid.

[52] R.W. Kimmerer, *Weaving Traditional Ecological Knowledge into Biological Education: A Call to Action*, in 52 *BioScience* 5 (2002), 432-438.

[53] T. Fields, *Trees in Early Irish Law and Lore: Respect for Other-than-Human Life in Europe's History*, in 12 *Ecopsychology* 2 (2020), 130-138, 136.

ecological justice on the island and the belated work of decolonization'.[54]

Yet the path from recommendation to referendum remains uncertain. As of January 2025, 'not much has been done since the review of the recommendation by the *Oireachtas Joint Committee*. While a large boost in the debate has been noted, there is no significant milestone that has been reached in organising a referendum'.[55] Recent political developments might explain this *impasse*: the March 2024 referendum failures created 'a loss of momentum, but also a justification – legitimate or not – for the state to distance itself from the process'.[56] The governmental instability following Varadkar's resignation, Harris's brief tenure, and the November 2024 general elections further compounded the delays. Most crucially, none of the major parties included RoN constitutional reform in their election manifestos.[57]

Local-level developments provide grounds for cautious optimism. Donegal County Council and several other local authorities have passed motions declaring support for Rights of Nature, though these carry no binding legal effect. Nevertheless, these motions establish frameworks for councils to 'reflect on how they might integrate Rights of Nature into their work',[58] and plans exist to disseminate RoN proposals through the Republic's Public Participation Networks, which serve as platforms for citizen-led input into local development plans.

The Irish case thus presents a valid test of our earlier claim. The evidence remains mixed: on one hand, the *Citizens' Assembly on Biodiversity Loss* achieved remarkable policy uptake. On the other hand, the March 2024 referendum failures demonstrate that parliamentary endorsement – even when grounded in prior citizen assembly deliberation – proves insufficient to guarantee constitutional amendment. The subsequent governmental insta-

[54] P. Doran, *Rights of Nature are the Rights of Ireland - Towards a Constitutional Referendum Like no Other*, in *Chemins-publics.org*, 21 February 2024.

[55] L. Place, *Cearta an Dúlra*, cit., 4.

[56] Ibid.

[57] Ibid., 5.

[58] R. Killean, J. Gilbert, P. Doran, *Rights of Nature on the Island of Ireland*, cit., 56.

bility and electoral silence on RoN issues reveal how quickly momentum can dissipate.

Yet unlike the French constitutional ambitions that Macron abandoned entirely, the Irish RoN proposal maintains institutional viability. The *Oireachtas Joint Committee* recommendation remains in effect; the legal and scholarly network supporting RoN continues developing, and local authorities increase their commitments. The question is whether Martin's government will demonstrate political courage to proceed with what would be, globally, an unprecedented constitutional innovation by a European nation: enshrining *cearta an dúlra* – the Rights of Nature – at the highest level of domestic law.

4. *An 'Oligarchy of the Enthusiastic'? Concluding Remarks on Deliberative Mini-Publics and Sustainability Governance*

Carolan and Glennon's provocative warning about the risk of creating an 'oligarchy of the enthusiastic'[59] captures a fundamental legitimacy concern haunting deliberative mini-publics: do randomly selected citizens who volunteer months of their lives to climate assemblies genuinely represent the broader *dēmos*, or do they constitute a self-selecting elite of the engaged, motivated by pre-existing environmental commitments?

In addressing this question – and the broader issues we raised along the way – this study has sought to achieve three key aims. First, it has attempted to demonstrate that CACC can achieve strong political impact when coupled with appropriate institutional design, transcending merely symbolic consultation and political window-dressing. Second, it has illustrated how deliberative mini-publics might serve as drivers of constitutional change, not only through legislative policy but through reshaping fundamental constitutional commitments, particularly regarding intergenerational obligations and the legal status of non-human natural entities. Third, it has aimed to advance the argument that embedding citizen participation in climate governance could

[59] E. Carolan, S. Glennon, *The Consensus-Clarifying Role*, cit., 202.

enable a shift from reactive, litigation-dependent responses to proactive, anticipatory models that institutionalise citizen-driven climate action before judicial intervention.

The evidence suggests a more nuanced conclusion. France's 70% implementation rate five years post-Convention and Ireland's remarkable track record confirm that properly embedded mini-publics can indeed drive constitutional change. Still, both cases have revealed sharp limitations: France's constitutional referendum was abandoned despite Convention consensus, while Ireland's March 2024 referendum defeats triggered governmental collapse. The tension between these successes and failures illuminates the question Doyle and Walsh posed: do CACC *clarify* existing consensus or actively *build* new consensus capable of transforming our political horizon?[60]

A comparative analysis suggests CACC perform both functions simultaneously, though to varying degrees on a scale dependent on contextual factors. The Irish RoN case exemplifies what Amirante aptly defines a *considerable amount of South in our North*:[61] spaces where paradigms developed in the Global South gain traction, facilitated by historical experiences of colonisation and ongoing searches for alternative ontologies of human-nature relations. In engaging Ecuadorian Rights of Nature through the lens of pre-colonial *Brehon Law*, Ireland participates in precisely such 'glocal' circulation: constitutional innovation rooted in indigenous legal heritage that expresses solidarity with anti-colonial struggles elsewhere. The CABL provided the deliberative 'safe space' where these counter-hegemonic paradigms could be articulated, evaluated, and ultimately endorsed by a representative cross-section of Irish society.

Yet we must heed Lorenzoni's caution against 'overselling' CACC impacts, particularly when these pertain to constitutional matters: 'if the primary analytical focus is on the direct implementation of their recommendations, most NCCAs fall short of

[60] O. Doyle, R. Walsh, *Constitutional Amendment and Public Will Formation*, cit., 406.

[61] See in this volume D. Amirante, *Sustainability, Natural Resources and Communities: Learning from Southern Voices*, (…) ff.

this ambition'.[62] This warning proves particularly salient in light of France's constitutional failures and Ireland's recent referendums. When citizens invest substantial time in deliberative processes, develop ambitious recommendations through reasoned discourse with experts, secure governmental promises of 'no filter' implementation, and then witness those recommendations diluted, delayed, or dismissed – what effect does this have on democratic trust? The French association *Les 150#sans filtres* formed precisely to monitor whether Macron's rhetorical commitments translated into concrete action. Similarly, Irish voters' crushing rejection of constitutional amendments previously endorsed by a Citizens' Assembly raises uncomfortable questions about whether mini-publics genuinely capture public sentiment or generate recommendations that, however normatively defensible, lack broader democratic legitimacy.

These concerns gain urgency as 'notable shifts occur in the political landscape where responsibility for climate action is challenged in courts'.[63] The proliferation of strategic climate litigation represents what we call *reactive* or *pathological* responses to democratic failure. When representative institutions prove incapable of meeting constitutionally mandated climate obligations, courts intervene to enforce rights claims. While judicial remedies can compel governments to set more ambitious targets, they cannot resolve the distributive conflicts underlying decarbonisation and cannot generate the democratic legitimacy needed for sustained implementation.

CACC, by contrast, may function as *proactive* or *physiological* tools:[64] mechanisms for anticipating and preventing democratic failures before they require judicial intervention. The goal is not to replace representative democracy or judicial review, but to *complement* these institutions by providing spaces where intergenerational obligations can be deliberated outside electoral pressures.

[62] I. Lorenzoni, A.J. Jordan, C. Sullivan-Thomsett *et al.*, *A Review of National Citizens' Climate Assemblies*, cit., 12.

[63] Ibid.

[64] See also E. Buono, *Citizens' Assemblies on Climate Change*, cit., 156.

Complementarity requires what Setälä identifies as proper institutional embedding. Her analysis suggests 'it is unlikely that there will be a general theory of mini-publics'[65] applicable across all contexts. Instead, 'there is a need for theory-guided empirical research to explore potential functions and develop better practices of mini-publics' tailored to specific political systems.[66]

Effective CACC must maintain distance from governmental actors sufficient to generate genuinely transformative recommendations, yet proximity sufficient to ensure those recommendations receive serious consideration rather than symbolic acknowledgement. Achieving this balance requires institutionalisation that goes beyond *ad-hoc* convening: constitutional or statutory provisions mandating assembly formation at regular intervals, obligating governmental response to recommendations within defined timeframes, and establishing monitoring mechanisms to track implementation. Without such forms of institutionalisation, CACC risk becoming 'co-opted events':[67] procedurally sophisticated mechanisms for channelling climate concern into politically manageable recommendations.

The Anthropocene confronts us with what Baber and Bartlett defined the 'inescapable equivocality of democratic environmental governance'.[68] More precisely, as Taylor argues:

Transformative democracy is […] no panacea. It cannot decisively shield a democratic *demos* from rupture. To admit as much is not to concede defeat. Nor is it to prematurely surrender to either the lure of populism or pessimism of vanguardism. It is rather to call forth the imagination. It is to ask that we imagine democracy anew.[69]

Despite legitimacy concerns, despite implementation short-

[65] M. Setälä, *Functions of Deliberative Mini-Publics in Democratic Systems*, in M. Qvortrup, D. Vancic (Eds), *Complementary Democracy: The Art of Deliberative Listening*, Berlin-Boston, 2022, 7.

[66] Ibid., 27.

[67] I. Lorenzoni, A.J. Jordan, C. Sullivan-Thomsett *et al.*, *A review of National Citizens' Climate Assemblies*, cit., 12.

[68] W.F. Baber, R.V. Bartlett, *Deliberative Democracy and the Environment*, cit., 764.

[69] K.A. Taylor, *Neither a Populist Nor a Vanguardist be!*, cit., 1236.

falls and constitutional failures, despite the risks of overselling and co-optation, CACC have demonstrated capacity to generate ambitious climate policy recommendations, to secure substantial governmental uptake, and to introduce paradigms like Rights of Nature previously absent from European constitutional discourse. They even became conduits through which Southern constitutional imaginaries have reached Northern legal traditions, facilitating the ontological pluralism that sustainability governance demands.

Whether CACC ultimately fulfil their promise as drivers of constitutional change – and whether Ireland proceeds with a Rights of Nature referendum that would confirm this claim – depends on choices political actors will make in coming months and years. But when citizens are given opportunity, time, and resources to deliberate on climate policy, they consistently propose actions more ambitious than existing governmental commitments. The question is whether representative institutions possess sufficient courage to implement those proposals, or whether courts will increasingly need to intervene as deliberative democracy's promises remain unrealised.

B. Sustainability and Independent Authorities in Europe and Beyond

THE ROLE OF EU AGENCIES IN EU ENVIRONMENTAL LAW AND POLICY: FROM INFORMATION GATHERING TO POLICY ADVICE

Annalisa Volpato - Ellen Vos

Abstract: *This contribution discusses the increasingly important role that EU agencies play in the shaping and implementation of EU environmental law and policy. It analyses four sets of tasks attributed to them and their contribution to integrating environmental protection concerns, and examines the impact of the European Green Deal on the tasks of the agencies, with a focus on the European Environment Agency. It finds that the Green Deal has consolidated and reinforced existing tasks of EU agencies. It describes moreover the creation of a new body, the European Scientific Advisory Board on Climate Change, as created by the European Climate law, with the specific mandate to give scientific advice on climate change, as well as broader policy recommendations, to EU institutions and Member States. Currently, the Green Deal's importance is diminishing due to the Commission's political agenda prioritising competitiveness, simplification, deregulation, and the dismantling of EU environmental rules. However, the role of EU agencies and the newly established Board may be crucial in ensuring environmental protection, producing independent scientific knowledge and creating awareness on climate change impacts and to monitor and identify actions to achieve the Union's climate targets.*

Keywords: EU Agencies, EU Governance, Environmental Protection, Sustainability, Climate Change.

1. *Introduction*

In the last decades, the role of administrative agencies has grown progressively both in quantitative and qualitative terms in the European Union (EU). From the first EU agencies in the 1970s, which were entrusted with merely informational tasks, the number of decentralised agencies has increased exponentially in subsequent years. Nowadays, there are more than 35 EU agencies that operate across the EU's institutional landscape, carrying

out a multiplicity of tasks related to various EU policies:[1] assisting in the implementation of EU law and policy, providing scientific advice, collecting information and providing specific services. Today, EU agencies – defined as permanent bodies with separate legal personality under EU public law that are set up by the institutions through secondary legislation[2] – undeniably represent a distinct feature of EU administration.[3]

The empowerment of EU agencies without an express legal basis in the Treaties and without clear constitutional boundaries has raised various concerns over the legitimacy of these bodies as they are increasingly called to exercise more extensive powers, even in complex and politically sensitive domains.[4] The delegation of powers to EU agencies was moulded in the so-called *Meroni* doctrine elaborated by the Court of Justice of the European Union (hereinafter, the Court), which established strict limits to the kind of powers which could be entrusted to these bodies.[5] The conferral of discretionary powers to EU agencies was sanctioned by the Court only in its 2014 *Short Selling* judgment,[6] but again more nuanced by the Court in its more recent case law.[7]

[1] For an overview of this phenomenon, see the study carried out by Ellen Vos, commissioned by the European Parliamentary Research Service, *EU Agencies, Common Approach and Parliamentary Scrutiny*, available at http://www.europarl.europa.eu.

[2] See M. Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration*, Oxford, 2016, 9.

[3] See, *inter alia*, M. Everson, C. Monda, E. Vos (Eds), *European Agencies in between Institutions and Member States*, Wolters Kluwer, 2014; M. Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration*, Oxford, 2016; M. Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford, 2013; E. Chiti, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Padova, 2002; C. Tovo, *Le agenzie decentrate dell'Unione europea*, Napoli, 2016.

[4] M. Everson, C. Monda and E. Vos, *What Is the Future of European Agencies?*, in M. Everson, C. Monda, E. Vos (Eds), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn, 2014, 236-238.

[5] Case C-9/56, *Meroni & Co v High Authority*, EU:C:1958:7 and Case 10/56, *Meroni & Co v High Authority of the European Coal and Steel Community*, EU:C:1958:8, para. 151.

[6] See Case C-270/12, *UK v Council of the European Union and European Parliament (Short Selling),* EU:C:2014:18.

[7] See Case C-551/22P, *European Commission v Single Resolution Board,* EU:C:2024:520, where the Court held that 'the final assessment of the discre-

In this contribution we will discuss the role of agencies in EU environmental law and policy, with a specific focus on their contribution to environmental protection and sustainability. Where EU agencies are significantly diverse, varying in their functions, structure and in the powers conferred, scholars have suggested different taxonomies and qualifications of these bodies.[8] Considering that often one agency performs a plurality of tasks,[9] for the purpose of this contribution we will discuss, with no ambitions to put forward a formal categorisation, four sets of tasks that agencies perform in relation to environmental protection: information, certification, control and environmental risk assessments (section 2). This is followed by a discussion on the role of EU agencies in the European Green Deal (section 3), focusing on the European Environmental Agency and the newly established European Scientific Advisory Board on Climate Change. Some reflections on the current state of EU environmental law and policy conclude the contribution (section 4).

2. *The Role of EU Agencies in Environmental Law and Policy: A Task-based Approach*

The increasing role of EU agencies in the EU administrative landscape has also determined their progressive involvement in

tionary aspects of the scheme which fall within the scope of EU policy for the resolution of credit institutions' must be carried out by the Commission or, if applicable, by the Council (para 81). Moreover the Court explicitly held that the SRB's resolution scheme was a preparatory act that could not be challenged before the Court, as 'it is the Commission, and not the SRB, which must answer for that resolution action before the EU judicature', para 88, and herewith reversed the GC's ruling in Case T-481/17 *Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v Single Resolution Board*, EU:T:2022:311.

[8] *Inter alia*, A. Kreher, *Agencies in the European Community – A Step towards Administrative Integration in Europe*, in 4 *Journal of European Public Policy* 2 (1997), 236-238; E. Chiti, *An Important Part of the EU Institutional Machinery: Features, Problems and Perspectives of European Agencies,* 46 *Common Market Law Review* (2009), 1403.

[9] E. Vos, *European Agencies and the Composite EU Executive*, in M. Everson, C. Monda, E. Vos (Eds), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn, 2014, 20.

the shaping and management of EU environmental policy. Although still under-researched, the involvement of EU agencies in environmental protection has attracted some academic attention from environmental lawyers.[10] Providing the Commission with scientific and technical expertise, EU agencies are recognised as playing an increasingly important role in EU law and policy-making in a number of environmentally sensitive domains.[11] However, EU agencies' functions related to environmental protection are diverse, scattered across legislative acts, and attributed to a plurality of EU agencies. In a previous study,[12] we identified the tasks performed by EU agencies in connection to environmental protection and classified them into four main categories: (i) information gathering, (ii) certification, (iii) control, and (iv) environmental risk assessments.

(i) Information Gathering

Information gathering is clearly the main task of the European Environmental Agency (EEA), established in 1990 to provide EU institutions and Member States with objective information to frame and implement sound and effective environmental policies.[13] The EEA collects environmental data mainly through the

[10] M. Lee, *EU Environmental Law, Governance and Decision-Making*, Oxford, 2014, 45; N. De Sadeleer, *EU Environmental Law and the Internal Market*, Oxford, 2014, 193.

[11] Ibid.

[12] A. Volpato and E. Vos, *The Institutional Architecture of EU Environmental Governance: the Role of EU Agencies,* in M. Peeters and M. Eliantonio (Eds), *Research Handbook on EU Environmental Law*, Cheltenham, 2020, 54-69.

[13] Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, OJ L 120, 11.5.1990, 1-6. The original Regulation was amended in particular by Council Regulation (EC) No 933/1999 of 29 April 1999 (OJ L 117, 5.5.1999, 1-4) and Regulation (EC) No 1641/2003 of the European Parliament and of the Council of 22 July 2003 (OJ L 245, 29.9.2003, 1-3). It has now been replaced by Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network, OJ L 126, 21.5.2009, 13-22. For an analysis of

European Environment Information and Observation Network (EIONET), composed of national authorities with the competency to collect and process data on the state of the environment in their country.[14] On this basis, it not only publishes a report on the state of the environment every five years,[15] but also elaborates more targeted reports on specific issues.[16] Moreover, it plays a role in the implementation and enforcement phases, assisting the Commission in the monitoring and assessment of the application of EU benchmarks.[17] Finally, it ensures the broad dissemination of reliable and comparable environmental information to the general public, in particular through its website.[18] Potentially, this allows the EEA to influence the development of EU environmental policy in the phase of elaboration of environmental legislation, providing the scientific grounding and the factual justification for the adoption EU measures. In this sense, the role of the EEA in EU environmental policy embodies that new mode of governance Majone defined as 'regulation by information' according to which non-majoritarian expert bodies shape the conceptual basis for EU policy decisions and, thus, have an indirect, yet effective, impact on regulation.[19] However, the specific role of the EEA in the overall regulatory process is not clearly defined

the innovations of the consolidated Regulation, see S. Doumbe-Bille, *Le règlement (CE) n° 401/2009 du Parlement européen et du Conseil du 23 avril 2009 relatif à l'agence européenne pour l'environnement,* in *Revue européenne de droit de la consommation* 2 (2010), 181-197.

[14] See Articles 2 (a) of Regulation (EC) No 401/2009.

[15] Article 2 (h) of Regulation (EC) No 401/2009.

[16] For a classification of EEA reports, see O. Caspersen, *The European Environment Agency*, in *Global Environmental Change* 9 (1999), 71-75.

[17] L. Cuocolo, *Le agenzie per l'ambiente tra diritto comunitario e diritti interni*, in V. Salvatore (Ed.), *Le agenzie dell'Unione Europea. Profili istituzionali e tendenze evolutive*, Jean Monnet Centre, 2011, 97. See also European Environmental Agency, *Consolidated annual activity report 2017* (June 2018), available at www.eea.europa.eu.

[18] Article 2 (m) of Regulation (EC) No 401/2009. For the institutional implications of this task, see L. Cuocolo, *Le agenzie per l'ambiente tra diritto comunitario e diritti interni*, in V. Salvatore (Ed.), *Le agenzie dell'Unione Europea. Profili istituzionali e tendenze evolutive*, Jean Monnet Centre, 2011, 94.

[19] G. Majone, *The New European Agencies: Regulation by Information*, in *Journal of European Public Policy* (1997), 262-275.

by legislation and its actual influence on policy-making so far remains unclear, if not very limited.[20]

(ii) Certification

The task of collecting information about the environment is shared with other agencies, specialised in specific sectors, such as aviation or maritime safety. However, these agencies also perform a second set of tasks which are closer to enforcement powers than just information collection. In particular, the European Aviation Safety Agency (EASA) – established with the aim, among others, of contributing 'to a high, uniform level of environmental protection' in the aviation sector[21] – not only conducts studies, simulations and provides technical advice in this field;[22] but also issues the certificates required for the aircraft designs of and their components. Before issuing a certificate for a design, it verifies its safety and airworthiness, as well as its compliance with noise and emission standards in force.[23] Therefore, through its certification tasks, this agency has the power to adopt binding measures which have legal effects on third parties and are connected to the objective of environmental protection, in particular the control of the noise and emissions levels in the EU.[24]

[20] See M. Lee, *EU Environmental Law, Governance and Decision-Making*, Oxford, 2014, 45. See also A. R. Zito, *European Agencies as Agents of Governance and EU Learning*, in 16 *Journal of European Public Policy* (2009), 1224.

[21] Article 1 of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, OJ L 212, 22.8.2018, 1-122. See also Article 87.

[22] Article 87 of Regulation (EU) 2018/1139.

[23] Articles 9-15 of Regulation (EU) 2018/1139. The relevant environmental standards are the ones of Chicago Convention, referred to in the Regulation, or, residually, the ones set forth in Annex III to the Regulation.

[24] See E. Vos, *European Agencies and the Composite EU Executive*, cit., 21.

(iii) Control

The European Maritime Safety Agency (EMSA)[25] and the European Fisheries Control Agency (EFCA)[26] are empowered to carry out control activities related to environmental protection, such as inspections on national administrations, port facilities, ships, and shipping companies. In particular, EMSA collects, records and evaluates technical data in the field of marine pollution, both accidental and deliberate, and assists the Commission in preparatory works for the updating and developing EU legislation in this field.[27] Moreover, it assists the Commission in monitoring and enforcing legislation, including in its aspects related to environment protection and, for this purpose, is entrusted with powers of inspection, particularly visits to the Member States.[28] At the same time, in its task of coordinating control and inspection activities in relation to the Common Fisheries Policy (a policy strongly characterised by measures concerning the environmental sustainability of natural marine resources),[29] the EFCA is entrusted with powers of operational coordination of

[25] Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208, 5.8.2002, 1-9. For an analysis of the powers of EMSA and of the EU maritime safety policy, see S. Dupré and E. Guy, *Actors and Their Representations in Shipping Policy: Developing the European Maritime Safety Agency*, in 32 *Transport Reviews* 6 (2012), 697-713.

[26] Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, OJ L 354, 28.12.2013, 22-61. See also E. Kurlanda, *Exploitation of Sea Resources and the Territorial Application of the Law of the Sea,* in 56 *Journal of Politic and Law* (2011); C. Uta Marin, *The EU Integrated Maritime Policy*, in 26 *Rev. Drept Mar* (2014), 26-38.

[27] Article 2 (a) and (f) of Regulation (EC) No 1406/2002

[28] Article 2 (b) of Regulation (EC) No 1406/2002. See also Article 3 of the same Regulation.

[29] Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, OJ L 354, 28.12.2013, 22-61. See also E. Kurlanda, *Exploitation of Sea Resources and the Territorial Application of the Law of the Sea,* in 56 *Journal of Politic and Law* (2011), 56; C. Uta Marin, *The EU Integrated Maritime Policy*, in 26 *Rev. Drept Mar* (2014), 26-38.

the control and inspection operations of the Member States[30] and with inspection powers in international waters,[31] thus ensuring compliance with the relevant environmental obligations in the maritime domain.[32]

(iv) Environmental Risk Assessments

Finally, a few agencies are entrusted with the mandate to carry out a scientific assessment of the risks that certain products or substances may pose to the life and health of persons, animals and plants. Three agencies in particular are tasked through specific regulations to provide an identification and evaluation of the effects of certain products, in order to give scientific support to the Commission's decision on market authorisation: the European Food Safety Authority (EFSA) for food and feed,[33] the European Chemicals Agency (ECHA) for chemical substances and agents,[34] and the European Medicines Agency (EMA) for medicinal products for veterinarian and human use.[35] In the case of EFSA, it is noteworthy that, while its founding regulation requires it only to 'take into account' the environment in its mission,[36] sectoral legislative acts request EFSA to include not only

[30] Article 3 of Regulation (EU) 2019/476.

[31] Article 19 of Regulation (EU) 2019/476.

[32] See C. Johnson, *Fisheries Enforcement in European Community Waters since 2002,* in 23 *International Marine & Coastal Law* (2008)*,* 249-270.

[33] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, 1-24.

[34] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, OJ L 136, 29.5.2007, 3-280.

[35] Regulation (EC) No 726/2004, laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30.4.2004, 1-33.

[36] Article 22 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority

the effects on human and animal health, but also the effects on the environment in its assessments.[37] These assessments are conveyed in documents that are referred to as 'environmental risk assessments' (ERAs).[38] ERAs are also carried out by the EMA for the authorisation of medicinal products for veterinary[39] and human use,[40] whereas the ECHA is called on to assess the impact on the environment of substances under the CLP Regulation[41] and the REACH Regulation.[42] Hence, companies which intend to market a product falling under these regulations in the EU, need to provide data on its effects on the environment, which will be

and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, 1-24. See also Article 5: 'Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment'.

[37] Regulation No 1107/2009 on the placing of plant protection products on the market; Regulation No 1831/2003 on additives for use in animal nutrition; Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms; Regulation No 1829/2003 on genetically modified food and feed.

[38] For an overview of the ERAs in EFSA's work, see https://www.efsa.europa.eu/en/topics/topic/environmental-risk-assessment.

[39] See Annex I (point 6) of Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products, OJ L 311, 28.11.2001, 1-66.

[40] See Article 8 and Annex I (point 1.6) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, 67-128. For medicines containing, or consisting of, GMOs, specific rules apply: express reference to Annex II of Council Directive 90/220/EEC is made by Articles 6 and 31 of Regulation (EC) No 726/2004, laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30.4.2004, 1-33.

[41] Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, OJ L 353, 31.12.2008, 1-1355.

[42] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, OJ L 136, 29.5.2007, 3-280.

assessed by the relevant EU agency and then included in the grounds for the Commission's final decision.

3. *EU Agencies and the European Green Deal: Between Continuity and Change*

3.1. *The Policy Shift and Its Impact on EU Agencies*

From the overview of the tasks and powers of EU agencies in relation to environmental protection, it is clear that, in many ways, EU agencies have long played a relevant part in support of the EU environmental policy. However, this policy has recently undergone an important regulatory shift. With the publication of its European Green Deal communication in 2019, the European Commission has set in motion a process of transformation of the EU economy towards a more sustainable trajectory in order to address the urgent climate and environmental-related challenges.[43] This has resulted in a number of legislative reforms – among which Regulation 2021/1119, commonly known as the European Climate Law,[44] represents the cornerstone of the EU's climate change mitigation policy.[45] It establishes an innovative climate governance framework, aimed at achieving the greenhouse gas emission reduction targets of 55% (in line with the EU's international commitments under the Paris agreement)[46] and, ultimate-

[43] European Commission, Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, COM/2019/640 final.

[44] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243/1.

[45] European Commission, *The European Green Deal*, COM/2019/640 final.

[46] In particular, 'at least 55% compared to 1990 levels' by 2023, see Article 4(1) European Climate Law. See also Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) U.N. Doc. FCCC/CP/2015/L.9/Rev/1; Council Decision (EU) 2016/1841 of 5 October 2016 on the conclu-

ly, climate neutrality by 2050.[47] These objectives are pursued, in particular, through the adoption of the 'Fit for 55' legislative package, composed of twelve regulations and directives – such as the Effort Sharing Regulation,[48] the Emission Trading System ('ETS') Directive[49] and the LULUCF Regulation[50] – which introduce novel rules and obligations in different policy sectors, including in the fields of energy, transport, forestry and agriculture.[51]

Considering the significant impact brought by these initiatives, it was clear that this also affected the tasks and powers of EU agencies active in this field, and beyond. In the light of the scientific and technical expertise needed in complex issues such as climate change, EU agencies may play a particularly important role in providing the regulatory science supporting the decisions of EU institutions to implement this strategy. Moreover, the European Green Deal had ambition to influence all EU actions and policies, requiring intense coordination among EU institutions and bodies to exploit the available synergies across different policy areas.[52]

In the 2019 European Green Deal Communication, EU agencies, together with EU institutions and other bodies, were called on to contribute, first of all, by reducing their own environmen-

sion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Chang [2016] OJ L282/1.

[47] K. Kulovesi and others, *The Climate Law: Strengthening EU Procedural Climate Governance?,* in 36 *Journal of Environmental Law* 23 (2024), 26.

[48] Regulation (EU) 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) 2018/842 [2018] OJ L111/1.

[49] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L 275/32.

[50] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework [2003] OJ L156/1.

[51] See European Commission, *'Fit for 55': Delivering the EU's 2030 Climate Target on the Way to Climate Neutrality* (2021) COM(2021) 550 final.

[52] European Commission, *The European Green Deal*, COM/2019/640 final, 3.

tal impact as institutions and employers.[53] Accordingly, in many internal working plans and strategies, adopted by EU agencies directly after the Green Deal, there is special attention and self-reflection on how to adapt and incorporate the objectives and policies of the Green Deal within their existing activities.[54] Moreover, EU agencies were expected to include concepts and goals introduced by the European Green Deal in their work. In particular, EFSA has elaborated, for instance, the concept of 'one health – one environment'[55] and is rethinking its working methods in order to systematically include environmental considerations in risk assessment.[56] One result of this is the adoption of 'an integrated risk assessment' which would include an assessment of the environmental impact of food products and substances in a combined way.[57]

Furthermore, EU agencies are repeatedly mentioned in the legislative acts which were adopted to implement the European Green Deal objectives, especially in relation to the crucial support role these administrative bodies have vis-à-vis the European Commission. While the specific impact on the work of the EEA will be analysed in detail *infra*,[58] it is important to mention that, after the European Green Deal, also EASA and EMSA are tasked with assisting the Commission in its activities of monitoring, reporting and verification emissions generated, respectively, by aviation[59]

[53] Ibid, 23.

[54] For instance, in the EFSA's strategy for 2027 there was a specific section on how to implement the Green Deal and the Farm to Fork communication in the food sector, see EFSA Strategy 2027, adopted by the Management Board on 24 June 2021, 3.

[55] Mentioned in European Commission, *The European Green Deal*, COM/2019/640 final, 15.

[56] See also the joint initiative between ECDC, ECHA, EEA, EMA and EFSA, *Cross-agency knowledge for One Health action - Joint statement by European Union Agencies*, 13 November 2023, available at https://www.efsa.europa.eu/sites/default/files/2023-11/one-health-2023-joint-statement.pdf.

[57] EFSA Strategy 2027, 8.

[58] See in more detail section 4.2.

[59] Art. 6 Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport (ReFuelEU Aviation), OJ L, 2023/2405, 31.10.2023.

and maritime transport activities.[60] Moreover, for some EU agencies the adoption of the 'Fit for 55' package has added new tasks or competences to the ones they were already exercising. This is the case, for instance, of EASA which under the ReFuelEU Aviation Regulation has been entrusted with the monitoring and reporting of the new obligations introduced by that Regulation about the use of fuel by aircraft operators and aviation fuel suppliers.[61] This Agency is further charged with the implementation and enforcement of a new voluntary labelling scheme for measuring the environmental performance of aviation as established by that Regulation.[62]

Comparing the tasks introduced as a direct effect of the European Green Deal with those already exercised by these EU agencies, there appears to be a clear continuity in the kind of tasks performed. The role of EU agencies before and after the European Green Deal remains mainly a supporting one vis-à-vis the European Commission, now extending to new schemes and enforcement areas. As such, EU agencies continue to have an important position in the implementation of EU environmental policy, with the same powers and the same limits.

3.2 *The European Environmental Agency and the European Green Deal*

In relation to the European Environmental Agency, the change brought by the European Green Deal has been in the

[60] Art. 11a Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union as amended by Directive (EU) 2023/958 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure, OJ L 130, 16.5.2023, pp. 115-133.

[61] Art. 5 Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport (ReFuelEU Aviation), OJ L, 2023/2405, 31.10.2023.

[62] Art. 14 Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport (ReFuelEU Aviation), OJ L, 2023/2405, 31.10.2023.

sense of a continuity and, to some extent, an increase in tasks compared to those initially conferred. In particular, the European Climate Law requires the EEA to assist the European Commission in the assessment of the Union's progress in achieving the environmental objectives and consistency of the Union's measures with the climate-neutrality objective, as well as the national measures on this.[63] At the same time, the Regulation on the Governance of the Energy Union and Climate Action expressly provides for an EEA role in the assessment, monitoring and reporting of Member States' policies and measures on decarbonisation and energy efficiency.[64] It requires that the EEA compiles the information reported by single Member States; controls their quality and consistency; maintains and updates a database on Member States' mitigation policies and measures.[65] Moreover, it is tasked with disseminating information collected under that Regulation, including maintaining and updating a database on Member States' mitigation policies and measures and the 'European Climate Adaptation Platform' relating to impacts, vulnerabilities and adaptation to climate change.[66] Similarly, under the proposal for a Soil Monitoring Law which has recently been agreed upon by the European Parliament and Council,[67] the EEA must support the Commission in monitoring Member States on their measures to maintain soil health in the European Union, also by managing a 'digital soil health data portal' based on data provided by Member States or delivered under the Copernicus component of the EU Space Programme.[68]

[63] Art. 8 (4) of European Climate Law.

[64] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, OJ L 328, 21.12.2018, pp. 1-77.

[65] Article 42 of Regulation on the Governance of the Energy Union and Climate Action.

[66] Art. 42 of Regulation on the Governance of the Energy Union and Climate Action.

[67] European Parliament, Legislative resolution of 23 October 2025 on the Council position at first reading with a view to the adoption of a directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Law), 09474/1/2025 – C10-0229/2025 – 2023/0232(COD).

[68] Art. 6 of Proposal for a Directive of the European Parliament and of the

Therefore, with the European Green Deal, the activities of the EEA in the assistance of the European Commission have been enhanced, reaching to areas and topics – such as soil health and energy efficiency – not previously in its mandate. In this sense, it is undeniable that the scope of this Agency's activities has expanded, so it continues to contribute significantly to the implementation of EU environmental policy. However, from a formal perspective, it is important to highlight that the legal effects of the powers exercised by the EEA are not changed. The tasks still consist of collecting and compiling data on the state of certain aspects of the environment or on the national measures adopted, i.e. gathering information on the factual situation in the European Union. From the wording of the novel provisions, it is quite clear that the EEA does not carry out scientific studies or scientific literature reviews on its own.[69] It is equally clear that the EEA does not exercise decision-making (nor pre-decision-making)[70] powers since it is the European Commission which ultimately has the responsibility of the final assessment and decision; the EEA does not give specific advice on the outcome nor does it concretely decide on the assessment of the compliance with EU environmental provisions. In this sense, despite existing political pressure to transform the EEA into a proper

Council on Soil Monitoring and Resilience (Soil Monitoring Law), COM/2023/416 final.

[69] As, for instance, the EFSA is empowered to under Art. 32d of the General Food Law Regulation, as amended by Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain, OJ L 231, 6.9.2019, pp. 1-28.

[70] For a legal classification of EU agencies' powers, see S. Griller and A. Orator, *Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine*, in 35 *European Law Review* 1 (2010), 12; A. Kreher, *Agencies in the European Community – A Step towards Administrative Integration in Europe*, in 4 *Journal of European Public Policy* 2 (1997), 236-338; E. Chiti, *An Important Part of the EU Institutional Machinery: Features, Problems and Perspectives of European Agencies*, 46 *Common Market Law Review* (2009), 1403; M. Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford, 2013, 38.

decision-making agency,[71] it remains an agency with information gathering tasks.

3.3. *The European Scientific Advisory Board on Climate Change*

The most interesting institutional innovation in the context of the European Green Deal is not a radical transformation of EU agencies' role which, as discussed, largely remains unchanged from a legal perspective. Rather, the innovation arguably lies in the creation of a new body, i.e. the European Scientific Advisory Board on Climate Change. This new body established by the European Climate Law,[72] shares similarities with EU agencies, but constitutes an innovative institutional arrangement.[73] It is composed of fifteen senior scientific experts in different relevant disciplines,[74] who are appointed in a personal capacity for a term of four years, renewable once.[75] By virtue of its independence and scientific and technical expertise, the Advisory Board must 'serve as a point of reference for the Union on scientific knowledge relating to climate change'.[76]

Whilst the initial proposal by the European Commission did not foresee such a body,[77] its current institutional setting is the

[71] European Commission, Implementing Decision (EU) 2023/2522 of 8 November 2023 on the request for registration, pursuant to Regulation (EU) 2019/788 of the European Parliament and of the Council, of the European citizens' initiative entitled Creation of a European Environment Authority, OJ L, 2023/2522, 16.11.2023. The collection of signatures has closed on 10/01/2025 without achieving the required number.

[72] Article 12 of European Climate Law.

[73] A. Cuomo and E. Vos, *The European Scientific Advisory Board on Climate Change: Fit for Purpose?*, in *63 Common Market Law Review* (2026), 9.

[74] Art. 10a(2) EEA Regulation, as amended by the European Climate Law. The appointment procedure shall ensure 'a varied disciplinary and sectoral expertise, as well as gender and geographical balance'.

[75] Art. 10a (3) EEA Regulation, as amended by the European Climate Law.

[76] Art, 3(1) of European Climate Law.

[77] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM (2020) 80.

result of the political pressure of the European Parliament, which demanded the establishment of a fully-fledged EU agency on climate change.[78] The supposed intent was to mirror the existing specialised bodies which institutionalise scientific expertise in climate change at the national and international level,[79] in particular the Intergovernmental Panel on Climate Change (IPCC) operating within the United National Framework Convention on Climate Change.[80] The compromise reached in negotiations with the Council was the creation of a separate body, which acts independently from EU institutions and Member States in discharging its tasks.[81] Yet, its work is conceived as complementary to that of the EEA, to which it is also institutionally and financially connected. In particular, the Management Board of the EEA appoints the members of the Advisory Board,[82] defines its budget[83] and hosts a Secretariat for its administrative support.[84] As such, the Advisory Board does not constitute a self-standing agency,

[78] European Parliament, Amendments 57 and 76 adopted on 8 October 2020 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality, P9_TA(2020)0253.

[79] See C. Elliot *et al.*, *Climate Advisory Bodies: Experiences and Approaches for Effective Climate Change' Policy,* in *World Resources Institute*, 2021; T. Meyer, *Institutions and Expertise: The Role of Science in Climate Change Lawmaking,* in K. R. Gray, R. Tarasofsky and C. P Carlarne (Eds), *The Oxford Handbook of International Climate Change Law*, Oxford, 2016.

[80] For an analysis of this influential body, see N. Singh Ghaleigh, *Science and Climate Change Law: The Role of the IPCC in International Decision-Making,* in K. R. Gray, R. Tarasofsky and C. P Carlarne (Eds), *The Oxford Handbook of International Climate Change Law*, Oxford, 2016, 57. See also D. French and B. Pontin, *The Science of Climate Change: A Legal Perspective on the IPCC,* in M. Faure (Ed.) *Elgar Encyclopedia of Environmental Law*, Cheltenham-Northampton, 2023.

[81] Article 10a (5) EEA Regulation. For a discussion of the effectiveness of the independence guarantees of the Advisory Board, see A. Cuomo and E. Vos, *The European Scientific Advisory Board on Climate Change: Fit for Purpose?*, in *63 Common Market Law Review* (2026) 1-30.

[82] Art. 10a (3) EEA Regulation.

[83] Art. 11 (5) EEA Regulation.

[84] See ESABCC, Annual Work Programme 2025, 5.

yet it represents an innovative form of EU administrative body with few equivalents in the EU institutional landscape.[85]

The tasks of the Advisory Board are manifold.[86] Firstly, on the basis of the latest scientific findings of the IPCC reports and scientific climate data, it must provide scientific advice and issue reports on existing and proposed EU measures, climate targets and indicative greenhouse gas budgets.[87] These reports shall not simply give account of the factual situation, but also provide an assessment of the coherence of EU measures with the objectives of European Climate Law and the Union's international commitments under the Paris Agreement. In this sense, it serves as a 'watchdog' of the climate change ambitions of the Union.[88] Secondly, the Advisory Board is expected to contribute to the exchange of independent scientific knowledge in the field of modelling, monitoring, promising research and innovation on the matter of emission reductions or removals;[89] and to raise awareness on climate change and its impacts, stimulating dialogue and cooperation between scientific bodies within the EU and beyond.[90] Thirdly, it is also tasked with identifying actions and opportunities needed to successfully achieve the Union climate targets.[91] Therefore, the scientific expertise of the Advisory Board does not only concern existing measures, but looks to future actions of the EU, potentially steering policy choices in the direc-

[85] Comparable bodies may be the European Systemic Risk Board and the European Artificial Intelligence Board, as suggested by A. Cuomo and E. Vos, *The European Scientific Advisory Board on Climate Change: Fit for Purpose?*, in *63 Common Market Law Review* (2026), 9.

[86] For an overview and analysis, see A. Giorgi, *The EU Green Deal and the Transformations of the European Administrative System: Does the "Epistemic Leadership" of the Scientific Advisory Board Push the Agency Model over the Sunset Boulevard?*, in, 8 *European Papers* (2023), 893.

[87] Art. 3 (2) lett. a and b of European Climate Law.

[88] A. Giorgi, *The EU Green Deal and the Transformations of the European Administrative System: Does the "Epistemic Leadership" of the Scientific Advisory Board Push the Agency Model over the Sunset Boulevard?*, in 8 *European Papers* (2023), 893.

[89] Art. 3 (2) lett. c of European Climate Law.

[90] Art. 3 (2) lett. e of European Climate Law.

[91] Art. 3 (2) lett. d of European Climate Law.

tion considered most appropriate by its members.[92] So far, the Advisory Board has exercised this task through the publication of reports[93] which contain detailed remarks and recommendations which EU institutions and bodies have generally followed.[94]

Considering the general wording of Art. 3 (2) of the European Climate Law, the mandate of the Advisory Board appears to be rather broad, going beyond the traditional information gathering role of EU agencies, especially as compared to the EEA. Especially the ability to formulate far-reaching recommendations, in a policy field of cross-cutting nature such as climate change, blurs the line between scientific advice and policy recommendation, paving the way for a more incisive role of this body in EU environmental decision-making.[95]

4. *Concluding remarks*

EU agencies play an increasingly important role in the shaping and implementation of EU environmental law and policy. They contribute in many different ways to the objective of environmental protection and, even more after the European Green Deal, to the achievement of the specific targets of that policy. This is the case not only for the European Environmental Agency, which is the specialised environmental agency, but also for other agencies which incorporate environmental protection considerations in their specific areas. Moreover, the creation of a new body, the European Scientific Advisory Board on Climate Change, gives new impetus to the scientific underpinning of climate change initiatives. At the same time, the expansive mandate

[92] K. Varis, *The European Scientific Advisory Body on Climate Change*, in *4iTraction Report*, 2024, 15.

[93] The list of reports and publications of the Advisory Board can be found at https://climate-advisory-board.europa.eu/reports-and-publications/scientific-advice-for-amending-the-european-climate-law-setting-climate-goals-to-strengthen-eu-strategic-priorities.

[94] A. Cuomo and E. Vos, *The European Scientific Advisory Board on Climate Change: Fit for Purpose?*, in *63 Common Market Law Review* (2026), 7.

[95] Ibid. 9.

of the Board, including the formulation of policy recommendations, could be influential in prioritising climate change actions.

However, today the Commission's focus on competitiveness, simplification and deregulation tends to the dismantling of various actions of the European Green Deal and to lowering the ambitions and obligations laid down in adopted legislative acts. Even though, in the words of the President of the European Commission, this policy remains a top political priority,[96] the withdrawal of flagship legislative initiatives[97] and the adoption of Omnibus packages delaying and reducing emissions-cutting commitments[98] appears to pull the brake on the development of strong EU law and policy on sustainability and climate change. In this shifting context, the role of EU agencies and the newly established Board may become even more crucial to protecting the environment by means of producing independent scientific knowledge and creating awareness on climate change impacts, as

[96] U. von der Leyen, *2025 State of the Union Address*, Strasbourg, 10 September 2025, p. 6.

[97] For instance, European Commission, Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM/2023/166 final; European Commission, Proposal for a Regulation of the European Parliament and of the Council on the sustainable use of plant protection products and amending Regulation (EU) 2021/2115' COM(2022) 305 final.

[98] See the approval of the European Parliament on 13 November 2025 of European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements COM(2025) 80 final; Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM/2025/81 final; European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/956 as regards simplifying and strengthening the carbon border adjustment mechanism, COM/2025/87 final (Omnibus I). See also Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2015/1017, (EU) 2021/523, (EU) 2021/695 and (EU) 2021/1153 as regards increasing the efficiency of the EU guarantee under Regulation (EU) 2021/523 and simplifying reporting requirements, COM/2025/84 final (Omnibus II).

well as to monitor and identify actions to achieve EU climate targets. After all, one of the initial rationales for the creation of EU agencies was precisely the idea to establish expert bodies isolated from political pressures and shifts which would be able to develop credible solutions with a long-term perspective.[99] In the present political turmoil, the tasks conferred to EU agencies and the stability of their entrenchment in EU environmental policy may thus contribute to maintaining the credibility of EU commitments to a more sustainable trajectory for the EU economy. Clearly, since their powers remain mostly non-binding, much will depend on the collaboration and the synergy between EU agencies and EU institutions and bodies. Still, their institutional and functional features, briefly outlined in this contribution, show the crucial role EU agencies could – and should – have in shaping a greener future for the EU.

[99] For an overview of the rationales for EU agencies' creation, see E. Vos, *EU Agencies on the Move: Challenges Ahead*, in *SIEPS* 1 (2018), 16-17. See also G. Majone, *The Rise of the Regulatory State in Europe*, in 17 *West European Politics* 3 (1994), 77-101.

INDEPENDENT ADMINISTRATIVE AUTHORITIES: A COMPARATIVE INVESTIGATION ON CONTEMPORARY ISSUES

Claudia Sartoretti

Abstract: *The environmental and climate crisis requires governance to evolve, with scientific expertise and independent administrative authorities playing a central role. When in place, these entities develop long-term, evidence-based strategies to address sustainability and climate change, integrating environmental objectives across sectors. The rise of regulatory and accountability agencies reflects a shift toward expert, depoliticised oversight. Collaborative approaches, like the EU Green Deal and US whole-of-government strategy, demonstrate the need for coordinated action among institutions. Independent authorities, especially in competition policy, support sustainable development by fostering innovation, enforcing regulations and balancing economic and environmental goals for a resilient and equitable future.*

Keywords: Independent Administrative Authorities; Scientific Expertise; Regulation; Sustainability; Environment, Climate Change

1. *Introduction*

The increasing awareness of the environmental and climate emergency has prompted a profound reconsideration of global economic dynamics. This renewed configuration of economic relations which focuses on more sustainable and resilient models, inevitably calls for a critical reflection on the roles and responsibilities of the bodies and authorities that shape and regulate the market. In this complex context, characterised by intricate scientific, technological and legal challenges, it becomes essential to rely on the expertise of entities with advanced scientific and technical knowledge.

The integration of science into environmental regulation is not new: rules governing scientific activities, legal interventions based on specialised knowledge, and legal concepts whose definitions depend on scientific principles are now present across

every branch of the legal system.[1] Continuous dialogue and interaction with the hard sciences are necessary because scientific statements and regulatory definitions often overlap. This overlap makes interpreting the complex system of technical standards in environmental law a daunting challenge, even for experienced jurists. In the specific context of the fight against climate change, this interaction takes on an even more critical and pervasive significance. Policy decisions aimed at mitigating the impacts of global warming and adapting to its consequences must be grounded in solid scientific evidence. Accurate understanding of the phenomena at play, from atmospheric dynamics to the impact on ecosystems and human societies, requires rigorous analysis of data and projections developed by the scientific community. Without a solid scientific understanding of these phenomena, policies risk being ineffective, inadequate for their purpose, or even counterproductive.

The complex relationship between law and science, made even more delicate by the global challenge of climate change and

[1] See M. Tallachini, *La costruzione giuridica dei rischi e la partecipazione del pubblico alle decisioni science-based*, in G. Comadè, G. Ponzanelli (Eds), *Scienza e diritto nel prisma del diritto comparato* Torino, 2004, 339 ff.; Id., *Scienza e potere*, in *Enciclopedia del diritto,* vol. *Potere e Costituzione* (ed. by M. Cartabia, M. Ruotolo), Milano, 2023, 1059-1095, esp. 1061, highlights how in knowledge-based societies, science, law, and policy 'are increasingly interdependent in the mutual construction and legitimation of norms', and emphasises how the last decade has seen significant commitment, both theoretically and through concrete reforms, to improve various aspects related to knowledge management. These efforts – the author observes – have focused on refining expertise acquisition systems, optimising organisational structures that collect and manage knowledge for regulatory purposes, and developing better models for analysing and interpreting cognitive data, especially in contexts characterised by scientific uncertainty; R. Ferrara, *Scienza e diritto nella società del rischio: il ruolo della scienza e della tecnica* in *Il diritto dell'economia* 3 (2022), 359-370, esp. 365, observes how the growing interconnection between law, science and *téchne* is due to recent scientific and technological advances and the emergence of new interests in contemporary societies; this has led law, as a regulator of interests, to focus on sectors previously neglected or underestimated, such as environmental, health, food, cultural heritage, digital, and new technologies law, many of which fall under public law; A. Bonomo, *L'approccio science-based sul cambiamento climatico: quale spazio per il decisore pubblico?* in *Rivista quadrimestrale di diritto dell'ambiente* 1 (2024), 53-99.

the difficulty of interpreting environmental regulations, highlights the need to entrust crucial decisions to independent administrative authorities based on sound scientific and technical expertise. These institutions, equipped with advanced specialised competencies and operating free from contingent political or economic influences, can ensure the application of environmental law specifically oriented towards climate change mitigation and adaptation.

Independent Administrative Authorities (IAAs), with their independence and technical expertise, are crucial for tackling complex, intergenerational challenges like environmental and climate change.[2] They are uniquely suited to developing and implementing long-term strategies for these issues, safeguarding future interests that might otherwise be overlooked by short-term political agendas.

For instance, there is a clear complementary relationship between the work of Antitrust Authorities and promoting sustainability. In Italy, the AGCM (Italian Competition Authority) supports sustainable development by various means, including protecting competition and the market (which involves advocacy), consumer protection and by applying the legality rating.[3]

2. *Independent Administrative Authorities and Sustainability Governance*

The current debate among EU member states highlights the timely relevance of IAAs in climate and environmental action. The core question is whether it is better to establish a new, dedicated independent authority for climate and environmental reg-

[2] See, among others, R. Bifulco, *Diritto e generazioni future. Profili giuridici della responsabilità intergenerazionale*, Milano, 2008, *passim* esp. 120, who states that 'the fortune of a constitutional text also depends on its authors' ability to be, so to speak, scholars of the past and seers of the future'; P. Lombardi, *Ambiente e generazioni future: la dimensione temporale della solidarietà* in *Federalismi.it* 1 (2023), January 11.

[3] See, for ex., E. Iossa, F. Mattonai, *Il contributo dell'Agcm allo sviluppo della sostenibilità* in *Mercato Concorrenza Regole* 3 (2023), 365-389.

ulation, or to empower existing IAAs to handle these sensitive oversight duties by boosting their capabilities and resources.

This discussion gained significant momentum with the adoption of a key European Green Deal directive: Directive (EU) 2024/1760 of June 13, 2024. It introduces a framework for corporate due diligence and fundamental human rights protection,[4] and Article 24 specifically requires member states to designate an authority to monitor large European companies' compliance with due diligence obligations and enforce them.

This issue reflects the complexities of modern environmental governance.[5] On one hand, creating a new 'green' IAA could offer greater specialisation, an exclusive focus and increased visibility for climate and environmental policies, leading to a more impactful and coordinated approach.[6] Such an authority could

[4] Directive (EU) 2024/1760 of the European Parliament and of the Council of June 13, 2024, on corporate due diligence for sustainability and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

[5] K. Yesilkagit, J. Jordana, *Entangled Agencies and Embedded Preferences: National Regulatory Agencies in Multi-Level European Governance* in 29 *Journal of European Public Policy* 10 (2022), 1677-1697 notice that the emergence of trans-governmental policy regimes in Europe has reshaped the role of National Regulatory Agencies (NRAs), challenging the traditional distinction between domestic and European governance. Instead of seeing these as separate spheres, a new dynamic has developed that combines multiple delegation chains and innovative coordination structures. NRAs now act as intermediaries or brokers, linking domestic and European political systems in ways that go beyond the usual two-level bureaucratic autonomy models designed for national contexts.

[6] Certain states have already chosen to entrust independent authorities with environmental mediation responsibilities. In some cases, an existing mediator or 'ombudsman' had their prerogatives extended to include environmental matters. For ex., in Argentina, the National Ombudsman (*Defensor del Pueblo de la Nación*), created by the 1994 constitutional amendment, has been assisted since 2017 by a deputy responsible for the environment and sustainable development, charged with defending the right to a healthy environment. This office issues recommendations (*exhortación*) to both the state and provinces.

In Sweden, there are three specialised ombudsmen under the supervision of a chief ombudsman, one of whom is responsible for environmental protection and oversight of agencies under the Swedish Ministry of the Environment.

This organisational model is also found in Spain, Ontario (Canada), Greece, Belgium, and Austria, forming the dominant model.

develop specific expertise and *ad hoc* regulatory tools without the interference or competing priorities that might burden existing, already busy entities.[7]

On the other hand, strengthening existing IAAs could provide benefits in terms of efficiency, reduced bureaucracy and synergy. Many IAAs already have experience regulating sectors with significant environmental impacts (like energy, transport and competition) and possess established know-how in oversight and sanctions. Expanding their mandates and reinforcing their capabilities could prevent institutional fragmentation and enable faster action, leveraging existing structures and relationships.

The discussion around independent bodies for climate and environmental governance remains complex and highly debated. This complexity is compounded by the emergence of new, independent legal entities that, while distinct from traditional Independent Administrative Authorities (IAAs), serve a similar purpose in some jurisdictions by establishing *ad hoc* bodies for climate and the environment.

A prime example of this trend can be seen in France and Germany. France established the *Haut Conseil pour le Climat* (High

Other countries have created specific environmental authorities. For ex., New Zealand's Parliamentary Commissioner for the Environment, established in 1986, investigates environmental practices of the administration. Independent from the government, this commissioner has the right to information and submits recommendations to Parliament in reports.

In Quebec (Canada), the Bureau of Public Hearings is tasked with informing and consulting citizens, conducting investigations, advising the government, as well as fulfilling a mediation role.

More recently the Spanish legislator created a new legal entity on September 30, 2022, called 'the Mar Menor lagoon', endowed it with rights, and established guardian bodies for this lagoon. The Spanish initiative concerning the rights of nature includes creating environmental guarantors – entities with some autonomy charged with protecting the lagoon.

[7] See e.g. the Report drafted by the member of parliament M. Gérard Leseul for the *Commission des lois constitutionelle*, *de la législation et de l'administration générale de la République,* on constitutional bill aimed at creating an Environmental Defender, available at https://www.assemblee-nationale.fr/. For Leseul 'la création d'un défenseur de l'environnement permettrait de renforcer l'effectivité du droit de l'environnement et l'évaluation environnementale de nos politiques publiques'.

Council for Climate) under Article D132-1 of its Environmental Code,[8] while Germany introduced the *Expertenrat für Klimafragen* (Expert Council on Climate Issues) through its Climate Change Act (*Klimaschutzgesetz*) of December 12, 2019. In both cases, these are advisory bodies lacking regulatory and oversight powers. Their primary function is to provide opinions and recommendations. However, the non-binding nature of these recommendations represents a point of potential interaction – and, for some observers,[9] a limitation – with the executive branch.

Furthermore, both bodies are composed of independent experts, but their appointment mechanisms raise questions about their full autonomy from the executive. In France, the law unequivocally states that the '*Haut Conseil pour le climat,* an independent body, is placed under the authority of the Prime Minister', while the German law specifies that the appointment of the Expert Council falls to the federal government.[10]

[8] Environmental Code of September 18, 2000, as amended by Decree No. 2019-439 of May 14, 2019, Article 1.

[9] Nick Evans, Paula Schöberlein, Matthias Duwe, *Raising the Bar on National climate governance in the EU: How EU policy can help Member States deliver certainty, accountability, consensus, and consistency on the road to net zero,* Ecologic Institute, Germany, July 2024.

[10] Other European countries have also established similar bodies through their climate laws, including Spain with its Comité de Personas Expertas de Cambio Climático y Transición Energética (Committee of Experts on Climate Change and Energy Transition) and the United Kingdom with the Climate Change Committee. Additionally, the European Union has its own advisory body, the European Scientific Advisory Board on Climate Change, introduced by Regulation (EU) 2021/1119 of the European Parliament and of the Council of June 30, 2021, establishing the framework for achieving climate neutrality and amending Regulation (EC) No 401/2009 and Regulation (EU) 2018/1999 ('European Climate Law'). While the mandates and functions of these individual bodies differ across jurisdictions, a common thread is the non-binding scientific support they offer to political decisions. They all function as reference points for the government and parliament, providing mandatory (but not binding) technical opinions on specific goals and deadlines, or upon direct request. For further details, see, for ex., F. De Leonardis, *Il dovere di ascolto della scienza: è arrivato il momento della scrittura?* in *Rivista quadrimestrale di diritto dell'ambiente*, Editorial (2024), 4-12, esp. 8 ff.; L. Colella, *L'Haut Conseil pour le climat in Francia. Una 'istituzione' della transizione ecologica* in *Queste Istituzioni* 1 (2021), 8-27.

Having discussed the broader climate and environmental challenges, it is also essential to highlight the role of the agri-food sector. This industry plays a dual role in the climate crisis: it significantly contributes to global greenhouse gas emissions, yet is highly vulnerable to the impacts of climate change.[11] Thus, implementing robust mitigation and adaptation policies is essential. These policies are not just about reducing emissions; they are vital for enhancing agricultural resilience in the face of a changing climate. As a direct consequence, international organisations are increasingly turning their attention to food security, recognising the severe effects of global warming and the urgent need for action.

Ultimately, addressing the sustainability challenge demands a holistic and innovative approach to governance. This means more than just minor adjustments to existing frameworks; it requires a fundamental rethinking of the roles played by traditional powers, coupled with the embrace of new and evolving institutional solutions. Building a truly sustainable future for generations to come will only be possible through the joint commitment of all institutional and social actors. This includes governments, businesses, civil society, and international bodies all working in concert, pooling their expertise and resources to develop and implement effective, long-term strategies.

The United States, for example, before the rise of Trump, saw

[11] The connection between food security and climate change has deep roots. As has been observed (N. Giannelli, E. Paglialunga, F. Turato, *Le politiche per la sicurezza alimentare e la sostenibilità nel contesto europeo e degli accordi commerciali internazionali* in *Argomenti* 18 (2021), 46-76), a key contribution to this debate came early this century from the Food and Agriculture Organization (FAO), which in 2001 defined food security multidimensionally as the condition where 'all people, at all times, have physical, social, and economic access to sufficient, safe, and nutritious food to meet their dietary needs and preferences for an active and healthy life'. The FAO identified four pillars of food security and noted that vulnerability arises when any one of these pillars is at risk. According to the FAO framework, climate change driven by human activities – including socioeconomic, technological, and demographic factors – impacts all assets and activities within the food system, threatening all pillars of food security. Additionally, indirect effects like climate-induced migration and conflicts further exacerbate food security risks.

Biden champion a comprehensive, 'whole-of-government strategy'[12] that integrates environmental justice and climate considerations into decision-making processes across federal agencies and various sectors. This approach intended to align regulatory and policy efforts towards addressing environmental challenges holistically. The Biden Administration advocated a 'whole-of-government' approach to climate change and environmental justice, involving not just traditional agencies like the EPA and Interior Department, but all federal bodies, including Defense, Treasury, Justice, and Agriculture.

A key illustration of this effort lies in the coordination between independent agencies such as the FTC (Federal Trade Commission), SEC (Securities and Exchange Commission), and EPA (Environmental Protection Agency), which together formed what sometimes referred to as the 'American trinity' against greenwashing. These agencies worked collaboratively to combat misleading environmental claims that can deceive consumers and undermine trust in genuinely sustainable products.[13]

[12] See, Z. Handelman, *Tracking the Biden Administration's Whole-of-Government Approach to Equity and Environmental Justice* in *Vermont J. Environ. Law* (2022), available at: https://vjel.vermontlaw.edu/top-ten/2021/12/tracking-the-biden-administrations-whole-of-government-approach-to-equity-and-environmental-justice/; J. Skinner-Thompson, *Procedural Environmental Justice*, 97 *Wash. L. Rev.* 399 (2022); S. Conley, D.M. Konisky, M. Mullin, *Delivering on Environmental Justice? U.S. State Implementation of the Justice40 Initiative* in 53(3) *Publius* 349 (2023); see also, C. Sartoretti, *Biden's Green America. Towards a New US Environmental Policy* in *DPCEonline,* 2023, 159-176 and Id, *Securing Environmental Justice for All: Joe Biden's Agenda to Ensure Everyone Lives in Safe and Healthy Communities* in *DPCEonline,* 2024, 435-448.

[13] Even EU environmental law and policy-making involve multiple institutional actors. While the European Commission continues to be the primary policy-maker, EU agencies play an increasingly significant role across various environmentally sensitive areas. Although the European Environment Agency (EEA) is the decentralised agency most clearly dedicated to supporting EU environmental policy, the contributions of other agencies must also be taken into account. See for further details, A. Volpato, E. Vos, *The institutional architecture of EU environmental governance: the role of EU agencies* in M. Peeters, M. Eliantonio (Eds), *Research Handbook on EU Environmental Law*, 2020, Cheltenham, Northampton, 2020, 54-70. See also M. Marei Viti, G. Gkimtsas, C. Liquete *et al.*, *Introducing the Progress Monitoring Tools of the EU Biodiversity Strategy for 2030* in 164 *Ecological Indicators* (2024), 1-10, hi-

The whole-of-government strategy, inspired by the UK concept of 'joined-up government', promotes whole of government strategy, collaboration and coordination across departments to effectively address environmental issues. By fostering an inclusive and integrated framework, Biden aims to overcome organisational silos, encouraging joint action and ensuring that decision-making considers the broader impact of government operations on climate and pollution.

At the same time, there has been a significant and sustained rise in consumer demand for environmentally friendly or 'green' products in the U.S. market. This growing interest, however, has been accompanied by increasing concerns about greenwashing – a practice where companies exaggerate or falsify their environmental impact to appear more sustainable than they truly are. This has led to complicated challenges in verifying and trusting environmental claims associated with various standards and labels. The combination of rising demand and scepticism has pushed regulators to tighten oversight, encouraging transparency and accountability in environmental marketing to protect consumers and promote genuine sustainability.

3. *Independent administrative authorities: a comparative perspective*

As previously noted, since the 1990s, agro-food supply chains have become global and complex, increasing the need for minimum standards and guarantees for the safety, wholesomeness, and quality of food and, similarly, attention to the environment and climate change has grown too. More specifically, the agro-food sector significantly contributes to global greenhouse gas emissions and is highly vulnerable to climate change.[14] Mitiga-

ghlight the presence of a biodiversity governance framework, adopting an integrated whole-of-society approach to implementation, and to bolstering knowledge, research, financing, and investments.

[14] More in detail, J. Verschuuren, *The Paris Agreement on Climate Change: Agriculture and Food Security* in 7 *European Journal of Risk Regulation* 1

tion and adaptation policies are crucial to reducing emissions and supporting agricultural resilience, a topic that has gained increased visibility within international environmental and sustainability organisations recently. In this scenario, independent administrative authorities have been playing a key role in ensuring an independent and transparent scientific assessment of food risks. But what exactly are independent authorities?

Independent regulatory agencies can be defined as 'public organisations with regulatory powers that are neither elected by the people, nor directly managed by elected officials'.[15] IRAs are part of the *agencification* trend that has characterised OECD (Organisation for Economic Co-operation and Development) countries and they constitute a key regulatory tool in several sectors, from telecom to food safety, from environmental protection to energy.

These public bodies originated in the late 19th century U.S. as Independent Regulatory Commissions (IRCs) and have since spread globally, especially in Europe. They serve as specialised, technically expert bodies overseeing sensitive sectors like banking, telecommunications and energy, aiming to depoliticise regulation. Unlike traditional government agencies, IRCs operate with autonomy, using specialised knowledge to replace political discretion with technical decision-making.

The rise of IRAs reflects a shift toward a 'regulatory state'. This trend appears in both the U.S. and Europe, despite their differing historical approaches – America moving away from laissez-faire policies, Europe reducing direct state intervention through liberalisation and privatisation. More specifically, in the United States, Independent Regulatory Commissions (IRCs) were established during the New Deal of the 1930s to increase government intervention and address failures of an unregulated market. In contrast, Europe followed the opposite path starting

(2016), 54-57; J. Poore, T. Nemecek, *Reducing Food's Environmental Impacts Through Producers and Consumers* in *Science* (2018), 987-992

[15] M. Thatcher, A. Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions* in 25 *West European Politics* 1 (2002), 1-22; F. Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe,* Cheltenham, 2008, 21-22

in the 1990s, aiming to reduce state economic control and liberalise sectors previously monopolised by the state, such as energy, gas, and telecommunications. Independent authorities thus took on the role of supervisors for these sectors, transforming the state from a 'manager' into a mere 'regulator' of the market.

International institutions like the World Bank and IMF since encouraged the establishment of IRAs in developing countries too, particularly Latin America. It should be observed, however, that strong presidential systems there often limit the actual independence of these agencies, making them somewhat dependent on executive power, despite their technical expertise.

Overall, IRAs represent a new administrative model designed to manage complex economic sectors through technical, neutral regulation to minimise political influence.

Nevertheless, we are now faced with a group of entities that, while sharing some characteristics, differ significantly based on the context in which they developed. Their peculiarities are closely tied to the specifics of the administrative system and the economic and political needs of each country. Consequently, there is no single universal model[16] and each independent authority has unique features that cannot be ignored, suggesting the existence of distinct 'models'.

The lack of a unified terminology for these entities reflects their complex and multifaceted nature. Although they share the goal of managing highly technical and sensitive sectors, such as competition, communications or the financial system, with high competence and independence from political power, the differences among various legal systems are substantial.

There is no single standardised 'name' or legal qualification. Each country uses terms that are not directly comparable, as each definition reflects the specifics of its own system. For exam-

[16] In 1997, Giuliano Amato, *Autorità semi-indipendenti ed Autorità di garanzia* in *Autorità indipendenti e principi costituzionali*, Associazione italiana dei costituzionalisti, Padova, 1999, 13-35, warned against falling into the trap of a 'unifying simplification' cautioning that studying these entities in a uniform way risks flattening a rich and varied reality into overly generic classifications.

ple, the Italian '*autorità amministrative indipendenti*' and the French '*autorités administratives indépendantes'* resemble North American 'independent regulatory agencies' or British 'quangos', while differing in some respects.

Take the Italian definition, for instance: the combination of 'authority', 'administrative' and 'independent' is deliberate. The term 'authority' emphasises that these are not mere advisory bodies, but have decision-making power. 'Administrative' indicates they can adopt unilateral administrative acts. Finally, 'independent' clarifies that, although part of the State, they are not subject to hierarchical control.

Conversely, the term 'regulatory' in the U.S. definition is not equivalent to 'administrative'. It refers to a regulatory policy developed in the United States from the late 19th century that opposed the ideology of laissez-faire and aimed to limit the influence of large economic concentrations and ensure the proper development of the market.[17]

It can further be noted that the rise of the regulatory state has not been a uniform process but rather a series of reforms marked by significant differences across countries. It should also be noted that within the diverse melting pot of independent authorities, a distinction can be made – as observed in many legal systems – between entities responsible for market regulation (such as antitrust authorities, which independently oversee competition) and other independent authorities that pursue different objectives.

Alongside Independent Regulatory Agencies (IRAs), there has been a significant increase in the number and power of independent accountability agencies over the past two decades.[18] These include electoral bodies, ombudsmen, anti-corruption

[17] See, for further details, G. Grasso, *Spunti per uno studio sulle autorità amministrative indipendenti: il problema del fondamento costituzionale (Italia, Francia, Stati Uniti d'America)*, in *Quad. reg.,* 1993, 1303 ff.: Id, *L'anomalia di un "modello": le autorità (amministrative) indipendenti nei Paesi membri dell'Unione europea,* in *Il Politico,* 2000, 261-283

[18] J.M. Ackerman, *Understanding Independent Accountability Agencies*, in S. Rose-Ackerman, P.L., Lindseth (Eds), *Comparative Administrative Law,* Cheltenham-Northampton, 2010, 265-277

agencies, and other oversight institutions. They have grown in parallel with the expansion of independent regulatory agencies.

These accountability agencies hold great potential to rebuild public confidence and support. In contexts where governments are perceived as corrupt, authoritarian and elitist, effective accountability agencies can even surpass the traditional branches of government in public trust, when they are seen to prevent corruption and ensure transparency.

The independence of regulatory agencies means they can operate free from political interference, particularly from the executive branch. This independence is secured through mechanisms such as 'for-cause' removal protection, specified terms of office, and structures like collegial membership, often granted by legislation or the Constitution. In the United States, the Supreme Court's decision in Humphrey's Executor (1935)[19] established a constitutional foundation for this independence by confirming that Congress can limit the President's power to remove officials from agencies performing quasi-legislative or quasi-judicial functions, protecting these agencies from direct presidential control.

However, in February 2025, President Donald Trump signed Executive Order 14215, titled 'Ensuring Accountability for All Agencies',[20] which introduced significant changes to this traditional framework of independence. The order requires independent regulatory agencies, such as the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC), to consult regularly with the White House. It mandates these agencies to submit significant regulations to the White House Office of Management and Budget (OMB) for review and approval before publication and requires the agencies to establish White House liaison positions. Furthermore, the executive order grants the executive branch oversight of agencies' budgets and requires executive branch officials to follow legal interpretations from the President or Attorney General, effectively increasing the White House's influence.

[19] Humphrey's Executor v. United States, 295 U.S. 602 (1935)

[20] Executive Order 14215 of February 18, 2025: *Ensuring Accountability for All Agencies*

These measures mark a sharp departure from the longstanding practice of agency independence by injecting direct political control into entities traditionally shielded to ensure expert, non-partisan decision-making. This change has sparked constitutional debates, as critics argue it clashes with the protections enshrined by the Humphrey's Executor decision and undermines the autonomy necessary for these agencies to function effectively without political bias. The Democratic Party has even filed a lawsuit against parts of the order, reflecting the controversy over whether this executive action exceeds constitutional limits.

In summary, Independent Authorities handle complex issues that demand specialised expertise and must be able to rapidly adapt to changes in the economic environment. They also must 'shield market interventions from interference from captured politicians and bureaucrats'.[21] However, not all IA have the same level of independence. For instance, when comparing two competition authorities – the German *Bundeskartellamt* and the Italian *Autorità garante della concorrenza e del mercato* – many, including experts, might assume the German authority is more independent. Yet this is incorrect. The Italian agency's members are appointed for seven-year terms (while the Parliament's term is five years) and cannot be removed from office during that time, whereas the president of the German agency does not have a fixed term. Additionally, the *Bundeskartellamt* operates under the authority of the Federal Ministry of Economic Affairs, while the Italian agency is fully separate from the government.[22] These differences largely reflect the economic and administrative structures of their respective countries.

In the diverse sphere of independent authorities, questions arise about whether entities like the EPA and EFSA can be in-

[21] As it has been established in the OECD report *From Interventionism to Regulatory Governance*, OECD Reviews of Regulatory Reform, 2002, 95

[22] To study more, see P. Fabbio, *Il diritto della concorrenza in Germania: osservazioni e valutazioni in prospettiva europea* in *Orizzonti del Diritto Commerciale* 3 (2019), 549-585; A. Licastro, *Meta Platforms Inc., già Facebook Inc. v. Bundeskartellamt: la Corte di Giustizia dell'Unione Europea apre (finalmente) all'integrazione fra diritto antitrust e data protection* in *Rivista della Regolazione dei mercati*, Fascicolo 2/2023, 503-536

cluded. The shift from models with clearly defined categories (such as legal person, body, or office) – where the relationships between science, politics, and administration were more straightforward – to a complex landscape of fluid and variable concepts indeed suggests that these entities might fit into a single category.

Formally, the EPA and EFSA serve as support and advisory agencies to political power, while traditional independent authorities typically hold regulatory, sanctioning, and quasi-judicial powers that can limit political influence.

The EPA is an independent executive agency, meaning it operates independently from executive departments but remains directly under the President's authority – the EPA director is appointed by the President and can be dismissed at any time.

Regarding the European Food Safety Authority (EFSA), there are concerns about its classification as an independent authority due to its organisational structure. Some view the EFSA as a *sui generis*[23] independent authority because it does not regulate the food safety sector but is responsible for risk assessment within that sector. Others argue that the EFSA cannot be classified as an independent administrative authority since it does not make binding decisions subject to judicial appeal, unlike authorities dealing with antitrust or privacy issues.[24] Instead, the EFSA functions as a technical and scientific advisory body, with its influence largely based on prestige and networking with national counterparts.

However, on a practical level, if an agency issues an unfavourable opinion contrary to political expectations, can politics truly afford to ignore it? This rhetorical question touches upon a critical tension in governance because, while politically elected ac-

[23] See, N. Longobardi, *A proposito di autorità italiana per la sicurezza alimentare fra disciplina europea e interventi normativi nazionali* in *Rivista di diritto alimentare* 4 (2009), 30 ss.

[24] For a reflection on the need to balance accountability and independence with reference to EFSA, see L. Drott et al., *Accountability and Risk Governance: a Scenario-Informed Reflection on European Regulation of GMOs* in 16 *Journal of Risk Research* 9 (2013), 1131 ff.; L. Ferrari, P. Pinto, *La riforma di EFSA: riflessioni sulla comunicazione del rischio in ambito alimentare in tempi di pandemia* in *DPCEonline* 2 (2021), 1565-1584

tors formally retain decision-making power, ignoring the scientifically grounded opinions of these agencies is often politically and practically untenable. Such opinions hold, in fact, significant weight because they come with credibility rooted in technical expertise, transparency and independence from political pressures.

4. *Independent Agencies Play a Crucial Role in Advancing Sustainability*

The inherent value of independent agencies in advancing sustainability lies in their capacity for objective expertise and long-term vision.

Unlike elected officials, who may be influenced by short-term political pressures, independent agencies focus on the scientific and technical intricacies of sustainability issues. Environmental agencies, for example, conduct rigorous data analysis, perform risk assessments, and offer policy recommendations grounded in research, free from political constraints. This technical competence is essential for developing effective regulations, ensuring compliance, and assessing the impact of sustainability initiatives.

Moreover, their independence enables them to serve as watchdogs, holding governments and corporations accountable to established environmental and social standards. They can investigate violations, impose sanctions and advocate for transparency and accountability. In an era where greenwashing and regulatory capture threaten sustainability efforts, the impartial oversight of independent agencies is indispensable. They balance powerful interest groups and help maintain sustainability a priority despite economic pressures.

Beyond regulation and enforcement, independent agencies foster innovation and promote sustainable practices by providing grants, technical support, and collaborative platforms. Agencies focusing on renewable energy, for instance, support research and pilot projects and create market incentives to accelerate clean technology adoption.

However, the effectiveness of these agencies depends on safeguarding their independence through clear legal mandates,

proper funding and transparent appointment processes. They also require appropriate oversight and accountability mechanisms to prevent abuses of power and collaboration with other government branches, civil society and the private sector is vital.

In the context of climate change, resource depletion and social inequality, independent agencies offer vital contributions to sustainability. Their expertise, autonomy, and long-term outlook provide the steady, expert guidance needed to transform sustainability from concept to reality. They are a foundational yet often underappreciated pillar of a resilient, equitable future.

Environmental protection and climate action are primarily pursued through targeted public policies. Nevertheless, competition policy, particularly antitrust enforcement, must also embrace a transformative approach to production systems to promote sustainable economic development. Recent crises like the economic downturn, the Ukraine conflict and energy shortages have heightened this urgency. Importantly, the relationship between competition and environmental sustainability is not solely about compromise, antitrust and environmental protection frequently align to foster sustainable solutions.

There is a diffusion of environmental concerns across all IAAs. All authorities are now also attentive to the environmental impacts and energy sobriety of all regulated or controlled sectors and domains, whereas previously they focused more on the protection of rights and freedoms through the individual, particularly vulnerable persons, or obviously on the economic regulation of a sector that has become competitive. This protective vision of the environment and support for energy transition are thus defended by authorities whose area of competence is *a priori* far removed from this policy.

In France, for instance, eight independent regulatory authorities have collaborated since 2017 as an informal group to address cross-cutting issues related to the Paris Agreement (2015) and the regulatory challenges posed by the climate emergency. This group included the Competition Authority, the Financial Markets Authority (AMF), the Regulatory Authority for Electronic Communications, Postal Services and Print Media Distribution (ARCEP), the Transport Regulatory Authority (ART), the

National Commission for Informatics and Liberties (CNIL), the Energy Regulatory Commission (CRE), the Superior Audiovisual Council (CSA) and the High Authority for the Dissemination of Artistic Works and Protection of Rights on the Internet (HADOPI). In 2020, these authorities published a joint reflection on the climate emergency and the regulatory challenges it entails.[25]

Despite their diverse and traditionally sector-specific missions, these eight authorities founded an informal cooperative platform to address the urgent climate crisis collectively. Their joint efforts highlight the necessity of integrating climate considerations and energy sobriety across all regulated sectors. This collaborative approach demonstrates a regulatory evolution where environmental objectives now permeate fields far removed from classic environmental policy, such as financial markets, audiovisual regulation, digital rights, and transport.

This multi-authority collaboration reflects a holistic vision of governance where climate and environmental protection are not isolated concerns but are regarded as central factors in ensuring sustainable development and societal well-being.[26] It also signals

[25] *The Paris Agreement and the regulatory challenges raised by the climate emergency*, available at www.amf-france.org

[26] See, É. Debaets, V. Palma-Amalric, J. Schmitz, *Les AAI et l'anticipation des choix politiques structurants* in *Autorités administratives indépendantes et libertés – Actualités de l'année 2023* in *Rev. de droit et libertés fondamentaux* online, 2024, who notice how, in France, Independent Administrative Authorities (AAI) continue to support ongoing revolutions in environmental and energy issues, integrating these concerns into public and private decision-making processes. These bodies focus on addressing climate change challenges, including health, water quality, and maritime activities, promoting ecological transition. AAIs use environmental criteria as tools for reflection and decision-making. For instance, the National Consultative Ethics Committee (CCNE) works on health and environmental interactions to anticipate future ecological and health crises. Public debates on potable water quality and marine planning involve citizen participation to support sustainable development, including offshore wind energy. The Financial Markets Authority (AMF) champions sustainable finance, guiding companies on new European regulations and promoting climate-related corporate resolutions. Nuclear safety authorities (ASN) address climate impacts on nuclear plants, while the Energy Regulatory Commission (CRE) manages future gas infrastructure in line with

the willingness of French regulatory bodies to innovate and adapt their roles in response to global climate commitments like the Paris Agreement and to the increasing expectations for systemic energy transition, and emissions reduction.

Overall, this collective initiative from traditionally separate authorities exemplifies how France's administrative governance is evolving to integrate and address climate urgency through regulatory innovation, cross-sector collaboration and enhanced mission scopes.

5. *Sustainability and Competition Policy: Advancing Environmental Goals through Regulatory Innovation*

Sustainability ranks high on the European Union's development agenda and aligns with the 2015 United Nations Sustainable Development Goals (also known as the 2030 Agenda for Sustainable Development).[27] The Green Deal and Next Generation EU call for balancing competitiveness with inclusiveness and urge Member States to promote resource use in harmony with a

carbon neutrality goals. AAIs also incentivise responsible corporate reporting and marketing practices, with agencies like ARCOM (Authority for the Regulation of Audiovisual and Digital Communication) drafting climate codes of conduct and encouraging reduced environmental impact in digital services. The Competition Authority (AC) investigates competition issues linked to the green transition, such as electric vehicle charging infrastructure. The National Civil Aviation Agency (ACNUSA) denounces delays in energy transition by airports and calls for reduced flights and fleet renewal to limit noise and pollution harmful to health. Overall, these authorities adopt both educational and enforcement roles to protect citizen rights in environment, energy, and health.

[27] The 2015 United Nations Sustainable Development Goals, known as the 2030 Agenda, are a global plan adopted by 193 countries to be achieved by 2030. They consist of 17 goals designed to end poverty, fight hunger, promote health and education, achieve gender equality, ensure clean water and energy, foster economic growth, protect the planet and promote peaceful and inclusive societies. The Agenda integrates social, economic and environmental dimensions to ensure development meets present and future generations' needs globally, involving all countries and sectors in a common effort for sustainable development.

green transition. In recent years, indeed, European institutions have increasingly prioritised environmental policies, setting ambitious targets to enhance sustainability and combat climate change. However, achieving these goals cannot disregard the effective involvement of public and private actors, nor the revision of all European policies, including competition policy. At the same time, there is a growing belief that collaborations between companies are necessary to achieve significant progress in sustainability and environmental performance, but many of these initiatives are hindered by the risks arising from a rigid application of antitrust rules, specifically the prohibition on restrictive agreements established by Article 101 TFEU.[28]

Thus, the argument that environmental objectives should be pursued by legislators rather than the Commission and national competition authorities (NCAs) can be countered by the necessity of a green shift in competition policy – one that fundamentally transforms its application beyond a purely economic perspective.

Thanks to Article 11 TFEU environmental protection and sustainability are given priority among extra-economic goals.[29] The principle of integration sets environmental policy apart from all other Union actions. Union primary law ensures, as far as possible, coordination between environmental measures and all other Union policies – including competition policy – that may affect environmental protection.

In essence, by reinforcing an ongoing trend, especially at the

[28] Article 101 TFEU is a key provision in EU competition law that prohibits restrictive agreements and coordinated practices among independent market operators, whether horizontal (between competitors) or vertical (between producers and distributors). It also forbids decisions by associations of undertakings that may affect trade between EU Member States and distort competition in the internal market. Examples of prohibited conduct include price-fixing, market sharing, production limits and discriminatory trading conditions. The article aims to prevent anti-competitive practices to preserve fair competition and the proper functioning of the internal market. Some exceptions apply if agreements contribute to technical or economic progress and benefit consumers fairly without eliminating competition.

[29] Article 11 of the Treaty on the Functioning of the European Union (TFEU) mandates the integration of environmental protection requirements into the definition and implementation of all EU policies and activities.

national level, the Green Deal has placed environmental issues at the core of competition policy debates. The focus has been mainly on how antitrust rules can help enhance environmental quality protections, promoting a clearly more sustainable form of development.

Regarding the intersection of competition and the environment, some recent initiatives by National Competition Authorities (NCAs) stand out. Recognising the significant challenges posed by the Green Deal and the pandemic to all European public policies, these authorities have initiated discussions on how horizontal agreements and concerted practices among economic operators might be compatible with antitrust law when aimed at advancing environmental objectives.

Saving limited environmental resources, producing less polluting final goods and healthier food products, reducing unnecessary packaging and non-recyclable plastics are issues that the EU competition policies are also called to address. Sustainability has long been a focus of the Authority, based on the belief that competition can help achieve these goals by complementing existing regulatory incentive and disincentive tools,[30] and promoting the transition towards a sustainable growth model. Competition should encourage the efficient use of the planet's scarce resources. Competitive markets foster productive efficiency, improve the allocation of production factors including natural resources, reward companies adopting more energy-efficient technologies, enhance production processes, and stimulate the creation of new products based on renewable energy sources.

Some studies[31] indicate that enhanced environmental sustainability has been effectively promoted through the active interventions of competition authorities, which play a crucial role as

[30] An example of this is the increasing use of fiscal or financial instruments to incentivise (e.g., eco-bonuses) or disincentivise (e.g., sugar tax or plastic tax) certain production of goods or services.

[31] J. Nowag, *Sustainability and Competition Law and Policy* – Background Note, OECD, DAF/COMP(2020)3, December 1, 2020, available at: https://one.oecd.org›DAF›COMP(2020)3›pdf; L. Nesta, F. Vona, F. Nicolelli, *Environmental Policies, Competition and Innovation in Renewable Energy* in *Journal of Environmental Economics and Management* 3 (2014), 396.

guardians of sustainability by rigorously enforcing competition law. These authorities help ensure that market dynamics not only prevent anti-competitive practices but also foster innovation and efficiency aligned with sustainability objectives. By monitoring and guiding corporate behaviour, competition authorities contribute to shaping markets that support the sustainable allocation of resources, encourage the adoption of cleaner technologies, and facilitate environmentally responsible business practices – thus linking regulatory enforcement with broader sustainability goals.

This exemplifies, for instance, the E.ON-Innogy merger where the European Commission[32] imposed conditions of divestment to safeguard competition within the electricity and gas retail markets. E.ON agreed to sell off Innogy's electricity and gas retail businesses, certain wholesale operations, and specific electricity generation assets, ensuring the continued effectiveness of market competition. These divestitures helped prevent the emergence of market dominance, thereby preserving consumer choice and maintaining competitive prices.

Furthermore, this reformulation fostered a more efficient and sustainable market structure by clarifying the separation of roles: E.ON focusing on retail and networks, while RWE concentrates on generation and wholesale activities. Such organisational restructuring encouraged investments in renewable energy and infrastructure modernisation, thus supporting the EU's green transition goals.

A similar example is the Aurubis/Metallo case,[33] where the European Commission carefully monitored the merger to ensure it did not hinder the collection and recycling of copper waste – an essential element of a sustainable circular economy.

These cases illustrate how antitrust interventions can, even indirectly, support environmental sustainability objectives by aligning with strategies for green growth.

[32] EU Commission, Case M.8870 – E.ON/Innogy, (2019)

[33] EU Commission, Case M.9409 Aurubis/ Metallo Group Holding C (2020) 2752 final.

Looking internationally, the case of Panasonic/Sanyo[34] in the USA might serve as an example of an intervention with coincidental spillover effects on sustainability.

In this specific case, the United States Federal Trade Commission (FTC) intervened during Panasonic's acquisition of Sanyo, the two largest global manufacturers of rechargeable NiMH batteries. The FTC imposed conditions requiring the divestiture of certain assets and the transfer of know-how to a third party to prevent excessive market concentration and promote competition. This intervention positively impacted sustainability because rechargeable batteries are crucial for the energy transition, facilitating the storage of renewable energy and reducing environmental impact compared to disposable batteries.

Specifically, the divestiture included Sanyo's main NiMH battery manufacturing plant, employees, licenses and intellectual property, which were sold to FDK Corporation, a Fujitsu subsidiary, enabling FDK to compete effectively with the merged entity. The FTC highlighted that NiMH batteries are critical for various essential uses, including public safety radios, further underlining the importance of the market's competitive health.

Therefore, although the FTC action was primarily designed to protect competition, it also indirectly supported sustainability goals by securing the market for rechargeable batteries that contribute significantly to reducing CO2 emissions and facilitating renewable energy use.

A less explored aspect of the relationship between environment and competition concerns the possibility of directing legal instruments and traditional economic theories beyond the protection of market functioning and the short-term interests of producers and consumers to achieve broader social goals. Whilst connecting to wider debates on antitrust objectives, especially in the US, this aspect has unique significance for environmental transition. Specifically, it concerns the autonomy and freedom of private actors, in the absence of public regulatory intervention,

[34] Decision and Order of FTC, Analysis of Agreement Containing Consent Orders to Aid Public Comment – In the Matter of Panasonic Corporation and Sanyo Electric Co, Ltd (091-050), 2009

to promote innovations and structural changes in production processes that could be of benefit to the environment.

On this specific aspect of the relationship between competition and the environment, recent actions by national competition authorities (NCAs) have emerged. Highlighting the challenges that the Green Deal and the pandemic pose to European public policies, these authorities have sought to initiate debate on the compatibility of antitrust law with agreements and practices among economic operators which promote environmental objectives.

A key example is the Dutch Competition Authority's 2020 draft *Guidelines on Sustainability Agreements*.[35] These guidelines aim to establish shared criteria and methodologies to measure the environmental benefits of such agreements and assess the 'tolerability' of any restrictions on competition under Article 101(3) TFEU. This article allows for a retrospective assessment of agreements that enhance production or distribution, foster technical or economic progress and ensure that competition is not unfairly harmed, while benefits are equitably passed on to consumers.

The Dutch guidelines adopt a broad understanding of sustainability aligned with the UN 2030 Agenda, covering various social and environmental aspects. They define sustainability agreements as those mitigating negative impacts on people, animals, the environment or nature.

The guidelines differentiate between agreements presumed to severely restrict competition, such as price-fixing or market division, and agreements on sustainability that either pose no competitive concerns or can be justified because their environmental and social benefits outweigh their competitive harm. The guide-

[35] *Guidelines. Sustainability Agreements. Opportunities Within Competition law*, from the Netherlands Authority for Consumers and Markets (ACM) (9 July 2020). For further information see A. Moliterni, *Antitrust e ambiente ai tempi del Green Deal: il caso dei 'sustainability agreements'* in *Giornale di diritto amministrativo* n. 3/2021, 354-364; B. Van Rompuy, *Editorial*, in 4 *European Competition and Regulatory Law Rev.* 4 (2020), 257-259; D. Wouters, *Which Sustainability Agreements Are Not Caught by Article 101 (1) TFEU?* in 12 *Journal of European Competition Law & Practice* 3 (2021), 257-270

lines also highlight emerging Dutch sustainability policies that may legitimise certain agreements even beyond the scope of current exemption clauses under competition law.

6. *Conclusions*

In conclusion, the evolving environmental and climate crisis demands that governance frameworks adapt to meet the complexity and urgency of sustainability challenges. Independent Administrative Authorities, endowed with scientific expertise and operational autonomy, emerge as critical actors in this transformative landscape. Their capacity to develop and implement long-term, evidence-based strategies enables them to balance diverse interests, shield regulatory decisions from short-term political pressures, and foster innovation across sectors that are traditionally detached from environmental oversight.

Comparative investigation reveals a nuanced institutional landscape where IAAs not only regulate but increasingly integrate environmental and climate objectives within their mandates. This integration spans multiple sectors – from energy to competition law – reflecting a systemic shift towards embedding sustainability as a core regulatory priority. Moreover, the increasing convergence of IAA roles with emerging advisory bodies and accountability agencies highlights the need for flexible yet robust governance mechanisms that uphold transparency, scientific rigour and democratic legitimacy.

As Europe pursues ambitious Green Deal objectives and legal frameworks evolve to embed sustainability imperatives, the proactive collaboration among IAAs (including in multilevel settings),[36] governments, civil society and markets will be indispensable. Thus, effective environmental governance entails not

[36] Cooperation among Independent Administrative Authorities (IAAs) in the EU is facilitated by a variety of legal and institutional mechanisms embedded in EU law. Examples like the IMPEL network (European Network for the Implementation and Enforcement of Environmental Law) illustrate such collaborative efforts in environmental enforcement. Cooperation can be for-

merely isolated policy adjustments but a holistic reimagining of institutional roles, legal principles and regulatory practices. Such comprehensive integration is essential for genuinely safeguarding societal resilience, resource preservation and intergenerational equity in the face of ongoing global environmental change.

mal – via administrative agreements or joint supervisory teams – or informal, such as networks managing cross-border complaints or consultations between Member States and EU institutions. These mechanisms rest on the principle of sincere cooperation under EU treaties, ensuring consistent enforcement of EU policies and promoting mutual trust and efficiency among national IAAs, particularly in environmental governance.

BALANCING EXPERTISE AND LEGITIMACY: THE EFSA AND THE EEA IN THE GOVERNANCE OF EU SUSTAINABILITY

Alberto Atelli

Abstract: *At the intersection of expertise and democracy, EU sustainability governance depends on the work of its agencies. This paper contrasts the European Food Safety Authority (EFSA), whose scientific opinions carry normative influence, with the European Environment Agency (EEA), which provides descriptive evidence and analyses. Framed by theories of epistemic democracy, the study examines how both institutions balance autonomy, accountability and stakeholder participation. Despite structural asymmetries, EFSA and EEA perform complementary functions, combining normative authority with empirical knowledge to strengthen the coherence and democratic legitimacy of EU sustainability governance.*

Keywords: EU Agencies; Sustainability; Epistocracy; Autonomy; Expertise.

1. *Introduction and Scope of the Research*

When approaching the subject of sustainability, one is immediately confronted with the inherent indeterminacy of the concept itself. Among the various definitions available, the *Oxford Dictionary* – though not prioritising it as the primary meaning – describes sustainability as 'the property of being environmentally sustainable; the degree to which a process or enterprise is able to be maintained or continued while avoiding the long-term depletion of natural resources'.[1] Conceptualising sustainability as a legal principle recognised across a multiplicity of legal systems proves even more complex. Such an endeavour inevitably exposes the notion to criticism that extends well beyond its semantic

[1] *Oxford English Dictionary*, *Sustainability*, available at: https://www.oed.com/dictionary/sustainability_n?tl=true [last accessed: 4 September 2025].

vagueness,[2] raising questions about its fairness[3] and, indeed, its practical utility.[4]

This study refrains from conducting a comprehensive doctrinal and regulatory reconstruction of sustainability. Rather, it seeks to underscore that sustainability – and specifically the principle of sustainability – must be regarded as a concrete and inescapable reality, regardless of the criticisms to which it may be subject. Within this framework, the purpose of the research is to analyse the role played by two key European Union agencies – the European Environment Agency (EEA) and the European Food Safety Authority (EFSA) – in shaping the governance of sustainability.

Before proceeding, it is necessary to identify the theoretical and conceptual framework of this study, specifying the relevant dimensions of the principle of sustainability given the term's polysemous nature. In particular, this contribution refers to the notion of sustainable development, understood in the sense established by the authoritative definition provided in the United Nations' 1987 Brundtland Report,[5] according to which sustainable development means 'meeting the needs of the present without compromising the ability of future generations to meet their own needs', and is further specified as 'the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs'.

[2] R. MacGregor Pelikánová, *Sustainability in Europe: Roots and Evolution of the Current Legal Regime*, Cham, (2025), 35 ff; M.A. White, *Sustainability: I Know It When I See It*, in *Ecol. Econ.* (2013), 213-217; N. Stockmann, *Now they Can Cope? The Green Deal and the Contested Meaning of Sustainability in EU Sectoral Governance*, in *Front. Polit. Sci.* (2024), 2-3.

[3] B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, in *Int. Community Law Rev.* (2006), 25-26; E. Daly, J.R. May, *The Indivisibility of Human Dignity and Sustainability*, in S.A. Atapattu, C.G. Gonzalez, S.L. Seck (Eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development*, Cambridge (2021), 23 ff; M. Lostal, *One-dimensional Law: a Critique of the Human Right to a Clean, Healthy and Sustainable Environment*, in *Int. J. Hum. Rights* (2025), 828-833.

[4] A. Gillespie, *The Long Road to Sustainability: The Past, Present, and Future of International Environmental Law and Policy*, Oxford, (2017), 219 ff.

[5] G.H. Brundtland, *Our Common Future*, Oxford, (1987).

Today, the concept of sustainable development has full recognition in EU primary law and is explicitly enshrined – taking into account the recitals and preambles – a total of seven times: five in the Treaty on European Union (TEU), and once each in the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the EU (CFREU). It is appropriate to examine in some detail these legal texts, starting with the TEU, Article 3, which forms part of the so-called constitutional core of the Treaties.[6] This outlines, along with other key provisions, particularly Article 2, the *telos* of the European Union,[7] or rather its multiple objectives (*teloi*). Paragraphs 3 and 5 are complementary and mutually reinforcing: the former identifies sustainable development as the primary goal of European single market integration,[8] while the latter situates the Union's contribution to the sustainable development of the planet among the objectives of its external action.[9]

This teleological conception of sustainable development is strengthened by the principle of integration,[10] as reflected in the combined reading of Article 11 TFEU and Article 37 CFREU, which require environmental protection to be integrated into all Union policies and activities. As such, sustainable development,

[6] L.D. Spieker, *EU Values Before the Court of Justice*, Oxford (2023), 87 ff; J. Bast, A. von Bogdandy, *The Constitutional Core of the Union: on the CJEU's New, Principled Constitutionalism*, in *Common Market Law Rev.* (2024), 1471 ff.

[7] J. Bast, A. von Bogdandy, *The Constitutional Core of the Union*, cit., 1471.

[8] H.-J. Blanke, S. Mangiameli (Eds), *The Treaty on European Union (TEU): A Commentary*, Berlino-Heidelberg (2013), 172.

[9] H.-J. Blanke, S. Mangiameli (Eds), *The Treaty on European Union (TEU): A Commentary*, cit., 179-180; S.E. Akdoğan, J.P.T. Társia, J.B.M. Diz, R.A. Wessel, *Introduction: EU External Relations Law and Sustainability*, in R.A. Wessel, J. Bergamaschine Mata Diz, J. Péret Tasende Társia, S.E. Akdoğan (eds), *EU External Relations Law and Sustainability*, The Hague, (2024), 1-2; M.W. Gehring, *EU External Relations Law on Trade and Sustainable Development: The Evolving Nature of EU Law and Policy Constraints*, in *Eur. Foreign Aff. Rev.* (2025), 162.

[10] V. Karageorgou, *The Environmental Integration Principle in EU Law: Normative Content and Functions Also in Light of New Developments, Such as the European Green Deal*, in *Eur. Papers* (2023), 167 ff.

enshrined in EU primary law, acts as a programmatic principle guiding EU action, including, for the purposes of this study, its Agencies.

Taking the argument a step further, it could be argued that sustainable development has become part of the common constitutional heritage of the European Union, conceived broadly as comprising both the Union itself and its Member States, including their respective constitutional orders.[11] In the Italian legal system, it should be noted that Constitutional Law No. 1/2022, which amended Articles 9 and 41 of the Italian Constitution, to include two core elements of sustainable development: the protection of the environment and the safeguarding of future generations. Interestingly, the notion of 'sustainable development' is not explicitly mentioned. This legislative choice has divided scholars between those who welcome[12] and those who criticise[13] the omission and raises the question of whether sustainable development nonetheless exists as an implicit constitutional principle within the Italian legal order.

Having thus clarified the specific understanding of sustainability to which this study refers – namely, sustainable development as enshrined in EU primary law – it is now necessary to set out some methodological considerations and to outline briefly the overall structure of this contribution.

1.1. *Methodology and Overview*

The methodological framework of this study primarily adopts a doctrinal approach,[14] relying on sources of European Union

[11] D. Jočienė, *The Concept of Sustainability in National Constitutions: Insights from Constitutional Jurisprudence*, in *Law and Sustainability: Perspectives for Lithuania and Beyond*, Kraków (2023), 45-59.

[12] L. Bartolucci, *Il più recente cammino delle generazioni future nel diritto costituzionale*, in *www.osservatorioaic.it*, 6 July 2021, 216-217; R. Montaldo, *La tutela costituzionale dell'ambiente nella modifica degli artt. 9 e 41 Cost.: una riforma opportuna e necessaria?*, in *Federalismi.it* (2022), 208-210.

[13] R. Bifulco, *Primissime riflessioni intorno alla l. cost. 1/2022*, in *Federalismi.it* 11 (2022), 7-8.

[14] S. Theil, *Carefully Tailored: Doctrinal Methods and Empirical Contribu-*

law, the case law of the Court of Justice of the European Union (CJEU), and relevant legal scholarship. However, given that this research, while legal in nature, addresses the complex relationship between science and policy – or, more specifically, the tension between democratic legitimacy and epistemic legitimacy – an interdisciplinary perspective is necessary, drawing on concepts from political philosophy and social sciences. Furthermore, a comparative method is employed to highlight the differences and similarities between the two EU agencies focussed on in this study.

This study concentrates on the European Environment Agency (EEA) and the European Food Safety Authority (EFSA) because they operate in distinct domains of sustainability governance, thereby offering a richer comparative perspective. Other agencies, such as the European Chemicals Agency (ECHA), while undoubtedly relevant, adopt decision-making mechanisms closer to those of the EFSA making them less suitable for illustrating structural and procedural divergences.

The EFSA produces scientific opinions that are formally non-binding yet possess significant normative influence, shaping EU policies and legislation in practice. In contrast, the EEA primarily provides data, analyses, and reports, whose impact on EU law tends to be more indirect. This contrast allows a precise examination of how soft law instruments affect the democratic legitimacy of EU governance.

Section 2 outlines the relationship between science and policy in EU sustainability governance, focusing on the fundamental role of Agencies. After reconstructing the theoretical framework on epistemic issues, section 3 compares the two Agencies' structures, decision-making procedures and the impact of their work on scientific evidence and regulation. The study concludes with some considerations on the coherence of the sustainability governance system and a synopsis of the main findings.

tions, in *Oxf. J. Legal Stud.* (2025), 5 ff; R. van Gestel, *Quality, Methodology, and Politics in Doctrinal Legal Scholarship*, in *Law and Method* (2023), 5-6.

2. *The Epistemic Governance of Sustainability in the EU: the Epistemic Dilemma*

In the opinion of the author, before proceeding with the analysis of the Agencies and their toolbox, it is both useful and appropriate to situate this research within the context of the debate between proponents of democracy and those of epistocracy. Drawing from the categories of political philosophy helps to mitigate the partiality of an approach that is solely and exclusively legal in studying the relationship between science and political decision-making.

The objective here is not to provide an exhaustive reconstruction of a vast and still ongoing debate, but rather to offer broad conceptual coordinates that can aid in understanding the significant philosophical implications of the subject under examination.

As a preliminary step, the issue of definition must be addressed. Epistocracy is a term coined by David Estlund,[15] who, despite being its theorist, is not an advocate of it. The theory of epistocracy, however, has ancient roots, tracing back to Platonic[16] and Aristotelian[17] thought, passing through John Stuart Mill[18] and Gaetano Mosca,[19] and still finding supporters today.[20] It refers to the 'rule of experts' as opposed to democracy, understood as the 'rule of the majority'. However, such a concise definition

[15] D. Estlund, *Why Not Epistocracy?*, in N. Reshotko (Ed.), *Desire, Identity, and Existence: Essays in Honor of T.M. Penner*, Edmonton: Academic Printing & Publishing, (2003), 53-69.

[16] K. Lippert-Rasmussen, *Estlund on Epistocracy: Critique*, in *Res Publica* (2012), 242.

[17] C. Holst, *What is Epistocracy? Dimensions of Knowledge-Based Rule*, in T. Lund-Olsen et al. (Eds), *Sacred Science? On Science and Its Interrelations with Religious Worldviews*, Wageningen: Wageningen Academic Publishers, (2012), 43.

[18] J.S. Mill, *Considerations on Representative Government*, Project Gutenberg, (2010).

[19] C. Pinelli, *La questione del diritto di voto in Gaetano Mosca e nei costituzionalisti italiani*, in *Materiali per una storia della cultura giuridica* (1998), 433-445.

[20] J. Brennan, *The Right to a Competent Electorate*, in *Philos. Q.* (2011), 700-724; J. Brennan, *Against Democracy*, Princeton, (2016).

gives rise to a series of questions, at least two of which deserve consideration in this context: how to identify experts[21] and, above all, whether an epistocratic decision-making system is preferable to a democratic one.

Regarding the first aspect, the crucial issue lies in the selection process of this body of 'experts'.[22] As for the second, while there are both supporters and critics of epistocracy, a significant portion of the scholarly literature seeks to reconcile democracy and epistocracy by emphasising the epistemic component within democratic systems.[23] This perspective provides the conceptual framework for this research.

In particular, it is useful to refer to Estlund's epistemic proceduralism[24] and Lafont's critique of technocracy.[25]

Epistemic proceduralism, as proposed by David Estlund, argues that democracy is justified not only because it is procedurally fair but also because it tends to produce better decisions through collective deliberation.[26] Unlike epistocracy, epistemic proceduralism values expertise but ensures that decision-making remains democratic, allowing for public debate, institutional

[21] D. Estlund, *Democratic Authority: A Philosophical Framework*, Princeton, (2008), 36.

[22] H. Nowotny, *Democratising Expertise and Socially Robust Knowledge*, in *Sci. Public Policy* (2003), 151-156.

[23] D. Landa, R. Pevnick, *Representative Democracy as Defensible Epistocracy*, in *Am. Polit. Sci. Rev.* (2020), 1-13; J. Van Bouwel, *Strengthening the Epistemic Case Against Epistocracy and for Democracy*, in *Soc. Epistemol.* (2023), 110-126; A. Manor, *Polycentric Limited Epistocracy: Political Expertise and the Wiki-Model*, in *Episteme* (2022), 1-20; U. Bhatia, *Indirect Elections as a Constitutional Device of Epistocracy*, in *Int. J. Const. Law* (2022), 82-111; P. Gunn, *Democracy and Epistocracy*, in *Crit. Rev.* (2014), 59-77; R.E. Goodin, K. Spiekermann, *An Epistemic Theory of Democracy*, Oxford (2018). Antonino Palumbo, on the other hand, denies the feasibility of an epistemic democracy in *Epistemic Models of DD: Reasoning and Judging in an Epistemically Correct Way*, in Id. (Ed.), *The Deliberative Turn in Democratic Theory. The Theories, Concepts and Practices of Democracy*, Cham: Palgrave Macmillan, (2024), 81-123.

[24] D. Estlund, *Why Not Epistocracy?*, cit., *passim*.

[25] C. Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy*, Oxford, (2019), 75-100.

[26] J.B. Min, *Epistocracy and Democratic Epistemology*, in *Polit. Cent. Eur.* (2015), 92-96.

checks and diverse perspectives to refine policies. It strikes a balance between knowledge and legitimacy, integrating expert input within a transparent and participatory framework.

Cristina Lafont's critique of technocracy contends that expert-driven governance undermines democratic legitimacy if it excludes public participation. She challenges the notion that technical expertise alone should guide policy decisions, emphasising that citizens must have a role in shaping the policies that govern them.[27] Unlike technocratic models that prioritise efficiency and expert knowledge, Lafont advocates for deliberative democracy, in which expertise informs decision-making but remains subject to public debate, accountability, and democratic scrutiny.[28]

Now, let us attempt to apply these theories to the present research context. However, first a clarification is necessary. Both Estlund's and Lafont's theses have been widely debated and criticised[29] and it would be impossible to fully account for the extensive discourse surrounding them within this paper. Moreover, the intention here is not to endorse one theory over the other, but rather to use them as a theoretical and conceptual lens through which to frame the present analysis.

[27] C. Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy*, Oxford, (2019), *passim*.

[28] Ibid., 161-188.

[29] Against Estlund we can account for J.B. Min, *Epistocracy and Democratic Epistemology*, cit., 91-109; K. Lippert-Rasmussen, *Estlund on Epistocracy: A Critique*, in *Res Publica* (2012), 241-258; H.S. Richardson, *Estlund's Promising Account of Democratic Authority*, in *Ethics*, (2011), 301-334; M.R. Windsor, *Estlund's Utopophobia: From Aspiration to Social Dependence*, in *Soc. Altern.* (2011), 42-45. A moderate critique of Lafont's theoretical framework comes from J. Habermas, *Commentary on Cristina Lafont, Democracy Without Shortcuts*, in *J. Delib. Democr.* (2020), 10-14; M.E. Warren, *Participatory Deliberative Democracy in Complex Mass Societies*, in *J. Delib. Democr.* (2020), 81-88; T. Tamura, *Another Way for Deepening Democracy Without Shortcuts*, in *J. Delib. Democr.* (2020), 89-95. For a reply to these critiques, see C. Lafont, *Against Anti-Democratic Shortcuts: A Few Replies to Critics*, in *J. Delib. Democr.* (2020), 96-109.

2.1 *EU Agencies and Their Epistemic Contribution to Sustainability Governance*

A complete and accurate reconstruction of the bodies that fall within the category of EU Agencies is by no means an easy task. This is due, on the one hand, to the significant differences among these bodies in terms of functioning, competences, and objectives, and, on the other hand, to the fact that the phenomenon of 'agentification'[30] has unfolded over a period beginning in 1975, with the establishment of the first two Agencies – the European Centre for the Development of Vocational Training (CEDEFOP) in Thessaloniki and the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND) in Dublin – and appears far from having reached its conclusion.[31]

Rather, it seems evident that the creation of new Agencies corresponds to the emergence of new and complex issues that require the intervention of bodies endowed with high-level technical expertise[32] and positioned, if not as fully independent, then at least as autonomous from the EU institutions.[33] Prior to analys-

[30] B. Waluyo, *The Tides of Agencification: Literature Development and Future Directions*, in *Int. J. Public Sect. Manag.* (2022), *passim*; K. Verhoest, *Agencification in Europe*, in E. Ongaro, S. Van Thiel (Eds), *The Palgrave Handbook of Public Administration and Management in Europe*, Palgrave Macmillan, (2018), 327 ff; M. Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford, (2016), 3 ff; E. Vos, *European Agencies and the Composite EU Executive*, in M. Everson, C. Monda, E. Vos (Eds), *European Agencies in Between Institutions and Member States*, Alphen aan den Rijn, (2014), 13-17.

[31] Most recently, one may consider the establishment of the Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA) in 2024.

[32] M. Simoncini, *Administrative Regulation beyond the Non-Delegation Doctrine: A Study on EU Agencies*, Oxford, (2018), 2; A.R. Zito, *Expertise and Power: Agencies Operating in Complex Environments*, in *Politics Gov.* (2015), *passim*; C. Ossege, *Driven by Expertise and Insulation? The Autonomy of European Regulatory Agencies*, in *Politics Gov.* (2015), *passim*.

[33] K. Verhoest, *Agencification in Europe*, cit., 332 ff; C. Ossege, *Driven by Expertise and Insulation? The Autonomy of European Regulatory Agencies*, cit., 102-103; A.R. Zito, *Expertise and Power: Agencies Operating in Complex Environments*, cit., *passim*; T. Jevnaker, *When EU Agencies Set Up Advisory Committees: All About Autonomy?*, in *J. Common Mark. Stud.* (2024), 422 ff.

ing in detail the two previously mentioned Agencies, it is appropriate to identify some essential features and fundamental classifications of EU Agencies in general.

On a formal level, one feature that appears to unite all Agencies is the attribution of legal personality,[34] notwithstanding the uncertain contours of the notion of legal personality within the framework of EU law.[35] On a substantive level, however, the common features seem to be those mentioned earlier, namely: a high degree of technical qualification and a guarantee of autonomy from the Institutions and other EU bodies. This autonomy, however, does not exclude the possibility of oversight,[36] including judicial review, to which Agencies remain subject.[37]

Among the possible classifications of EU Agencies, two are worth mentioning. The first relates to the objectives for which a given Agency has been established, or, more precisely, the pillar within which its activity is situated under the former structure of the EU Treaties. By way of example, one may consider the role of the European Union Intellectual Property Office (EUIPO) in the construction of the single market, Frontex within the Area of Freedom, Security and Justice, or the European Defence Agency (EDA) in the context of the Common Security and Defence Policy.

A second categorisation concerns the source of law that pro-

[34] K. Lenaerts, P. Van Nuffel, T. Corthaut, *EU Constitutional Law*, Oxford, (2021), 467.

[35] M. Ruffert, *Personality under EU Law: A Conceptual Answer towards the Pluralisation of the EU*, in *Eur. Law J.* (2014), 347-351.

[36] M. Simoncini, *Administrative Regulation beyond the Non-Delegation Doctrine: A Study on EU Agencies*, cit., 142; K. Lenaerts, *EU Constitutional Law*, cit., 467; M. Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, cit., 299 ff; N. Font, I. Pérez Durán, *The European Parliament oversight of EU agencies through written questions*, in *J. Eur. Public Policy* (2016), 1350 ff.

[37] Joined Cases 9/56 and 10/56, *Meroni & Co, Industrie Metallurgiche, SAS v High Authority of the European Coal and Steel Community*, [1958] ECR 53, 173; Case C-270/12, *United Kingdom v Council and European Parliament*, ECLI:EU:C:2014:18, para. 53. M. Simoncini, *Administrative Regulation beyond the Non-Delegation Doctrine: A Study on EU Agencies*, cit., 169 ff; M. Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, cit., 249 ff.

vides the legal basis for each Agency. While the vast majority of Agencies are established and regulated by secondary sources of EU law, specifically Regulations, others – such as Europol – are provided for directly in the Treaties.[38]

Several other classifications could be drawn, for example, with reference to the organisational structure and functions of the various Agencies. However, the foregoing observations will suffice for present purposes. We can now proceed to highlight the role that the Agencies play, by virtue of their expertise and autonomy, in the governance of sustainability within the European Union.

Having thus clarified some essential coordinates of the phenomenon of agentification within the European Union, we can now turn to the analysis of the role and importance of EU Agencies in the governance of sustainability. Just as the introductory chapter highlighted the polysemy and the uncertain contours of the concept of sustainability, it is necessary here to add a caveat regarding the complexity of sustainability governance in the EU context. In particular, it can be argued that sustainable development, in addition to shaping the activities of the EU, of the Member States, and even their local authorities,[39] has increasingly assumed a horizontal dimension.[40] This evolution stems from the recognition that the objectives of sustainable development can hardly be achieved without the involvement of private actors.[41] Two examples illustrate this point effectively. First, one may consider a recent significant legislative intervention by the EU: the

[38] K. Lenaerts, *EU Constitutional Law*, cit., 467.

[39] R. Bandari, E.A. Moallemi, A. Kharrazi, R. Šakić Trogrlić, B.A. Bryan, *Transdisciplinary Approaches to Local Sustainability: Aligning Local Governance and Navigating Spillovers with Global Action Towards the Sustainable Development Goals*, in *Sustain. Sci.* (2023), 1294-1295.

[40] L.J. Kotzé, *Arguing Global Environmental Constitutionalism*, in *Transnatl. Environ. Law* (2012), 221-222.

[41] K. Buhmann, L. Feld, *Shifting Boundaries: a Transnational Legal Perspective on the EU Corporate Sustainability Due Diligence Directive*, in *Transnatl. Legal Theory* (2024), 374 ff; M. Thorens, N. Bernaz, O. Hospes, *Advocating for the EU Corporate Sustainability Due Diligence Directive Against the Odds: Strategies and Legitimation*, in *J. Common Mark. Stud.* (2025), 606-607.

Corporate Sustainability Due Diligence Directive.[42] This instrument assigns a central role to economic operators, who can no longer pursue profit at the expense of sustainability. Secondly, the Renewable Energy Communities introduced and regulated by the RED II Directive[43] aim to promote both the production and the sharing of energy from renewable sources. These two examples are emblematic: in the first case, companies' activities are bound by compliance with specific sustainability standards, while in the second, associative models are encouraged, generating environmental benefits as well as economic advantages for citizen-users. Therefore, sustainable development necessarily requires the active participation of private actors, although the focus of this contribution remains on the role of the EU Agencies.

2.2. *Challenges*

To better highlight the delicate role played by the Agencies in the governance of sustainability, it is useful to revisit two concepts briefly mentioned earlier but which deserve further and deeper examination: expertise and autonomy. On the one hand, the expertise of these bodies makes them indispensable for political decision-makers when adopting policies that are technically and scientifically sound, a requirement that becomes unavoidable when addressing sustainability-related challenges. However, this raises once again the epistemic dilemma, forcing us to confront the question of who qualifies as an expert. On the other hand, autonomy is equally essential to ensure that the processes of data collection, analysis, and, where appropriate, decision-making or deliberation carried out by the Agencies remain free from external interference. In this regard, it becomes neces-

[42] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024, *on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859*.

[43] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018, *on the promotion of the use of energy from renewable sources (recast)*.

sary to clarify from whom and from what such autonomy must be protected – namely, political influence and private interests.

2.2.1. *Expertise*

If the governance of sustainability through the Agencies touches upon the most sensitive aspects of the tension between politics and science, that is, between democratic legitimacy and epistemic legitimacy, it is nonetheless true that the very notion of epistemic legitimacy is far from being universally accepted. In particular, it has been argued that there is a need to 'democratise expertise' and, conversely, to 'expertise democracy'. From this perspective, some further reflections are required. The starting point must be the recognition that the governance of sustainability cannot remain a technocratic exercise insulated from public deliberation. The European Food Safety Authority (EFSA) and the European Environment Agency (EEA) wield significant influence over food safety and environmental policies, yet their mandates and decision-making authority are often misunderstood. The EFSA is not a regulatory agency but a scientific risk assessment body, providing advice to policymakers while risk management decisions rest with the European Commission and Member States.[44] Similarly, the EEA primarily collects and disseminates environmental data, serving as a knowledge broker rather than an enforcement body.[45] To enhance democratic legitimacy, transparency and policy responsiveness, these agencies must integrate structured participation, contested knowledge and foresight methodologies to ensure that decisions reflect not only scientific assessments but also societal values and lived experiences.[46] This aligns with the argument

[44] M. Klintman, A. Kronsell, *Challenges to Legitimacy in Food Safety Governance? The Case of the European Food Safety Authority (EFSA)*, in *Eur. Integr.* (2010), 322-323.

[45] D.R. Keleman, *The Politics of "Eurocratic" Structure and the New European Agencies*, in *West Eur. Polit.* (2002), 101.

[46] C. Holst, J. Christensen, *The Epistemic Quality of Expert Bodies: From Normative-Theoretical Concept to Empirical Measurement*, in *Acta Polit.* (2024), 824-827.

that 'citizens are, and should remain, a driving force of the transition'.[47]

A crucial step is transforming public consultations from formal exercises into substantive participatory processes. The EFSA integrates public consultations at various stages of the scientific assessment process, including during the development of assessment protocols and before finalising scientific outputs. However, stakeholder influence is often limited by the procedural structure which prioritises scientific independence and evidence-based assessments.[48] Instead, consultations should be multi-staged, engaging consumer groups, small-scale food producers and public health advocates at early decision-making phases. The EEA must similarly integrate climate justice organisations, local sustainability initiatives and local knowledge holders into the definition of environmental indicators.[49] These reforms align with deliberative democracy models which prevent regulatory capture by dominant actors while broadening the epistemic base of policy decisions.[50]

Beyond consultation, participatory expert panels should replace insular advisory bodies that privilege established epistemic communities.[51] It has been argued that while public consultations can serve as a mechanism for gathering knowledge, they often reinforce existing divides rather than fostering genuine dialogue: 'Public consultations are inadequate for fully understanding complex topics, and thus should not be used as a standalone tool for feeding into policy'.[52] The EFSA's risk assessment

[47] European Commission, *Communication from the Commission: The European Green Deal*, COM (2019) 640 final, Brussels, 11 December 2019.

[48] EFSA (European Food Safety Authority), *Guidelines on EFSA Consultations*, EFSA Supporting Publication (2018): EN-1390, (2018).

[49] C. Matti, L. Bontoux, K. Jensen, *Strategic Foresight Framework for Addressing Agency in Sustainability Transitions: A Co-Creation Approach*, in *Front. Sustain.* (2025), 2-3.

[50] E. Krick, *Creating Participatory Expert Bodies: How the Targeted Selection of Policy Advisers Can Bridge the Epistemic-Democratic Divide*, in *Eur. Polit. Soc.* (2019), 105-106.

[51] J. White, *Technocratic Myopia: On the Pitfalls of Depoliticising the Future*, in *Eur. J. Soc. Theory* (2024), 269-270.

[52] A. Frelih-Larsen, C.-A. Chivers, I. Herb, J. Mills, M. Reed, *The Role of Public Consultations in Decision-Making on Future Agricultural Pesticide Use:*

panels must incorporate nutritionists, consumer safety advocates and independent researchers to ensure that food regulations balance technical precision with ethical concerns. The EEA, meanwhile, should ensure urban planners, renewable energy cooperatives and sustainability-focused enterprises participate in the knowledge-production process, bridging institutional expertise with local innovation.[53] Such 'targeted selection' mechanisms enhance both scientific rigour and democratic representation.[54]

2.2.2. *Autonomy*

The issue of the autonomy of EU Agencies is characterised by a high degree of complexity, and it is possible here to focus only on certain salient aspects and problematic nodes. Nevertheless, the aspect concerning the autonomy of the Agencies is a decisive one, and its analysis is necessary to complete this general framework, which serves as a preliminary step for the study of the two agencies that will be examined shortly.

A first clarification concerns the terms autonomy or independence, even though the two are often used interchangeably in the literature.[55] In this regard, the term autonomy is considered more appropriate in light of the relationship between the Agencies and those EU institutions capable of exercising influence or control over them.[56] A further clarification concerns the fact that the *de jure* autonomy of the Agencies[57] may not fully correspond to their *de facto* autonomy, since the latter may be affected by

Insights from European Union's Farm to Fork Strategy Public Consultation, in *J. Environ. Policy Plan.* (2023), 488.

[53] V. Bader, *Sciences, Politics, and Associative Democracy: Democratizing Science and Expertizing Democracy*, in *Innov.: Eur. J. Soc. Sci. Res.* (2014), 420-422.

[54] E. Krick, *Creating Participatory Expert Bodies*, cit., 108-112.

[55] M. Busuioc, M. Groenleer, *The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives*, in M. Everson, C. Monda, E. Vos (eds), *European Agencies in Between Institutions and Member States*, The Hague: Kluwer Law International (2014), 185.

[56] Ibid., 185.

[57] M. Busuioc, *Accountability, Control and Independence: The Case of European Agencies*, in *Eur. Law J.* (2009), 600.

informal dynamics that can either limit or expand the actual scope of their autonomy.[58] Indeed, it has been observed that Agencies with a similar institutional design may nonetheless diverge in practice with regard to their levels of autonomy, depending also on the ability of their governing bodies to secure legitimacy and to build networks of alliances.[59] Moreover, from a regulatory perspective, Agencies may adapt their interpretative approaches over time and display risk averse behaviour to protect and strengthen their autonomy.[60] On the basis of these considerations, it can safely be affirmed that the quantification of an Agency's autonomy, although naturally anchored to legal texts, may nonetheless vary in practice, and a fundamental role in this respect is played by the way in which the executive organs interpret and exercise their mandate.

The autonomy under discussion may be distinguished according to whether it is exercised vis-à-vis the Union's political institutions or private actors. As regards the institutions, the relationship between the Agencies and the European Commission should first be highlighted. While not one of dependence, it can be understood in terms of subordination.[61] It has been observed that the Commission exercises its powers of guidance and oversight more or less strictly at its own convenience.[62] Given this, it is argued that the greater the Commission's influence in agenda-setting, the greater the alignment with its positions, and thus the greater the sacrifice of autonomy of the Agencies.[63] At the same

[58] Ibid., 604.

[59] M.L.P. Groenleer, *Agency Autonomy Actually: Managerial Strategies, Legitimacy, and the Early Development of the European Union's Agencies for Drug and Food Safety Regulation*, in *Int. Public Manag. J.* (2014), 261-262.

[60] C. Ossege, *Driven by Expertise and Insulation? The Autonomy of European Regulatory Agencies*, in *Politics Gov.* (2015), 107-108.

[61] M. Egeberg, J. Trondal, N.M. Vestlund, *The quest for order: unravelling the relationship between the European Commission and European Union agencies*, in *J. Eur. Public Policy* (2015), 611-612.

[62] M. Thatcher, *The Creation of European Regulatory Agencies and its Limits: a Comparative Analysis of European Delegation*, in *J. Eur. Public Policy* (2011), 805-806.

[63] E. Ruffing, *European (Networked) Agencies Between Independence and Influence*, in *J. Eur. Public Policy* (2022), 1551-1552.

time, the Commission has repeatedly relied on the Meroni doctrine to restrict the attribution of new prerogatives to the Agencies and to limit their autonomy.[64]

As regards the relationship between the Agencies and private actors, it seems more appropriate to speak of independence rather than autonomy. This is because it is necessary to establish a set of safeguards to prevent the occurrence of the phenomenon commonly referred to as regulatory capture.[65] In order to prevent and avoid this undesirable phenomenon, the solution adopted has been to limit the possible access points of private stakeholders to the Agencies and to introduce what has been defined as procedural insulation.[66] However, while the insulation of Agencies is useful in protecting them from external influences, an Agency cannot entirely disregard the private interests affected by its activities if it is to regulate effectively. The solution deemed appropriate has therefore been the establishment of so-called advisory committees, which have the undeniable advantage of increasing transparency in the relationship between the Agency and private stakeholders, while also allowing stakeholders to contribute to the fulfilment of the Agency's mandate,[67] thereby giving voice to the plurality of private interests – not exclusively those of an economic or industrial nature.[68]

[64] M. Wood, *Mapping EU Agencies as Political Entrepreneurs*, in *Eur. J. Polit. Res.* (2018), 405-406; M. Thatcher, *The Creation of European Regulatory Agencies and its Limits: a Comparative Analysis of European Delegation*, cit., 800;

[65] W.Y. Li, *Regulatory Capture's Third Face of Power*, in *Socio-Econ. Rev.* (2023), 1219 ff; R.A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, in D. Carpenter, D.A. Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, Cambridge (2013), 49-56.

[66] C. Ossege, *Driven by Expertise and Insulation? The Autonomy of European Regulatory Agencies*, cit., 104.

[67] T. Jevnaker, *When EU Agencies Set Up Advisory Committees: All About Autonomy?*, cit., 423.

[68] Ibid., 420.

3.1. *The EFSA and the EEA*

The European Environment Agency (EEA), based in Copenhagen, was established by EEC Regulation 1210/1990 (as amended by EEC Regulation 933/1999 and EC Regulation 401/2009) with the purpose, defined in Article 1 (2) of the Regulation, of supporting the European Community (now the Union) and the Member States in the governance of sustainability. In particular, the Agency's contribution consists in providing:

(a) objective, reliable and comparable information at European level enabling them to take the requisite measures to protect the environment, to assess the results of such measures and to ensure that the public is properly informed about the state of the environment, and to that end;
(b) the necessary technical and scientific support.

The European Food Safety Authority (EFSA), located in Parma, was established by Articles 22 *et seq.* of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, also known as the General Food Law Regulation. In this case, the mission of the Authority, pursuant to paragraphs 2-6 of Article 22 of the Regulation, is to:

> […] provide scientific advice and scientific and technical support for the Community's legislation and policies in all fields which have a direct or indirect impact on food and feed safety. It shall provide independent information on all matters within these fields and communicate on risks.
>
> 3. The Authority shall contribute to a high level of protection of human life and health, and in this respect take account of animal health and welfare, plant health and the environment, in the context of the operation of the internal market.
> 4. The Authority shall collect and analyse data to allow the characterisation and monitoring of risks which have a direct or indirect impact on food and feed safety.
> 5. The mission of the Authority shall also include the provision of:

(a) scientific advice and scientific and technical support on human nutrition in relation to Community legislation and, at the request of the Commission, assistance concerning communication on nutritional issues within the framework of the Community health programme;
(b) scientific opinions on other matters relating to animal health and welfare and plant health;
(c) scientific opinions on products other than food and feed relating to genetically modified organisms as defined by Directive 2001/18/EC and without prejudice to the procedures established therein.

6. The Authority shall provide scientific opinions which will serve as the scientific basis for the drafting and adoption of Community measures in the fields falling within its mission".

Both Agencies play a fundamental role in gathering scientific evidence to support political decision-making. A key difference is that the EEA is limited to collecting and disseminating data, while the EFSA is also called upon to provide opinions. This point will be addressed more thoroughly in the section concerning the normative power of the two Agencies, understood as their impact at the decision-making level within the EU system of sustainability governance. Before proceeding with that analysis, however, it is necessary to consider the organisational structure of the two Agencies.

3.2. *Organisational Aspects*

The European Environment Agency is governed by a Management Board[69] and a Bureau,[70] which are responsible for providing the overall strategic direction of the Agency, approving its

[69] Regulation (EC) No 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network (Codified version), art. 8 para. 1.

[70] Ibid., art. 8 para. 2.

annual and multi-annual work programmes, budgets and reports, and ensuring accountability to both the EU institutions and the member countries. Day-to-day management is carried out by the Executive Director,[71] supported by an Internal Control Coordinator to guarantee proper oversight and compliance. The Executive Director is also advised by the Scientific Committee,[72] an independent body of external experts that ensures the scientific quality, independence and relevance of the Agency's outputs. Its epistemic function is further complemented by the more specialised European Scientific Advisory Board on Climate Change, which was introduced by Article 3 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

The Agency's work is organised into thematic departments and cross-cutting services.[73] The Environment Department addresses core environmental domains such as pollution and health, freshwater and marine ecosystems, and biodiversity and nature. The Climate Department covers climate neutrality, energy and mobility, climate risk and resilience, as well as greenhouse gas reporting and verification; it also acts as the secretariat to the European Scientific Advisory Board on Climate Change. The Sustainability Department focuses on the transition towards more sustainable systems, addressing areas such as circular economy, sustainability indicators, fair transitions, and governance processes. In addition to these thematic domains, the Agency relies on several horizontal support functions. The Communications Department is responsible for publishing reports and data, managing public communication and stakeholder networks, and ensuring transparency and accessibility of environmental information. The Digital Department handles information and com-

[71] Ibid., art. 9.

[72] Ibid., art. 10.

[73] European Environment Agency, *EEA Organisational Chart as of 01.09.2025*, available at: https://www.eea.europa.eu/en/about/who-we-are/governance/organisational-chart [last accessed: 15 September 2025].

munication technology, data management and Earth observation services, providing the digital backbone for the Agency's knowledge and information systems. The Resources Department covers human resource management, finance, legal assurance and facilities management.

Beyond its internal departments, the EEA operates within a wider networked system. A cornerstone of this system is Eionet (the European Environment Information and Observation Network), which links national focal points and reference centres in the member and cooperating countries, ensuring that environmental data are gathered, quality-assured and comparable across Europe.[74] The Agency also coordinates with several European Topic Centres[75] (ETCs), which are external consortia of institutions providing specialised expertise and technical support in areas such as biodiversity, circular economy, climate adaptation and mitigation, environmental health and sustainability transitions.

The structure of the EFSA is similar to that of the EEA and, pursuant to Article 24 of the General Food Law Regulation, is composed of the Management Board, the Executive Director and staff, the Advisory Forum and the Scientific Committee and Scientific Panels.

The Management Board[76] is made up of 14 members appointed by the Council, in consultation with the European Parliament, plus one representative of the European Commission. Its role is to provide strategic direction, adopt the Authority's internal rules, work programmes and annual reports, oversee financial regulations and budgets, and ensure that the EFSA carries out its mission in line with EU legislative and policy priorities. Members are appointed for a four-year term (renewable once) and the Board elects its own Chair.

[74] S. Dammann, D. Gee, *Science into Policy: The European Environment Agency*, in J. Lentsch, P. Weingart (Eds), *The Politics of Scientific Advice*, Cambridge, (2011), 240.

[75] *EEA Organisational Chart as of 01.09.2025*, cit.

[76] General Food Law Regulation, art. 25.

The Executive Director,[77] appointed by the Management Board from a shortlist proposed by the Commission, is the legal representative of the EFSA and responsible for the day-to-day administration of the Authority. The Director prepares work programmes, implements the decisions of the Management Board, ensures scientific and administrative support for the EFSA's scientific bodies, manages the budget and staff, and maintains contact with the European Parliament. Each year, the Director submits draft reports, programmes, accounts and budgets to the Management Board for approval.

The Advisory Forum[78] brings together representatives of each Member State's competent bodies that perform tasks similar to those of the EFSA. It provides advice to the Executive Director, fosters cooperation between the EFSA and national authorities, avoids duplication of scientific work, promotes networking and serves as a mechanism for sharing information on potential risks and emerging issues. It is chaired by the Executive Director and meets at least four times a year.

Finally, the Scientific Committee and the Scientific Panels[79] constitute the scientific backbone of the EFSA. The Scientific Committee ensures consistency across EFSA's scientific work, addresses cross-cutting and multisectoral issues, and may establish working groups when needed. The Scientific Panels, each composed of independent experts, issue scientific opinions in specific areas such as food additives, feed, plant health, GMOs, nutrition, biological hazards, contaminants and animal health and welfare. Members are appointed for three years (renewable) through open calls, and both the Committee and the Panels adopt their own procedures and may organise public hearings.

On the basis of this brief examination of the organisation of these two Agencies, it is appropriate to focus on certain key aspects. First, senior positions within both Agencies and the dualism between the Management Board and the Executive Director. The former is a collegial body which, in some way, functions as a

[77] Ibid., art. 26.
[78] Ibid., art. 27.
[79] Ibid., art. 28.

link between politics and the Agencies.[80] This is evident from the appointment procedure for the members of the Board, as defined in the respective founding regulations, in which the Commission, Parliament and Member States (in the case of EFSA, the Council)[81] all participate. The role of the Management Board is therefore one of supervision and strategic guidance, to which the Agency's organs – above all the Executive Director – must conform, without undermining the epistemic legitimacy deriving from scientific expertise. An interesting difference lies in the presence, in the case of the EEA, of the so-called Bureau, which is simply the Management Board in a reduced composition, operating when the latter is not convened.[82]

A second aspect of interest concerns the relationship with the Member States' agencies. In the case of the EFSA, one of its constituent organs is the Advisory Board, which means that representatives of the Member States are directly integrated into the Agency's organisational structure. EIONET, on the other hand, while being a branch of the EEA and dependent on it, is not an organ or office of the Agency but rather a partnership network operating on the basis of ten-year strategic plans under the aegis of the EEA without being structurally part of it.[83]

We observe significant differences in the stakeholder relationships of the two Agencies and varying degrees of openness towards interest groups. In the case of the EFSA, it is noteworthy that the founding Regulation, in Recital 56 and Article 42, expressly requires openness towards stakeholders, explicitly mentioning consumers. Therefore, the Agency has developed an articulated system of venues that serve as points of contact with the

[80] S. Dammann, D. Gee, *Science into Policy: The European Environment Agency*, in J. Lentsch, P. Weingart (eds), *The Politics of Scientific Advice*, Cambridge, (2011), 240.

[81] General Food Law Regulation, art. 25.

[82] M. Martens, *Voice or Loyalty? The Evolution of the European Environment Agency (EEA)*, in *J. Common Mark. Stud.*, (2010), 887.

[83] European Environment Agency, *Delivering Data and Knowledge to Achieve Europe's Environment and Climate Ambitions. EEA-Eionet Strategy 2021-2030*, Luxembourg: Publications Office of the European Union, (2021).

wide range of interests arising along the entire food chain,[84] thereby enhancing the role and weight of civil society.[85] The involvement of stakeholders, above all consumers, is emphasised by the EU legislator, in light of the EFSA's mission to ensure food safety in situations of risk. This task undoubtedly requires the collection and processing of scientific data, but in determining the acceptable level of risk, such data needs to be integrated with value-based considerations.[86]

The same cannot be said of the EEA, whose mandate is to collect and process scientific data on the environment in order to enable policymakers to make informed decisions, without providing precise value-laden indications. EEA activity – essentially consisting of scientific research – remains a prerogative of the scientists co-opted within the Agency. The identification of stakeholders is undoubtedly more difficult here than in the EFSA's case, since the concept of environment is far broader than that of food safety. Nevertheless, it might be possible to isolate certain differentiated positions, such as those particularly exposed to the consequences of climate change. Even after undertaking the challenging task of identifying such stakeholders, a further difficulty would remain of integrating them effectively into the Agency's 'machinery'. Notwithstanding the limits of its mission and structure, the EEA appears fully aware of the social significance of its work and of the importance of civil society in environmental protection. This may be seen in its attention to institutional communication strategies.[87]

[84] *EFSA – European Food Safety Authority*, 'Stakeholders / Engagement Platforms', available at: https://www.efsa.europa.eu/en/stakeholders/engagement-platforms.

[85] L. Leone, *EFSA under Revision: Transparency and Sustainability in the Food Chain*, in *Yearb. Eur. Law* (2020), 537-538.

[86] Ibid., 559.

[87] European Environment Agency, *Communication, Environment and Behaviour. A Scoping Study on the Links between Public Communication, Environment Policy Implementation and Behavioural Science*, EEA Report No. 13/2016 (2016), p. 7 ff.

3.3. *The Normative Power*

In this section, the discussion will focus on normative power (or the absence thereof), making use of the polysemy of this expression. Normative power is understood here both in the sense of issuing binding and non-binding acts, and in the sense of the Agencies' ability to influence political decision-makers through their activities. The decision to move on these two different levels recognises that even an Agency with limited or entirely absent powers of rule-making and/or regulation may nonetheless exert significant influence on political decision-making. It is therefore appropriate, before examining the two Agencies in detail, to recall a precise and still valid taxonomy of EU Agencies[88] with reference to their 'normative power'. Griller and Orator outline a scale ranging from the so-called 'ordinary agencies',[89] which are not entrusted with decision-making powers and limit themselves to activities that may be described as neutral – for example, in the case of the EEA, the collection and processing of scientific data – to the next level, that of Agencies with 'pre-decision-making'[90] functions, in which the EFSA is included. The latter are characterised by the issuance of non-binding decisions which, however, exert a decisive influence on the adoption of binding acts by the Commission.[91] This scale culminates with the so-called 'rule-making Agencies',[92] which exercise binding regulatory powers, as in the case of the EASA. The two Agencies examined here occupy the two lowest steps of this scale, but may still be able to exercise a decisive influence on the rule-makers.

It is therefore useful to turn to the typical acts of the two Agencies. The EFSA has at its disposal a range of instruments that it may issue depending on the circumstances. The most sig-

[88] S. Griller, A. Orator, *Everything under Control?: The 'Way Forward' for European Agencies in the Footsteps of the 'Meroni' Doctrine*, in *Eur. Law Rev.* (2010), 8-9.

[89] Ibid., 8.

[90] Ibid., 8-9.

[91] M. Kritikos, *EU Policy-Making on GMOs: The False Promise of Proceduralism*, London (2018), 182.

[92] Ibid., 9.

nificant tool is provided directly by Article 22 (6) of its founding Regulation: the Scientific Opinions, which explicitly serve as the 'scientific basis for the drafting and adoption of Community measures in the fields falling within its mission'. The Scientific Opinions are issued, pursuant to Article 29 (1):

"(a) at the request of the Commission, in respect of any matter within its mission, and in all cases where Community legislation provides for the Authority to be consulted;

(b) on its own initiative, on matters falling within its mission.

The European Parliament or a Member State may also request the Authority to issue a Scientific Opinion on matters falling within its mission".

Of considerable importance are the Guidelines addressed to EFSA experts, aimed at ensuring quality and methodological consistency in the research activities carried out on behalf of the Authority. These Guidelines perform the fundamental function of safeguarding the epistemic authority of the EFSA.

The EEA, by contrast, is an Agency that does not provide the political decision-maker with an opinion but merely with scientific evidence. The documents issued by the EEA are therefore those typical of the dissemination of scientific content, such as reports or briefings. These documents have official scientific value but, unlike the EFSA, do not contain an opinion and do not suggest to the European institutions or the Member States which paths to follow in order to protect the environment and achieve sustainability objectives. Nevertheless, it has been observed that the EEA is still capable of influencing decision-makers: preliminarily, by framing the problem,[93] and *ex post*, by assessing the effectiveness of the sustainability policies implemented.[94]

4. *Conclusion*

The analysis confirms that the EFSA and the EEA occupy distinct but complementary epistemic roles within the EU's sustain-

[93] S. Dammann, D. Gee, *Science into Policy: The European Environment Agency*, cit., 239-240.

[94] Ibid.

ability governance framework. The EFSA's mandate is to deliver independent scientific advice and risk assessments on food and feed safety issues, giving rise to explicit normative recommendations that directly inform legislation and regulatory decisions. By contrast, the EEA is tasked with gathering, quality-checking and disseminating environmental data and evidence-based analyses. In other words, the EFSA generates science-based normative opinions about what is safe or acceptable in the food chain, whereas the EEA provides empirical descriptive information on environmental states and trends. This functional asymmetry means that the EFSA's work tends to embed value judgments about risk thresholds, while the EEA's outputs serve as the factual basis for setting sustainability targets without prescribing policy *per se*.

At the same time, their technical authority highlights a broader tension between expertise and democratic legitimacy. As commentators observe, EU agencies often derive legitimacy from their specialised knowledge,[95] but this can conflict with democratic ideals of accountability. In practice, the EFSA's high-profile scientific judgments (for example on controversial pesticides or GMOs) periodically attract public scrutiny and political debate,[96] testing its democratic justification. The EEA's role as a neutral 'provider of facts' tends to command broad acceptance, yet its influence is more indirect. The contrast reflects an epistemic-democratic dilemma: the EFSA's normatively charged expertise can appear to encroach on political choices, whereas the EEA's evidence-based mandate keeps it safely within technocratic bounds. The study finds that the two agencies face different legitimacy pressures. EFSA must carefully justify its scientific opinions through transparent procedures and stakeholder dialogue, while the EEA maintains legitimacy mainly through reputation for objectivity and the credibility of its data.

[95] T.N. Fjørtoft, A. Michailidou, *Beyond Expertise: the Public Construction of Legitimacy for EU Agencies*, in *Polit. Res. Exch.* (2021), 2.

[96] M. Garcia-Alonso, C. Novillo, P. Kostolaniova, M. Martinez Parrilla, E. Alcalde, N. Podevin, *The EU's GM Crop Conundrum: Did the EU Policy Strategy to Convert EFSA GMO Guidance into Legislation Deliver on its Promises?*, in *EMBO Rep.* (2022), 25-26.

These differences mirror important structural and normative asymmetries. The EFSA was established by EU Regulation in 2002 with a strong legal remit to advise risk managers, and is accountable to an EU management board and ultimately to the Commission and Parliament. Its founding statute explicitly mandates ongoing consultation with consumer, industry, producer and other interest groups. By contrast, the EEA (created in 1993) operates as an independent agency structured around the European Environmental Information and Observation Network (Eionet): it collaborates closely with national environment agencies in 38 countries to compile data. In normative terms, the EFSA's outputs often carry explicit policy implications (for instance, recommending limits on contaminants), whereas EEA publications frame normative sustainability goals (such as emissions targets) only indirectly via scientific assessments. These divergent missions mean the two agencies sit in different parts of the governance system. On one hand, this specialisation enhances coherence by ensuring that each agency focuses its expertise where it adds most value. On the other hand, their different procedures and priorities require effective coordination to maintain an integrated sustainability strategy. In sum, the system's coherence depends on recognising these complementarities: the EFSA's pre-regulatory science and the EEA's environmental monitoring are two sides of the same knowledge coin.

Finally, both the autonomy and stakeholder engagement mechanisms of the EFSA and EEA modulate their contributions to sustainability. Their operational independence tends to strengthen the credibility of their outputs. For example, EU evaluations note that the Commission 'depends on [the EEA's] robust and reliable data' and thus highly values the Agency's independence.[97] Similarly, the EFSA enforces strict rules to safeguard the objectivity of its experts. At the same time, both agencies employ inclusive engagement to bolster legitimacy. The EFSA maintains multiple consultation channels – from a formal Stakeholders' Consultative Platform to public comment windows –

[97] European Environment Agency, *Evaluation of the European Environment Agency. Final Report*, Cowi, April 2013, 34-35.

explicitly to promote openness and trust. The EEA engages through its scientific committee and broad Eionet network; in practice it has built strong links with key users (Member States, the Commission and other stakeholders). By balancing independent expertise with participatory input, these mechanisms help align technical advice with societal needs. Overall, the study finds that the EFSA and the EEA each enhance EU sustainability governance in their own way: their autonomous expertise lends authority to policy discussions, and their structured stakeholder ties help ensure that such expertise remains relevant and accountable. The result is a system that, despite its asymmetries, can integrate diverse sources of knowledge to inform more coherent and democratically attuned sustainability policies.

FOOD SAFETY GOVERNANCE BETWEEN THE EU AND ITALY: ONE HEALTH AND DATA INTEROPERABILITY AS DRIVERS OF INTEGRATION

Nicola Brignoli

Abstract: *This article analyses the multilevel governance of food safety in Italy and the European Union, highlighting the interplay between institutions, regulatory frameworks and information infrastructures. It argues that fragmentation of competences and weak coordination mechanisms undermine the effectiveness of policies, particularly in the absence of interoperable data systems. Building on recent EU legal developments – from the General Food Law to the Data Act – the study emphasises the role of data as a regulatory infrastructure. It concludes by advocating integrated approaches, grounded in the One Health paradigm, and the potential establishment of an independent national authority.*

Keywords: Food Safety Governance; Multilevel Governance; Data Interoperability; One Health; Public Health Protection.

1. *Introduction: the Complexity of Food Regulation and the Role of Data*

The regulation of the food sector stands as one of the most significant examples of contemporary regulatory complexity. It stems from the interplay between global and local dimensions and from the coexistence of multiple interests: the protection of public health, consumer safety, environmental preservation, economic and social needs, business competitiveness and the overall functioning of the European internal market. The multiplicity of these factors translates into a transversal and multilevel regulatory framework, shaped by the interaction of heterogeneous sources and by competences distributed across different tiers of government.[1]

[1] The literature on the subject is extremely extensive. Without any claim to completeness, see, among many others: P. Borghi, I. Canfora, A. Di Lauro, L.

In this scenario, food governance cannot be confined to the definition of substantive rules alone but also requires organisational and technological tools capable of supporting coordination among the numerous actors involved. A decisive role is played by information systems which must ensure the timely and secure collection, circulation and processing of data. The effectiveness of the regulatory framework increasingly depends on the availability and interoperability of data, which have now become a true infrastructure of governance.

The transversal nature of the subject is clearly reflected in the plurality of interests it encompasses and in the complexity of the legal relations that arise therefrom, both horizontally (between private operators and actors) and vertically (between administrations and citizens). At the European level, food safety is grounded on multiple legal bases – from the Common Agricultural Policy (Art. 43 TFEU) to the free movement of goods (Art. 114 TFEU), from public health (Art. 168 (4) TFEU) to consumer protection (Art. 169 TFEU). Such plurality renders the system inevitably integrated yet not always coherent,[2] highlighting the need for effective institutional cooperation and for interoperable information flows to sustain its functioning.

The Italian experience likewise reflects significant fragmentation and overlap of competences. Art. 117 (3) of the Constitution

Russo (Eds), *Trattato di diritto alimentare italiano e dell'Unione europea*, Milano, 2024; M.T. Roberts (Ed.), *Research Handbook on International Food Law*, Cheltenham, 2023; F. Albisinni, *Strumentario di diritto alimentare europeo*, Milano, 2023; L. Scaffardi, V. Zeno-Zencovich (Eds), *Cibo e diritto. Una prospettiva comparata*, Roma, 2020; A. Isoni, M. Troisi, M. Pierri (Eds), *Food Diversity Between Rights, Duties and Autonomies. Legal Perspectives for a Scientific, Cultural and Social Debate on the Right to Food and Agroecology*, Berlin, 2018; G. Steier, K.K. Patel (Eds), *International Food Law and Policy*, Berlin, 2017; L. Costato, F. Albisinni (Eds), *European and Global Food Law*, Padova, 2016; S. Masini, *Diritto alimentare. Una mappa delle funzioni*, Milano, 2014; M. Ferrari, U. Izzo, *Diritto alimentare comparato. Regole del cibo e ruolo della tecnologia*, Bologna, 2012; A. Jannarelli, *Profili giuridici del sistema agro-alimentare tra ascesa e crisi della globalizzazione*, Bari, 2011; B. van der Meulen, M. van der Velde, *European Food Law Handbook*, Wageningen, 2008; R. Vitolo, *Il diritto alimentare nell'ordinamento interno e comunitario*, Napoli, 2003.

[2] As observed by M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto amministrativo*, Torino, 2023, 6.

assigns concurrent legislative powers over both health protection and food, thereby making constant cooperation between the State and the Regions indispensable. While this arrangement allows the regulatory framework to be adapted to territorial specificities, it also requires robust coordination mechanisms, given the high risk of normative conflicts and duplications. The ability to integrate and share data relevant to food safety thus becomes an essential condition for ensuring uniformity and effectiveness in public action.[3]

The global dimension of food supply chains – characterised by the increasing distance between the place of production and the place of consumption – demands an ever more transnational regulatory approach. The dynamics of globalisation have indeed extended the scope of regulation beyond state borders, generating continuous interaction between legal orders, principles and models. In this context, the availability of comparable and shareable data at the international level constitutes an integral component of the very architecture of multilevel food governance.

Building on these premises, this contribution pursues four main objectives. First, it traces the gradual European attraction of food law and the emergence of polycentric governance architectures at Union level. Second, it examines how these arrangements are mirrored, and in part fragmented, within the Italian system, at both central and regional tiers of government. Third, it analyses the still unresolved issue of data interoperability within multilevel food safety governance, highlighting its legal and organisational implications. Finally, it advances a few proposals – including the establishment of a national independent food safety authority and the strengthening of shared data infrastructures – aimed at fostering a more integrated model of food safety governance, consistent with the One Health paradigm.

[3] Cf. H.J.P. Marvin, E.M. Janssen, Y. Bouzembrak, P.J.M. Hendriksen, M. Staats, *Big Data in food Safety: An Overview*, in *Critical Reviews* in 57 *Food Science and Nutrition* 11 (2017), 2286 ff.

2. *The European Attraction of Food Regulation and the Centrality of Information Networks*

In Italian the word *sicurezza* means safety and security, therefore, the Italian concept of *sicurezza alimentare* (food safety/security) traditionally evokes a twofold dimension, encompassing both.[4] In English terminology the concept is separated, food safety concerns the wholesomeness of food and the protection of human health,[5] and food security refers to the stability of supplies and the guarantee of universal access to adequate food.[6] Although both perspectives are relevant for understanding the phenomenon, legal regulation has developed more comprehensively on the side of food safety, closely connected with the protection of health (Art. 32 of the Italian Constitution) and with European Union law.[7]

[4] Cf. L. Costato, S. Rizzioli, *Sicurezza alimentare*, in *Dig. disc. priv.*, *sez. civ.*, agg., Torino, 2010, and V. Pacileo, *Il diritto degli alimenti*, Padova, 2003, esp. 34 ff.

[5] According to M. Ramajoli, *Dalla «food safety» alla «food security» e ritorno*, in *Amministrare* 2-3 (2015), 277-278, in addition to the traditional hygienic-health profile, food safety today also includes toxicological safety, namely the wholesomeness of the intrinsic composition of the food, and nutritional safety, understood as the absence of adverse effects on the consumer arising from the manner, frequency or quantity of consumption.

[6] As observed by C. Napolitano, *Sicurezza alimentare ed etica della sostenibilità: profili di diritto amministrativo*, in *Federalismi.it* 18 (2018), 9, it is a concept imbued with ethical and humanitarian concerns, aimed at ensuring the adequacy of nutrition not only from a hygienic and sanitary perspective, but also in relation to the age, lifestyle, gender and socio-economic condition of individuals.

[7] At European level, food safety assumed a fully-fledged form following the crisis of the so-called 'mad cow disease' (bovine spongiform encephalopathy – BSE), which broke out in the 1990s and generated a profound crisis of citizens' trust in the institutions responsible for food control. In response to this emergency, the European Commission initiated a process of comprehensive reform of food legislation, drawing on policy documents such as the 1997 Green Paper and the 2000 White Paper on Food Safety, which laid the conceptual and political foundations for the adoption of Regulation (EC) No 178/2002, still regarded as the founding text of EU food law. On this point, see N. Longobardi, *A proposito di autorità italiana per la sicurezza alimentare fra disciplina europea e interventi normativi nazionali*, in *Riv. dir. alim.* 4 (2009), 2.

The Europeanisation of food law originated within the process of constructing the single market, with the objective of removing technical barriers to the free movement of products.[8] In this process, the case-law of the Court of Justice played a driving role: from the *Dassonville*[9] judgment, which defined as prohibited restrictions any measures capable of hindering trade, to the principle of mutual recognition introduced in *Cassis de Dijon*,[10] according to which a Member State may not prohibit the marketing of a product lawfully manufactured in another Member State, and finally to *Keck*,[11] which refined the limits of that principle. In this initial phase, food law was drawn into the supranational sphere for primarily economic purposes, aimed at ensuring the integration of the internal market.

Over time European food law has expanded its objectives, increasingly focusing on consumer protection and public health. This shift reflects a broader trend within the European legal order towards responding to growing social expectations of protection in areas directly affecting the individual.[12] The turning point was Regulation (EC) No 178/2002, which introduced the general principles of food law, established the European Food Safety Authority (EFSA) and structured procedures in the field of food safety. This act provided unity and coherence to a previously

[8] As noted by M. Savino, *Autorità e libertà nell'Unione europea: la sicurezza alimentare*, in *Riv. trim. dir. pubbl.* 2 (2007), 415, this explains the introduction of legislation aimed at removing technical barriers to the free movement of food products, barriers often arising from differences between national rules on the designation, form, size, weight, composition, presentation, labelling and packaging of food and beverages.

[9] Court of Justice, judgment of 11 July 1974, Case C-8/74, *Dassonville* v. *SA éts. fourcroy and SA breuval & cie*, esp. para. 5.

[10] Cf. Court of Justice, judgment of 20 February 1979, Case C-120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein*, in esp. para. 14.

[11] Cf. Court of Justice, judgment of 24 November 1993, Joined Cases C-267/91 and C-268/91, *Keck* and *Mithouard*.

[12] Cf. M. Ramajoli, *La giuridificazione del settore alimentare*, cit., 666, observes that from this perspective in the food sector, consumer protection drives the adoption of legislation imposing sales designations and information obligations that are certainly more stringent than those provided for the protection of consumers in general, due to the peculiarity of the good in question.

fragmented sector, serving as a genuine constitutional charter of EU food law.[13]

The attraction of the matter at European level was also driven by factors external to strictly legal reasoning: the connection with agriculture and animal husbandry, long since brought under EU competence through the common agricultural policy, and the strategic weight of the European food industry in global markets, which made a unitary regulatory intervention necessary to consolidate the Union's international competitiveness.[14]

At the organisational and procedural level, Regulation (EC) No 178/2002 also inaugurated a new governance of food safety. It is characterised by a polycentric and multilevel structure, in which public authorities operating at European, national and territorial level interact with private operators and consumer associations.[15] In order to govern a sector marked by increasing interdependence between legal orders and by constant exposure to transnational risks, a networked dimension of the system has progressively developed within this architecture, based on mechanisms of coordination and cooperation that extend across the entire supply chain, both in day-to-day management and in crisis response.

A network may be understood, first and foremost, as a structure – or, if one prefers, an infrastructure – whether material or immaterial, which connects a plurality of elements, giving rise to a system of reciprocal relations between them and presupposing one or more centres of direction responsible for steering its overall functioning towards a shared objective.[16] From this perspec-

[13] As effectively noted by B. van der Meulen, M. van der Velde, *European Food Law Handbook*, cit., 253. By contrast, M. Ramajoli, *La giuridificazione del settore alimentare*, cit., 660 refers instead to a legal framework for food law.

[14] Thus S. Cassese, *Proposte per un'Autorità nazionale per la sicurezza alimentare*, in *Giorn. dir. amm.* 7 (2002), 799 ff., observes that the issue of food safety is, for several reasons, of European dimension.

[15] As observed by M.P. Chiti, *Il diritto amministrativo dell'integrazione*, in G. Falcon (Ed.), *Il diritto amministrativo dei paesi europei tra omogeneizzazione e diversità culturali*, Milano, 2005, 377, who underlines that Community law marked the transition from the dualistic administrative system to a polycentric and multilevel system.

[16] In these terms, F. Vetrò, *Il servizio pubblico a rete. L'esempio paradigmatico dell'energia elettrica*, Torino, 2005, 1-2.

tive, the network expresses the way in which the system operates and the type of relationship that is established among its components: it can be depicted as a set of nodes and edges,[17] where the nodes represent the points of interaction between the actors involved and the edges are the trajectories along which information, decisions and control move. A communication originating from a given node reaches others by travelling along these edges and intersecting, progressively, further nodes, with the result that each element is at once a recipient and a potential relay point for transmission within the network.

This configuration responds to the need to govern a sector characterised by growing interdependence between legal orders and by constant exposure to transnational risks, in a context in which different competences overlap and the principle of conferral is in operation (Art. 2 TFEU). It gives rise to a multilevel institutional model with a networked structure, which operates through both formal and informal instruments and develops within the framework of the principle of sincere cooperation (Art. 4 (3) TEU).

Networks may be either stable or variable: among the former are the Rapid Alert System for Food and Feed (RASFF)[18] and the

[17] As aptly noted by V. Paganizza, *Il sistema di allarme rapido per gli alimenti e i mangimi (RASFF): comunicazione e collaborazione per la gestione del rischio*, Padova, 2023, 71.

[18] Among the main contributions on the RASFF system, the following may be mentioned: V. Paganizza, *Il sistema di allarme rapido per gli alimenti e i mangimi (RASFF)*, cit.; V. Paganizza, *I soggetti della gestione del rischio a livello europeo e nazionale: il sistema di allarme rapido*, in P. Borghi, I. Canfora, A. Di Lauro, L. Russo (Eds), *Trattato di diritto alimentare italiano e dell'Unione europea*, cit., 222 ff.; M. D'Addezio, G. Maccioni, *The Rapid Alert System*, in L. Costato, F. Albisinni (Eds), *European and Global Food Law*, cit., 301 ff.; F. Capelli, *Il regolamento (UE) n. 16/2011 della Commissione europea sul "sistema di allarme rapido" in materia di prodotti alimentari e di mangimi*, in *Dir. com. scambi internaz.* 2 (2012), 367 ff.; G. Maccioni, *Il "Sistema" di allarme rapido*, in *Riv. dir. alim.*, 2011, 2, 3 ff.; L. Petrelli, *Il Sistema di allarme rapido per gli alimenti ed i mangimi*, in *Riv. it. dir. alim.* 4 (2010), 14 ff.; C. Pinelli, *Sistema di allarme rapido per alimenti e mangimi. Peculiarità e problematiche applicative*, in *Alimenta*, 11-12, 2006, 223 ff.; P. Lattanzi, *Il sistema di allarme rapido nella sicurezza alimentare*, in *Agr. Ist. Merc.* 3 (2004), 237 ff.; L. Petrelli, *Commento all'articolo 50, Commento all'articolo 51, Commento all'articolo 52*

network of scientific organisations recognised by EFSA; among the latter are the crisis coordinators established by Implementing Decision (EU) 2019/300.

The RASFF system represents an emblematic example for understanding the nature and functioning of these functional networks. It operates as a rapid information-exchange network involving the Member States, the Commission and EFSA, which are interconnected through national contact points. Its logic is not hierarchical but reticular: it is based on a plurality of nodes which are equivalent to one another, albeit entrusted with different roles, they are united by the shared objective of ensuring the highest possible level of health protection. Within this framework, an 'alert' takes the form of a qualified item of information which, once a risk has emerged in connection with the consumption of food or the use of feed or food-contact materials, triggers a mechanism of targeted surveillance and swift risk management, the effectiveness of which depends to a large extent on the speed with which information circulates through the network.[19]

These networks also differ according to the type of relationships they establish: they may be horizontal, based on the functional equivalence of nodes, as in the case of the Advisory Forum between EFSA and national authorities; or vertical, where one node exercises functions of direction or transmission, as in the RASFF system, where the Commission acts as coordinator and clearing house for information.[20] There are also 'transitional' networks, activated in emergency situations, such as the crisis units composed of the Commission, EFSA and Member States, which jointly participate in risk assessment.

Networks can be distinguished by their function: some are intended to support the activities of agencies or other networks (the so-called 'networks of networks'); others facilitate the circu-

del Regolamento (CE) n. 178/2002, in *La sicurezza alimentare nell'Unione europea. Commentario a cura dell'Istituto di diritto agrario internazionale e comparato (IDAIC)*, in *Le nuove leggi civili commentate*, Padova, 2003, 428 ff.

[19] V. Paganizza, *Il sistema di allarme rapido per gli alimenti e i mangimi (RASFF)*, cit., 69 ff.

[20] Cf. L. Petrelli, *Il Sistema di allarme rapido per gli alimenti ed i mangimi*, in *Riv. it. dir. alim.* 4 (2010), 1 ff.

lation of information, forming 'virtual' but operational architectures. An example of the former is the network formed by EFSA and the national competent authorities in the relevant sectors; an example of the latter is the RASFF.[21]

This has confirmed the networked dimension of the system, founded on coordination and cooperation mechanisms that extend throughout the supply chain, both in ordinary management and in crisis response. Yet despite the degree of formalisation achieved, these networks suffer from significant limitations. Their effectiveness depends on the loyal cooperation of Member States and on the efficiency of national structures, in the absence of sanctioning mechanisms or a strong federal power at EU level.[22] Consequently, food governance remains an advanced but incomplete system, which finds in its networked dimension a flexible tool of management, still susceptible to further developments towards more integrated and binding models.

Ultimately, the networked configuration of European food governance represents not only an organisational model based on multilevel cooperation, but also an information infrastructure grounded in the quality, timeliness and interoperability of data exchanged among the various actors. The effectiveness of food safety thus depends not only on the loyal cooperation of Member States, but also on the system's capacity to ensure reliable and shared information flows, able to sustain rapid and coherent decision-making in a context increasingly marked by complex and transnational risks.

[21] On this threefold classification of networks, see M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto amministrativo*, cit., 192-193. For this latter classification, the Author draws on the taxonomy proposed by L. Ammannati, *Governance e regolazione attraverso reti*, in P. Bilancia, L. Ammannati (Eds), *Governance dell'economia e integrazione europea. Governance multilivello regolazione e reti*, vol. 2, Milano, 2008, 287, which distinguishes between: networks coinciding with agencies, networks whose nodes are agencies, networks 'generated' by agencies, and finally 'virtual' networks used by agencies in the performance of their tasks.

[22] Thus M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto amministrativo*, cit., 194-195.

3. *The European Level of Food Governance*

Food safety lies at the intersection of globally relevant interests and competences, within a regulatory framework characterised by pluralism and polycentrism. Alongside national and regional sources, EU law and international standards also play a role, elaborated by bodies such as the World Trade Organization (WTO) and the Codex Alimentarius Commission (CAC).[23] The latter, in particular, constitutes a paradigmatic example of global governance: although it is an intergovernmental body, it relies on the contribution of expert committees, including those of private origin, tasked with defining internationally recognised food standards.

While acknowledging the importance of international actors, the core of this system remains the legal order of the European Union and, in close connection, that of the Member States. The EU has indeed assumed a central role in constructing an innovative and multilevel food governance system, capable of steering internal choices and serving as a model beyond its own borders. This applies not only to normative elaboration, but also to the progressive structuring of information networks and shared databases, which have now become indispensable to ensuring the effectiveness and coherence of food safety policies across supply chains that consistently transcend national boundaries.

3.1. *The Pivotal Role of the European Commission*

Within the multilevel governance of food safety, the European Commission occupies a pivotal position, to the extent that it may be regarded as the principal risk manager at supranational level. This centrality is the outcome of a progressive strengthening of its competences, initiated with Regulation (EC) No 178/2002 and subsequently consolidated with the Treaty of Lisbon.[24]

[23] On this subject, see D. Bevilacqua, *La sicurezza alimentare negli ordinamenti giuridici ultrastatali*, Milano, 2012, 67 ff.

[24] By virtue of Arts. 290 and 291 TFEU, the European Commission plays

The 2002 Regulation conferred upon the Commission a broad range of functions: from the management of the Rapid Alert System for Food and Feed (RASFF, Art. 50) to the adoption of emergency measures (Art. 53), and the drafting of the General Plan for Crisis Management (Art. 55). These are complemented by the power to monitor the activity of the EFSA (Art. 61), to propose reforms where necessary, and by legislative and regulatory competences in specific sectors such as labelling, traceability, food contact materials and novel foods.

The framework was redesigned following the BSE crisis, whichexposed the dangers of overlapping risk assessment and risk management.[25] In response, the Regulation introduced a clear separation of functions: assessment entrusted to EFSA, management retained by the Commission, exercised with the assistance of the Standing Committee on Plants, Animals, Food and Feed

a central role in the implementation of the Union's binding legal acts, thereby confirming itself as the principal executive body of EU law. This configuration is the outcome of a gradual institutional evolution, culminating in the entry into force of the Treaty of Lisbon, which rationalised the distribution of competences among the Union's institutions in the field of executive functions. In particular, Art. 291 TFEU provides that, where uniform conditions for implementing legally binding acts of the Union are required, the Commission is normally entrusted with adopting implementing acts, save for the limited and circumscribed cases in which the Treaties confer such a function upon the Council. Within this framework, the Commission has assumed an essential role of coordination and of ensuring the effective enforcement of EU law, carrying out secondary regulatory activity and positioning itself as the operational cornerstone of the Union's administrative system. On this point, see L. Costato, *Poteri delegati e poteri di esecuzione della Commissione U.E.: dalla PAC al TFUE*, in *Riv. dir. alim.*, 1, 2010, 3 ff.

[25] In the system prior to Regulation (CE) No 178/2002, the absence of a clear separation between the stage of technical-scientific assessment and that of subsequent discretionary decision-making often led to choices that lacked transparency, accompanied by inadequate and uncoordinated institutional communication, thereby fuelling a growing climate of mistrust towards the European institutions and, indirectly, the national ones. This also resulted in significant difficulty in identifying the body responsible for the elaboration of scientific opinions, thereby weakening the principle of institutional accountability. On this point, see L. Salvi, *Diritto alimentare e innovazione tecnologica nella regolazione dell'Unione europea. Profili di legittimità e accountability*, Napoli, 2017, 100.

(SCoPAFF), established under Art. 58 of Regulation (EC) No 178/2002. The Committee, composed of Member State representatives and divided into thematic sections,[26] contributes to a negotiated decision-making model, in which the Commission – though without voting rights – plays a mediating and coordinating role, with the possibility of referral to the Appeal Committee in cases of disagreement.

The Commission's interaction with SCoPAFF is particularly intense in procedures concerning pre-market authorisation,[27] where the safety of potentially risky products or substances must be assessed. In this context, the Committee serves as a forum for reconciling national interests, thereby reinforcing the overall balance of the system.[28]

Alongside its risk management and secondary regulatory functions, the Commission also exercises a role of political impetus and strategic coordination. As holder of the right of legislative initiative, pursuant to Art. 17 (2) TEU and Arts. 289 and 294 TFEU, it has promoted the adoption of measures which progressively shaped the substantive standards of European food law: from labelling (Regulation (EU) 2011/1169) to traceability (Art. 18 of Regulation (EC) No 178/2002), from microbiological safety to food contact materials (Regulation (EC) No 1935/2004), and the regulation of novel foods[29] (Regulation (EU) 2015/2283).

[26] These comprise fourteen sections: animal health and welfare; animal nutrition; biological safety of the food chain; import controls and conditions; forest reproductive material; general food law; genetically modified food and feed and environmental risk; novel food safety and toxicology; plant protection products; plant health; propagating material and plants of fruit genera and species; propagating material of ornamental plants; seeds and propagating material for agriculture and horticulture; vine.

[27] Cf. L. Salvi, *Il "nodo" della comitologia nell'Unione europea e le prospettive di riforma. Spunti di riflessione attorno al sistema di autorizzazione dei pesticidi ed al «caso glifosato»*, in *Riv. it. dir. alim.* 1 (2019), 10.

[28] Cf. M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto amministrativo*, cit., 204, who observes that the submission of a project to the committee also represents an opportunity to find a balance between the potentially opposing interests of Member States.

[29] On this point, see V. Paganizza, *I nuovi alimenti ("Novel Foods")*, in P. Borghi, I. Canfora, A. Di Lauro, L. Russo (Eds), *Trattato di diritto alimentare italiano e dell'Unione europea*, cit., 560 ff., L. Scaffardi, *Novel Food, una sfida*

In parallel, Regulation (EU) 2017/625 entrusted the Commission with the coordination of official controls carried out by the Member States,[30] through the Health and Food Audits and Analysis office (formerly FVO), ensuring the uniform application of EU law throughout the food chain. Finally, the Commission represents the Union in the main international fora, such as the Codex Alimentarius and the WTO, contributing to the definition of global standards consistent with the Union's legal framework.

Within the Commission, a crucial role is played by the Directorate-General for Agriculture and Rural Development (DG AGRI), responsible for issues linked to the common agricultural policy and product quality, and by the Directorate-General for Health and Food Safety (DG SANTE), responsible for the implementation of food law, emergency management and coordination of RASFF.[31] These structures not only support regulatory activity but also sustain an increasingly sophisticated information infrastructure, based on the collection, exchange and processing of comparable data, in line with Europe's evolution towards 'data-driven' governance.

Data management has indeed become one of the most significant aspects of the Commission's role: through information net-

ancora aperta tra sicurezza alimentare, innovazione e sviluppo sostenibile, in L. Scaffardi, V. Zeno-Zencovich (Eds), *Cibo e diritto. Una prospettiva comparata*, cit., 735 ff., and G. Formici, *Al via il Regolamento sui* "Novel Food", in *Forum quad. cost.*, 2018, 1 ff.

[30] On this point, see F. Albisinni, *Il Regolamento (UE) 2017/625: controlli ufficiali, ciclo della vita, impresa e globalizzazione*, in *Riv. dir. alim.*, 1, 2018, 11 ff., and D. Bevilacqua, *Il nuovo regolamento sui controlli alimentari e l'"accentramento decentrato" della governance europea*, in *Giorn. dir. amm.*, 6, 2018, 738 ff.

[31] Additional competences in the agri-food sector are exercised, in a complementary capacity, by other Directorates-General of the Commission: in particular, the Directorate-General for Maritime Affairs and Fisheries (DG MARE), with regard to the food safety of fishery products and the sustainability of marine resources; the Directorate-General for the Environment (DG ENV), which deals with the environmental aspects of food production and the sustainable management of natural resources; and the Directorate-General for Competition (DG COMP), responsible for the application of antitrust and State aid rules in the agri-food sector, with implications for the proper functioning of the internal food market.

works, common databases and digital traceability systems, it ensures that decisions are grounded in scientific evidence that is accessible and interoperable. In this regard, the principles of transparency and openness promoted by Regulation (EU) 2019/1381 reinforce the democratic legitimacy of the system, although concerns remain over the confidentiality of SCoPAFF's work, seemingly at odds with Regulation (EC) No 1049/2001 on access to documents. The Committee's deliberations and preparatory documents are, in fact, classified as confidential *ab origine* under Art. 13 of its internal rules. This approach appears to be in tension with the principles enshrined in Regulation (EC) No 1049/2001, which require accessibility of legislative documents,[32] save in cases of serious risk to the decision-making process.[33]

Lastly, the Commission is a key actor in the integrated and sustainable policies introduced by the Farm to Fork strategy,[34] part of the European Green Deal,[35] which connects food safety with environmental, health and social objectives. This confirms that its role goes well beyond risk management, extending to the defini-

[32] As noted by M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto amministrativo*, cit., 205.

[33] Pursuant to Art. 12, para. 2 of Regulation (EC) No 1049/2001, 'legislative documents, that is, documents drawn up or received in the course of procedures for the adoption of legally binding acts in or for the Member States, should be made directly accessible', except in cases where disclosure would undermine the protection of important public interests or where documents have been classified as sensitive.

[34] Cf. COM(2020) 381 *final* of 20 May 2020. It is a ten-year plan aimed at making European food systems sustainable and designed to impact all stages of the agri-food chain, from production to distribution and consumption.

[35] Cf. COM(2019) 640 *final* of 11 December 2019. On the European Green Deal: D. Bevilacqua, E. Chiti, *Green Deal. Come costruire una nuova Europa*, Bologna, 2024; P. Cucumile, *Il* Green deal *europeo*, in *Amb. dir.*, 2021, 1 ff.; A. Moliterni, *Il* Green Deal *europeo e le sfide per il diritto dell'ambiente*, in *Riv. quadr. dir. amb.*, 1, 2021, 4 ff.; C. Scissa, *What Room for the 1998 Aarhus Convention in the European Green Deal? An Analysis of the Possible Reluctance of the Court of Justice*, in Ibid., 94 ff.; R. De Paolis, *Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism*, in Ibid., 112 ff.; M.C. Carta, *Il* Green Deal *europeo. Considerazioni critiche sulla tutela dell'ambiente e le iniziative di diritto UE*, in *Euroius.it*, 2020, 54 ff.

tion of a systemic vision of the food chain, in which the regulatory and informational dimensions are increasingly inseparable.

3.2. *The Technical-Scientific Function of EFSA*

The European Food Safety Authority (EFSA), established by Regulation (EC) No 178/2002, constitutes the technical-scientific core of European governance, despite lacking regulatory powers in the strict sense.[36] Notwithstanding its formal designation as an 'Authority', the EFSA is in fact a typical decentralised EU agency, tasked with providing scientific advice and coordinating the activities of national competent authorities. Its creation, inspired by the French model of the *Agence française de sécurité des*

[36] Observes L. Salvi, *Diritto alimentare e innovazione tecnologica nella regolazione dell'Unione europea. Profili di legittimità e accountability*, cit., 106, that EFSA was conceived as a pre-decision-making agency, lacking as such regulatory powers in the strict sense. In this regard, N. Longobardi, *A proposito di autorità italiana per la sicurezza alimentare fra disciplina europea e interventi normativi nazionali*, cit., 6 qualifies it as a sui generis independent authority since it is not vested with the institutional function of regulating the sector in which it operates (food safety), but rather entrusted with the responsibility of risk assessment in the same sector. Similarly, according to M. Cocconi, *I pareri dell'Autorità europea per la sicurezza alimentare e le garanzie per il cittadino rispetto a giudizi scientifici arbitrati o incerti*, in N. Bassi, J. Ziller (Eds), *La formazione procedimentale della conoscenza scientifica ufficiale. Il caso dell'agenzia europea per la sicurezza alimentare (EFSA)*, Torino, 2017, 22-23, the legislature chose not to shape EFSA as an authority of genuine regulation, but rather as the necessary point of reference for the assessment of the risk connected with food safety through the adoption of scientific opinions. On this point, see also: A. Alemanno, S. Gabbi (Eds), *Foundations of EU Food Law and Policy. Ten Years of the European Food Safety Authority*, London, 2014; S. Gabbi, *L'autorità europea per la sicurezza alimentare. Genesi, aspetti problematici e prospettive di riforma*, Milano, 2009; F. Alemanno, *The European Food Safety Authority at Five, in European Food and Feed Law Review* 1 (2008), 2 ff.; R. O' Rourke, *Scientific Conflict, the EFSA and a Common Risk Assessment, in European Food and Feed Law Review* 4 (2007), 197 ff.; F. Capelli, *Nuova disciplina del settore alimentare e autorità europea per la sicurezza alimentare*, Milano, 2006; A. Nucci, *L'Autorità europea per la sicurezza alimentare: uno strumento per la protezione dei consumatori?*, in *Dir. giur. agr. alim. amb.*, 2006, 728 ff.; M. Benozzo, *I principi generali della legislazione alimentare e la nuova Autorità*, in *Dir. giur. agr. amb.*, 2003, 208 ff.

aliments[37] (AFSA, later integrated into the *Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail* – ANSES), and the replacement of the numerous scientific committees within the Commission, marked a decisive shift towards a system based on the clear separation of risk assessment and risk management (Art. 6), with the former entrusted to EFSA and the latter retained by the Commission.[38]

This reform was a response to the shortcomings revealed during the BSE crisis, when the overlap between technical and decision-making tasks undermined transparency and accountability. The EFSA was thus conceived as the Union's principal science advisor, ensuring impartiality, independence and transparency in the assessment of risks relating to food and feed.

In this role, the EFSA performs advisory functions, primarily through the adoption of non-binding scientific opinions prepared by the Scientific Committee and permanent Panels at the request of the Commission, the European Parliament or the Member States. The Authority also enjoys a power of self-tasking, allowing it to address issues deemed particularly significant: in such cases, when its opinions are taken up by the institutions, the EFSA effectively exercises a para-legislative function of normative impetus.[39]

Although formally non-binding, the EFSA's opinions exert a decisive impact: they guide legislative production, shape administrative practice, and are frequently relied upon in judicial proceedings as technical-scientific standards for assessing the lawfulness of public measures or the conduct of economic operators.[40]

[37] As note by V. Parisio, *Sicurezza alimentare, funzione amministrativa e giudice amministrativo interprete del diritto interno ed europeo*, in C. Bottari (Ed.), *La sicurezza alimentare. Profili normativi e giurisprudenziali tra diritto interno, internazionale ed europeo*, Rimini, 2015, 82.

[38] Cf. A.G. Caragli, M. Leggio, *Governance e regolazione del settore agroalimentare verso il paradigma One Health*, Torino, 2024, 31. On this point, see also E. Chiti, *I principi della valutazione del rischio nel settore della sicurezza alimentare*, in N. Bassi, J. Ziller (Eds), *La formazione procedimentale della conoscenza scientifica ufficiale*, cit., 9 ff.

[39] Cf. S. Gabbi, *L'autorità europea per la sicurezza alimentare. Genesi, aspetti problematici e prospettive di riforma*, Milano, 2009, 155-157.

[40] Cf. M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto am-*

The framework governing the EFSA's organisation and functioning places particular emphasis on values that must consistently underpin its activity: independence, scientific excellence, transparency and innovation. These represent the pillars of its technical-scientific legitimacy and the criteria against which its performance is to be evaluated. From this perspective, the increasing emphasis on data – rendered accessible, interoperable and shareable – constitutes a natural expression of these principles, as it guarantees the verifiability of assessments, strengthens transparency and fosters innovation through the circulation of knowledge.

The EFSA also acts as the central node in a European network of food safety, based on the principle of loyal cooperation. Working with national scientific authorities and research centres, it ensures coherence and vertical coordination, helping to harmonise risk assessments and to consolidate mutual trust among institutions. This networked structure results in a shared knowledge infrastructure, where the circulation and interoperability of data assume an ever more decisive role.

The reform introduced by Regulation (EU) 2019/1381 profoundly reshaped the EFSA's organisation and procedures. It strengthened the role of Member States in the Management Board, redefined the criteria for the selection of scientific experts, and, most importantly, enhanced the principle of transparency. Among the most significant innovations are the mandatory publication of scientific studies submitted by economic operators and the establishment of a centralised database (Art. 32-ter), intended to improve the traceability and accessibility of information. This reflects the awareness that regulatory quality depends not only on the scientific excellence of experts but also on the availability of open, comparable and timely data.[41]

ministrativo, cit., 209, who refers, in this regard, to Consiglio di Stato, Sixth Chamber, judgment of 12 February 2020, No 1053, which in turn relied on certain EFSA opinions to review the lawfulness of administrative sanctioning measures adopted by the Italian Competition Authority (AGCM).

[41] On the importance of data quality for ensuring the maintenance of EFSA's scientific rigour standards, see S. Cappè, M. Gilsenan, E. O'Dea, J. Ri-

In this light, the EFSA is not merely an advisory body, but increasingly a platform for the management of scientific knowledge, feeding the entire European food safety system. Its databases, developed in cooperation with Member States and private operators, have become strategic infrastructures to guarantee interoperability and reliability across globalised supply chains.[42]

Nonetheless, certain critical issues remain. The reform reinforced the Commission's political control over the EFSA, granting it the power to conduct periodic evaluations of its activity and even to propose its reform or abolition.[43] Such a provision, arguably intended to rebalance the wide autonomy accorded to the Authority, inevitably fuels the risk of latent political influence, notwithstanding the formal separation between risk assessment and risk management.[44]

Controversial cases, such as those concerning glyphosate and bisphenol A, have further highlighted the need to strengthen safeguards for independence, particularly with respect to conflicts of interest, external pressures and the phenomenon of revolving doors. While the new framework reinforced the principle of loyal cooperation between the EFSA, the Member States and other European agencies, the need remains for more robust instruments to prevent and sanction undue interference.

Overall, the EFSA today represents an advanced model of a technical-scientific agency, grounded in independence, transparency and innovation. Its credibility, however, depends on its abil-

chardson, D. Verloo, *The Future of data in EFSA*, in *EFSA Journal*, 7 December 2018.

[42] On this point, see S. Sapienza, *Big Data, Algorithms and Food Safety. A Legal and Ethical Approach to Data Ownership and Data Governance*, Berlin, 2022.

[43] In the previous version, it was provided that, every six years, the Authority, in agreement with the Commission, would promote an external and independent evaluation of its performance; the conclusions of the assessment were then examined by the Management Board, which could, where appropriate, issue recommendations to the Commission regarding possible amendments to the Authority's organisational structure, its operating methods, or the overall impact of its activities.

[44] As observed by M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto amministrativo*, cit., 214.

ity to combine scientific rigour and data openness with an adequate balance of political oversight. In this delicate equilibrium – made all the more crucial by the EFSA's management of Europe's food safety information infrastructure – lies the future of the governance of food safety in the Union.

4. *The National Level of Food Safety Governance*

In the Italian legal system, the governance of food safety appears complex and fragmented, for both historical and regulatory reasons. Unlike the European level – where the experience of the food crises of the 1990s fostered the development of a coherent system, based on the separation of risk assessment and risk management and on the allocation of competences to clearly identified actors (the Commission, EFSA, and Member States) – the national legislator did not introduce a systemic reform following the entry into force of Regulation (EC) No 178/2002.

The choice – widely criticised – not to establish a national independent authority led instead to the distribution of functions among a multiplicity of pre-existing bodies:[45] Ministries, Regions, local authorities, health agencies, zooprophylactic institutes and technical entities. The result has been a polycentric and overlapping system,[46] in which coordination depends more on the initiative of individual actors than on stable institutional mechanisms.[47]

[45] On the establishment of an independent authority for food safety, see S. Cassese, *Proposte per un'autorità nazionale per la sicurezza alimentare*, in *Ragiusan*, 2003, 206 ff.; N. Longobardi, *A proposito di autorità italiana per la sicurezza alimentare fra disciplina europea e interventi normativi nazionali*, cit.; F. Martines, *Sicurezza alimentare e diritto amministrativo*, in G. Cerrina Feroni, T.E. Frosini, L. Mezzetti, P.L. Petrillo (Eds), *Ambiente, energia, alimentazione. Modelli giuridici comparati per lo sviluppo sostenibile*, vol. 1, Tome II, Firenze, 2016, 329 ff.

[46] Speaks of A system characterised by marked polymorphism, which has given rise to a multipolar and wholly disaggregated organisation C. Franchini, *L'organizzazione amministrativa italiana*, in M.P. Chiti, G. Greco (Eds), *Trattato di diritto amministrativo europeo*, vol. 2, Milano, 2007, 890, generated by the fragmentary nature of the organisational framework and by legislative choices.

[47] Observes M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto*

These difficulties are not solely the outcome of domestic choices, since the European framework itself remains characterised by incomplete harmonisation, particularly with regard to control systems and sanctioning guarantees, thereby exacerbating national complexity. The fragmentation of the European legal framework thus contributes significantly to the organisational difficulties encountered at the domestic level.[48]

In this context, the absence of a genuinely integrated information infrastructure constitutes an additional weakness: the fragmentation of competences translates into a fragmentation of data, thereby hindering the timeliness and coherence of public decision-making.

4.1. *Ministerial Structures and the new Organisational Framework of the Ministry of Health*

Under Article 117 (3) of the Italian Constitution, both health protection and food are matters of concurrent legislation. Interpreted in the light of the principles of subsidiarity and functional as well as regulatory parallelism, this constitutional configuration implies that the regulation of food safety involves all territorial levels: from the central State to the Regions and local authorities, together with a variety of related entities.

At the State level, competences are mainly distributed among three ministries: the Ministry of Health, the Ministry of Agriculture, Food Sovereignty and Forestry (MASAF), and the Ministry of the Environment and Energy Security (MASE). Each of these ministries intervenes on different aspects of the matter, yet without concentrating competences within single, dedicated struc-

amministrativo, cit., 219 how the Italian legislator has merely distributed (or concentrated, as the case may be) among a multiplicity of already existing bodies the powers and functions introduced and conferred from time to time by EU legislation.

[48] As noted by A. Police, *Conclusions*, in M. Allena, L. Donato, M. Trimarchi (Eds), *Eu Food Law Regulation: which Opportunities for Italy*, in *Dir. econ.* 3 (2016), 154-155.

tures. The result is a fragmented distribution of tasks and responsibilities.

The Ministry of Health has recently restructured its organisation with Decree of the President of the Council of Ministers (D.P.C.M.) of 30 October 2023, No 196,[49] establishing four departments, including the Department of Human Health, Animal Health and the Ecosystem (One Health) and International Relations. For the first time in the history of the Republic, the ministerial framework formally embraces the One Health paradigm, designed to safeguard health in its integrated and interconnected dimension,[50] in line with developments at EU level, with the experience gained during the pandemic, and with the priorities of the National Recovery and Resilience Plan (PNRR).

The expression One Health denotes an integrated and cross-cutting approach to the protection of health, which regards human health, animal health and the balance of ecosystems (including plants and environmental systems) as inextricably interconnected.[51] This gives rise to a triadic model, which presupposes a unified reading of these dimensions and requires that legisla-

[49] Laying down the new «Organisational regulations of the Ministry of Health».

[50] Cf. A.G. Caragli, M. Leggio, *Governance e regolazione del settore agroalimentare verso il paradigma One Health*, cit., 42. On this point, see M. Della Malva, *One Health*, in S. Valaguzza (Ed.), *Esplorazioni di diritto dell'ambiente*, Napoli, 2024, 187 ff., and S.N. Garcia, B.I. Osburn, M.T. Jay-Russell, *One Health for Food Safety, Food Security, and Sustainable Food Production*, in 4 *Frontiers Sustainable Food System* 1 (2020), 1 ff.

[51] Cf. the definition set out in the *Joint Tripartite (FAO, OIE, WHO) and UNEP Statement – Tripartite and UNEP support OHHLEP's definition of "One Health"*, 1 December 2021, according to which One Health refers to 'an integrated, unifying approach that aims to sustainability balance and optimize the health of people, animals and ecosystems. It recognizes the health of humans, domestic and wild animals, plants, and the wider environment (including ecosystems) are closely linked and inter-dependent'. More recently, on this topic see: D. Butturini, G. Guerra (Eds), *Prospettive multidisciplinari sull'approccio* One Health*. Contributi per un primo step verso l'attuazione giuridica*, Torino, 2025; L. Violini (Ed.), One health. *Dal paradigma alle implicazioni giuridiche*, Torino, 2023; F. Aperio Bella (Ed.), One Health*: la tutela della salute oltre i confini nazionali e disciplinari. Per un approccio olistico alla salute umana, animale e ambientale*, Napoli, 2022.

tive and administrative action be designed and implemented in a holistic manner, through coordination between a plurality of actors and institutions.[52] The consolidation of this approach finds significant constitutional confirmation in Constitutional Law No 1 of 11 February 2022, which amended Arts. 9 and 41 of the Constitution, strengthening the joint protection of health, the environment, animals and the ecosystem in a direction increasingly close to the One Health logic. The One Health paradigm is, finally, directly linked to the food sector, since the joint promotion of human, animal and environmental health entails accelerating the transition towards sustainable and resilient food systems,[53] acknowledging that European Union legislation covers the entire food chain and regulates its functioning in accordance with this logic.[54] Against this background, the idea of 'single health', when framed in terms of sustainability, translates into the requirement that food production be at once accessible to all (food security) and safe throughout all stages of the chain (food safety).

This Department of Human Health, Animal Health and the Ecosystem (One Health) and International Relations has been entrusted with broad competences, ranging from the exercise of State functions in the field of nutrition, food and dietary education, to risk assessment in food safety, environmental and ecosystem protection, living conditions and human well-being,[55] as well

[52] As observed by L. Violini, *Il progetto 1H_HUB: considerazioni metodologiche sul ruolo dei giuristi nell'implementazione del paradigma dello* One Health, in Id. (Ed.), One health. *Dal paradigma alle implicazioni giuridiche*, cit., 4.

[53] Cf. F. Rossi Dal Pozzo, *Le nuove tecniche genomiche e il loro impiego nel settore agroalimentare. L'Unione europea alla ricerca di una disciplina giuridica sostenibile*, in L. Violini (Ed.), One health. *Dal paradigma alle implicazioni giuridiche*, cit., 80.

[54] Cf. TAR Lazio, Roma, Sec. III-*quater*, 14 December 2023, No 18931. The judgment is also referred to by A.G. Caragli, M. Leggio, Governance *e regolazione del settore agroalimentare verso il paradigma* One Health, cit., 57, as acknowledging the correlation between the One Health paradigm and the food sector.

[55] In addition to these, pursuant to Article 18 of the Regulation, the Department is responsible for coordination and supervisory activities in the following areas: identification, definition, evaluation, information and promotion of healthy lifestyles, in relation to the ecosystem, the living environment and the working environment; animal health, veterinary medicines and animal

as the coordination of relations with international bodies.[56] It also serves as the national contact authority with EFSA.[57]

This expansion of competences has not been free from criticism. In its interim opinion on the draft regulation,[58] the Council of State observed that some of the functions conferred on the Department could not be traced back to the previous normative framework,[59] thus raising doubts about the legitimacy of assign-

welfare; coordination and financing of the Experimental Zooprophylactic Institutes and supervision thereof; research and experimentation in the food and veterinary sectors; implementation of Legislative Decree No 8 of 9 April 2008 for staff in service, assigned or seconded to, or posted at, the Veterinary Offices for Community Compliance (UVAC) and Border Control Posts (PCF), through the heads of the relevant offices; State functions concerning healthcare assistance to Italian citizens abroad and cross-border healthcare assistance; promotion of the implementation of conventions, recommendations and Community and international programmes in the health sector; technical support in the health field to the Ministry of Foreign Affairs and International Cooperation and to the Italian Agency for Development Cooperation and – without prejudice to their competences – the coordination of programming and guidance activities carried out by the Ministry of Health for the purpose of defining Italy's strategic guidelines on global health and international health policy; management of litigation and legal affairs within the remit of the Department.

[56] Article 18, para. 1, lett. *j*) of D.P.C.M. No 196/2023 refers to the European Union, the Council of Europe, the Organisation for Economic Co-operation and Development, the World Health Organization, the World Organisation for Animal Health, the Food and Agriculture Organization of the United Nations, and other international organisations or specialised agencies. Furthermore, pursuant to Article 18, para. 2 of D.P.C.M. No 196/2023, the Department, through the Directorate-General for Healthy Lifestyles and Relations with the Ecosystem, manages relations with the World Organisation for Animal Health (WOAH) and the Food and Agriculture Organization (FAO) and, within the scope of its competences, with the European Union, the Council of Europe, the World Health Organization and other international organisations.

[57] Thus, following on from the Directorate-General of Collegial Bodies for the Protection of Health (DGOCTS).

[58] Cf. Cons. Stato, Sez. Cons., 17 October 2023, No 01326.

[59] The reference made by the Council of State concerned, in particular, letters *a*) and *g*) of Article 18, para. 1 of D.P.C.M. No 196/2023, with regard to the identification, definition, evaluation, information and promotion of healthy lifestyles, in relation to the ecosystem, the living environment and the working environment" and the "protection of the environment and the ecosystem, of living conditions and of people's well-being.

ing new competences through a regulatory source. The concern is twofold: on the one hand, potential interference with the competences of other ministries; on the other, the risk of violating the principle whereby organisational rules should not confer new administrative functions.

In its subsequent explanatory report, however, the Ministry clarified that the primary legislative basis for the competences linked to the One Health paradigm is to be found in Legislative Decree No 300 of 30 July 1999, which defines the institutional mission and scope of the Ministry of Health. According to this interpretation, the new departmental structure would not amount to a substantive innovation but rather to an organisational evolution consistent with the functional orientation already outlined by the legislator.

The Department of Human Health, Animal Health and the Ecosystem (One Health) and International Relations is subdivided into three Directorates-General: the Directorate-General for Healthy Lifestyles and Ecosystem Relations, the Directorate-General for Hygiene and Food Safety, and the Directorate-General for Animal Health. Food-related competences are primarily assigned to the first two.

The Directorate-General for Healthy Lifestyles and Ecosystem Relations promotes public health in relation to lifestyles and the environment, with particular attention to the ecosystemic dimension of prevention. It also contributes to the assessment of physical, chemical and biological risks associated with food safety and ensures the functioning of the National Food Safety Committee, working in coordination with the Regions and with the Directorate-General for Hygiene and Food Safety.

The latter plays a central role in risk management along the entire agri-food chain, overseeing the hygiene and safety of food production and marketing. It coordinates the national rapid alert system, official control plans, and inspection, audit and certification activities. It is also responsible for nutrition labelling, foods intended for specific population groups, novel foods, GMOs, contaminants, food contact materials and plant protection products, exercising these functions in cooperation with peripheral health offices (UVAC-PCF) and public control laboratories. In

both directorates, the quality, accessibility and interoperability of the data collected and exchanged are indispensable elements: both the promotion of health and the management of risks depend on the ability to integrate information in real time across different institutional levels and scientific sectors.

The Ministry of Health also relies on the *Istituto Superiore di Sanità* (ISS) and the *Istituti Zooprofilattici Sperimentali* (IZS). The ISS is a public research body and the technical-scientific organ of the National Health Service, under the supervision of the Minister of Health. Through its Department of Food Safety, Nutrition and Veterinary Public Health,[60] it plays a central role in providing scientific and technical support for public policies on food safety, particularly with reference to risk assessment for human health arising from chemical, physical and microbiological contamination. The ISS prepares scientific opinions, conducts studies and epidemiological monitoring, promotes research activities and supports competent authorities in defining risk management measures, and until 2018 acted as the national contact point with the EFSA. The IZS, by contrast, consist of ten interregional institutes that serve as the technical-operational arm of the Ministry of Health and the Regions for analytical, diagnostic, research and scientific support activities in the field of food safety and animal health.[61] They contribute to the assessment of chemical, physical and microbiological risks along the food chain, carry out laboratory tests on food and feed, and conduct epidemiological surveillance and environmental monitoring. They also participate in national and regional control programmes and collaborate with the EFSA and the competent European authorities in producing data and scientific opinions.

At the operational level, the Ministry of Health also relies on the Carabinieri Command for Health Protection – NAS, which carries out inspection and enforcement activities in the field of food safety. Structured in local units, the NAS perform nationwide inspections and controls, including within the framework

[60] In turn divided into four Units: nutrition and health; chemical food safety; microbiological food safety and foodborne diseases; emerging zoonoses.

[61] At the Milano headquarters of the *Istituto Zooprofilattico Sperimentale*

of national and regional control plans, contributing to the detection of violations, the prevention of fraud and the protection of public health.

The MASAF plays a significant role in food safety through two main structures: the Central Inspectorate for the Protection of Quality and Fraud Repression of Agri-food Products (ICQRF) and the Council for Agricultural Research and Analysis of Agricultural Economics (CREA). The ICQRF is the national authority responsible for official controls on regulated agri-food production, including products protected by quality schemes such as PDO, PGI and TSG. It carries out inspection activities throughout the supply chain, combating fraud and unfair practices, and is competent for import and export controls as well as for supervising compliance with labelling and advertising regulations for agri-food products. CREA, by contrast, is the national public research body for agri-food, working closely with MASAF. Within it, the Centre for Food and Nutrition Research (CREA-AN) serves as the Ministry's scientific reference structure. It is responsible, *inter alia*, for drafting and updating the national food composition tables, preparing the Guidelines for Healthy Nutrition,[62] and providing scientific and technical support in relation to the nutritional quality of food, including within EU quality schemes. These activities make CREA-AN a key interlocutor in shaping nutrition policies and integrating scientific evidence into the regulatory process.

The MASE, finally, plays a crucial role in shaping and implementing environmental policies that directly or indirectly affect food safety. Its competences include the regulation of sustainable use of plant protection products, water resource management, and the protection of air and soil quality, all of which are funda-

(IZS) of Lombardy and Emilia-Romagna, the National Reference Centre for Emerging Risks in Food Safety has been established (pursuant to Article 1 of the Ministry of Health Decree of 18 January 2013). Its tasks include implementing systems for the identification and early assessment of emerging risks in food safety, carrying out monitoring activities, and undertaking any other initiatives useful for the identification of emerging risks in food safety.

[62] Drawn up based on the Dietary Reference Values (LARN) for nutrients and energy indicated by EFSA.

mental to ensuring the safety of the agri-food chain. The Ministry is also responsible for broader environmental policies intersecting with food safety, exercising regulatory, planning, control and coordination functions in fields such as waste management and biodiversity protection.

The ministerial framework highlights a distribution of competences in food safety across a multiplicity of actors, each with complex internal structures and often overlapping responsibilities. The absence of a central coordinating body at national level inevitably generates difficulties in coordination and risks of duplication, with potential adverse effects on the overall effectiveness of risk prevention and management policies. In this context, the Regions and local authorities, which are responsible for implementing measures at territorial level, play a crucial role but at the same time accentuate the need for instruments of cooperation and harmonisation between different levels of government. Added to this is the need for a genuinely integrated information infrastructure capable of ensuring interoperability between the data collected by the various administrations: only in this way can institutional fragmentation be offset by a coherent and unified management of information, an essential condition for the effectiveness of food safety governance.

4.2. *The Regional and Local Level*

Within the framework of concurrent legislation, the Regions and Autonomous Provinces play a central role in the concrete implementation of food safety policies. Pursuant to the principle of subsidiarity and the constitutional allocation of administrative competences in the fields of health protection and food regulation, responsibility at regional level includes the planning, guidance and coordination of control activities, as well as the organisation of services responsible for monitoring and prevention.

Operational activities are mainly carried out by the Departments of Hygiene and Public Health of the Local Health Authorities (AUSL), which, in coordination with regional health directorates, perform inspections along the food chain, from

production to distribution and catering. The AUSL thus operate as the executive arm of the Regions, which are also responsible for adopting regional control plans and managing health emergencies related to the safety of food and feed.

Alongside these structures, the Regional Environmental Protection Agencies (ARPA) play a particularly significant role in environmental monitoring and assessing risks associated with the chemical and biological contamination of agricultural and food ecosystems. The integration between the AUSL and ARPA enables a more comprehensive approach to risk management, one capable of also taking into account the environmental impacts on food safety.

Within this multilevel framework, the State-Regions Conference plays a fundamental role as the key institutional forum for dialogue and coordination between central government and territorial autonomies. Through this body, forms of cooperation and coordination are developed to harmonise the planning and execution of official controls along the food chain.

A significant example of this coordinating function is the Agreement of 10 November 2016,[63] by which the Guidelines for official controls in the field of food safety were adopted in implementation of Regulations (EC) Nos 882/2004 and 854/2004. Although these regulations have since been repealed and replaced by Regulation (EU) 2017/625, the Agreement represented an important step in the shared definition of uniform criteria for planning, conducting and reporting inspection activities, on the basis of risk assessment and with a view to greater transparency and efficiency.

Again, within the State-Regions Conference, the Agreement of 8 April 2020[64] approved the National Emergency Plan for Food and Feed, implementing Article 115 of Regulation (EU) 2017/625 and setting out operational procedures for the coordinated management of health crises related to food safety. The

[63] Cf. Rep. Atti No 212/CSR of 10 November 2016.

[64] Cf. Rep. Atti No 61/CSR of 8 April 2020, published in the G.U. Serie Generale No 108 of 27 April 2020.

Plan assigns specific roles to regional and national coordinators and establishes an obligation of triennial updating.

More recently, institutional cooperation has also materialised in the definition of the Multiannual National Control Plan 2023-2027, adopted by the Ministry of Health in agreement with the Regions and Autonomous Provinces. This Plan is the strategic instrument through which official controls are programmed across the national territory, according to a risk-based approach and grounded in criteria of uniformity, proportionality and transparency. The PCNP also provides a concrete response to the need to ensure a high level of protection of public health and consumer interests, while strengthening integration across different levels of government.

Through these shared instruments, the State-Regions Conference confirms its role as a crucial node in food governance, fostering unified programming, effective coordination of administrative activities, and a more responsive and coherent management of health emergencies. This reflects the awareness that only integrated action among different institutional levels can ensure the effectiveness of food safety policies.

5. *Data Interoperability in Food Safety Governance*

Within the framework of multilevel food safety governance, data interoperability between administrations represents a strategic yet often neglected issue. The ability of public institutions to collect, share, compare and effectively use information along the entire food chain is an essential precondition for the timely detection of risks, the management of health emergencies, and the planning of public policies. In this perspective, data ceases to be merely a technical resource and becomes a genuine regulatory infrastructure, whose accessibility and integrability determine the effectiveness of administrative action.

Despite the importance attached to information flows in EU law and in national strategies, the current information framework for the food sector remains marked by fragmentation and inconsistency. Numerous systems, databases and platforms coex-

ist – at European, national, regional and local level – gathering heterogeneous data on different aspects of the food chain: hygiene and safety, nutritional quality, traceability, pesticide residues, environmental contamination, inspection activities and analytical results. Among these, examples include the RASFF system, the databases of the ISS and IZS, regional information flows, ARPA registers, ICQRF platforms and the data collected by the NAS Command. Yet these systems do not always communicate with one another, nor are they based on shared or interoperable standards, generating inefficiencies, duplications and asymmetries of information that hinder institutional cooperation.

Current shortcomings manifest themselves on three levels: semantic, due to the lack of a common language among databases; technical, owing to the incompatibility of formats and digital infrastructures; and organisational, as a result of the absence of clear roles, responsibilities and access rights. This situation is aggravated by rigid bureaucratic practices and by a weak data culture within public administrations, which tend to treat information as a proprietary resource rather than as a common good serving the public interest.

From a regulatory perspective, the framework is composite. At EU level, Regulation (EU) 2017/625 on official controls along the agri-food chain explicitly promotes the development of integrated information systems, requiring Member States to ensure data sharing and interconnection. This is complemented by broader measures that have reshaped the EU data law framework. Data, initially regulated mainly in terms of privacy and personal data protection (notably through the General Data Protection Regulation – GDPR),[65] are now also the object of regulatory measures aimed not only at protecting fundamental rights, but at stimulating economic growth and sustainability through

[65] This refers to Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC (General Data Protection Regulation – GDPR). For a comprehensive analysis of data protection law, see R. D'Orazio, F. Finocchiaro, O. Pollicino, G. Resta (Eds), *Codice della privacy e «data protection»*, Milano, 2021.

sharing, quality, interoperability and cybersecurity.[66] The main initiatives include the Data Governance Act,[67] which regulates the sharing and re-use of public and private data; the Data Act,[68] which establishes interoperability requirements and rules for fair access to data, including for public administrations;[69] Regulation (EU) 2025/327 on the European Health Data Space (EHDS), which creates a legal and technical infrastructure for the primary and secondary use of health data,[70] with significant implications also for the integration of food data within a One Health perspective. This expansive regulatory shift reflects the Union's intention to respond to the challenges of data-driven innovation, strengthening competitiveness and sustainability while at the same time ensuring a high level of public health protection.

In this context, mention must also be made of Regulation (EU) 2019/1381 on the transparency and sustainability of risk assessment, which has strengthened the ecosystem of scientific data by requiring the systematic publication of studies submitted by economic operators, the creation of a centralised database at the EFSA, and more transparent access procedures. Taken together, EU data law has assumed an organic and multilevel configuration, combining the sectoral rules of food safety with general principles of interoperability and openness, thereby outlin-

[66] A response to this need was put forward by the European Commission in Communication COM(2020) 66 final of 19 February 2020, entitled 'A European Strategy for Data'.

[67] This refers to Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance, which amends Regulation (EU) 2018/1724.

[68] This refers to Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data, amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828.

[69] For an analysis of the Data Governance Act and the Data Act, see G. Resta, *Pubblico e privato nel sistema europeo di governo dei dati*, in *Riv. trim. dir. pubbl.* 4 (2022), 971 ff., and A. Iannuzzi, *I regolamenti intersettoriali per l'istituzione di «data spaces»: Data Governance Act e Data Act*, in F. Pizzetti (Ed.), *La regolazione europea della società digitale*, Torino, 2024, 107 ff.

[70] On this point, see recently E. Santamaría Echeverría, *Integrating Environmental Sustainability into EU Data Law and Governance: The Case of Health data*, in 34 *RECIEL* 2 (2025), 512-521.

ing a framework which, if effectively implemented, could provide the legal basis for predictive, data-driven food safety management.

At the national level, the National Recovery and Resilience Plan marks a decisive turning point. Mission 6 (Health) finances the development of the Electronic Health Record 2.0, designed to collect and render interoperable health data across the national territory, while Mission 1 (Digitalisation of Public Administration) aims to establish common standards and cloud infrastructures. Although conceived for healthcare purposes, the Electronic Health Record could serve as a model – and potentially as an integrating hub – for information flows concerning food safety, especially if linked to regional prevention systems, ARPA and AUSL databases and epidemiological surveillance networks. To this must be added the Multiannual National Control Plan 2023-2027, adopted pursuant to Regulation (EU) 2017/625, which functions as an operational coordination tool between the Ministry of Health, the Regions and territorial authorities, and which itself presupposes genuine interoperability of information systems to ensure uniform and transparent controls along the food chain.

Thus, interoperability cannot be understood as a merely technological issue but must be addressed as a governance challenge. This requires the adoption of strong institutional leadership to define common standards, promote information-sharing, regulate data flows in line with the protection of fundamental rights and ensure accountability for non-compliance with information obligations. A central role could be played by the State-Regions Conference, as a coordinating forum for the administrations concerned, as well as by a potential national supervisory body – possibly an independent food safety authority – entrusted with both informational coordination and oversight of data interoperability.

Interoperability ultimately represents an enabling condition for transforming food governance from a formally polycentric but substantially fragmented network into an integrated, collaborative and transparent system, capable of preventing risks, protecting consumers and responding promptly to health crises. At

the same time, it constitutes a litmus test for the real capacity of institutions to act in a synergistic and results-oriented manner, overcoming the organisational and cultural barriers that still hinder the efficiency of public action.

6. *Conclusions: Towards an Integrated Governance of Food Safety*

The Italian model of food safety governance takes the shape of a complex, multilevel network, encompassing a wide range of institutional and private actors. The analysis has highlighted a number of structural weaknesses that undermine its effectiveness. In particular, the fragmentation of competences and overlaps between different levels of government emerge as vulnerabilities which, in the most significant cases, result in delays in decision-making and operational difficulties. The coexistence of a plurality of actors is not in itself a limitation; it becomes problematic, however, when there is a lack of adequate instruments for coordination and integration, especially in the management and circulation of information.

A significant aspect concerns data interoperability. In a prevention and risk management system, it is essential to have constantly updated information, easily shareable and accessible among the various administrations, so as to ensure speed, consistency and transparency in public action. Interoperability, however, is not just about the technical possibility of 'linking' existing databases, but entails the definition of common standards, clear rules on rights of access and on obligations to feed information systems, as well as governance mechanisms that hold the actors involved accountable for the primary and secondary use of the information collected. In the absence of integrated information platforms and a unitary design of the 'data value chain', food policies tend to remain fragmented and uneven, and prove less effective precisely when greater operational responsiveness is required.

In this context, the evolution of European Union legislation on data – from the GDPR to the Data Governance Act, from the Data Act through to the Regulation on the European Health

Data Space – clearly shows that information can no longer be regarded as an ancillary element, but rather as the real terrain on which the competitiveness, sustainability and effectiveness of public policies, including those in the field of food law, are played out. The European framework only produces significant effects if it is matched by organisational implementation, since the principles of interoperability, re-use and data quality must be translated into concrete institutional design choices and into stable coordination tools between health, environmental and agricultural administrations. In other words, interoperability should become a criterion for policy design, not merely a technological objective declared *ex post*.

This gives rise to a broader consideration, concerning the need for a genuine cultural evolution in governance. The multilevel paradigm must be translated into a systemic perspective, one capable of transcending the usual bureaucratic compartmentalisation and of promoting forms of dialogue and cooperation among institutional actors. Such a shift is all the more urgent in a context marked by complex and interrelated challenges: environmental sustainability, food security, equity in food systems and ecological transition require a public administration that is not only technically competent, but also fully aware of the interdependencies linking human, animal and environmental health.

The One Health approach – now firmly established at the organisational level, as evidenced by the creation of the Department of Human Health, Animal Health and the Ecosystem within the Ministry of Health – offers a useful methodological orientation for developing genuinely integrated regulatory strategies. This involves not merely coordinating competences at the stage of their exercise, but adopting a decision-making criterion that simultaneously considers all the relevant interests, without presupposing hierarchies, but rather seeking a balance between the demands of protection, development and innovation.

This can be facilitated by reopening the debate on what was already envisaged in Regulation (EC) No 178/2002 itself, which contemplated the possibility of establishing, at the national level, an independent authority competent in the food sector. On that basis, it may be argued that the Italian legal order now has a suf-

ficient European foundation to reconsider the opportunity to concentrate in a single body functions of guidance, supervision and coordination in the field of food safety, provided that the institutional architecture is constructed in full compliance with the logic of Regulation (EC) No 178/2002.

A non-negotiable structural element would remain the distinction between risk assessment and risk management. The assessment function should be entrusted to independent technical and scientific expertise, following the model set out in Arts. 6 and 22-23 of Regulation (EC) No 178/2002, whereas risk management would continue to be exercised by the competent political and administrative authorities, in accordance with the procedures and limits laid down in Articles 53-55 and with the system of implementing measures centred on the Standing Committee (SCoPAFF) referred to in Art. 58. In this framework, the new authority would neither overlap with the EFSA nor duplicate its functions, but would operate as a national support body within the boundaries traced by EU law, by preparing evidence-based scientific opinions, collecting, validating and systematising data, promoting methodological harmonisation in line with European standards, and ensuring the systematic transmission of information to the network provided for in Art. 36 and to the publicity and data-sharing mechanisms introduced by Regulation (EU) 2019/1381. At national level, the assessment activity could focus on aspects that are not fully harmonised or that display a strong territorial dimension, while remaining coordinated with the assessment processes conducted by the EFSA. Risk management, by contrast, would remain firmly within the sphere of public decision-making, through the planning and conduct of official controls, the activation of alert flows and the possible adoption of national safeguard measures only in the cases and under the conditions laid down in Art. 54 of Regulation (EC) No 178/2002. Such an arrangement should also incorporate, at domestic level, the guarantees of transparency and independence of scientific assessments laid down by Regulation (EU) 2019/1381 and reflected in the text of Regulation (EC) No 178/2002.

In this way, the national authority would operate as a genuine 'control room', capable of ensuring uniform application, direct-

ing and coordinating control activities in a perspective of risk prediction and prevention, safeguarding the quality and interoperability of data, and guaranteeing clear, coherent and transparent communication vis-à-vis economic operators and consumers. The requirements of independence – defined through appointment criteria, rules on incompatibilities, financial autonomy and transparency obligations – would constitute both the technical and scientific foundation of decision-making and the precondition for stronger public accountability, to be exercised through periodic reports, consultations and impact assessments.

As regards its material scope, the core of the authority's competences would relate to food safety. In the area of food security, by contrast, its intervention would need to be carefully delimited, since the objectives of security of supply are closely linked to the common agricultural policy and the internal market regime, as well as to sectoral legislation whose main reference points are currently Regulation (EU) 2021/2115 on CAP Strategic Plans and Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products. It follows that a national authority could not intervene in market policy choices, support schemes or measures capable of altering common management or hindering free movement; it could, however, exercise functions of monitoring, analysis, early warning and coordination of supply resilience plans, by defining information standards and technical guidelines to support national and European decision-making, without encroaching upon the respective spheres of competence.

At domestic level, the establishment of a single independent authority would, finally, require the relationship with the Regions to be rethought in cooperative terms. Regional functions would have to be framed within a more predictable national architecture, in compliance with the principle of loyal cooperation, through common standards, shared procedures, data-exchange platforms and substitutive powers that are expressly defined and confined to situations of serious non-compliance or emergency. In this way, the plurality of decision-making centres would be brought within a unitary design, thereby attenuating the contradictions of highly decentralised regulation and, at the same time,

remedying the infrastructural deficit on the information side: data interoperability would become the stable underpinning of a system of governance capable of holding together food safety and food security in line with the One Health paradigm.

REGULATION AND CONTROL ACTIVITIES IN THE MULTILEVEL AGRI-FOOD SYSTEM. ANALYSIS BETWEEN THE EUROPEAN LAW AND THE ITALIAN LEGAL SYSTEM

Ludovico Iorio

Abstract: *The following contribution highlights the importance of regulatory and control activities for the Agri-food supply chain, as applied between the European and the Italian legal system. Specifically, it describes the normative regulatory framework as an instrument through which public decisionmakers define the main objectives and requirements that economic operators must follow in developing their agricultural activities, with particular attention to the 'One Health' approach. Alongside regulation are control mechanisms, involving continuous oversight either directly by public powers or through delegated private entities.*

Key words: Regulation and Control Activities; Multilevel Agri-Food System; 'One Health' Approach; Risks Evaluation and Precautionary Principle; Subsidiarity Principle.

1. *Introduction*

A primary observation is the inherently 'multisectoral'[1] nature of the Agri-food domain. This is manifested in the multiple inter-

[1] Or 'multifunctionality', as extensively discussed by R. Henke (Ed.), *Verso il riconoscimento di una agricoltura multifunzionale. Teorie, politiche, strumenti*, Napoli, 2004. See also Organisation for Economic Co-operation and Development (OECD) (2005) *Multifunctionality in Agriculture. What Role for Private Initiatives?*, Paris; Organisation for Economic Co-operation and Development (OECD) (2001) *Multifunctionality: Towards an Analytical Framework*, Paris. On the concept of agricultural multifunctionality, also: D. Storti, R. Henke, M. C. Macrì, *The new European Rural Policy: a Comparative Analysis Across Regions in the EU*, in *Report to the 87th EAAE-Seminar: Assessing Rural Development Policies of the CAP*, Vienna, 2004/4, 9-19; A. Iannarelli, entry "*Mercato agricolo europeo*", in *Enciclopedia del diritto*, Annali II-2, 2008, 770; S. Gardini, *Il controllo amministrativo della filiera agroalimentare*, in *Il diritto dell'economia* 3 (2024), 91-112; F. Smith, *Contribution of the European Com-*

sections between the Agri-food sector and other legal subjects, among which the connection with the right to health[2] is paramount. However, this feature also acquires relevance in the context of public authorities exercising their powers over territorial governance and urban planning.[3] Moreover, it intersects with the duty to uphold the principle of competition, not only in terms of

munity on the Multifunctional Character of Agriculture, in *Journal of International Economic Law*, Oxford Press, 2000, 710. On this topic it may be useful to consider also the Contribution of the European Community on the Multifunctional Character of Agriculture, info paper adopted in 1999, or the info paper (1999) of the European commission, *Safeguarding the Multifunctional Role of EU Agriculture: Which Instruments?*

[2] Article 32 of the Italian Constitution sets out the guarantees that the legal system must uphold to ensure the effective enjoyment of the right to health, defined as a fundamental right of individuals, as well as a public good.

In particular, it is useful to interpret the content of Article 32 in conjunction with Article 9 of the Constitution, to extend the purpose of the fundamental right to health to include the right to a healthy environment.

This interpretative reading enables the identification of environmental well-being as a dimension inherently linked to the protection of individual and collective health. This framework places particular importance on the super-individual dimension of environmental goods, especially those referred to as *silvo-agro-forestry resources,* whose protection transcends private interests and aligns with constitutional values to preserve ecosystems for the benefit of current and future generations. G. Agrifoglio*, «Fossili giuridici viventi». Alcune osservazioni su usi civici e proprietà collettiva a margine di Cass. Civ. sez. II, ord. 23 novembre 2022, N. 34460*, in *Europa e Diritto Privato* 2 (2023), 433. It is worth noting that Article 168(1) of the Treaty on the Functioning of the European Union (TFEU) also affirms the obligation to ensure a high level of human health protection in the implementation of Union policies.

[3] In this regard, reference may be made to the so-called no net land take principle, which has been extensively addressed within the EU legal and policy framework. Notably, between 2011 and 2012, the European Commission showed significant interest in the protection of soil as a legal good. The issue of urban regeneration as a planning instrument for tackling soil consumption is also examined from the perspective of urban and territorial planning by U. Outka, *The Energy-Land Use Nexus*, in 27 *Journal of Land Use & Environmental Law* 2 (2012), 245-257; G. Pagliari, *Governo del territorio e consumo del suolo. Riflessioni sulle prospettive della pianificazione urbanistica,* in *Rivista giuridica dell'edilizia* 5 (2020), 325; P. Smith, *et al.*, *Agriculture, Forestry and Other Land Use* (AFOLU), in O. Edenhofer *et al.* (Eds), *Climate Change 2014: Mitigation to Climate Change Contribution of Working Group III, to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge-New York, 2014, 816 ff.

market access for agricultural competitors but also regarding the transparent circulation of product-related information.

On the one hand, this scenario calls for a careful regulatory framework designed to ensure fairness in market access opportunities for private enterprises; on the other, it demands that the final product results from a production process that fully complies with the hygiene and safety standards necessary to safeguard consumer interests. This clearly reflects the need to strike a balance between those opposed interests.

Simply evaluating the dynamics of supply and demand along the Agri-food supply chain seems largely inconsistent with the current normative framework. The conduct of business activities in the Agri-food sector must allow for profitability for economic operators; nonetheless, such permission must be coordinated with the efficient use of natural resources, thereby promoting a model of business activity based on sustainability,[4] with particular regard to environmental externalities.

[4] The concept of sustainability may be summarised as the duty to minimise the negative impact of human activity on the environment to ensure that future generations can enjoy access to natural resources at least equivalent to that held by current generations, both qualitatively and quantitatively. This issue was first addressed at the international level by the 1987 Brundtland Report, drafted by the World Commission on Environment and Development, which defined sustainable development as: '*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*'. A. Ross-Robertson, *Sustainable Development*, in *The New Oxford Companion to Law*, Oxford, 2012; A. D'Aloia, *Generazioni future*, in *Enciclopedia del diritto*, Annali IX, 2016, 331 ff. With specific regard to Agri-food sustainability, R. Shindelar, *The Ecological Sustainability of Local Food Systems*, in *RCC Perspectives*, *No. 1, Think Global, Eat Local: Exploring Foodways*, 2015, 19-24.

European Union law, in any case, gives substantive content to the concept of sustainability in Article 2, point 17, of Directive 2013/34/EU, specifying that so-called sustainability matters – described therein for the purpose of corporate reporting – refer to '*environmental, social and human rights factors, as well as governance factors, including sustainability factors as defined in Article 2, point (24), of Regulation (EU) 2019/2088*'. On this point, F. Vetrò, *Sviluppo sostenibile, transizione energetica e neutralità climatica. Profili di* governance*: efficienza energetica ed energie rinnovabili nel "nuovo ordinamento" dell'energia*, in *Rivista italiana di diritto pubblico comunitario* 1 (2022), 54, where the author underscores that sustainability does not occupy a space so-

The environment, as a legally relevant concept, has come to occupy a prominent role not only within the national legal system[5] but also in the framework of EU law. Supranational legislation has indeed evolved to support the construction of a system grounded in sustainable practices,[6] that require a balanced use of resources aimed at reconciling biodiversity protection with the interests of consumers.[7]

Within this multi-level legal framework, regulatory intervention in the area under discussion finds its roots primarily in the Treaty on the Functioning of the European Union (TFEU). As further confirmation of its multidisciplinary nature, the TFEU establishes an essential link with environmental law[8] and incorpo-

lely within the ethical domain of private economic initiative; rather, it constitutes, in all respects, a legal principle. At the same time, however, it also emerges as a cross-cutting objective, insofar as it is shared across multiple sectors. See also M. Petrachi, N. Brignoli, *Energia pulita: misura di prevenzione della lotta ai cambiamenti climatici e presidio di tutela ambientale*, in *Diritto dell'economia* 3 (2024), 205.

[5] Constitutional Law n. 1 of 11 February 2022, entitled '*Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente*', formally enshrined environmental protection as a legal interest in the Italian Constitution. About that, E. Di Salvatore, *Brevi osservazioni sulla revisione degli articoli 9 e 41 della Costituzione*, in *Costituzionalismi.it* 1 (2022); G. L. Conti, *Costituzione e ambiente: prendere sul serio la legge costituzionale 1/2022,* in *Rivista quadrimestrale di diritto dell'ambiente* 1 (2023), 136 ff.

[6] A useful investigation about the Agri-food supply chain development is offered by D. Ratnajeewa, P. Bhaskar, *Improving Resilience of Agrifood Supply Chains: a Systematic Literature Review*, in *Modern Supply Chain Research and Applications*, 2025, 1-28, where the authors also underline the importance of the institutional bodies in contributing to regulate that specific sector.

[7] S. Gardini, *Il controllo amministrativo della filiera agroalimentare*, in *Il diritto dell'economia*, cit., 91-112, and F. Trimarchi Banfi, *La sostenibilità dello sviluppo economico nel diritto dell'Unione Europea*, in *Diritto amministrativo* 3 (2024), with particular attention to corporate sustainability reporting, as a method of financial disclosure that holds both the duty to comply with accounting requirements and the necessity to demonstrate the alignment of corporate activities with the applicable sustainability standards.

[8] Indeed, Article 38 defines 'agricultural product' as one resulting from the use of land, livestock farming, or fishing, or directly connected activities. Moreover, considering that paragraph 4 of the same article addresses the establishment of the Common Agricultural Policy (CAP) among the Member States, and in light of the combined reading of Article 39 TFEU, which outlines the

rates the so-called precautionary principle,[9] a legal standard borrowed directly from environmental law and aimed at the protection of the aforementioned legal interest.[10] This foundational framework was followed by the adoption of the White Paper on Food Safety by the European Commission in 2000, which sought to establish a coherent common framework in matters of food safety. In continuity with this, the Farm to Fork Strategy[11] was later adopted, further developing the trajectory initiated at the beginning of the century. These measures are in turn integrated with broader strategic frameworks such as the European Green Deal[12]

economic and social objectives of the CAP, it becomes clear that the policy mandates an increase in agricultural productivity supported by technical progress, the assurance of a fair standard of living for the agricultural population, and the safeguarding of supply security. G. A. Primerano, *Ambiente e diritto agroalimentare. Organizzazione, regolazione e controlli*, in *Diritto amministrativo* 3(2019), 628 ff., where the author notes that, while the CAP initially appeared to be primarily oriented toward promoting productive aspects, it now seems to be increasingly sustained by eco-conditionality, greening measures, and the need to encourage rural development, further confirming the central role that environmental considerations have come to play within the Agri-food sector as well.

[9] *Infra* (note n. 53).

[10] Article 191(2) TFEU specifies that the principle under consideration is to be applied where, in the context of a preventive scientific assessment, reasonable concerns arise regarding the potentially harmful effects of the activity in question on the environment, or on human, animal, or plant health. Also see C.A. Redi, G. Gennari, *Science, Law and Courts in Europe*, Torino, 2004, about the importance of scientific results for regulation.

[11] Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Farm to Fork Strategy for a Fair, Healthy and Environmentally-friendly food system*, 20 May 2020, COM(2020) 381 final.

[12] The Green Deal is a comprehensive package of initiatives aimed at tackling climate change, involving environmental dimensions such as the protection of biodiversity and ecosystems, as well as matters related to energy, industrial policy, and economic development, including, in particular, the agricultural sector, which is of relevance here. S. Oberthür, K. Kulovesi, *Accelerating the EU's Climate Transformation: The European Green Deal's Fit for 55 Package Unpacked*, in 34 *Review of European Comparative & International Environmental Law* 3 (2025), 7-22; D. Bevilacqua, *La normativa europea sul clima e il* Green new deal*. Una regolazione strategica di indirizzo*, in *Rivista trimestrale di diritto pubblico* 2 (2022), 297. In particular, the initiatives envisaged by the Green Deal aim at effectuating the process culminating in the

and the 2030 Agenda for Sustainable Development.[13] The multidisciplinarity and the variety of interests subject to integrated protection in the Agri-food sector are summarised in the concept of 'One Health',[14] originally developed within medical and scientific theory.[15] This concept embodies a holistic approach that has been formally included into the Italian legal order through D.P.R. n. 196/2023. This model of public health protection rests upon the concurrent and interdependent oversight of human, environmental, and animal health and safety.[16]

Within such a framework, private economic initiative is subject to a plurality of limitations, ranging from competition law

ecological transition. A. Bonomo*, Governare la transizione ecologica: tra interessi nuovi e conflitti*, in *Rivista trimestrale di diritto pubblico* 3 (2024), 619 ff.

[13] It is presented as a plan relating to seventeen Sustainable Development Goals, whose necessary pursuit has been established by the Member States and the UN General Assembly to be achieved by 2030.

[14] For a more detailed examination of the definition from a jurisprudential perspective, A. Peters, *COVID-19 As a Catalyst for the (Re-)Constitutionalisation of International Law: One Health – One Welfare*, in M.M. Mbengue, J. D'aspermont (Eds)*, Crisis Narratives in International Law, Brill*, Leiden-Boston, 2022, 92; G. Ragone, M. Ramajoli, *One Health e ordinamento Italiano: il livello costituzionale, la normazione primaria e la fase dell'implementazione amministrativa*, in L. Violini (Ed.), *One Health*. *Dal paradigma alle implicazioni giuridiche*, Torino, 2023, 9 ff.

[15] The origin of this concept is attributed to the veterinarian William B. Karesh. C.f. W. B. Karesh, *Championing "One Health"*, in 98 *Bull World Health Organ*. 10 (2020), 652-653.

[16] A.G. Caragli, M. Leggio, *Governance e regolazione del settore agroalimentare verso il paradigma One Health*, in *Pubblicazioni del Dipartimento di diritto pubblico italiano e sovranazionale dell'università degli studi di Milano*, Torino, 2024, 56 ff. where the authors recall the document "*Joint Tripartite (FAO, OIE, WHO) and UNEP Statement, Tripartite and UNEP Support OHHELP's Definition of One Health"*, december 1st 2021; V. Paganizza, *One Health nella prospettiva ambientale: il sistema di scambio rapido di informazione per gli alimenti e i mangimi come antesignano del paradigma evocativo «salute umana, animale e degli ecosistemi»,* in D. Butturini, G. Guerra (Eds) *Prospettive multidisciplinari sull'approccio One Health Contributi per un primo* step *verso l'attuazione giuridica,* 2025, 111 ff.; L. Leone, *One Health in EU Animal Welfare Legislation: Normative Trends and Developments*, in 20 *European Food & Feed Law Review* 4 (2025), 211-222, and also, *passim*, F. Aperio Bella (ed.), *One Health*: *la tutela della salute oltre i confini nazionali e disciplinari. Per un approccio olistico alla salute umna, animale e ambientale*, Napoli, 2022.

and rules on market access – which collectively serve the broader duty to protect the consumer's fundamental right to health – to the adoption of policy models and mechanisms that ensure sustainability. It may indeed be argued that market dynamics can only be regarded as virtuous if economic operators, while complying with competition standards, also undertake their activities in a manner consistent with environmental sustainability and food safety obligations throughout the product life cycle.[17]

As a result, environmental and health considerations demand a reconfiguration of the rigid application of market regulation principles. These ideas, historically perceived as occupying a secondary position, are now being given wider importance, marking a reversal in the original objectives of the European project, which was initially characterised by a strong emphasis on market liberalisation[18] and its corresponding regulatory infrastructure.

The element of multidisciplinarity mentioned at the beginning, together with the development of a regulatory framework grounded in robust public intervention in the Agri-food sector, has led to the emergence of what may be referred to as 'Agri-food Administrative Law'.[19] This legal domain is shaped by the

[17] G. A. Primerano, *Ambiente e diritto agroalimentare. Organizzazione, regolazione e controlli*, cit., 635.

[18] F. Capelli, *La libera circolazione dei prodotti alimentari nel mercato unico europeo*, in *Diritto comunitario e degli scambi internazionali*, 1993, 7.

[19] G. A. Primerano, cit. *Ambiente e diritto agroalimentare. Organizzazione, regolazione e controlli*, cit., 640-641, theorises the existence of a branch of law that constitutes the intersection between the discipline of public authorities, traditionally intended as administrative law, and Agri-food law, given the substantial presence of public-law norms within Agri-food legislation, with specific reference to administrative procedures for the issuance of permits required for the operation of the various activities comprising the supply chain, as well as in matters concerning the granting of quality labels and trademarks. The author recalls L.R. Perfetti, *Principi della disciplina pubblicistica dell'alimentazione. Premesse ad un diritto amministrativo dell'alimentazione*, *in Rivista di diritto agrario*, 2014, 3-20, 15, defines it as «*that body of law which examines the authoritative powers vested in public entities to ensure that the food products market operates primarily with a view to guaranteeing the highest level of protection of human health, market competition, and adequate individual supply at prices which, where necessary, may be subject to regulation*». This definition

authoritative mechanisms typical of administrative law. However, administrative dynamics in this context are recalibrated in light of the regulatory and organisational needs pertaining to market integrity, food safety, and environmental sustainability.[20]

Accordingly, the regulatory structure is primarily characterised by a strong public presence, with public actors operating across four distinct levels, distributed between the EU and national legal systems.[21] Alongside this first model, however, comes into play a form of regulation exercised by the very players whose activities are subject to regulation, thus introducing a hybrid system wherein both public authorities and private operators contribute to the enforcement and evolution of Agri-food governance.

precisely delineates the regulatory functions exercised by public administrations in this domain, placing them within the scope of the so-called *Agri-food administrative law*.

[20] The emergence of a system characterised by the synthesis of different branches of law is attributable not only to the multifaceted nature of agriculture but also to a shift in the understanding of agriculture, marked precisely by the sustainability aspects previously mentioned. Indeed, whereas the sector under consideration was initially approached primarily with regard to economic factors, it currently assumes a role that is also ecologically oriented towards environmental protection and social impact. G. A. Primerano*, Il carattere multifunzionale dell'agricoltura tra attività economica e tutela dell'ambiente*, in *Diritto Amministrativo* 4 (2019), 837 ff.

[21] The primary role is held by the European Commission, supported by agencies and independent authorities; in third place are committees representing various categories of stakeholders, and finally, the fourth tier is occupied by national administrations. F. Albisinni, *La filiera agro-alimentare fra produzione e mercato*, in *Il Diritto Industriale* 2 (2025), 105 ff., and also G. A. Primerano, *Il carattere multifunzionale dell'agricoltura tra attività economica e tutela dell'ambientei*, cit., 625, or D. Bevilacqua, *Le definizioni di OGM, le intenzioni del legislatore e il bilanciamento degli interessi*, in *Giornale di diritto amministrativo* 3 (2019), 377. The matter becomes even more complex when considering that the Agri-food sector is classified under Article 117 of the Constitution as an area of concurrent legislative competence shared between the State and the Regions. Cf. *passim*, A. Fioritto, *Agricoltura (amministrazione della)*, in *Digesto Pubblico*, 1987 – *One Legale.it*.

2. *The exercise of administrative regulatory power in the multilevel Agri-food system: from an inspectorial and sanctioning model to preventive regulation*

Issues relating to the concepts of food safety and food security,[22] justify public intervention to establish a system capable of meeting the requirements of health and safety. Indeed, these notions concern the existence of economic, social, and material conditions enabling the provision of adequate quantities of food for all individuals. It follows that public regulation constitutes the most appropriate instrument to guarantee safeguards to prevent any imbalance between the supply and demand of agricultural products and is, at the same time, essential for enforcing precise quality standards in terms of hygiene, health, and sustainability. Thus, public regulation serves as a key guarantee for addressing both health and sustainability concerns.

Regulatory activity should be identified as the establishment of rules governing the proper functioning of a given market sector through the preventive delineation of the limits and modalities for the conduct of private operators acting within it. Such regulation involves the continuous assessment of the activity under scrutiny to ensure its conformity with the principles and values originally established, by virtue of the public interest it represents.[23]

[22] The first concept refers to security in terms of the availability of sufficient quantities of food to meet everyone's access needs, whereas the second pertains to the safety of consuming food produced under conditions that ensure adequate hygiene and health standards. Both concepts constitute the cornerstone of the One Health system, which aims at an integrated protection of human and animal health, together with plant and environmental health, from a sustainable perspective. On this topic, among the numerous contributions, M. Sollini*, Il sistema della sicurezza alimentare. Profili di diritto amministrativo,* Torino, 2023, 14 ff.; L Costato, F. Albisinni, *European and Global Food Law*, Milan, 2016 and S. Gardini, *Il controllo amministrativo della filiera agroalimentare*, in *Il diritto dell'economia*, cit, 92 ff.; C. Napolitano, *Sicurezza alimentare ed etica della sostenibilità: profili di diritto amministrativo*, in *Federalismi.it*, 2018, 6 ff.; M. Cohen, *Right to food*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, august 2016.

[23] F. G. Scoca, entry '*Attività amministrativa*', in *Enc. dir.* – Agg. VI, 2002,

The broad scope of public regulatory intervention in the Agri-food sector necessitates that administrative functions be directed toward all stages of the supply chain, given the significance each phase holds, even beyond national borders. Consequently, regulatory intervention is primarily imposed by supranational rules, enabling the function given to institutional actors on that level; then public administrations of individual Member States come into play, considering the regulatory requirements needed to grant proper circulation and trade of agricultural goods among countries.[24]

The aforementioned multilayered governance and legislative system is influenced by decisions of supranational courts, and originally featured a predominance of criminal law norms with sanctioning nature, leaving administrative intervention with a primarily inspectional and 'policing' function, especially regarding hygienic and sanitary matters.[25]

80, this authoritative doctrine emphasises how the very existence of such an activity, based on a teleological criterion, has led to the transition from a 'managing-type' of State to a 'regulatory' one, characterised in a neutral sense, insofar as '*it does not pursue specific interests nor aim at objectives that may be set by the body presiding over regulation*'. The author further highlights that the interest in the proper functioning of market dynamics is in no way interchangeable with the interests of individual competitors therein, constituting as a result an additional element. Consequently, private economic operators are not intended as direct addressees of the regulation but only by virtue of their position within the sector under supervision, since: 'the public interest thus delineated assumes a conditioning role over the very content of regulation, with reference to which two defining moments can be identified: the first relating to the formulation of the rule, and the second to its application – more precisely, to ensuring that the rule as formulated is applied. This is, therefore, an activity performed by public entities (public agencies, to use terminology imported from the U.S. legal system), which are recognized not only the power to adopt rules but also to apply and enforce them (whether administratively or judicially)'.

[24] M. Ramajoli, *Quale futuro per la regolazione alimentare?*, in 2 *Milan Law Reviw* 2 (2021), 61.

[25] S. Cassese, *Lo spazio giuridico globale*, Rome-Bari, 2003, 113 ff. and M. Ramajoli, *Quale futuro per la regolazione alimentare?*, cit., 64, and S. Gardini, *Il controllo amministrativo della filiera agroalimentare*, in *Il diritto dell'economia*, cit. 94.

Accordingly, administrative activity was characterised by repressive intervention in the presence of unhealthy production conditions, occupying a subsidiary role to the exercise of criminal prosecution. However, it needs to be considered that European integration policies, also aimed at the completion of the single market, have led to a fundamental shift in perspective, whereby the circulation of safe food products became a central purpose for the development of the Member States' economies.

The logical consequence was to enable public administrations to exercise their powers at a stage preceding mere repression (which by nature is subsequent), changing focus from responding to violations of hygienic and sanitary standards in the production phase to proactively establishing protections to ensure compliance with those standards from the beginning.[26]

The definitive transformation of food from a matter of exclusively private interest to a fully-qualified public concern occurred with the adoption of Regulation (EC) n. 178/2002, which established the European Food Safety Authority (EFSA),[27] and the so-called Hygiene Package two years later, consisting of Regulation (EC) nn. 852/2004, 853/2004, 854/2004,[28] and 882/2004. Legal scholarship[29] has recognised that the elevation of food safety to a matter of public interest was brought about by the 'juridification' of the subject matter, due precisely to the introduction of these rules, resulting in food safety becoming a cornerstone of European policies.

[26] A. Morrone, *Lineamenti di una Costituzione alimentare*, in A. Morrone, M. Mocchegiani (Eds) *La regolazione della sicurezza alimentare tra diritto, tecnica e mercato: problemi e prospettive* – VII No. 9 Bologna, 2022, 9 ff.

[27] It constitutes the European Food Safety Authority. The same Regulation gave formal recognition to the precautionary principle within the procedures of risk assessment, risk management, and risk communication.

[28] The first concerned the hygiene standards that products need to meet; the second, hygiene of products of animal origin; the third, official controls on food of animal origin for human consumption; and the fourth, official controls on feed, food, and animal welfare.

[29] M. Ramajoli, *La giuridificazione del settore alimentare*, in *Diritto amministrativo*, 2015, 657 ff., along with A. Morrone, *Lineamenti di una Costituzione alimentare*, cit., 9 ff. and S. Gardini, *Il controllo amministrativo della filiera agroalimentare*, in *Il diritto dell'economia*, cit. 91-112.

This shift in perspective required that the exercise of administrative power no longer be aimed solely at eliminating breaches of healthfulness, sustainability, and competition principles through repressive measures. Instead, it must primarily be employed to promote the adoption of product traceability measures and transparency throughout production phases, thereby ensuring the proper conduct of Agri-food activities. This objective requires that the administrative function is developed inside a regulatory and, thus, preventive framework, through planning and programming measures or enabling acts, alongside the already mentioned control activities that complement sanctioning powers.[30]

2.1. *Models of Multi-Level Regulation in the Agri-food*

Under Articles 38, 39, and 40 of the TFEU, the Common Agricultural Policy (CAP) is established as a core objective of the Union's legal order, with explicitly defined goals that have both social and economic implications.[31] The fulfilment of these objectives requires the adoption of common rules to ensure the

[30] G. A. Primerano, *Il carattere multifunzionale dell'agricoltura tra attività economica e tutela dell'ambientei*, cit., 617 and M. Ramajoli, *Quale futuro per la regolazione alimentare?*, cit., 64. It is in this context that prior intervention targets risk analysis, through its integration into the risk analysis process, structured into the phases of assessment, management, and communication. Specifically, the first two phases (risk assessment and risk management) are entrusted to the EFSA by Regulation No. 178/2002, while the final phase (risk communication) is assigned to the European Commission.

[31] Consider that Article 39 TFEU identifies as a main goal increase productivity in the Agri-food sector through technical progress, alongside ensuring fairness and income stability for those engaged in agricultural work. This objective also encompasses market regulation, to ensure market stability, among other goals.

While originally of primary significance at the supranational level, national courts of last instance have affirmed its application in contractual exchanges between economic operators. They connected it to Article 1227 of the Italian Civil Code on contributory negligence, to reinforce the safety obligations incumbent upon contractual parties (see Cass. civ., 10 luglio 2014, n. 15824 in *www.dejure.it*).

proper structuring of the market in a competitive sense. This includes regulation of agricultural product prices, instruments governing import and export regimes, and mechanisms for upstream and downstream subsidies.[32]

Regulatory activities aimed at safeguarding food safety and food security are primarily carried out by the European Food Safety Authority (EFSA) and the European Commission. These institutions are responsible for establishing public standards to be observed, effectively elevating such matters to a supranational level of governance.

However, it cannot be said that Member States are entirely excluded from the exercise of regulatory power, even though such administrative competence is predominantly vested in the mentioned Agency. Rather, Member States are permitted to intervene at a later stage. While the standards[33] are defined at the European level, the response to their violation is given by national authorities.

This organisation reflects the so-called command-and-control model, which presupposes the imposition of binding conduct rules on economic operators by a public authority. Any violation of such rules implies the application of penalties or administrative sanctions. Consequently, private actors are not allowed to act

[32] M. Bavorova, N. Hirschauer, G. Martino, *Food Safety and Network Governance structure of the Agri-food system*, in 37 *European Journal of Law and Economics* 1 (2014), 1-12; G. A. Primerano, *Ambiente e diritto agroalimentare. Organizzazione, regolazione e controlli*, cit., 631, offers an example of price regulation as found in Article 44 TFEU, referring to the legitimate possibility granted to Member States to impose compensatory taxation upon importation, in cases where national legislation adversely affects competition in food production, unless the same Member State applies equivalent compensatory taxation upon exportation.

[33] A. La Spina, G. Majone, *Lo Stato regolatore*, Bologna, 2000 observed that standards established within regulatory frameworks take distinct forms. For instance, performance standards, define outcomes to be achieved; specification standards, set out the specific methods or procedures to be followed to attain those outcomes; and engineering standards, outline multiple operational plans or technical solutions, any of which can be chosen by the operator, to achieve the regulatory objective.

discretely; they are merely obligated to comply with the authoritatively imposed rules.

The merit of this traditional regulatory model lies in its contribution to the shift from an evaluation focused on the conformity of individual agricultural products with risk-elimination requirements, to a presumption of food safety, provided that production processes follow the standards established by the public regulator.[34] As a result, regulatory assessment is now predominantly conducted *ex post*, focusing on the accuracy of the treatment of agricultural products considering the predetermined standards, thereby enhancing the significance of monitoring and enforcement activities.[35]

Nonetheless, this model does not exhaust the regulatory instruments available within the current supranational and domestic legal frameworks. Alongside it, other approaches such as co-regulation and self-regulation have emerged, which actively involve private actors[36] in the regulatory process.

Co-regulation constitutes a participatory model of regulatory power; whereby public authorities delegate certain regulatory functions to economic operators. These operators then comply to codes of conduct or standards developed either by themselves or jointly with public institutions.[37] Unlike the command-and-control model, which relies on instruments of hard law, co-regulation tends to operate with soft law norms.[38]

In contrast, self-regulation represents a model in which pri-

[34] Once again, it is Regulation (EC) N. 178/2002 that establishes such a presumption, as set forth in Article 14(7).

[35] A.G. Caragli, M. Leggio, *Governance e regolazione del settore agroalimentare verso il paradigma One Health*, cited, 111 ff.

[36] D. Bevilacqua, J. Duncan, *Towards a New Cosmopolitanism: Global Reflexive Interactive Democracy as a New Mechanism for Civil Society Participation in Agri-food Governance*, in 10 *Global Jurist* 1 (2010), 2.

[37] An example can be the EU Code of Conduct on Responsible Food Business and Marketing Practices, which constitutes a component of the Farm to Fork Strategy. This initiative seeks to promote the adoption of voluntary commitments aimed at encouraging healthy and sustainable consumption.

[38] M. Ramajoli, *Soft law e ordinamento amministrativo*, in *Riv. trim dir. am.*, fasc. 1 - 2017, 147. About self-regulation, also see A. Ogus, *Rethinking Self-Regulation*, in 15 *Oxford Journal of Legal Studies* 1 (1995), 97 ff.

vate actors assume full protagonism. Economic operators independently define regulatory standards, which, however, do not possess any binding effect from a public point of view.[39] Rather, these are private criteria negotiated among supply chain participants and embedded within their contractual agreements.[40] Their binding force arises solely from the norms of private law, and they do not produce any effects on a public legal level. The practical benefit of this approach lies in facilitating access to specific segments of the supply chain or market. In case of non-compliance, the economic operator may be excluded from participation,[41] as a form of sanction.

The significance of these regulatory models is particularly evident in efforts to govern the environmental sustainability of the Agri-food supply chain. This area is predominantly characterized by instruments of a less coercive and more voluntary nature.

3. *Control Activity in the Agri-food Supply Chain*

Internal administrative control activity constitutes the mechanism through which the legal order ensures public action's lawfulness, while also securing its legal effects.[42] This function retains its significance even when the oversight is carried out by public authorities in fulfilment of their duty to supervise specific private economic initiatives, such as those regarding the food sector. What changes, however, is the analytical perspective: the evaluation – whether as an internal procedural act or the outcome of a dedicated procedure – concerns the compliance of the

[39] A.G. Caragli, M. Leggio, *Governance e regolazione del settore agroalimentare verso il paradigma One Health*, cit., 125.

[40] Art. 1372 of the Italian Civil Code, concerning the binding force of contracts, which states: '*The contract has the force of law between the parties* […]', in accordance with the Latin maxim *pacta tertiis nec nocent nec prosunt*, referring to the fact that agreements neither harm nor benefit third parties.

[41] F. Adornato, *Intervento pubblico in agricoltura: la nuova frontiera degli accordi negoziali,* in F. Adornato (Ed.) *Sviluppo locale e contrattazione programmata*, Milan, 2004 and A. La Spina, G. Majone, *Lo Stato regolatore,* cit., 35.

[42] Z. Szente "*Administrative Control*", in *Max Planck Encyclopedia of Comparative Constitutional Law*, March 2018, 1-13, G. Berti, N. Marzona, '*Controlli amministrativi*', in *Enc. dir.* (Add. III), 1999, 457 ff.

activity under examination with the normative criteria established to prevent risks and thereby guarantee its legality.[43]

This function finds constitutional recognition in Article 41 of the Italian Constitution, which empowers the State to supervise private economic activities in order to verify their consistency with the social purposes identified by the law. A positive assessment thus implies the activity's apparent eligibility for legal protection.[44]

The perspective assumed in this kind of oversight is, therefore, not repressive of potential violations committed by private actors, but rather serves a precautionary verification role, ensuring that regulatory rules are correctly observed.

Within the wider system of controls, the notion of risk is especially significant. It is in this context that the three phases of risk managementshow their importance. The entire Agri-food supply chain is subject to the principle whereby each Member State must monitor product compliance with EU law, either through public inspections or via self-checking activities conducted by economic operators themselves. Such inspections are referred to as 'official controls'.[45]

At the regulatory level, Regulation (EC) n. 178/2002 plays a fundamental role not only in standard-setting but also in the organisation of control activities. This regulation, it is worth recalling, enshrines the precautionary principle, from which the objec-

[43] Traditionally, the *genus* of control activities is divided into two distinct *species*: oversight over public administrations, and specific oversights over private activities. M.S. Giannini, *Controllo: nozione e problemi*, in *Rivista trimestrale di diritto pubblico* 4 (1974), 1263 ff., the author defines control as the verification of the regularity of a function, accomplished by a subject for their own function or in relation to an external one.

[44] A. Colavecchio, *Provvedimento amministrativo e atti di accertamento tecnico*, in *Giornale di diritto amministrativo*, n. 1, 1° gennaio 2020, 96, where the authors expose the control activity as performed by the Gestore dei Servizi Energetici S.p.A. (GSE).

[45] Pursuant to Article 2 of Regulation (EU) 2017/625, such activities constitute monitoring and surveillance tasks carried out by competent authorities over the conduct of private operators and products. C. E. Rizzo, R. Venuto, G. Giovanni, S. Raffaele, C. Genovese, *Assessment of Food Hygiene Non-Compliance and Control Measures: A Three-Year Inspection Analysis in a Local Health Authority in Southern Italy*, in 14 *Foods* 19 (2025), 3364.

tive of food safety derives, requiring risk management through monitoring mechanisms.

The concept of risk in this context was initially institutionalised within the Hazard Analysis and Critical Control Points (HACCP) system, which imposed on economic operators a self-monitoring model complementary to official controls.[46] This system aims to identify potential threats to food safety to limit their impact. Similarly, the 2004 Hygiene Package[47] reinforced this approach by introducing a model of individual responsibility for economic operators, including training obligations tailored to the degree of responsibility inherent in the activity performed.[48]

The accountability process initiated by Regulation n. 178/2002, grounded in self-responsibility and preventive oversight, aligns fully with the application of the precautionary principle elaborated therein.[49]

[46] This system was introduced by Directive 93/43/EEC of 14 June 1993. It marked a turning point in the structure of official controls by introducing models of self-responsibility in the assessment of risk points, which significantly enhances the dynamism and responsiveness of the control apparatus. C. G. Awuchi, *HACCP, Quality, and Food Safety Management in Food and Agricultural systems*, in *Cogent Food & Agriculture, 9*(1), 2023; F. Albisinni, *Scienze della vita, produzione agricola e Lawmakers*: *una relazione incerta*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2018, fasc. 5, 740-41.

[47] Precisely, by art. 1 Reg. n. 2004/852/CE.

[48] G. A. Primerano, *Ambiente e diritto agroalimentare. Organizzazione regolazione e controlli*, cit., 638, underscores the accountability function assigned to the operator within the HACCP system, with primary accountability placed on economic actors for the identification and management of food safety risks; on this topic, see also F. Albisinni, *Funzioni pubbliche e competenze dei privati fra accountability e trasparenza: verso un diverso ordine nella Food Law,* in *Riv. dir. alim*. 1 (2015), 8. A different aspect of accountability in Agri-food, relevant from the sustainability point of view, is examined by R. Maughan, A. O'Dochartaigh, *Dialogic Accounting in a Multi-Stakeholder Initiative: examining the role of state, semi-state and civil society actors in agrifood sustainability*, in 38 *Accounting, auditing & accountability journal* 7 (2025), 1776-1803. On this topic, see also G. Agyemang, *Let's have a relook at accountability*", in 56 *The British Accounting Review* 1 (2024); J. Bebbington, C. Larrinaga, *Accounting and Sustainable Development: an Exploration*, in 39 *Accounting, Organizations and Society* 6 (2014), 395-413.

[49] F. Albisinni, *Sicurezze e controlli: chi garantisce cosa?*, in *Riv. dir. alim*. 4 (2011), 5 ff.

The newer Regulation (EU) n. 2017/625[50] constitutes the comprehensive legal basis for official controls. It represents an evolutionary reconsideration of the fundamental concepts of risk and hazard,[51] underlining the interconnection between the two. For the first time, the regulation adopts a holistic approach, extending beyond human health to encompass animal health and environmental protection as well.[52]

Ultimately, control activities are shaped by the principles of

[50] A. Menditto, F. Anniballi, B. Auricchio, D. De Medici, P. Stacchin, *Regulation (EU) 2017/625 and the 'Union Agri-food Chain Legislation'. A New Comprehensive Approach in Line with the 'One Health' Paradigm?,* in *Food & Law Review* 5 (2017), 406 ff.

[51] Article 3(23) of the mentioned Regulation defines hazard as '*any agent or condition with the potential to have an adverse effect on human, animal or plant health, animal welfare or the environment*'. The following provision then defines risk for the purposes of official controls as '*a function of the probability of an adverse effect on human, animal or plant health, animal welfare or the environment and of the severity of that effect, consequential to a hazard*'.

Thus, the Regulation establishes an inseparable logical connection between hazard and risk, the latter presupposing the former: the existence of a hazard is a necessary condition for the emergence of risk. On the conceptual distinction between the two terms, see M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto amministrativo*, cit., 67 ff., who links risk to a probabilistic theory grounded in private law, arguing that risk is perfectly reducible to precise spatiotemporal coordinates, and that the event may be 'rationalised' by means of probability calculus. This evaluation is considered generally 'reliable', as it rests on what is known as the rule of experience: a notion that continues to feed into an outdated positivist optimism.

However, this approach is ultimately unsatisfactory, as it fails to capture the complex and multifaceted nature of reality. Indeed, it reduces the dimension of the possible to a mere eventuality, as if it were unmanageable due to its inherent uncertainty.

By contrast, the concept of hazard appears to be more closely linked to an assessment of the existence of the constitutive elements of damage, considered both necessary and sufficient to produce harm. Whereas risk entails an element of inherent uncertainty, hazard, conversely, concerns the determination of the harmful conditions capable of giving birth to the damaging event.

[52] Cf.; A. Menditto, F. Anniballi, Fabrizio, B. Auricchio, *Regulation (EU) 2017/625 and the 'Union Agri-food Chain Legislation': A New Comprehensive Approach in Line with the 'One Health' Paradigm?*, in 12 *European Food & Feed Law Review* 5 (2017), 406-412; F. Albisinni*, Il Regolamento (UE) 2017/625: controlli ufficiali, ciclo della vita, impresa, e globalizzazione*, in *Riv. dir. alim*. 1 (2018), 12.

precaution[53] and prevention, with specific regard to both food-re-

[53] The precautionary principle owes its conceptual origin to legal thought in the field of environmental law; nevertheless, Regulation (EC) No. 178 expressly requires its application within the agrifood sector**.** See M. Ramajoli, *Quale futuro per la regolazione alimentare?*, cit., 66. The principle originates from European Union law and is characterised by the anticipation of the threshold of protection to a point in time at which scientific assessment is incapable of yielding a conclusive determination concerning the existence or extent of the risk. Since the Single European Act of 1986, the European Community has worked to establish common policies to regulate the environment as a fundamental good. As a result, this principle was incorporated into the EC Treaty. This was on the basis that preventive action is less onerous than repressive or remedial measures, and that damage to the environmental asset is frequently irreversible or, in any event, not susceptible to full restoration. See S. Grassi, entry '*Tutela dell'ambiente* (*diritto amministrativo*)', in *Enc. dir.*, Annali I, 2007, 1114 ff.; also R. Ferrara, *I principi comunitari della tutela dell'ambiente*, in *Dir. amm.,* 2005, 509 ff.See also M. Sollini, *Il sistema della sicurezza alimentare. Profili di diritto amministrativo*, Torino, 2023, 65 ff., who clearly distinguishes legal theories of causation relevant to civil or criminal law from those applied in administrative law. The author underscores the link between risk and danger, the second intended as an event that can be empirically verified and evaluated, and the consistent use by legislators of such terminology in situations of urgency. Additionally, the concept of 'risk' in administrative law differs from – but remains related to – the notion of 'emergency', which implies the exercise of exceptional powers beyond normal administrative procedures, aimed at an effective response to the objective unpredictability of a given event. See F. Giglioni, *Amministrazione dell'emergenza*, in *Enc. dir.*, Annali VI - 2013, 44 ff.; M.P. Chiti, *Il rischio sanitario e l'evoluzione dall'amministrazione dell'emergenza all'amministrazione precauzionale*, in *Riv. it. Dir. pub. Com.,* 2006, 1; C. Stephenson, M. Koivusalo, A. McCallum, S. Atkins, *Is Public Health Losing Its Reach? the Precautionary Principle and European Union chemicals policy*, in 35 *European Journal of Public Health* (2025), 2; A. Akins, P. O'B Lyver, H. F. Alrøe, H. Moller, *The universal precautionary principle: New pillars and pathways for environmental, sociocultural, and economic resilience,* in 11 *Sustainability* 8 (2019), 2357.

Regardless of the legal branch in question, the notions of 'risk' and 'danger' remain connected to the idea of a probabilistic assessment (*id quod plerumque accidit*) of a harmful event. However, in the context of risk assessment in Agri-food control, the most relevant element is the initial evaluation based on a degree of uncertainty, from which steps must be taken toward collecting data that can statistically reduce the risk's realisation and avoid the danger. On the role of uncertainty as a defining element of the precautionary principle; based on the analysis of Cons. Stato, Sez. III, 26 ottobre 2023, n. 9265, which demonstrates how jurisprudence applies the precautionary principle even in situations where neither technology nor scientific results appear sufficient to

lated risk and hazard, also having to be programmed in accordance with the principle of proportionality. This affects the frequency of inspections, which must be balanced to the size of the risk, in that way ensuring the efficient use of available resources.[54]

3.1. *Multiannual National Control Plans as Effective Control Activity for Preventing Risks*

This type of valuation demands a careful and structured planning activity,[55] to ensure the effective involvement of the '"competent authorities"'[56] in the implementation of official controls. The Multi-Annual National Control Plans ('MANCPs') pursue this complex function by setting in advance the purposes and criteria of control activities, thereby informing economic operators of such parameters and enabling better compliance.

Risk analysis also characterises the MANCPs, as these plans must include an evaluation of the activities most exposed to the occurrence of risks from a probabilistic point of view. This confirms that, in the sector under consideration, only a preventive and integrated assessment of the various relevant factors can ensure the effectiveness of controls across the Agri-food chain.[57]

determine with certainty the outcome of a risky activity. For further discussion on risk in administrative law, see L. Giani, M. D'Orsogna and A. Police (Eds), *Dal diritto dell'emergenza al diritto del rischio*, Napoli, 2018, *passim*.

[54] D. Bevilacqua, *Il nuovo regolamento sui controlli alimentari e l''accentramento decentrato' della governance europea – Il commento*, in *Giornale di diritto amministrativo* 6 (2018), 738 and see also A.G. Caragli, M. Leggio, *Governance e regolazione del settore agroalimentare verso il paradigma One Health*, cit.,, 221 ff.

[55] M. S. Giannini, entry '*Pianificazione*', in *Enc. dir.* – XXXIII, 1983, 629 ff., where it is described as one of the fundamental pillars of public authorities' action, even being previous to the emergence of modern States. It is rooted in democratic organisational structures and involves the setting of objectives and the determination of the modalities for allocating the resources necessary for their achievement.

[56] Defined by art. 3 of the reg. n. 2017/625 (EU).

[57] See S. Gardini, *Il controllo amministrativo della filiera agroalimentare*, cit., 101.

These instruments fall within the regulatory framework established by Regulation (EU) n. 2017/625, with the intention of promoting greater compliance on the part of private actors operating in the sector. Indeed, the already mentioned supranational source requires each Member State[58] to adopt a Plan identifying the official controls to be carried out within national territory, in accordance with the strategic objectives set forth therein.

In particular, the MANCPs monitor the progress of control activities in relation to the predetermined objectives, with ongoing assessment of their achievement. This is closely linked to the obligation to develop an annual report, which presupposes the continuous updating of the Plan, as disposed in art. 111 of the Regulation.

The function of planning instruments, therefore, unfolds along two dimensions: on the one hand, the descriptive aspect concerning the control activities developed in every segment of the supply chain, necessary to fulfil reporting obligations and assure compliance; on the other hand, the strategic function typical of planning acts, involving the right allocation and management of resources.

The public authorities involved are granted specific competences depending on the sector in which the Plan is required to set strategic goals and the corresponding modalities for pursuing the public interest. Consequently, the public body endowed with the relevant authority is also responsible for the execution of control activities arising from the implementation of the MANCP. Alongside the general rule whereby each administration bears individual responsibility, is a special mechanism of coordination[59]

[58] The Italian State adopted the Plan during the 'Conferenza Stato-Regioni', a session held between the Central administration and the regional ones, on 22 March 2023, through the approval of a document effective for the period 2023-2027.

[59] Specifically, the 'Nucleo permanente di coordinamento' (Permanent Coordination Unit) is the body given with the responsibility for coordinating the activities deriving from the implementation of the Plan. It was established, confirming the provisions previously in force, through the 'Intesa Stato-Regioni' (an agreement between the involved administrations) n. 55/CSR of 22 March 2023. The Unit is composed of senior officials from the administrations

based on the involvement of senior officials from the competent authorities, representing a centralised approach to the exercise of control functions.

3.2. *First Line and Second Line Control Alongside with Private Control Activity*

Administrative controls over the Agri-food supply chain are primarily carried out by the competent national authorities,[60] following the imposition of sectoral regulation at the European level. Nevertheless, supranational authorities vested with such oversight powers also exercise significant operational functions in implementing control mechanisms.

Unlike other sectors, the control function was not assigned to EFSA in its competence as the specialised agency in the Agri-food domain. Instead, it has been delegated to the European Commission, as this was deemed more appropriate to safeguard democratic oversight, which might otherwise be compromised were such powers delegated to an agency.[61]

involved, three representatives of the Regions and Autonomous Provinces, one representative from the *Istituto Superiore di Sanità*, one representative from the *Centro di referenza nazionale per l'epidemiologia veterinaria, la programmazione, l'informazione e l'analisi del rischio*, as well as representatives from law enforcement authorities.

On the same occasion, the Regions were also granted the possibility to develop additional Plans beyond the national ones to ensure more effective regional control activities.

Articles 102 ff of Regulation (EU) 2017/625, concerning so-called *administrative assistance*, provide a further and specific example of coordination. This mechanism allows the *Ministero dell'agricoltura, della sovranità alimentare e delle foreste* to enter into agreements with the competent authorities of other Member States, with a view to encourage cooperation. In particular, such cooperation is reflected in the possibility for those authorities to participate in official controls carried out in another Member State.

[60] Pursuant to art. 2, par. 1, D. Lgs. n. 27/2021, these authorities are: the Ministry of Health, the Regions, the Autonomous Provinces, and the Local Health Authorities

[61] Indeed, it was considered that such a system does not conflict with the principles established by the *Meroni* doctrine, according to which: '*the delega-*

Accordingly, the Commission is tasked with performing both direct control functions over private actors, referred to as 'first-line' controls in supranational terminology, and indirect controls over the national competent authorities themselves, through the so-called 'second-line' controls.[62]

In the context of first-line controls, the Commission conducts administrative oversight by introducing a procedure that culminates in the adoption of an administrative act. The peculiarity here lies in the fact that such acts are directed at the Member States' own administrative bodies, which, specifically, are the very authorities initially entrusted with control functions.[63] Furthermore, the Commission retains the power to adopt enforcement measures against Member States in cases where there is 'evidence of serious dysfunctions' in their control systems, pursuant to Article 141 of Regulation (EU) No. 625/2017.[64]

As previously noted with respect to regulatory functions, private entities may also participate in performing control activities within the supply chain.

This remains the case regardless of the provisions of Regulation (EU) 2017/625 concerning the protection of animal health or environmental safety. The Regulation generally presumes that such safeguards should fall within the responsibility of public authorities rather than private initiative. Nevertheless, Article

tion of regulatory powers to an independent authority may lead to an undue dilution of democratic accountability. […] *Secondly, the control function must lie at the heart of the Commission's risk management process if it is to act effectively in the interest of consumers* […]', as outlined in the White Paper.

[62] D. Bevilacqua, *Il nuovo regolamento sui controlli alimentari e l''accentramento decentrato' della governance europea,* cit., 746.

[63] L. Buffoni, entry '*Controlli amministrativi*', in *Enc. dir*., Annali X, 2017, 317.

[64] In this second scenario, however, it has been noted (A.G. Caragli, M. Leggio, last cited, 231) that the actual addressee of the measure is not clearly identifiable. What is certain is that, where the risk factors outlined in the provision are present, the Commission calls upon the Member State to take appropriate remedial action. If the State fails to do so, the Commission can adopt the mentioned implementing acts, which typically take the form of an implementing regulation.

31[65] allows public administrations to outsource the performance of control functions to designated private entities, as an alternative to direct administrative oversight.[66] Such delegation is consistent with the principle of legality,[67] as it remains subject to procedural requirements – even when exercised by private actors – and, most importantly, can only occur where expressly authorised by law.[68]

A clear example of this delegated control is the issuance of regulated certifications. On the other hand, a different situation arises considering non-regulated activities, such as ethical animal welfare certifications,[69] where control by the certifying body is limited to preliminary verification and lacks any public check.[70] However, a subsequent public verification may still become necessary regarding such certifications, in order to evaluate not only compliance with applicable supply chain standards but also the truthfulness of the certification itself.

[65] The article is entitled 'Conditions for delegating certain tasks related to other official activities' and specifies that 'the competent authorities may delegate certain tasks related to other official activities to one or more delegated bodies subject to compliance with the following conditions […]'.

[66] Voluntary standard organizations may be an example. A. Burrell, *'Good Agricultural Practices' in the Agri-food Supply Chain*, in 13 *Environmental Law Review* 4 (2011), 255 ff.

[67] Consiglio di Stato (Adunanza Plenaria), 3 settembre 2019, n. 9, where the aforementioned principle was affirmed with reference to the provisions set forth in art. 11, D. Lgs. N. 79/1999, which required the Minister of Economic Development, in agreement with the Minister of the Environment, to establish the rules for fulfilling the 'mandatory quota' through the institution of an administrative procedure aimed at control, which could also be delegated to qualified private entities (in the present case, the Gestore dei Servizi Energetici S.p.A.). On the topic, see generally A. Colavecchio, last cited.

[68] D. Bevilacqua, *L'esercizio privato di funzioni amministrative comunitarie*, in *Giorn. Dir. am.*, n. 7, 1 luglio 2008, 732 and S. S. Scoca, *Gli atti di autoamministrazione*, Ibid., n. 7, 1 luglio 2014, 1787, emphasise that this concerns the exercise of a public function by individuals who are not invested with a position within the workforce of the delegating public administration but merely hold an office of public law.

[69] L. Paoloni, *Benessere animale e filiera sostenibile*, in *Riv. dir. alim.*, Anno XV 3 (2021), 40.

[70] A.G. Caragli, M. Leggio, *Governance e regolazione del settore agroalimentare verso il paradigma One Health*, cit., 255.

This form of delegated exercise of public functions is, in any event, consistent with the constitutional principle of horizontal subsidiarity[71] enshrined in Article 118, paragraph 4, of the Italian Constitution, as well as with Law n. 241/1990, insofar as Article 1-*ter* requires that private actors delegated with the conduct of administrative proceedings adhere to the same principles that regulates the public administration in such procedures.

4. *Conclusion*

In conclusion, the current regulatory framework establishes a system aimed at achieving unified protection, yet directed towards three distinct areas: primarily human health, followed by animal and environmental health. This approach reflects the differing purpose of actions assumed by public authorities to implement the One Health paradigm, where the main goal of supranational legislation no longer coincides with promoting the principle of competition and market access, but rather with guiding productive activities towards operational methods inspired by environmental sustainability and hygienic-sanitary standards.[72] The result is that food safety has progressively become a matter of public interest, even prevailing over market considerations.

[71] The orientation of administrative activity towards the principles of effectiveness and efficiency has led to the constitutionalisation of the principle of horizontal subsidiarity, as a mechanism that clarifies how the achievement of the public interest does not require implementation exclusively by public administrations, making irrelevant the nature of the subject pursuing or contributing to its fulfilment. Consequently, the public administration is encouraged to outsource activities through delegation to private entities, provided that such outsourcing better satisfies the principle of good administration as enshrined in Article 97 of the Constitution and its related corollaries. See A. Maltoni, entry *Esercizio privato di pubbliche funzioni*, in *Enc. Dir.*, Annali I - 2007, 570; F. Gosis, entry *Ente pubblico,* Ibid., Annali VII - 2014, 411 ff.; A. Farì, *La sussidiarietà orizzontale in materia ambientale: il ruolo de iprivati e l'esercizio di funzioni pubbliche*, in *Rivista quadrimestrale di diritto dell'ambiente*, 3, 2015; D. Bevilacqua*, Il greenwashing e la tutela dei consumatori,* in *Giornale di diritto amministrativo* 4 (2024), 454.

[72] F. Albisinni, *La filiera agro-alimentare fra produzione e mercato,* cit., 1

To define an integrated system that simultaneously pursues multiple objectives and involves various levels of institutional actors entrusted with overseeing a public security purpose in the Agri-food sector, regulatory and control activities appear indispensable. Through such activities, the rules, standards, and objectives that economic operators need to observe in conducting their business activities are established beforehand (regulation); then continuous oversight, whether preventive or subsequent, is ensured throughout all phases of the food production chain, to guarantee the conformity of the activities performed observing what has been established by the public decision-maker, thereby preventing the occurring of risks (control).

Implementation of the European Union principle of precaution rests upon the different supranational principle of subsidiarity.[73] The latter principle, in fact, not only involves the intervention of public actors operating at different levels (thus embodying the multilevel governance structure of the sector, based on the coexistence of national public administrations, independent authorities, and European institutions), but also actively involves private actors, entrusted with self-monitoring based on the principle of self-responsibility. The subsidiarity mechanism is most

[73] The examined principle, in the supranational legal order, allows Member States to primarily take care of national public interests, and only if the exercise of the public function at the national level appears inadequate some different action can be taken at a higher level. Without any claim to exhaustiveness, M. Huysmans, T. van den Brink, P. van Gruisen, *Subsidiarity Ex Ante and Ex Post: From the Early Warning System to the Court of Justice of the European Union,* in 62 *Journal of Common Market Studies* 3 (2024), 744-759; J. R. Moodie, V. Salenius, M. Woien Meijer, *Why Territory Matters for Implementing Active Subsidiarity in EU Regional Policy*, in 56 *Regional Studies* 5 (2022), 866-878; P. Syrpis, *Review of* In Defence of Subsidiarity*, by Antonio Estella,* in 24 *Oxford Journal of Legal Studies* 2 (2004), 323-34; L. Sico, entry '*Sussidiarietà (principio di)* (dir. comunit.)', in *Enc. dir.*, Add. V, 2001, 1062, 1070. From a comparative perspective, through analysis of the organic law on agri-food security and sovereignty adopted in 2008 by Venezuela, it has also been emphasized how food sovereignty must necessarily be filtered through democratic mechanisms, by entrusting the management of such matters to subjects that have a connection to the territory where agricultural activity takes place, and subsidiarity is identified as the mechanism most satisfying such a need. On this point, S. Pitto, *Diritto al cibo (food security)*, Ibid., 2021, 22.

fully expressed through the horizontal and decentralised organisation that characterises the control system, which may also rely on the intervention of other Member States.[74]

Therefore, the multidisciplinary nature that characterises the topic of food safety and, more generally, the Agri-food sector, together with the corresponding need to meet security requirements related to sustainability and hygiene for the triad of human, environmental, and animal health, necessitates a sector founded on regulation and control. The pronounced intensity of the exercise of these administrative functions has thus led to the emergence of so-called Agri-food administrative law, further confirming the widespread sectorial nature of the matter, without relegating economic operators to mere executors of regulation, detached from control aspects concerning their activities.

[74] Cfr. D. Bevilacqua, *Il nuovo regolamento sui controlli alimentari e l'"accentramento decentrato" della governance europea*, cited, 745. The reference to the possibility of seeing the control carried out with the participation of a different Member State refers to the mechanism of 'administrative assistance' briefly mentioned above (note no. 59).

THE EVOLUTION OF THE ITALIAN COMPETITION AUTHORITY'S CASE-LAW ON GREEN CLAIMS: BEFORE AND AFTER THE GREENWASHING DIRECTIVE

Angelo Rainone

Abstract: *This article analyses the evolution of the Italian Competition Authority's (AGCM) case law on environmental claims ('green claims'), with particular focus on the impact of EU Directive 2024/825, known as the 'Greenwashing Directive' or 'Empowering Directive'.*

The author examines how the growing awareness of environmental sustainability has led the European Union to adopt a regulatory approach based on 'nudging' to combat greenwashing – deceptive business practices that present products or services as greener than they really are. Directive 2024/825 amends the Unfair Commercial Practices Directive 2005/29/EC, introducing specific definitions for 'environmental claims' and more stringent criteria for their assessment.

The analysis focuses on the jurisprudence of Italy's AGCM, which even before the Directive had developed a solid decision-making practice against greenwashing, applying the principles of transparency, truthfulness and neutrality. Emblematic cases such as Acqua Sant'Anna Bio Bottle, Ferrarelle Impatto Zero, and more recently the Eni and SHEIN cases are examined, illustrating the Authority's interpretive evolution.

The author shows how, even while many principles of the new Directive were already anticipated in the AGCM's practice, the entry into force of the new regulatory framework (scheduled for September 2026) will nonetheless have a significant impact, providing greater legal certainty and uniform criteria for evaluating environmental statements at the European level.

The paper concludes by highlighting how the Directive represents a paradigm shift that integrates market regulation and intellectual property protection with environmental sustainability goals, promoting a culture of corporate responsibility and transparency in commercial communications.

Keywords: Greenwashing, Environmental Claims, AGCM, EU Directive 2024/825, Sustainability

1. *Introduction*

Sustainability has emerged as a matter of increasingly urgent importance, drawing significant and growing attention across various sectors of society: as a matter of fact, the environmental crisis is now broadly acknowledged and widely recognised by the general public, policymakers, businesses and civil society alike as a fundamental concern that demands immediate and sustained action. In short, the implications of unsustainable practices – ranging from environmental degradation and climate change to resource scarcity and social inequality – have made it abundantly clear that the *status quo* is no longer tenable.

As is frequently observed in the evolution of public discourse, issues that are perceived by society as urgent or pressing often find their way into legal and regulatory frameworks.[1] Legal sciences, while occasionally less prompt in their response, generally react to social, environmental and economic pressures by developing tools, doctrines and enforcement mechanisms to address the challenges at hand.[2] In this sense, sustainability is not merely a moral or political imperative: it is increasingly becoming a legal one as well.

The pursuit of sustainability from a legal and regulatory standpoint manifests in a wide array of approaches. These include the creation and enforcement of mandatory rules that establish clear environmental and social standards for production, supply chains, and business operations. At the same time, regulatory

[1] In this regard, among others, P. F. Kjaer, A. Vetterlein, *Regulatory Governance: Rules, Resistance and Responsibility*, in 24 *Contemporary Politics* 5 (2018), 497-506, who held that 'Great transformations are unfolding within contemporary world society due to developments related to, among other things, the repercussions of the financial crisis, rapid technological developments and ecological challenges as well as the re-emergence of political conflicts centred on issues such as social inequality, nationalism and migration. Common for these otherwise very diverse developments is a consistent demand for regulation in order to solve perceived policy problems faster, more adequately and sustainably'.

[2] Cfr., L. Briamonte, D. Scarpato, *From Soft Law to Hard Law: Legal Transitions and Sustainable Challenges in the Italian Agri-Food Sector*, in 17 *Sustainability* 19 (2025), 8952.

strategies also rely on more flexible, behavioural approaches – such as 'nudging'[3] mechanisms – designed to subtly influence corporate behaviours without the use of direct coercion. These mechanisms guide economic actors towards more sustainable practices by altering the decision-making environment rather than mandating specific outcomes.

Among the more indirect, yet potentially powerful, regulatory instruments is the promotion of transparency and the strengthening of accuracy in corporate communications, particularly those directed at the marketplace.[4] Ensuring that companies disclose truthful, comprehensive and verifiable information regarding the sustainability of their products and services is crucial. Such disclosure enables consumers to make informed choices consistent with their values, thereby supporting the broader

[3] On the 'nudging' doctrine, refer to R.H. Thaler e C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, New Haven, 2008.

[4] Historically, on the thematic on the relationship between transparency and the well-being of the market, the most important paper is G. A. Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, in 84 (3) *Quarterly Journal of Economics*, 1970, 488-500. More recently, J. Bischof, J. Gassen, A. Rohlfing-Bastian et al., *Accounting for Transparency: a Framework and Three Applications in Tax, Managerial, and Financial Accounting*, in 76 *Schmalenbach J Bus Res* (2024), 573-61, who focuses on financial and tax matters reaching conclusions applicable to this field as well. Also, the Regional Administrative Court of Lazio (T.A.R. Lazio, Rome) in its judgment of 26 September 2024, No. 16702, delivered in the context of environmental-related litigation, affirmed the following: 'in un settore (…) contraddistinto da una forte asimmetria informativa tra operatori economici e consumatori. In sostanza, può affermarsi con certezza che il cliente medio non sia in grado di conoscere nel dettaglio le modalità e caratteristiche tecniche di funzionamento di tali servizi e delle app relative. Quando si veicola un claim di tal fatta sono dunque richieste ai professionisti una specifica e particolare diligenza e una correttezza informativa ancora più stringente, non evidentemente assicurate dalla ricorrente nel confezionamento del messaggio di cui si verte' (in translation: In a sector (…) marked by a significant informational asymmetry between economic operators and consumers, it can be stated with certainty that the average customer is not in a position to fully understand the technical characteristics and operational modalities of such services and their associated apps. Accordingly, when conveying claims of this nature, professionals are subject to heightened standards of diligence and a more stringent duty of informational accuracy – requirements which, in this case, were evidently not met by the claimant in the formulation of the contested message).

green transition, and, at the same time, this approach fosters a level playing field for businesses genuinely committed to sustainability, while deterring deceptive or manipulative practices.[5]

Indeed, one of the most pernicious and environmentally damaging forms of misleading business behaviour is the phenomenon known as 'greenwashing'.[6]

This notion encompasses a wide array of communication techniques, advertising initiatives, and marketing strategies deliberately designed and deployed by companies, public institutions and other entities. The underlying purpose of these practices is to conceal or downplay the actual (and often adverse) environmental impacts of particular economic activities. By selectively disclosing information, overstating environmental benefits or employing vague and unsubstantiated sustainability claims, such actors seek to construct a misleading appearance of environmental responsibility. In doing so, they present their operations, products, or services as significantly more eco-friendly, sustainable or ethical than they are, thereby deceiving both consumers and stakeholders.[7]

Such practices are not merely misleading – they actively interfere with the ability of consumers to make informed, responsible choices based on accurate information. They also distort market dynamics by placing truly sustainable businesses at a competitive disadvantage and by eroding public trust in environmental claims more broadly. As societal awareness and concern for environmental and climate-related issues have intensified in recent years,

[5] R.M. Rotman and A.D. Pennington, *Truth in Advertising for Environmental Sustainability*, 31 *Hastings Envt'l L.J.* (2025), 93.

[6] For a detailed analysis of the economic aspects related to greenwashing, reference is made to the following readings: A. Persakis, T. Nikolopoulos, I.C Negkakis *et al.*, *Greenwashing in Marketing: a Systematic Literature Review and Bibliometric Analysis*, in *Int Rev Public Nonprofit Mark* (2025); S.V. Freitas Netto, M.F.F. Sobral, A.R.B. Ribeiro, et al., *Concepts and Forms of Greenwashing: a Systematic* Review, in 32 *Environ Sci Eur* (2020).

[7] D. Schmuck, J. Matthes, J. and B. Naderer, *Misleading Consumers with Green Advertising? An Affect-Reason-Involvement Account of Greenwashing Effects in Environmental Advertising*, in 47 *Journal of Advertising* 2 (2018), 127-145.

greenwashing has increasingly come under scrutiny from regulators, advocacy groups and the public.

2. *The Greenwashing Directive*

In response to this growing sensitivity and heightened demand for accountability, the European Union has taken significant steps to place sustainability at the heart of its consumer protection policies.

One notable development in this regard is the European Union's Consumer Agenda of November 2020. This strategic document lays out the EU's comprehensive vision for consumer policy for the five-year period 2020 to 2025. Among the key priorities outlined in the agenda is the integration of sustainability as a fundamental guiding principle. The agenda recognises the crucial role that consumers play in the green transition and emphasises the need to empower them with truthful, reliable, and transparent information. It also underscores the importance of protecting consumers from deceptive commercial practices, such as greenwashing, that undermine both environmental goals and consumer rights.[8]

This heightened awareness of both the general public and policymakers across the European Union played a decisive role in shaping recent legislative initiatives to tackle the challenges posed by deceptive environmental claims. As misleading sustainability-related marketing practices have become increasingly widespread, the EU has taken concrete steps to reinforce consumer protection: a key outcome of this renewed policy focus was the formal adoption of Directive (EU) 2024/825[9] in Febru-

[8] Communication from the Commission to the European Parliament and the Council New Consumer Agenda Strengthening consumer resilience for sustainable recovery, 13.11.2020 COM(2020) 696, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0696&from=PT.

[9] For a more comprehensive discussion on the Greenwashing Directive, see J. MacLennan and W. De Catelle, *The Revision of EU Greenwashing Laws: A New Framework of Analysis*, in *Business and Human Rights Journal* (2025),

ary 2024. This instrument indeed marks an important milestone in the Union's broader strategy to ensure that consumers are better protected and more effectively empowered within the unfolding green transition.[10]

The directive is designed to tackle the increasingly widespread and sophisticated phenomenon of misleading 'green claims' made by businesses. These claims, often unsubstantiated or vague, mislead consumers into believing that products, services or companies themselves are more environmentally sustainable than they actually are. Such practices not only erode consumer trust but also hamper genuine sustainability efforts by creating confusion in the marketplace and rewarding companies that invest more in image than in substance.

Recognising the gravity of these concerns, the European Union adopted Directive 2024/825 to introduce more stringent safeguards, enhanced transparency obligations and clearer rules governing environmental advertising. The directive strengthens the existing framework of consumer protection by expressly targeting greenwashing practices and mandating that any environmental claims made in commercial communications be substantiated by robust, verifiable and scientifically credible evidence.[11]

Because of its ambitious scope and consumer-focused objectives, the legislation is frequently referred to by two informal names: the 'Empowering Directive', highlighting its goal of enabling consumers to make informed and sustainable choices, and the 'Greenwashing Directive', reflecting its primary mission of tackling false or misleading environmental marketing. Together, these labels capture the essence of a legal measure that aims to

1-7. It is important to note that the 'Green Claims Directive', which complements the 'Empowering Consumers Directive', has not been adopted.

[10] Cfr, F. Deana, *Reshaping Consumer Powers and Responsibilities in the European Union's Transition to a Sustainable Circular Economy*, in B. Calabrese (Ed.), *Legal Perspectives for a Sustainable Circular Economy. European Union and its Neighbours in a Globalized World*, Springer, (2025).

[11] C. Sciortino, F. Sgoi, S. Napoli, *Greenwashing in the Agri-Food Industry: A Discussion Around EU Policies and the Italian*, in 4 *Food and Humanity* (2025), 100528.

strike a balance between promoting sustainability and ensuring fairness and transparency in the internal market.

The Directive aims to actively promote the value and importance of sustainability within the complex dynamics of the internal market, by adopting a regulatory approach inspired by the principle of 'nudging'.[12] This concept implies that the European legislator, rather than imposing mandatory or rigid eco-sustainable production standards on businesses through authoritative or coercive measures, chooses instead to operate through more subtle, indirect means – particularly by focusing on the regulation of corporate communication practices.

In this way, the lawmaker seeks to influence market behaviours and business practices by combating misleading or deceptive marketing techniques – such as greenwashing – that can create a distorted perception in the minds of consumers. Such practices may negatively influence consumer behaviours and decision-making, leading individuals to make economic choices that are not genuinely sustainable from an ecological or environmental point of view, thus undermining the overall goal of sustainable development.

Protecting the consumer within this framework ultimately means safeguarding the proper functioning of the market itself.[13] The consumer has long been one of the principal beneficiaries of the legal rules governing commercial communication, particularly in areas such as misleading advertising, unfair commercial practices and the misuse of trademarks or labels that may distort the true environmental impact or origin of a product.

Today more than ever, consumer protection represents a fundamental and non-negotiable piece of the broader mosaic of European market regulation. It plays a critical role – on a par with antitrust law and industrial property law – in shaping and maintaining fair, transparent, and competitive conditions within the

[12] On this point, again, refer to R.H. Thaler e C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, New Haven, 2008.

[13] On this theory, cfr. L. Berg, *The Importance of Consumer Authorities for the Production and Maintenance of Trust and Social Capital in Consumer Markets*, in 45 *J Consum Policy* 3 (2022), 537-559.

single market. These areas of law collectively establish the rules of engagement for businesses operating in a highly competitive and increasingly sustainability-conscious economic environment, reinforcing the EU's commitment to an economy that is not only efficient but also socially responsible and environmentally aware.

An intervention of this nature – targeting misleading environmental claims and aiming to enhance consumer empowerment – inevitably triggered consequential amendments to the two cornerstone pieces of legislation that form the foundation of consumer protection within the European Union: the Unfair Commercial Practices Directive (Directive 2005/29/EC) and the Consumer Rights Directive (Directive 2011/83/EU). These directives have long served as the primary legal instruments for safeguarding consumers against deceptive, aggressive or otherwise unfair business practices, and for ensuring a high standard of consumer rights across the internal market.

The introduction of Directive (EU) 2024/825 did not replace or dismantle the existing legal frameworks. Rather, it carefully integrated new sustainability-oriented obligations and concepts into them, adapting their content to meet the contemporary challenges posed by the green transition and the growing environmental awareness of consumers. In this sense, the directive can be viewed as 'painting green' the existing consumer-protection acquis, enriching it with provisions specifically aimed at addressing greenwashing and other forms of deceptive environmental marketing – while preserving the coherence, structure and legal continuity of the original directives.

In a nutshell, under this new regime, the Unfair Commercial Practices Directive[14] now explicitly includes environmental

[14] For a more detailed discussion on the Unfair Commercial Practices Directive, see W. H. van. Boom, *Unfair Commercial Practices*, in C. Twigg-Flesner (Ed.), *Research Handbook on EU Consumer and Contract Law* Cheltenham, 2016, 388-405. Article 5 of Directive 2005/29/EC sets out a general clause that prohibits commercial practices which contravene the standards of professional diligence, and which distort, or are likely to distort, the economic behaviour of the average consumer in relation to a product. The core provisions addressing misleading practices are found in Articles 6 and 7, which specifically regulate misleading actions and misleading omissions, respectively.

claims within the scope of its provisions against misleading and unfair practices. It establishes clearer criteria for assessing the truthfulness and verifiability of such environmental claims, thereby setting a higher bar for businesses that wish to market their products or services as 'green'. Similarly, the Consumer Rights Directive has been updated to ensure that consumers receive more accurate and complete information about the environmental characteristics of products before making a purchase, thus strengthening their ability to make informed and responsible choices.

What is of particular significance from the standpoint of industrial and commercial law is unquestionably the substantive set of amendments introduced to Directive 2005/29/EC. These amendments represent a meaningful shift in the legal regulation of business-to-consumer communications, particularly in the realm of environmental marketing. The changes are not merely cosmetic or symbolic – they directly affect the way companies must structure their promotional strategies and compliance systems, especially when advertising supposed environmental or sustainability-related attributes of their products or services.

In practical terms, the revised Directive extends the scope of the rules on misleading commercial practices under Articles 6 and 7[15] to explicitly cover all forms of commercial communication – whether verbal, written, visual, or digital – that promote

[15] E. Minervini, L. Rossi Carleo, *Le pratiche commerciali sleali: direttiva comunitaria ed ordinamento italiano*, Milano, 2007; C. Granelli, *Le pratiche commerciali scorrette tra imprese e consumatori: l'attuazione della direttiva 2005/29/CE modifica il codice del consumo*, in *Obbl. contr.*, 2007, 777 ff; L.G. Vigoritti, *Verso l'attuazione della direttiva sulle pratiche commerciali sleal*i, in *Europa dir. priv.*, 2007, 521 ff.; G. De Cristofaro, *Pratiche commerciali scorrette e codice del consumo: il recepimento della direttiva 2005/29/CE nel diritto italiano: decreti legislativi nn. 145 e 146 del 2 agosto 2007*, Torino, 2008; S. Bastianon, *La tutela del consumatore alla luce delle nuove norme legislative e regolamentari in materia di pratiche commerciali slea*li, in 1 *Il Diritto Industriale* (2008), 1460 ff.; A. Genovese, *I decreti legislativi sulle pratiche commerciali scorrette. Attuazione e impatto sistematico della direttiva 2005/29/CE*, Padova, 2008; P.F. Bartolomucci, *Pratiche commerciali scorrette: profili civilistic*i, Napoli, 2009; F. Leonardi, *Comportamento omissivo dell'impresa e pratiche commerciali scorrette*, Milano, 2019.

products or services using false, vague, ambiguous or unsubstantiated environmental claims. These may include – by way of example – promotional claims which are not specified in clear and prominent terms in the same media, such as 'environmentally friendly', 'eco-friendly', 'green', 'nature's friend', 'ecological', 'environmentally correct', 'climate friendly' 'gentle on the environment', 'carbon friendly', 'energy efficient', 'biodegradable' and 'biobased',[16] among others. If such claims are made without clear, verifiable evidence or if they are framed in such a way as to give a misleading impression of environmental benefit, they may now be deemed unlawful under EU law.

As clarified in Recital 2 of Directive (EU) 2024/825, the EU legislator's intervention in this area is 'two-pronged' and structurally integrated into the existing legal framework.

As to the amendment of art. 6, the process of legal adaptation has involved two distinct yet interrelated aspects. On the one hand, as a result of the recent legislative amendment, any form of communication that 'contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise the main characteristics of the product, such as its availability, benefits, risks, execution, composition, environmental or social characteristics, accessories, circularity aspects, such as durability, reparability or recyclability, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product', is now explicitly included within the scope of misleading practices under Article 6, paragraph 1, of Directive 2005/29/EC.

This provision now applies not only in general terms but also,

[16] See Recital 9 of the 'Empowering Directive' (Directive EU 2024/825).

more specifically, to any statement or representation concerning the environmental or social characteristics of a product or service, including claims related to aspects of product circularity – such as durability, reparability or recyclability. This means that both the content and the form of presentation of such information are under scrutiny, particularly when these elements influence the commercial decision-making process of the average consumer in a direction that would not be justifiable on the basis of fully accurate or transparent information.

On the other hand, the practices referred to in paragraph 2 – commonly referred to in Italian legal doctrine as 'confusory misleading commercial practices'[17] – have also been expanded. These now encompass scenarios in which an environmental claim is made regarding future environmental performance, yet such a claim fails to include clear, objective, publicly accessible and verifiable commitments. These commitments must be established within a detailed and realistic implementation plan that includes specific, measurable goals, clearly defined deadlines and other relevant operational elements necessary to ensure proper execution, such as the allocation of resources.

Moreover, for such forward-looking environmental claims to be considered lawful and reliable, the plan must be subject to periodic independent verification by a third-party entity. The results or conclusions of this verification must be made available to consumers in a transparent and accessible manner. This aims to ensure that environmental messaging related to future outcomes is not speculative or deceptive, but instead grounded in verifiable facts and supported by tangible evidence, thereby enhancing consumer trust and promoting a more honest, sustainability-driven market.

The second prong of the legislative update involves an amendment to Annex I of Directive 2005/29/EC, commonly referred to as the 'blacklist'. This annex contains a catalogue of specific commercial practices that are deemed unequivocally unfair – and therefore automatically prohibited – regardless of the circum-

[17] A. Vanzetti-V. Di Cataldo-M.S. Spolidoro, *Manuale di diritto industriale*, Milano, 2021, 147

stances or consumer interpretation. The inclusion of certain greenwashing practices in this list marks a significant legal development: it removes any ambiguity as to the legality of particular claims or tactics, providing both clarity for businesses and stronger protection for consumers. In essence, these practices are now considered *per se* unlawful, eliminating the need for case-specific analysis and thereby streamlining enforcement actions by national authorities.

The update of the list in Annex I[18] of the Directive of 2005 (implemented into the Italian legal system in Article 23 of the Consumer Code) has been made in pursuit of the goal of 'greater legal certainty' (Recital 17 of Directive 2005/29/EC) and provides a list of behaviours that are considered inherently misleading commercial practices. This list is considered by some legal scholars to be the core of this regulation,[19] not to mention that such a status attributed to the black list has been acknowledged also by the European Commission itself: in its document titled 'Guidance on the implementation/application of Directive 2005/29/EC', the Commission suggested that, when assessing the conduct of a trader to determine whether it may be misleading, the first step for the interpreter should always be to verify whether the conduct in question falls within the scope of the black list.

These cases involving misleading environmental claims are clearly specifications of the behaviours described in the new paragraphs 1 and 2 of Article 6 of Directive 2005/29/EC, whose misleading nature is instead presumed. Among all the new cases

[18] In this regard, R. Calvo, *Le pratiche commerciali sleali 'ingannevoli'*, in G. De Cristofaro (Ed.) *Le pratiche commerciali sleali tra imprese e consumatori*, Torino, 2007, 205, and M. Dona, *L'elenco delle pratiche considerate in ogni caso sleali nell'allegato I della direttiva 2005/29/CE*, in E. Minervini, l. Rossi Carleo, *Le pratiche commerciali sleali*, Milano, 2007, 195.

[19] This view has been expressed by R. Calvo, *Le pratiche commerciali sleali 'ingannevoli'*, in G. De Cristofaro (Ed.), *Le pratiche commerciali sleali tra imprese e consumatori*, Torino, 2007, 205, and by M. Dona, *L'elenco delle pratiche considerate in ogni caso sleali nell'allegato I della direttiva 2005/29/CE*, in E. Minervini and L. Rossi Carleo (Eds), *Le pratiche commerciali sleali*, Milano, 2007, 195.

in the blacklist, the most important one for industrial law is the first, which introduces the idea of the 'sustainability label' (in Italian, *marchio di sostenibilità* and in French, *label de développement durable*, whose translation in Italian has been criticised by legal scholars).[20]

Together, these two changes form a comprehensive regulatory approach that blends contextual flexibility with categorical prohibitions, ensuring that environmental claims in marketing are subject to a higher degree of legal scrutiny. For businesses operating within the internal market, this means that compliance with environmental advertising standards is no longer optional or peripheral – it has become a core component of lawful market behaviour, with direct implications for product development, branding, legal risk management and competitive strategy.

3. *The Definition of 'Environmental Claim'*

At the heart of the first two interventions lies the definition of an 'environmental claim', as it establishes the scope of the new regulatory framework. The definition applies to 'any message or representation which is not mandatory under Union or national law, in any form, including text, pictorial, graphic or symbolic representation, such as labels, brand names, company names or product names, in the context of a commercial communication' whereby it 'states or implies that a product, product category, brand or trader has a positive or zero impact on the environment

[20] A slightly different view is expressed by M. Bertani, *Marchi di sostenibilità*, in 3 *Il Diritto Industriale* (2024). In line with the interpretation of the sustainability label as merely a set of rules applicable to different categories of signs regardless of the legal name, are M. Reale, *Comunicare l'impegno per l'ambiente: le nuove regole europee contro il greenwashing*, in 1 *Sociologia del diritto* (2024), and G. Spedicato, *Deceptively Green: How the EU's Unfair Commercial Practices Directive Can Support Trademark Law in Combating Corporate Greenwashing*, in AA.VV., *Creation Innovation Markets*, Berlin, 2024, 1065-1078. The present author wishes to refer, in this regard, to the article co-authored with C. Galli, *La Direttiva 'greenwashing': un common ground per la sostenibilità in Europa*, in 1 *Il Diritto Industriale* (2025).

or is less damaging to the environment than other products, product categories, brands or traders, or has improved its impact over time'. In short, any communication that suggests a relationship between a product and the environment capable of influencing the consumer's economic behaviour is considered to be environmental in nature.

In light of this definition, the amendment to paragraph 1 extends the sanctioning scope of Article 6 to environmental claims that contain 'untruthful' or 'misleading' information regarding certain characteristics falsely attributed to the promoted products, which are deemed to be of environmental relevance in the eyes of the consumer, such as durability, reparability or recyclability. The amendment to paragraph 2, on the other hand, concerns environmental claims relating to future commitments made by an economic operator, penalising promises not backed by adequate and concrete guarantees.

The interpretation of the concept of 'environmental claim' – which, once the new Directive has been transposed, will be provided by the national authorities of each Member State responsible to implement these provisions (in Italy, primarily the Competition Authority (AGCM), and secondarily the Regional Administrative Court of Lazio (TAR Lazio) and the Council of State, although the same cases may also fall under unfair competition and therefore be handled by ordinary courts) – will be the main factor determining the actual scope of application of this regulation and, consequently, the achievement of the EU legislator's goal of harmonisation.

To this end, it is important to note that the concept of 'environmental claim' was not newly introduced by the European legislator in the recently adopted Directive. but rather has its roots in the above-mentioned soft law instrument known as the 'Guidelines on the implementation/application of Directive 2005/29/EC on unfair commercial', issued by the European Commission. In fact, within that document – which in Chapter 4.1 outlines the criteria for applying Directive 2005/29/EC to environmentally relevant commercial practices – an environmental claim is defined as 'the practice of suggesting or otherwise giving the impression (within the context of commercial commu-

nication, marketing or advertising) that a product or service has a positive environmental impact, no impact, or is less damaging to the environment than competing products or services. This may relate to its composition, the way it is manufactured, how it can be disposed of, or the expected reduction in energy consumption or pollution from its use'.

This definition was likely the starting point for shaping the notion of 'environmental claim' as adopted in the Directive under discussion.

The fact that a document aimed at interpreting the previous version of the Directive on misleading commercial practices already referenced environmental claims confirms that even before this amendment, 'greenwashing' practices could be considered unlawful under general rules on misleading commercial practices and unfair competition. Such practices can indeed negatively affect both the consumer's right to self-determined economic behaviours and the fairness of relationships between businesses.

The phenomenon of 'greenwashing' was thus already addressed under the prohibition of unfair commercial practices, based on the assumption that a false environmental claim is 'contrary to professional diligence' and 'distorts or is likely to materially distort the economic behaviours of the average consumer in relation to the product it concerns', significantly impairing the consumer's ability to make an informed decision and thereby leading them to take a transactional decision they would not have otherwise taken – to quote the language of Directive 2005/29/EC.

This general definition applies to all commercial communications, including environmental statements, which encompass texts, logos, images, and symbols, and requires a case-by-case assessment of each specific commercial practice, the content of the environmental claim, and its influence on the purchasing decision of the average consumer.

It can therefore be said that the guiding principles of the Directive – including the case-by-case assessment (for practices not listed in the blacklist), along with the principles of truthfulness, neutrality, and transparency – were already embedded in the European legal framework and recognised by National Competi-

tion Authorities, including the *Autorità Garante per la Concorrenza e il Mercato* (AGCM), which has historically played a pivotal role in promoting the truthful and transparent communication of environmental claims.

4. *The AGCM Case Law on Environmental Claims*

The Italian Competition Authority (AGCM) has demonstrated a long-standing commitment to sustainability issues, leveraging Article 21 of the Consumer Code (which transposes Article 6 of Directive 2005/29/EC on unfair commercial practices into Italian law) to address practices associated with the phenomenon of 'greenwashing'.[21]

This approach has enabled the AGCM to issue proactive and even 'prophetic' landmark decisions regarding social, political and regulatory trends that European legal systems have begun to manifest, especially over the last two decades: these trends are particularly evident in market sectors that are intrinsically linked to the environment, such as the agricultural and the food & beverage sector.

In particular, the AGCM has applied the above-mentioned 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' issued by the European Commission, drawing from this soft-law document the principles later formalised by the Directive.

For example, as early as 2006, in its decision n. 15104/2006, the AGCM expressed what would later become the principle of transparency, sanctioning green claims that, while technically accurate, were presented in a misleading manner by an Italian cooperative supermarket chain. The case of Sacchetti Coop 100%

[21] For an in-depth examination of AGCM case law on green claims, see E. Iossa, F. Mattonai, *Il contributo dell'AGCM allo sviluppo della sostenibilità*, in 3 *Mercato Concorrenza Regole* (2023), 365-390; S. Magelli, *Ultimi provvedimenti dell'AGCM in materia di green claims*, in 2 *Il Diritto Industriale* (2025); see also V. Piccini, *Plurioffensività delle pratiche di greenwashing tra interventi dell'AGCM e la nuova direttiva UE 2024/825*, in 2 *Responsabilità civile e previdenza* (2025).

Biodegradabili: the AGCM sanctioned a comparative advertisement that, while highlighting its eco-plastic bag as 100% biodegradable, omitted to clarify that the compared products were made from 90% recyclable material.[22]

Since then, the AGCM (as well as the Administrative Regional Tribunal and the Supreme Administrative Court, in case of appeal) has focused on numerous instances of conducts that fall within the definition of greenwashing, applying the above-mentioned principles.

One of the most well-known cases is undoubtedly that involving an Italian mineral water company, the Acqua Sant'Anna – Bio Bottle case:[23] the commercial practice under scrutiny by the Authority involved the dissemination of advertising communications related to the 'Bio Bottle' produced by Acqua Sant'Anna, an, which was said to lead to savings in pollutant gas emissions due to the use of so-called 'bioplastics' instead of the well-known PET.

However, the bottles involved in the promotional campaign made up only 0.2% of total production, meaning that the claimed reduction in harmful emissions was not directly or exclusively attributable to the use of bioplastics, but rather to a 'parallel' offsetting activity in which Acqua Sant'Anna purchased renewable energy certificates. The AGCM therefore found that the environmental benefit derived from the use of bioplastics was overstated, leading consumers to believe they were dealing with 'an extraordinary performance' that was not supported by the facts. Furthermore, the calculation of the environmental impact of producing these bottles was based on an 'overestimated' approximation mechanism developed by the same producer of the bioplastics used for the marketed bottles. This approach did not meet the criteria of independence and due diligence required in this specific area, as indicated by the Commission in its Guidelines (and now in the greenwashing directive), which state that

[22] AGCM, January 11, 2006, Provision No. 15104 - Sacchetti Coop 100% Biodegradabili.

[23] AGCM, November 14, 2012, Provision No. 24046, in case No. PS6302 - Acqua Sant'Anna - Bio Bottle.

environmental claims 'must be based on a scientific methodology that is sufficiently thorough and complete to substantiate the environmental assertion and that leads to reliable and reproducible results'.

A similar decision was made in the case of Ferrarelle Impatto Zero,[24] where the AGCM reached the same conclusion of misleading advertising by mineral water brand, Ferrarelle. The promotional message referred to a mineral water presented as a 'Zero Impact Product', specifically the first zero-impact mineral water capable of respecting the ecosystem in its production processes. However, Ferrarelle's initiative was actually a temporary commitment to a CO_2 emission offset project that applied only to 7% of the actual annual production of bottled mineral water. The Authority therefore concluded that presenting the water as a 'zero-impact product' could mislead consumers into believing that the entire production and distribution process of the advertised water had no environmental impact, whereas the offsetting only neutralised a minimal fraction of CO_2 emissions and only for the duration of the advertising campaign.

Directive (EU) 2024/825 is required to be transposed by Member States by 27 March 2026, with the relevant national measures applying from 27 September 2026. Italy has already implemented the Directive through Legislative Decree No. 30 of 20 February 2026, published in the Italian Official Gazette on 9 March 2026 and in force as of 24 March 2026. While it is certainly true that many of the core principles and regulatory orientations it will introduce are already anticipated and partially incorporated into the practices of the Italian Competition Authority, it would nevertheless be short-sighted to assume that the formal adoption and future implementation of this Directive will have no meaningful consequences for the Authority's activities. On the contrary, the Directive is likely to bring about important developments both in terms of legal interpretation and enforcement methodology.

A recent case clearly illustrates why the Directive remains

[24] AGCM, February 8, 2012, Provision No. 23278, in case PS7235 - Ferrarelle Impatto Zero.

highly relevant. Despite multiple decisions by the AGCM – including the above-mentioned Ferrarelle case, in which the Authority held that claims such as 'zero impact product' were misleading – greenwashing practices continue to emerge, even with respect to types of environmental messaging whose illegality has already been established in several enforcement proceedings.

In mid-July 2025, the AGCM successfully concluded a moral suasion procedure against another mineral water company, Acqua Minerale San Benedetto S.p.A., which agreed to eliminate potentially misleading environmental claims related to its 'Ecogreen' product line. The company had previously used environmental assertions on the labels and packaging of its bottled water – as well as on its website and in promotional videos and TV commercials – suggesting that the production process had no greenhouse gas emissions or even a positive environmental impact.

In response to the Authority's intervention, San Benedetto removed the claim 'CO^2 Impatto Zero' (Zero CO^2 Impact) from all labels, packaging, digital platforms and advertising materials. It also revised the environmental language used and eliminated graphic elements evocative of nature, which could reinforce the perception of an elevated environmental profile unsupported by evidence. Furthermore, a QR code was added to the label, redirecting consumers to a dedicated section of the company's website with more accurate and transparent information on its sustainability practices.

Although the case was resolved without the imposition of formal sanctions, the AGCM took the opportunity to reiterate the fundamental principle, that when it comes to environmental claims, businesses must clearly and transparently communicate their efforts to reduce the negative impact of their activities, especially in relation to greenhouse gas emissions: this example underscores the continuing relevance and necessity of a clear and harmonised European regulatory framework such as that established by Directive (EU) 2024/825. While national authorities have been able to intervene using existing consumer protection rules, the Directive introduces greater clarity, legal certainty and uniform standards for assessing green claims across Member

States – helping to close enforcement gaps and strengthen the fight against greenwashing throughout the internal market.

An emblematic example of how the new legislative framework will influence and reshape Italian case law can be found in one of the most prominent and widely discussed decisions ever issued by the AGCM in the area of environmental advertising: the Eni case.[25] In this case, the Authority imposed the maximum fine permitted under the law – €5 million – on Eni S.p.A., a major Italian energy company, for the dissemination of misleading and deceptive advertising messages concerning its product 'Eni Diesel+'. The fuel was promoted as a 'Green Diesel', and marketed as having a positive environmental impact, offering fuel savings and a reduction in pollutant emissions. These advertising messages were disseminated through multiple channels and clearly intended to position the product as a more sustainable alternative in the eyes of environmentally conscious consumers.

According to the AGCM, the claims made in Eni's promotional campaign attributed environmental virtues to a product which, due to its very nature as a fossil fuel, could not reasonably be classified as 'green'. The Authority argued that such communications were not only misleading but also likely to significantly distort consumers' economic behaviour, particularly in a context where environmental awareness plays an increasingly crucial role in shaping market choices. In the AGCM's view, Eni should have presented the product's environmental features in a transparent, scientifically verifiable and unambiguous manner, making sure that consumers were not misled by overly optimistic or selective information.

The Authority noted that the use of the adjective 'green' in reference to a highly polluting product such as diesel was inherently problematic, as it created a false perception of environmental compatibility that was not supported by the actual characteristics of the fuel in question. As such, the AGCM concluded that the marketing campaign was not just misleading in a general

[25] AGCM, December 20 2019, Provision No. 28060 in case PS11400 – Eni Green Diesel+.

sense but legally deceptive, warranting the highest possible financial penalty.

However, this interpretation was subsequently overturned by the Supreme Administrative Court in its ruling issued on April 23, 2024.[26] The court took a significantly different approach, affirming that – at least in principle – the use of environmental language such as the term 'green' could not be categorically prohibited, even when referring to inherently polluting products like diesel. What mattered, according to the Supreme Administrative Court, was whether the product in question could be shown to have a lower environmental impact compared to competing alternatives. In this sense, the court acknowledged that relative environmental benefits may still justify the use of sustainability-related terminology.

What is particularly noteworthy about the court's decision is its explicit reference to the text of the Greenwashing Directive. Even though the Directive was not yet in force *ratione temporis*, the court recognised its interpretative relevance, describing it as an instrument that, while not yet binding, already held institutional and political significance in shaping how sustainability claims should be assessed by public authorities and the judiciary. In other words, the court used the Directive not merely as a future obligation, but as a guiding framework for present interpretation.

Building on this logic, the Supreme Administrative Court observed that the updated 'blacklist' attached to the Directive does not explicitly prohibit the use of the term 'green' in relation to fossil fuels. Therefore, the court concluded that such conduct should not be subject to automatic or presumptive illegality, but should instead be evaluated under a case-by-case analysis, in line with the symptomatic indicators outlined in Article 6 of the Directive (and the corresponding Article 21 of the Italian Consumer Code). This analysis must consider the context, the content and the impact of the commercial practice, rather than relying on general presumptions that apply only to blacklisted conduct.

[26] Supreme Administrative Court, Decision April 23, 2024, available at www.giustiziamministrativa.it

On this basis, the Supreme Administrative Court ultimately overturned the AGCM's decision, as well as the lower court ruling by the Administrative Tribunal of Lazio, stating that both had unlawfully applied a legal presumption where the law instead required a context-sensitive, individualised evaluation. This case clearly illustrates how the Directive will not only guide future enforcement, but also influence the interpretation of existing legal standards and reshape the balance between consumer protection and corporate communication rights.

Moreover, this is only one example of how the Directive is poised to have a tangible impact on both Italy's legal framework and the AGCM's evolving jurisprudence. Another case that may well have ended differently had the new rules on environmental claims already been in force involves the agricultural company Fileni, and was decided in early 2024 – just prior to the Directive's official adoption.[27]

In that case, Fileni had published a number of statements on its official website regarding the sustainability of its operations and its future plans to offset greenhouse gas emissions. The AGCM examined the claims to assess whether they were misleading, but ultimately determined that the statements were primarily forward-looking in nature, expressing an aspiration or intention to achieve climate neutrality in the future, rather than making definitive claims about the company's current environmental performance. Because of this, and in the absence of concrete proof that the statements had caused consumer confusion, the Authority concluded that the green claims did not violate existing regulations. However, Fileni was nonetheless sanctioned for other violations, particularly concerning supply chain traceability.

Had the Directive's provisions – particularly those concerning future environmental commitments – already been in effect at the time, the case might have been evaluated differently. The Directive, in fact, introduces stricter standards for future-oriented claims, requiring them to be backed by concrete, verifiable guar-

[27] AGCM, January 16, 2024, Provision No. 31025, in case PS12496 - Fileni.

antees, in order to prevent vague promises from being used to greenwash a company's image. In this context, the Fileni case offers another important example of how the Directive could shape both future enforcement strategies and the legal interpretation of environmental marketing practices.

One clear indication of the AGCM's evolving focus, particularly in light of growing environmental concerns and public pressure, is its recent decision to launch an investigation into the fast fashion sector, which is often associated with questionable environmental and labour practices. In particular, on September 25, 2024, the Authority initiated formal proceedings against the well-known multinational clothing retailer SHEIN, signalling a willingness to engage with complex and cross-border issues that lie at the intersection of sustainability, consumer protection and market transparency. This example highlights the AGCM's growing engagement with the broader structural dynamics that characterise the modern consumer economy – dynamics which the Directive aims to regulate more strictly. The investigation culminated in the decision dated 29 July 2025,[28] in which the AGCM has imposed a fine of €1 million on Infinite Styles Services Co. Ltd, the company responsible for operating Shein's e-commerce platforms within the European market, for engaging in misleading and/or deceptive environmental claims in the marketing and sale of clothing products under the Shein brand.

According to the AGCM's findings, the company disseminated environmental claims on its website and through other promotional and informational online materials, particularly within the sections titled #SHEINTHEKNOW, 'evoluSHEIN' and 'Social Responsibility'. These claims were, in certain instances, vague, overly generic, and unduly emphatic, while in others, misleading or lacking material information, thereby falling short of the standards required under EU and national consumer protection legislation.

Specifically, the environmental claims made within the #SHEINTHEKNOW section, which referred to the design of a

[28] AGCM, July 29 2025, Provision No 31639, in case PS12709 – SHEIN.

circular system and the recyclability of Shein products, were found to be false, or at the very least, ambiguous and potentially confusing for the average consumer. The promotional statements used to present and advertise garments from the 'evoluSHEIN by Design' line emphasised the use of 'green' or 'sustainable' fibres without adequately specifying the concrete environmental benefits associated with the product's entire life cycle, nor did they clarify that this product line represents only a marginal share of Shein's total offerings.

Moreover, such claims were deemed capable of misleading consumers into believing not only that the 'evoluSHEIN by Design' collection was made entirely from environmentally sustainable materials, but also that these products were fully recyclable – a representation that, in light of the actual fibres used and the current state of recycling technologies, was considered factually inaccurate.

In assessing the unfairness of Shein's conduct, the AGCM underscored the heightened duty of care incumbent upon the company, owing to the inherently high environmental impact associated with its business model. The Authority highlighted that Shein operates within the fast fashion and ultra-fast fashion sectors, which are characterised by high volumes of production and consumption, rapid turnover of goods and significant environmental externalities. In particular, the Authority explicitly stated that 'it is appropriate to clarify that SHEIN is one of the most prominent brands in the so-called fast and ultra-fast fashion sector, which is characterized by the extremely high volume and variety of garments sold at very low prices, typically designed for short-term or limited use (the so-called 'disposable fashion'). This business model is aimed at constantly aligning with emerging trends and rapidly shifting consumer preferences, and is further distinguished by the accelerated pace of market entry, extremely short delivery times (often within a few days), and the predominance of international shipments, particularly via air freight from China, followed by express courier services The fast and ultra-fast fashion model also entails significantly elevated levels of textile waste, much of which is destined for landfills or incineration, as well as contributing to the release of substantial

environmental pollutants across various stages of the production and distribution chain. This refers to a sector – namely, the textile and clothing industry – and a business model that are highly polluting by their very nature, whose environmental impact is further exacerbated by the intensive use of data centers, as well as by the air and courier-based shipping of individual garments to end consumers'[29] Therefore, companies in this inherently environmental-sensitive sector are expected to adhere to elevated standards of diligence, transparency and scientific substantiation when making environmental claims.

Further, the company's stated commitment to reduce greenhouse gas emissions by 25% by 2030, and to achieve net-zero emissions by 2050, as published under the 'Social Responsibility' section, was presented in generic, unsubstantiated and overly optimistic terms. These claims were found to be inconsistent with verifiable data, particularly in light of the increase in Shein's greenhouse gas emissions recorded during 2023 and 2024, thereby raising significant concerns regarding the credibility and substantiation of such forward-looking environmental promises.

Quite interestingly, during the procedure SHEIN has alleged unequal treatment in the proceedings conducted against it, expressly referring to the previously mentioned case PS12496 – Fileni, which also related to the substantiations of environmental future commitments. In its view, the AGCM's approach in that case was more lenient, despite the environmental claims at issue being comparable in nature. SHEIN further argued that its own

[29] In the Italian original text: '*è opportuno precisare che SHEIN è uno dei brand più noti nel settore del cd. fast and ultra fast fashion, che si caratterizza per enormi volumi e varietà di capi di abbigliamento venduti a prezzi molto bassi e concepiti per un uso limitato nel tempo (cd. 'usa e getta'), al fine 'seguire' sempre nuove mode e tendenze, per la velocità della loro immissione sul mercato, per i tempi brevissimi (pochi giorni) di consegna ai clienti, prevalentemente tramite spedizioni dalla Cina via aerea e via corriere, alti livelli di rifiuti destinati allo smaltimento e alle discariche, nonché rilascio di micro-plastiche. Trattasi di un settore (tessile/abbigliamento) e di un modello imprenditoriale altamente inquinante, il cui impatto ambientale è accresciuto dall'uso massiccio di data centers, nonché dalle spedizioni via aerea e via corriere dei capi d'abbigliamento ai singoli consumatori*).

conduct anticipated the requirements of the new Green Claims Directive, which has not yet been transposed into national law and is therefore not formally applicable at this stage.

In response to these objections, on the one hand, the AGCM addressed the alleged disparity in treatment claimed by SHEIN – particularly concerning the imposition of a heightened duty of care – by clarifying that the proceedings at issue are fundamentally different from the other cases referenced by the company (specifically, PS12496 – Fileni) because in the present case, SHEIN is a globally relevant operator engaged in a highly polluting business model that falls within the scope of so-called fast and ultra-fast fashion, which is qualitatively distinct from the business activities examined in the aforementioned proceedings; on the other hand, the further argument raised by SHEIN – namely, that the present proceedings allegedly aim to 'anticipate' the application of Directive (EU) 2024/825, which has not yet been transposed into the Italian legal system[30] and would introduce a more stringent regulatory framework on green claims – is to be considered both unfounded and opportunistic. In fact, not only was this Directive neither taken into consideration nor referenced in any communication addressed to the professional during the course of the proceedings (as SHEIN itself has acknowledged) but the only applicable legal provisions invoked are those contained in the Italian Consumer Code. The interpretative framework adopted by the Authority relies exclusively on the European Commission's 2021 Guidance on the implementation of Directive 2005/29/EC, and is further supported by relevant administrative case law (the AGCM mentions the ENI decision) and the Authority's own established enforcement practice in the area of environmental marketing and misleading commercial practices.

[30] A so-called '*Legge Comunitaria*' has been adopted in June 2025, delegating implementation to the government.

5. *Conclusion*

In sum, while the Directive (EU) 2024/825 may appear, at times, to reiterate principles already present within the EU legal order, it nonetheless represents a crucial step forward in the construction of a more coherent, transparent and accountable regulatory framework for environmental marketing practices. By strengthening the link between sustainability and fair commercial communication, the Directive not only enhances consumer protection but also promotes a culture of responsible business conduct within the single market, promoting both corporate social responsibility and consumer social responsibility.[31]

Its implications will be particularly significant for businesses engaging in co-branding practices, especially those that associate their corporate identity with certification or collective marks conveying environmental or social qualities. These tools, when used properly and based on verifiable, objective standards, have the potential to foster trust, support sustainable production, and enable consumers to make informed choices.

At the same time, the Directive's provisions implicitly reinforce the urgency of combating counterfeiting, which undermines both the credibility of genuine sustainability claims and the integrity of the marketplace. Counterfeiters, unlike legitimate rights holders, operate outside the boundaries of legal responsibility and ethical accountability, often at a cost to both consumers and the environment.

Ultimately, by elevating transparency, accountability, and scientific substantiation as the cornerstones of environmental communication, the Directive invites Member States, businesses, and institutions to align their strategies not only with legal compliance but with the broader objective of environmental integrity.

[31] For a more detailed discussion on the relationship between consumers and environmental protection: G. Marcatajo, *Trasparenza del mercato, tutela del consumatore e greenwashing*, in *JUS* (2022), 184-229; T. Perillo, *'Dal consumatore 'debole' al consumatore 'attivo': itinerari della conversione ecologica*, in *AmbienteDiritto* (2022); A. Troisi, *Enforcement e normative di contrasto al fenomeno del greenwashing*, in 5 *Giur. Comm.* (2022), 1257; D. Imbruglia, *Mercato unico sostenibile e diritto dei consumatori*, in 4 *Pers. e Merc.* (2021), 189 ff.

In this sense, it signals a paradigm shift: one where market regulation and intellectual property protection are no longer seen as separate from sustainability, but as essential tools in its service. For businesses, this shift represents not only a legal obligation but also a strategic opportunity: those able to credibly demonstrate their environmental commitments will be better positioned to build consumer trust, differentiate themselves in an increasingly sustainability-driven market and contribute meaningfully to the EU's green transition goals.

SYNERGISTIC CRISES: RELATIONS BETWEEN EFSA AND FSA POST-BREXIT

Ludovica Tripodi

Abstract: *The withdrawal of the United Kingdom from the European Union has profoundly reshaped the architecture of food safety governance in Europe. This article examines the post-Brexit relationship between the European Food Safety Authority (EFSA) and the UK Food Standards Agency (FSA), focusing on the legal, institutional and scientific consequences of regulatory divergence. It traces the evolution of food regulation towards a multi-level system grounded in the precautionary principle and evidence-based risk assessment, and compares EFSA's advisory, science-driven model with the FSA's integrated approach to risk assessment and management. The analysis highlights how Brexit has weakened the UK's access to scientific networks, alert systems and regulatory capacity, while reinforcing EFSA's role as a central pillar of coordinated European food safety governance and consumer protection.*

Keywords: Food Safety; EFSA; FSA; Brexit; Precautionary Principle.

1. *An Introduction*

Since ancient Greece, the 'care of provisions, both in terms of preventing commercial fraud and ensuring the healthiness of food and drink'[1] has been entrusted to magistrates, demonstrating that food and drink have always been, in some way, a matter of law,[2] albeit with specific reference to 'individual aspects and in relation to a limited purpose, namely to prevent fraud and damage to health'.[3] While the legislator has never considered food to be a relevant issue, it has always dealt with it by taking into ac-

[1] F. Cammeo, *Public Health,* in V. E. Orlando (Ed.), *First Complete Treatise on Italian Administrative Law,* Part II, Vol. IV, 1905, 213 ff.

[2] M. Ramajoli, *From* Food Safety *to* Food Security *and Back Again,* in *Amministrare* 2-3 (2015), 271 ff.

[3] Ibid.

count aspects mainly related to the protection of public health and food safety.

As is well known, the health and hygiene profile has been replaced by a profile aimed at protecting not only health but also agriculture, land use and the environment; protection, which has also taken place from a regulatory point of view, focuses on the entire food chain, 'from production to processing, from transport to marketing and any other aspect that may have an impact, even indirectly, on the matter (labelling, advertising, presentation, packaging materials, display, context, information, traceability of food, feed and food-producing animals, withdrawal of food and feed, research on food and nutrition'.[4]

The set of rules concerning food products is changing from prohibitions, sometimes punishable by criminal sanctions, to preventive rules aimed at food surveillance, ultimately receiving what we might call 'anticipatory' protection. This prudential or preventive approach, justified by the precautionary principle, will lead to the creation of a procedural path that public authorities are obliged to follow, starting from a generic action aimed at mere caution and prudence.[5] This new approach has led to the attribution of a new and significant importance to authorisation procedures that lead to the increasingly effective application of the precautionary principle. It has been observed that 'the precautionary

[4] Ibid., 272. On this specific aspect, see first of all Regulation 178/2002/EC and what was defined as the *hygiene package,* created by Regulations 852, 853, 854, 882/2004. As regards the literature, for purely reconstructive purposes, see F. Cappelli, B. Klaus, V. Silano, *Nuova disciplina del settore alimentare ed Autorità europea per la sicurezza alimentare (New Regulations for the food Sector and the European Food Safety Authority),* Milano, 2006, 174 ff. Finally, with regard to the lack of coherence and fragmentation of the subject matter, see *General Principles of Food Legislation in the European Union. Commission Green Paper,* Com (1997) 176 final of 30 April 1997 and White Paper on Food Safety, Com (1999) 719 final of 12 January 2000.

[5] See in this regard D. Amirante, *The precautionary principle between science and law. Introductory profiles* in AA.VV. *The Precautionary Principle Between Science and law,* in *Law and Environmental Management,* 2001, 23; L. Scaffardi, *The Precautionary Principle and Genetic Engineering in the Food Chain,* in R. Bifulco, A. D'Aloia, *A Right for the Future. Theories and Models of Sustainable Development and Intergenerational Responsibility,* Napoli, 2008, 660.

principle sets out general rules for the management of potential and uncertain risks, aimed at translating, on a case-by-case basis and in concrete terms, into rules of conduct that are valid both for public authorities and for economic operators, as well as into techniques and instruments of social action designed to communicate and share the risks associated with technological development'.[6] The increasingly standardised, non-arbitrary proceduralisation that aims to integrate the need for protection and development. This principle may also compress or limit the protection of assets, even those guaranteed by the constitution, by providing for a balancing act in the event of particular conflicts, which, in this case, is particularly delicate as it is conducted 'on the basis of scientific knowledge that is sometimes not yet fully established'.[7] Ultimately, therefore, in order to recognise the precautionary principle, the subject of preventive action becomes not only known risks but also those suspected to exist, in light of the decision of the supranational legislator and almost never that of the national legislator.

'If, in general, there are multiple sources of regulation in the institutional structure of the global world, this is particularly true in environmental matters'.[8] Firstly, in fact, 'the food sector has extra-national relevance due to a number of factors, ranging from the global nature of food circulation to the fact that the food supply chain does not always originate and end within individual national borders. In turn, the extra-national relevance of the sector and the necessarily supranational dimensions of the problems that the regulatory framework is called upon to resolve inevitably push the regulatory function beyond the state'.[9]

[6] L. Marini, *Precautionary Principle, Food Safety and Genetically Modified Organisms in EU Law,* in *il Dir dell'Unione Europea* 1 (2004), 167. It should be noted that, *initially,* the adoption of precautionary measures generally referred to environmental law, but was then extended to other areas of application.

[7] L. Scaffardi, *The precautionary principle and genetic engineering in the food chain,* cit., 661. On the difficulty of applying the precautionary principle, see, for example, S. Grassi, A. Gragnani, The precautionary principle in constitutional jurisprudence, in L. Chieffi (Ed.), *Biotechnology and the Protection of Environmental Value, Proceedings of the Conference Held*

[8] M. Ramajoli, *From* food safety *to* food security *and back again,* cit., 272

[9] Ibid.

The consequences of this are varied and occur on several levels: *first and foremost*, with regard to Italian, European and international sources of law; with regard to *governance*, since there is the coexistence of national and local administrative authorities and EU or international institutions; and in relation to the relationships between different courts. In this regard, it seems appropriate to conclude this introduction by recalling that, with the loss of the univocality of *the rule juris,* which was guaranteed by nation states, 'the necessary agreement at supranational levels is based on criteria and not on rules under which to subsume the facts of life, purified of their legally irrelevant elements'.[10]

2. *The BREXIT Phenomenon: an Overview*

As is well known, the evolution of the English state between the medieval and modern ages was characterised by constant tension between the consolidation of central power and the development of specific legal and institutional forms, in a process that saw the formation of a state model that was unique in the European context. England gradually developed a political structure in which monarchical power, while aspiring to strong centralisation, had to contend with an autonomous legal system – *common law* – which established itself as an instrument of cohesion and limitation of power, contributing to the definition of an embryonic principle of *the rule of law.* In this context, the law took on not only a technical function, but also an eminently political one, as legal production became a terrain of mediation between royal authority and territorial communities, favouring a process of statisation that was never fully absolutist. This dynamic was intertwined with the experience of internal colonialism, through which England extended its control over territories such as Wales and Ireland, integrating them into an administrative-legal system that served to strengthen the crown. At the same time, relations with the conti-

[10] A. Gambaro, *Civil Law and Common Law: Evolution and Methods of Comparison,* in *Two Icebergs Compared: the Drifts of Common Law and Civil Law,* Milano, 2009, 7 ff.

nent and the constant threat from France helped to consolidate a state identity based on elements of political and military cohesion and on a peculiar reworking of English Christianity, which gave the kingdom an original religious and institutional character.

For the purposes of this article, it is worth dwelling on the desire of the so-called *Brexiteers* to regain the political and legal sovereignty hitherto shared with the other EU Member States. It is precisely this sovereignty that will be restored in two ways: 'the exclusive sovereignty of constitutional bodies over decisions that impact the lives of the British people; the full reaffirmation of parliamentary sovereignty, understood according to the canons and dynamics of contemporary democracy'.[11] There is no doubt that British participation in the European Community and then in the European Union has meant an important change in the redefinition of the concept of sovereignty. In fact, it could be described as 'a sort of *starting point* for the process of relativising sovereignty',[12] in relation to both the national and parliamentary aspects mentioned above. It seems indisputable to say that part of the legal, decision-making and political power has been transferred from so-called *Constitutional Bodies* to 'external bodies'.

'Thus, a reduction and erosion of sovereignty understood as the absolute prerogative of British institutions, almost excluding external interference in their decisions, but also a relativisation of the classic principle of 'Sovereignty of Parliament', since the legislative regulation of many sectors from that moment onwards began to be developed directly by Community the most obvious demonstration of the pervasiveness of this change is precisely the difficulties that the United Kingdom then encountered in implementing Brexit: the legal intertwining between the legal systems was so close that it made its straightforward dissolution very difficult'.[13]

[11] C. Martinelli, *Brexit and the British Constitution. How and Why the United Kingdom Left the European Union,* Torino, 2023, 229. On the role of Parliament in English constitutional law, see C. Jones, *Is Dicey dicey,* in U.K. *Const. L. Blog,* 18 January 2021.

[12] C. Martinelli, *Brexit and the British Constitution.* cit., 231.

[13] Ibid., 232-233.

In truth, the decision to leave the European Union was mainly due to the United Kingdom's desire to break away and emancipate itself from the bureaucratic rigidity and legal constraints imposed by the EU:[14] however, the first years of separation have not entirely produced the desired consequences. The European Union has, in fact, managed to protect its unity and integrity as well as that of its single market, and has been unwilling to make any exceptions for a departing country, or to change its models of governance.[15] While the EU seems to have chosen a model of shared sovereignty within the framework of treaties, rules and shared institutions, the UK is inspired by models of sovereignty that are now anachronistic.[16] It is therefore easy to say that present and future relations between the UK and the EU[17] will exhibit conflicts and uncertainties. These will have to be managed as best as possible to avoid the outbreak of irreconcilable conflicts on several fronts. Managing the consequences of Brexit[18] will be

[14] C. Martinelli, *Brexit and the British Constitution,* cit., 255.

[15] B. Laffan, *The European response,* Bologna, 2, 2021, 56-68.

[16] Ibid.

[17] See, in this regard, B. Martill, U. Staiger (eds), *Brexit and Beyond. Rethinking the Future of Europe,* London, 2018.

[18] On the subject of consequences, see the conclusions of the Report J. Rutter, H. White, A. Lilly, *Accountability After Brexit. Parliament and the UK-EU Relationship,* in *The Institute for Government,* September 2022, 1-31. Specifically: 'After Parliament's bruising experiences of the post-referendum period, it is not surprising that many MPs, especially on the Labour benches, want to avoid looking back at Brexit. The government's message that Brexit is done has attraction for many in the Commons, regardless of whether they support the claim. But whatever the government may hope, Brexit is not really done and certainly not going away. There is a lot of evidence that Brexit is causing real problems for business and citizens – some a necessary consequence of the form of Brexit chosen, others unforeseen – but there is also frustration among Brexit supporters that the government has not been nimble enough at identifying and seizing the opportunities it presents. The UK and UK companies are still affected not just by what was agreed in the TCA, but by the way that agreement is being implemented and by future regulatory developments in both areas. The TCA is also not a permanent agreement – as Lord Frost has pointed out, it contains mechanisms for review and rebalancing, which means it will potentially remain a big issue not just for the rest of this parliament but for the next one too. It is right that the UK's relationship with its European neighbours is not dominating parliamentary time and attention

the real challenge for the United Kingdom, including, for our purposes, in the food sector.

3. *Food safety governance*[19]

It is now widely recognised and accepted that regulating food safety is of paramount importance both for protecting public health and for the impact on the activities of businesses in the agri-food sector. However, the term food safety has taken on two very different meanings:[20] the concept of food security has been defined by the FAO as a situation in which 'all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and preferences for an active and healthy life.[21] The term food safety, on the

as it did between 2016 and 2019. But the way the government manages the relationship still matters – and Parliament must not shirk its responsibilities to hold ministers to account for the way they are fulfilling that responsibility. The early days of the Truss government do not suggest that it has much more appetite for scrutiny than the Johnson government. But its advent is an opportunity for a reset – and it should also consider what influence it might want on the long-term UK–EU relationship if it found itself in opposition after the next election. Either government should propose changes itself or senior parliamentarians from across the political spectrum should pressurise government into making clear that parliament has an important continuing role to play. Failure to do this reinforces the impression that the mantra of 'taking back control', which was so powerful in the referendum of 2016, was about handing power to the executive and hoarding it there, not re-empowering parliament (27).

[19] The term 'regulatory governance' refers to the model of consolidated relations between actors who engage with principles, rules and decision-making procedures in a given area or sector in order to achieve 'specific regulatory objectives aimed at modifying the behaviour of those regulated in order to produce benefits for specific categories of ultimate beneficiaries of public policy'. (M.S. Righettini, *La regolazione della sicurezza alimentare tra globale e locale [The regulation of food safety between global and local],* in *Amministrare,* 2-3/2015, 294.

[20] On the 'polysemic' meaning of food security, see L. Scaffardi, *Food Security or How the 'Right to be Free from Hunger' is Evolving in a Changing World,* in *DPCEonline* 2 (2023), 2172.

[21] World Food Summit, 13-17 November 1996, Rome.

other hand, refers to food safety from a health and hygiene perspective and in terms of its impact on human health, including from a toxicological and nutritional point of view. The concept of food safety, therefore, 'has taken on an incremental and diversified meaning',[22] thanks in part to careful and precise regulations concerning labelling and transparency of the 'farm to fork' process,[23] which has enabled consumers to know the origin of products and their properties and characteristics.

Reference is made to the concept of food security, on the other hand, to indicate the guarantee of food supply, pursuant to Article 39 of the TFEU. However, this definition of food security seems, on the other hand, too narrow and incapable of capturing the necessary nuances, as the concept of food security must also include ethical and social aspects and, consequently, the universal duty to provide access to food to guarantee the dignity of the individual.[24]

[22] L. Scaffardi, cit., 2173. For a more in-depth analysis of this topic, see N. Irti, *People and the market,* in *Rivista di diritto civile,* 1995, 289 ff.

[23] See EU Reg. 178/2002.

[24] In this regard, see A. Morrone, *Lineamenti di una Costituzione alimentare,* in M. Moccheggiani, A. Morrone (Eds), *La regolazione della sicurezza alimentare tra diritto, tecnica e mercato: problemi e prospettive,* Bologna, 2022; M. Bottiglieri, *The protection of the right to adequate food in the Italian Constitution,* in *Forum di quaderni costituzionali* 11 (2015), 2-3, which states: 'The right to food, in fact, requires that the dignity of every human being be nourished, as well as their body. This means that whenever malnutrition (whether undernourishment or overeating) is such as to degrade human beings to the status of objects, human dignity is violated and must be protected. At least three aspects of the connection between the principle of dignity and the right to food can be inferred from the Constitution. Firstly, every person's level of access to food should be such as to guarantee them equal social dignity in their interpersonal relationships: both in their relationships with their fellow human beings, in the various social groups where their personality develops, and in their relationships with public institutions. Secondly, the remuneration of workers (Articles 36-37 of the Constitution) – or the assistance and welfare measures provided for (Article 38 of the Constitution)1 or foreseeable (such as universal basic income) – should be at a level that ensures a sufficiently nutritious, healthy diet that is acceptable from a cultural or religious point of view and does not frustrate other basic needs, i.e. does not deny the 'right to survival', the main components of which are food, health, housing and education. In a third sense, the right to access adequate food in a manner consistent

Ultimately, therefore, as Ziegler has clearly stated, the right to food is nothing more than 'having regular, permanent and free access (…) to food that is qualitatively and quantitatively adequate and sufficient, corresponding to the cultural traditions of the population to which the consumer belongs and capable of ensuring an individual and collective physical and mental life free from distress, satisfactory and dignified'.[25] Although food has long been conceived as a good, understood in its physicality and materiality, in recent years, awareness of the peculiarity and complexity of food as a good has placed it under a different lens through a holistic approach, considering not only the product but also the production process.[26] 'From this perspective, the guarantees to be provided cannot relate solely to the quality of food and, on average, to the health of those who consume it, but must also concern the quantity and availability of food products, thus taking into account the interrelationships of this complex production process with the environment, the economy and society'.[27]

In this regard, we cannot fail to mention the thinking of Stefano Rodotà, who argued that the right to food has gradually become a right that requires safe production that protects the environment and fundamental rights, including future generations among the actors involved.[28] The rationale and effects of

with 'human dignity' could be understood as a limitation on the freedom of economic initiative, which should be brought into line with it. On the basis of these considerations, dignity in access to food should not be considered as a fundamental right among others, nor as a supernorm, but as a legal matter that integrates other fundamental principles'.

[25] J. Ziegler, *On the Side of the Weak: The Right to Food,* Milano, 2004, 49. See also *General Comment* E/C.12/1999/5 of the Committee on Economic, Social and Cultural Rights.

[26] G. Formici, *Regulating 'Unfit Food': Cultural Identity, Food Security and the Food Divide*, in S. Lanni (Ed.), *Global Sustainability and Comparative Legal Cultures. Proceedings of the SIRD Conference,* Torino, 2022, 284. For further information, see S. Bolognini, *Times of Food (in)Security: a Legal Approach,* in *S.* Serefin, M. Brollo (Eds), *Women, Politics and Institutions,* Udine, 2013, 241 ff.; L. Costato, *From* food security *to* food insecurity, in *Agricultural Law Review* 1 (2011), 3 ff.

[27] G. Formici, *Regolamentare il 'cibo incommestibile': identità culturale, sicurezza alimentare e Food Divide*, cit., 280.

[28] S. Rodotà, *The right to have rights,* Rome-Bari, 2012, 128. For further

food safety governance and its reforms will be analysed below, which led, first and foremost, to the establishment of the European Food Safety Authority (EFSA) at the beginning of the 21st century. In truth, more generally, health protection is considered by the European Commission as an objective to be entrusted jointly to certain European agencies, which have legal personality, are governed by European public law and perform specific technical, scientific and management functions, such as the European Consumer Health Executive Agency (ECHEA), the European Centre for Disease Prevention and Control (ECDC), the European Environment Agency (EEA), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the European Medicines Agency (EMA), the European Chemicals Agency (ECHA) and the European Agency for Safety and Health at Work (EU-OSHA).

As for the European Commission's governance of food safety, the turning point came with the advent of the 'mad cow' crisis, which marked a real regulatory paradigm shift,[29] giving greater prominence to the consumer at the expense of the producer. Two main guidelines can be identified that have decisively marked the aforementioned change: 'a) to strengthen, through the establishment of an *ad hoc* European agency, the European Commission's coordination of existing risk assessment, management and communication systems at national level; b) to create, through the European agency, a more effective and integrated risk management operating system to increase consumer confidence in regulatory institutions'.[30]

information on this topic, see, in chronological order, V. De Santis, *Cultural Heritage and Future Generations,* in V. Giomi, P. Milazzo (Eds), *Cultural Heritage and Law,* Pisa, 2024; L. Bartolucci, *The most recent path of future generations in constitutional law,* in *Osservatorio costituzionale AIC* 4 (2021); G. Cordini, *The right to food, future generations and the market,* in *DPCE* SP., (2019); A. D'Aloia, *Future Generations,* in AA.VV., *Encyclopaedia of Law,* IX, Milano, 2016; R. Bifulco, *Law and Future Generations. Legal Issues of Intergenerational Responsibility,* Milano, 2008.

[29] M.S. Righettini, *The regulation of food safety between global and local,* cit., 293-294.

[30] Ibid., 294.

The circumstances that led to the expansion of the regulatory state and the growth of independent agencies also resulted in regulatory fragmentation, undermining the effectiveness of actions. 'While *agencyism* encourages excessive segmentation of competences and responsibilities, coordination and integration are considered to be the main remedies for fragmentation and factors capable of increasing the *responsiveness* and *effectiveness* of public intervention'.[31] With regard to food safety regulation in particular, during the 1990s there was increasing difficulty in reconciling the limitations imposed by borders with the growing demand for supranational control and regulation of production processes, markets and food for consumption.[32] What will really change the paradigm is food safety. Since the 1960s, food regulation has taken on an international dimension thanks to the FAO, WHO and WTO. In particular, with the decision of 17 November 2003, the EU became part of the ACC (*Codex Alimentarius Commission),* composed of 185 countries and supported by 21 technical commissions with the aim of defining standards and guidelines to ensure safety, quality and fairness in food production and trade.

'Thanks to the establishment of the WTO (World Trade Organisation), the legal value of *the Codex* has been further strengthened as it has been incorporated into sectoral agreements between member countries. 'In particular, the Agreement on Sanitary and Phytosanitary Measures (SPS) (Art. 2) expressly requested that the protective measures of WTO member countries be based on risk assessment techniques developed by the relevant international organisations, in particular the ACC'.[33]

At the same time, a voluntary control system known as HACCP (Hazard Analysis and Critical Control Points) has been established, which originated in the United States in the 1960s. Unlike the effects of *ex post* control, HACCP ensures that risks

[31] M.S. Righettini, *The Regulation of Food Safety Between Global and Local,* cit., 295.

[32] Ibid., 295.

[33] Ibid., 296. See also L. Costato, L. Borghi, S. Rizzioli, *Compendium of Food Law,* Padua, 2011, 71.

can be prevented throughout the entire production chain. It was introduced in Europe in the 1990s and, through Regulation (EC) No 852/2004,[34] which came into force in 2006, became a mandatory procedure for all food business operators. In addition, the European Commission, through Regulation (EC) No 852/2004, adopted *guidelines* to facilitate the application of HACCP to small and medium-sized food businesses.[35]

The European Union (which has general competence for the regulation of food production and trade) and, more specifically, the EFSA, which, as is well known, supports the EU with scientific assessments of food risks,[36] are part of the network of control systems exercised by public authorities and self-control systems adopted by private individuals and companies in the sector.

4. *The Birth of EFSA: Institutionalisation and Functions*

As already mentioned, the regulation and governance of food safety in Europe underwent a clear and profound change in the 1990s and early 2000s.

While initially the regulation of this area was mainly managed through national legislation and conceived as a mere tool for production processes and supply chains, with the state acting as a guarantor for agricultural businesses and, more generally, for the entire food industry, since the 1970s, with the European Charter for Consumer Protection, there has been an attempt to change the paradigm, which was consolidated two decades later with consumer protection,[37] formally recognised by the Maastricht

[34] Implemented in Italy by Legislative Decree 193/2007.

[35] Food companies also voluntarily adopt other standards: some of these are codified in the ISO 22000 standards, which guarantee traceability in the food chain.

[36] L. Costato, L. Borghi, S. Rizzioli, *Compendio di diritto alimentare,* cit., 71.

[37] At the regulatory level, Regulation 178/2002 defines a consumer as the final consumer of a food product who does not use that product in the context of a food business operation or activity, and Directive 2000/13/EC extends this definition not only to the final consumer but also to communities such as

Treaty.[38] The emergence of BSE (bovine spongiform encephalopathy), or mad cow disease, which first spread in the United Kingdom in 1986 and then to other countries on the European continent, resulted in approximately 190,000 cases of infection in animals and 225 cases in humans. The crisis demonstrated the inability of the European system to ensure effective control of safety within the food chain (production, marketing and consumption). 'The disease was caused by the widespread use of dangerous substances in the production of feed for farm animals, which then entered the food chain and affected humans'.[39] This led to the transfer of powers from Member States to EU institutions for the guidance and coordination of regulation, and in some cases also redefined the objectives and strategies of food safety policy.[40]

The European countries most affected were, unsurprisingly, those that relied most heavily on state regulation: the United Kingdom and France. In the United Kingdom, 2000 saw the creation of *the* Food Standards Agency (FSA) and the recognition of a clear failure on the part of the Conservative government and, in particular, the Ministry of Agriculture, Fishing and Food (MAFF). 'The main reason for the failure of British central government regulation was identified as the conflict of interest within Maff between its responsibilities for safeguarding food safety and promoting agriculture and the food industry'.[41]

restaurants, hospitals and canteens. This differs, for example, from the framework outlined in the Italian Consumer Code. From a jurisprudential point of view, however, the Court of Justice has intervened to develop the concept of the average consumer, whose characteristics are different and additional to those of the vulnerable consumer referred to in recital 18 of Directive 2005/29/EC on unfair commercial practices. For further information, see S. Carmignani, *Sulla persistente validità del consumatore medio (On the Continuing Validity of the Average Consumer),* in *Diritto agroalimentare,* 2020, 693.

[38] However, these were weak attempts, still focused more on protecting the producer.

[39] M.S. Righettini, *The Regulation of Food Safety Between Global and Local,* cit., 298.

[40] C. Ansell, D. Vogel (Eds), *What's The Beef? The Contested Governance of European Food Safety,* London, 2006.

[41] M.S. Righettini, *The Regulation of Food Safety Between Global and Local,* cit., 298. In this regard, one cannot ignore H. Rothstein, *From Precautio-*

As for France, the regulatory role of consumer associations was recognised as being of paramount importance: the privileged relationship between the state and farmers' lobbies gave way to shared management between the state and the European Commission.

The BSE crisis, combined with the development of new technologies in the agri-food sector, the sophistication of feed and food, the increasingly widespread use of pesticides and consequent risk to human health, the growing environmental pollution linked to food contamination, the globalisation of markets and increased competition with fraudulent practices, as well as the need to intensify crops, including through genetically modified organisms, has highlighted the need for a new European food safety policy.

The 1997 Green Paper[42] established the principle that no food can be placed on the market unless it is safe for human health, emphasising the urgent need for common public policies and legislative harmonisation at European level. Subsequently, in 2000, the White Paper[43] translated this approach into a three-pillar strategy involving the creation of a new regulatory and legal framework for the entire food chain based on product traceability, the standardisation of controls between Member States and the establishment of a European Food Authority characterised by independence, scientific excellence and transparency.

In 2002, the Parliament and the Council adopted Regulation (EC) No 178/2002, known as the General Food Law, which laid the foundations for European food safety policy by establishing the EFSA (European Food Safety Authority). 'The Agency is required to provide scientific support to the Commission and Member States, which are responsible for legislating in this area, in order to increase the confidence of both consumers and trad-

nary Bans to DIY Poison Tasting: Reform of the UK Food Safety Regulation Regime, in *What's The Beef?,* cit., 253 ff.

[42] Green Paper Com 176 of 30 April 1997, 'Green Paper on the general principles of food law'.

[43] White Paper Com 719 of 12 January 2000, Food Safety Legislation to make the *body* of legislation concerning all aspects of food 'from farm to table' consistent.

ing partners'.[44] As already mentioned, the new regulatory system had to be based on the precautionary principle and, therefore, in the absence of scientific certainty regarding risks to human health, it would be necessary to provide for and adopt preventive measures to protect EU consumers/citizens until scientific evidence is gathered.

In 2004, the so-called Hygiene Package was added to this framework, consisting of a set of regulations that came into force in 2006,[45] which imposed uniform criteria for hygiene in food production and standardised controls in all Member States. Regulation (EC) No 2073/2005 further extended these obligations to all operators in the supply chain, from production to distribution. Finally, Regulation (EC) No 765/2008 regulated the accreditation and market surveillance of products marketed with the CE marking, requiring each Member State to designate a single accreditation body: in Italy, this function was entrusted to Accredia, established by the merger of the previous private bodies, with the task of ensuring compliance with international standards in this area.

The creation of the European Food Safety Authority (EFSA) was undoubtedly a crucial turning point in the process of transforming European *governance* in the field of food risk. As mentioned, it is part of the broader phenomenon *of* 'agencification', that accompanied European integration, giving rise to a constellation of decentralised agencies tasked with providing technical and scientific expertise to support the formulation and implementation of European policies.[46]

[44] M.S. Righettini, *Food Safety Regulation Between Global and Local,* cit., 299.

[45] EC Regulation No. 852/2004 of 29 April 2004 on the hygiene of foodstuffs; EC Regulation No. 853/2004 of 29 April 2004 laying down specific hygiene rules for food of animal origin; EC Regulation No. 854 of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption; EC Regulation No. 882/2004 of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.

[46] G. Majone, *The Rise of the Regulatory State in Europe,* in *Western European Politics,* 1994, 17, 3, 77 ff; M. Egeberg, J. Trondal (2009), *Political Lea-*

The EFSA, established by Regulation (EC) No 178/2002, does not perform political decision-making functions, but is called upon to provide independent scientific support to the Commission, the Parliament and Member States in relation to risks affecting food, feed, animal health and welfare, and plant protection. This approach is part of a new 'risk law', so to speak, which interprets risk no longer as a mere consequence of inadequate controls, but as a dimension closely intertwined with the production and use of scientific knowledge in decision-making processes.

In this vein, the Commission's 2000 White Paper had already established the centrality of science as the foundation of a transparent food policy capable of rebuilding public confidence after the crises of previous years.

The organisational structure of EFSA has precisely this objective: the Management Board, composed of thirty-eight members[47] appointed by the Council of the Union after consultation with the Parliament and the Commission, provides strategic guidance; the Executive Director, appointed by the Board, is responsible for its operational management; the Advisory Forum, which brings together representatives of the competent national bodies, is a privileged forum for the exchange of data and practices between Member States, while the Scientific Committee and the eleven permanent expert groups ensure the production of opinions based on solid evidence, according to a model that favours coordination and consistency of procedures.

The EFSA is therefore called upon to formulate risk assessments by dividing the process into four stages: hazard identification, hazard characterisation, exposure assessment and, finally, overall risk characterisation, including uncertainty analysis. The collection and processing of purely scientific data is mainly carried out through the review of existing studies.

dership and Bureaucratic Autonomy, Effects of Agencification, in *bit.ly/452frzC;* D. Levi-Faure, *Regulatory Network and Regulatory Agencification: Towards a Single European Regulatory Space,* in 16 *Journal of European Public Policy* 6 (2011), 810-829.

[47] Regulation (EU) 2019/1381. Originally, EC Regulation No. 178/2002 provided for 14.

However, the Authority may choose to exercise its power to commission new and additional research. The other key function is risk communication. This is understood not only as the dissemination of information to citizens, but also as a continuous process of exchange between assessors, managers, consumers and other stakeholders. This aspect finds its maximum expression in the Rapid Alert System for Food and Feed (RASFF), which ensures the timely circulation of information between Member States and European institutions in the event of imminent threats to public health.

Furthermore, transparency at the EFSA is demonstrated through the publication of all scientific opinions, minutes, declarations of interest and activity reports, thereby strengthening the Authority's credibility among citizens and *stakeholders.*[48] Food risk governance in Europe is therefore a multi-level model, in which the independent scientific assessment provided by the EFSA is integrated with the political decisions of the Commission and Member States, while consumers, trade associations and other actors in the food chain participate in a system that aims to ensure safety, prevention and trust. This structure has enabled the EU to overcome the fragmentation of national systems and respond more effectively to the challenges posed by food crises, transforming food safety into a public policy based on knowledge, shared responsibility and transparency.[49]

The EFSA is organised into four functional departments: management (*Enpower*), risk assessment production (*Asses*), assessment services (*Enable*) and communication and partnerships (*Engage*), operational structures that fully reflect its mission of advice, transparency and cooperation. The risk assessment meth-

[48] In this regard, there has been no shortage of controversy and speculation over time about the actual independence of some of its members. One case in particular caused a stir: in January 2012, the non-governmental organisation *Pesticide Action Network* reported to the daily newspaper *Le Monde* a conflict of interest involving Commissioner Susan Barlow, a member of the committee on pesticide residues, packaging contamination and additives, who had previously been a consultant to several multinational food companies.

[49] M.S. Righettini, *La regolazione della sicurezza alimentare tra globale e locale (Food safety regulation between global and local),* cit., 299.

odology comprises four key steps – hazard identification, characterisation, exposure and overall risk characterisation, including uncertainties – in line with the criteria of scientific rigour and quality highlighted by *the General Food Law.*

In Italy, national integration with the EFSA was formalised through a 2007 agreement with the Ministry of Health, identifying the Istituto Superiore di Sanità (ISS) as the national *focal point*. The ISS, together with the Ministry's Department of Human, Animal and Ecosystem Health (*One Health)*, acts as a technical-scientific interface, supporting the development and dissemination of risk assessments.

The National Committee for Food Safety (CNSA) includes an advisory section for consumer and producer associations, established in 2009 and operational since 2012, which facilitates dialogue between institutions and stakeholders on risk information and communication issues. At the operational level, Italy is among the countries with the highest number of samples analysed in the EU pesticide residue monitoring programme: in 2019, the ISS analysed 1,520 samples compared to the minimum requirement of 828. EFSA assessments are carried out at the request of the Commission, Parliament or Member States (including the Italian Ministry of Health); the Authority may also initiate self-assigned procedures for emerging issues. The EFSA continuously communicates scientific findings to policy makers and the public, ensuring access to documents, consultations and dissemination of results in a clear and impartial manner. The Italian system integrates with the European rapid alert mechanism (RASFF) and national cooperation, strengthening confidence in and overall effectiveness of food risk governance in Europe. In summary, paragraphs 5 and 6 bring Italian governance within a European systemic model, in which the EFSA operates with solid organisational structures and strong national collaborations, achieving tangible results in food safety control, transparency and stakeholder inclusion.[50]

[50] bit.ly/4m3y0cG.

5. *The Food Standards Agency Before and After Brexit*

The EFSA and FSA are two pillars of food safety regulation, but with profoundly different structures, functions and vocations. The EFSA, established in 2002 in Parma on the basis of Regulation (EC) 178/2002, performs an exclusively technical and scientific function: it produces independent assessments of food risks, but leaves their management and decision-making to the European Commission and individual Member States. This strict separation between 'science' and 'management' was established in response to the BSE crisis and aims to ensure transparency, reliability and consistency at EU level. In contrast, the British FSA, established in 2000, combines the functions of risk assessment, management and communication in a single independent but governmental body, with strong direct consumer involvement through panels and consultations. As recalled by a former EFSA executive, who came from the FSA, in the UK 'consumers participate in scientific panels as 'lay members'', an approach that is avoided in Europe in order to preserve the separation between science and politics.

Brexit has led to a major reorganisation of the British system. The FSA has taken on responsibilities previously managed by EFSA and the European Commission, including the authorisation of novel foods, the monitoring of imports and inclusion in food alerts. However, several sources report that the UK suffers from a shortage of specialist staff, with difficulties in recruiting toxicologists and veterinarians. At the same time, leaving the European system has meant losing direct access to the RASFF (Rapid Alert System for Food and Feed), EURL laboratories and the scientific exchange network. The UK has therefore had to attempt to enter into bilateral agreements to try to compensate for these shortcomings. However, this was not enough. In fact, isolation had concrete consequences. For example, the failure to promptly initiate Post-Brexit controls in the early stages of the new institutional structure exposed consumers to potentially contaminated food, including chicken with salmonella from Poland.

The UK has also started to take a more independent approach

to legislation. Unlike the European Union, which banned the use of titanium dioxide (E171) as an additive in 2022, the UK kept its separate assessment and authorised its use. In maximum residue levels (MRLs) for pesticides, the UK has increased limits for over 100 products, including extreme cases such as a 4,000-fold increase for certain pesticides in tea, contrary to the reduction imposed by the EU for several compounds such as arsenic in baby food.

It is precisely the regulatory and authorisation procedures for novel foods that highlight further decisive differences. In 2023, for example, the European Union authorised insect-derived proteins and new additives (such as bovine beta-lactoglobulin), while the UK followed separate and slower procedures, with authorisation processes often blocked by limited resources and rigid bureaucratic structures.

The British model also suffered from limited infrastructure capacity, demonstrated by the fact that, for certain specific imported products, laboratory analyses are still carried out in EU countries due to the lack of adequate domestic laboratories. This has predictably led to additional costs, numerous delays and a reduced shelf life[51] for imported food products. Furthermore, delays in the implementation of sanitary and phytosanitary checks made the UK highly vulnerable and between 2021 and 2023 many food products arrived without effective controls.

The EU benefits from a well-established communication network based on the EFSA and so-called national Focal Points,[52] ensuring rapid and coordinated information flows thanks to the RASFF. Italy, like other EU countries, continues to operate with-

[51] In the context of food safety, the term '*shelf life*' refers to the commercial life of a product, i.e. the period of time between production and consumption of the food without any risk to consumer health.

[52] The national *focal point* is the interface between the EFSA (European Food Safety Authority) and, as far as Italy is concerned, the Ministry of Health. It promotes cooperation between organisations that can assist the Authority in fulfilling its tasks (Article 36 of Regulation (EC) No 178/2002) and between national experts and networks of scientific experts. It coordinates the activities of the EFSA's scientific networks at national level and carries out international scientific cooperation activities.

in this integrated system, ensuring transparency of opinions, scientific communication and stakeholder participation. In the United Kingdom, on the other hand, cooperation between devolved nations[53] (England, Scotland, Wales and Northern Ireland) is governed by Common Frameworks, but differences and potential internal conflicts persist, mainly because Northern Ireland,[54] subject to the Windsor Framework, remains aligned with EU standards and applies labels such as 'Not for EU' to products imported from Great Britain.

6. *An Attempt at a Conclusion*

To attempt a conclusion at the current time is not easy, and in the author's opinion, given the latest developments in current affairs, the geopolitical earthquakes and economic tsunamis that the European Union is facing or has faced, it seems realistic to think (or perhaps hope) for an evolution that will lead to the creation of a two-speed Europe.[55] One would be numerically smaller than the current European Union, composed of nations willing to share such a high degree of sovereignty as to give rise to a purely federal structure, including a common army; the other would be joined by countries interested primarily in being part

[53] See P. Leyland, *Devolution Post Brexit: The Perplexity of Multi-Levelled Governance in a Disunited Kingdom,* in *Istituzioni del Federalismo* 3 (2021), 729-758.

[54] The *Northern Ireland Protocol* represented an important meeting point between the UK and the EU in the wake of a shared Brexit, which, however, presented objective difficulties from the outset. In this context, the most significant action taken by the British government was the presentation of *the Northern Ireland Protocol Bill 2022-2023* to Parliament in June 2022. This is a bill that allows the Government to unilaterally disapply, 'when it considers it necessary' and 'except in cases expressly excluded', certain parts of the Protocol agreed with the European Union and the Withdrawal Agreement, blocking its direct effects on the UK legal system, starting with the enforceable nature of the Protocol itself in the courts of justice.

[55] In 2023, in a very different economic and geopolitical situation, this was an option already envisaged and hoped for by C. Martinelli, Brexit and the British Constitution, cit., 259.

of a large free trade area, or little more.[56] The United Kingdom could hope to fall into this second category in order to resolve outstanding and future issues and lasting friction. Limiting the analysis and returning to the consequences in the food sector, what has been explained so far seems to highlight a clear contrast. The EFSA represents a consolidated model of an independent scientific body, part of a structured European network, with clear roles and bilateral cooperation between states. The FSA, on the other hand, has recently taken on an expanded mandate, integrating all stages of risk analysis, but finds itself operating in a complex post-Brexit context, without the help and protection of European cooperation, with limited resources, inadequate infrastructure and evolving rules. The EU's ability to maintain high standards such as a coordinated alert system, regulatory continuity and an efficient and transparent system contrasts with the UK, which still appears to be in a phase of institutional reorganisation, grappling with resource constraints, regulatory gaps and challenges to the integrity of the food safety system. As things stand, all that remains is to observe and analyse whether the UK will be able to catch up through internal policies of regulatory innovation and the strengthening of control agencies.

[56] This thesis is excellently expressed by C. Martinelli, *La Brexit e la Costituzione Britannica*, cit., 255.

C. Sustainability Before Courts: A Global Perspective on Sustainability Litigation

CLIMATE JUSTICE AT THE ICJ: HUMAN RIGHTS IMPLICATIONS OF THE ADVISORY OPINION

Margaretha Wewerinke-Singh - Annalisa Savaresi - Claudia Ituarte-Lima and Corina Heri

Abstract: *The International Court of Justice's landmark Advisory Opinion on the Obligations of States with Respect to Climate Change delivered on 23 July 2025*[1] *has unequivocally placed human rights at the centre of the applicable law on climate change. With it, the International Court of Justice (ICJ) has consolidated the growing consensus on a global body of law on climate change grounded in human rights norms and obligations. The Advisory Opinion was adopted unanimously by all ICJ judges, signalling consensus on the interpretation of international obligations concerning climate change. Although not legally binding, the Court's authoritative interpretation carries considerable weight. While cautious in parts, the Opinion nonetheless sets a clear normative direction that will shape climate litigation, legislation, and diplomacy in the years ahead. Unsurprisingly, the Advisory Opinion has prompted extensive international commentary, particularly regarding its interpretation of States' human rights obligations.*[2] *This chapter examines the human rights relied upon in the ICJ's Ad-*

[1] International Court of Justice, *Obligations of States in Respect of Climate Change*, Advisory Opinion, 23 July 2025 (General List No. 187).

[2] D. R. Boyd, *A Right Foundational to Humanity's Existence: World's Highest Court Embraces the Right to a Healthy Environment*, *VerfBlog*, 30 July 2025. Available at: https://verfassungsblog.de/icj-climate-right-to-a-healthy-environment/; C. Heri, *Human Rights in the ICJ's Climate Opinion: A Comparative Evaluation*, *VerfBlog*, 1 August 2025. Available at: https://verfassungsblog.de/human-rights-in-the-icjs-climate-opinion/; M. McVey and A. Savaresi, *The ICJ Advisory Opinion on Climate Change: A Business and Human Rights Perspective*, *OpinioJuris*, 4 August 2025. Available at: https://opiniojuris.org/2025/08/04/the-icj-advisory-opinion-on-climate-change-a-business-and-human-rights-perspective/; R. Perera, *The ICJ's Recognition of an Autonomous Right to a Clean and Healthy Environment*, *EJIL: Talk!*, 19 August 2025. Available at: https://www.ejiltalk.org/the-icjs-recognition-of-an-autonomous-right-to-a-clean-and-healthy-environment/; M. Wewerinke-Singh and J. Viñuales, *The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts*, *EJIL: Talk!*, 4 August 2025. Available at: https://www.ejiltalk.org/the-great-re-

visory Opinion and explores how its interpretation interacts with recent pronouncements of the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), and relevant domestic and transnational practice.

Keywords: Climate Justice, ICJ Advisory Opinion, Right to a Clean, Healthy and Sustainable Environment, Human Rights and Climate Obligations

1. *Human Rights within and Beyond the Advisory Opinion*

Spearheaded by the Pacific Islands Students Fighting Climate Change,[3] the Advisory Opinion campaign before the ICJ catalysed unprecedented public participation, engaging youth and children, civil society organisations, as well as nature conservation and human rights groups.[4]

The ICJ's detailed analysis of States' human rights obligations proceeds along three tracks. First, the Court recognises that the effective enjoyment of human rights depends on a healthy environment and canvasses how climate change impairs specific rights.[5] Second, it turns to the implications of the right to a clean, healthy and sustainable environment.[6] Finally, the Court charac-

set-the-icj-reframes-the-conduct-responsible-for-climate-change-through-the-prism-of-internationally-wrongful-acts/.

[3] Pacific Islands Students Fighting Climate Change, *History Made at the World's Highest Court*. Available at: https://www.pisfcc.org.

[4] S. A. Samuel, *How Young People have Taken Climate Justice to the World's International Courts*, *The Conversation*, 21 July 2025. Available at: https://theconversation.com/how-young-people-have-taken-climate-justice-to-the-worlds-international-courts-261033; J. Peel and Z. Nay, *The UN is Asking the International Court of Justice for its Opinion on States' Climate Obligations. What Does This Mean?, The Conversation*, 3 April 2023. Available at: https://theconversation.com/the-un-is-asking-the-international-court-of-justice-for-its-opinion-on-states-climate-obligations-what-does-this-mean-202943; C. Ituarte-Lima, *On Climate Change, the International Court of Justice Faces a Pivotal Choice, The Conversation*, 5 December 2024. Available at: https://theconversation.com/on-climate-change-the-international-court-of-justice-faces-a-pivotal-choice-245189.

[5] ICJ Obligations of States in Respect of Climate Change, cit., paras 372-386

[6] Ibid., paras 387-393.

terises States' climate-protection obligations as *erga omnes*, and details the legal consequences associated with these. Several of the judges' separate opinions further elaborate on these points, enriching the interpretation of human rights law in relation to climate change.

The Advisory Opinion unequivocally asserts that environmental protection is a precondition for the enjoyment of a range of human rights – specifically mentioning those to life, health, an adequate standard of living, privacy, family and home, as well as the rights of women, children and Indigenous peoples. This position aligns the ICJ with the growing body of international, regional, and national practice recognising the interdependence between the enjoyment of human rights and the protection of the climate system. Since 2009, UN human rights bodies and special mandate holders have articulated the implications of human rights obligations for climate action, including through a series of Human Rights Council resolutions.[7] In 2021, these activities culminated with the appointment of a UN Special Rapporteur on the promotion and protection of human rights in the context of climate change.[8] In recent years, the rapidly expanding body of domestic jurisprudence recognising the links between human rights and climate law obligations – following the landmark *Leghari v Pakistan* judgement[9] – was corroborated at the regional level by the 2024 judgment by the ECtHR in *KlimaSeniorinnen et al v Switzerland*[10] and the 2025 Advisory Opinion of the

[7] Office of the United Nations High Commissioner for Human Rights, *Human Rights Council Resolutions on Human Rights and Climate Change: OHCHR and Climate Change*. Available at: https://www.ohchr.org/en/climate-change/human-rights-council-resolutions-human-rights-and-climate-change.

[8] Office of the United Nations High Commissioner for Human Rights, *Special Rapporteur on Climate Change*. Available at: https://www.ohchr.org/en/specialprocedures/sr-climate-change.

[9] *Leghari v. Federation of Pakistan* Case No: W.P. No. 25501/2015 (Lahore High Court, 25 January 2018). Available at: https://www.climatecasechart.com/document/leghari-v-federation-of-pakistan_80c5.

[10] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no. 53600/20 (ECtHR, 9 April 2024).

IACtHR on the Climate Emergency and Human Rights.[11] The ICJ's Advisory Opinion explicitly references some of these milestones, and several separate opinions by the judges further elaborate on them.

The ICJ's Advisory Opinion also specifically considers the role of the right to a clean, healthy and sustainable environment vis-à-vis climate change. As Boyd[12] and Heri[13] have also noted, this is not a mere rhetorical exercise. Rather, the Advisory Opinion crystallizes the position of this right within the applicable law, making it an integral part of State obligations regarding climate change. The Court stops short of explicitly recognising the right to a clean, healthy, and sustainable environment as a rule of customary international law, or of defining its normative content. This caution likely reflects three factors: the lack of recognition by powerful States, differing interpretations across legal systems, and a deliberate choice to leave space for human rights bodies to further develop the right in practice. Nonetheless, some judges, in separate opinions, went further, drawing on domestic constitutions, regional jurisprudence, and United Nations practice and concluding that the right either already constitutes customary international law or is rapidly crystallizing as such. Judge Bhandari, Judge Aurescu and Judge Tladi emphasise its customary status,[14] with Judge Aurescu – who raised a question on this at the ICJ hearings – explicitly grounding the right in widespread domestic recognition, regional jurisprudence, and UN resolutions. Judge Charlesworth explores the content of the right, emphasizing that its procedural and substantive features and special

[11] Inter-American Court of Human Rights, *Advisory Opinion AO-32/ 25 on Climate Emergency and Human Rights*, Advisory Opinion requested by the Republic of Chile and the Republic of Colombia, 29 May 2025.

[12] D. R. Boyd, *A Right Foundational to Humanity's Existence (…)*, cit.

[13] C. Heri, *Human Rights in the ICJ's Climate Opinion (…)*, cit.

[14] Judge Bhandari, *Separate Opinion, Obligations of States in Respect of Climate Change,* Advisory Opinion, ICJ, 23 July 2025 (General List No. 187); Judge Aurescu, *Separate Opinion, Obligations of States in Respect of Climate Change,* Advisory Opinion, ICJ, 23 July 2025 (General List No. 187); Judge Tladi, *Declaration, Obligations of States in Respect of Climate Change,* Advisory Opinion, ICJ, 23 July 2025 (General List No. 187).

obligations towards those in vulnerable situations.[15] Judge Sebutinde further underscores that the law must consider the interests of 'present and future generations'.[16]

Although the ICJ did not explicitly delineate the substantive elements of the right to a healthy environment, its references to climate, food, and water – anchored in IPCC evidence – clarify how these dimensions are interconnected and mutually reinforcing.[17] The Advisory Opinion highlights the composite character of the right and its dependence on ecological integrity. While the Court did not directly address the environmental democracy dimensions of the right – namely access to information, public participation, and access to justice – its recognition of the International Covenant on Civil and Political Rights[18] as a key instrument for climate-related obligations implicitly underscores the centrality of procedural rights, such as freedom of assembly and expression, for protecting individuals and groups from climate harms.

The Advisory Opinion integrates national and regional jurisprudence, the work by international bodies, and IPCC scientific assessments to clarify the heightened obligations of States toward vulnerable populations. The Court uses IPCC findings to articulate the causal links between climate change and the impairment of human rights under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[19] It particularly highlights how historically marginalized groups – especially women and Indigenous peoples – are disproportionately affected.[20] Judge Charlesworth

[15] Judge Charlesworth, *Separate Opinion, Obligations of States in Respect of Climate Change,* Advisory Opinion, ICJ, 23 July 2025 (General List No. 187).

[16] Vice-President Sebutinde, *Separate Opinion, Obligations of States in Respect of Climate Change,* Advisory Opinion, ICJ, 23 July 2025 (General List No. 187).

[17] ICJ *Obligations of States in Respect of Climate* Change, cit., para. 384.

[18] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNTS 999.

[19] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS 993.

[20] ICJ *Obligations of States in Respect of Climate Change,* cit., paras. 77, 384.

provides a more developed intersectional analysis of climate impacts, concluding that States have 'a particular obligation to protect the human rights of vulnerable groups [which] requires close attention to the potentially discriminatory effects of measures taken to respond to climate change'.[21]

Finally, the Advisory Opinion characterises States' climate-protection obligations – including the prevention duty under the no harm rule – as *erga omnes*, thus linking the human rights implications of climate harm to obligations owed to the international community as a whole. This finding – grounded on human rights as part of the legal framework applicable to climate change and *erga omnes* obligations as their corollary – powerfully confirms the crucial role of human rights in climate governance and is especially consequential.[22] It connects shared human rights interests in a stable climate to obligations enforceable by all States,[23] and not only by those specially injured. This interpretation potentially unlocks forms of invocation of responsibility that do not depend on bilateral injury and that reflect the distributive and intergenerational nature of climate harm.[24] It also aligns the Court's reasoning with domestic court decisions – such as *Urgenda v the State of the Netherlands*[25] – which held that difficulties of attribution and causation[26] do not exempt wrongful conduct from legal consequences.

[21] Judge Charlesworth, *Separate Opinion, Obligations of States in Respect of Climate* Change, cit., para. 29.

[22] S. Jodoin, A. Savaresi and M. Wewerinke-Singh, *Rights-based Approaches to Climate Decision-Making*, in 52 *Current Opinion in Environmental Sustainability* (2021), 45-53.

[23] A. Savaresi, *State Responsibility*, in M. Wewerinke-Singh, S. Mead (Eds), *The Cambridge Handbook on Climate Litigation*, Cambridge, 2025, 371-390.

[24] L. Pezzano, *Obligations Erga Omnes and Climate Change: Reflections on the ICJ Advisory Opinion, EJIL: Talk!*, 8 August 2025. Available at: https://www.ejiltalk.org/obligations-erga-omnes-and-climate-change-reflections-on-the-icj-advisory-opinion/.

[25] Urgenda, *The Urgenda climate case against the Dutch Government*. Available at: https://www.urgenda.nl/en/themas/climate-case/.

[26] L. Benjamin and S. Seck, *Causation*, in M. Wewerinke-Singh, S. Mead (Eds), *The Cambridge Handbook on Climate Litigation*, Cambridge, 2025, 391-414.

2. *Future Generations: From Equity* Infra Legem *to Rights-holders*

The Advisory Opinion weaves intergenerational equity into the legal principles applicable to climate change.[27] It treats intergenerational equity as a legal consideration that guides the interpretation and application of obligations – both treaty-based and customary – rather than as a self-standing source of obligation. In our reading, this is a choice of legal technique rather than a denial of normative salience. By placing future generations within the *infra legem* toolbox, the Court ensures that obligations are construed and applied in ways that avoid shifting intolerable burdens to those yet to be born. As Nolan also notes, however, regional human rights courts have moved further toward recognising future generations as rights-holders and toward using general principles to operationalise those rights.[28]

In its 2025 Advisory Opinion, the IACtHR stresses 'life in dignity', warns against 'ecological barbarism', and reads intergenerational considerations not only as interpretive constraints but as organising reasons for action.[29] This is a distinct jurisprudential move, one that foregrounds principles to concretise obligations owed to those not yet born. In doing so, the IACtHR draws on general principles – precaution, prevention, intergenerational equity – and soft-law instruments – such as the Maastricht Principles on the Human Rights of Future Generations[30] – to frame States' duties toward 'present and future generations of humanity' in climate governance. The Maastricht Principles articulate present generations' duties to avoid foreseeable harm

[27] ICJ *Obligations of States in Respect of Climate Change*, cit., paras. 155-157

[28] A. Nolan, *Placing Future Generations at the Heart of Inter-American Human Rights Law?, EJIL: Talk!*, 21 July 2025. Available at: https://www.ejiltalk.org/placing-future-generations-at-the-heart-of-inter-american-human-rights-law/.

[29] Inter-American Court of Human Rights, *Advisory Opinion AO-32/ 25 on Climate Emergency and Human Rights*, cit.

[30] *The Maastricht Principles on the Human Rights of Future Generations* (adopted in Maastricht on 3 February 2023). Available at: https://www.rightsoffuturegenerations.org/home.

to future generations, to cooperate internationally, and to act as stewards of natural systems. Their influence is evident in the IACtHR's Advisory Opinion and in domestic practice, and it also resonates with the ICJ's unanimous decision to treat intergenerational equity as an interpretive lens shaping the content of due diligence over time.

By contrast, in *KlimaSeniorinnen et al v Switzerland*, the ECtHR based its reasoning on Article 8 of the European Convention on Human Rights,[31] interpreted in conjunction with State obligations under the UNFCCC and the Paris Agreement. The Court conceptually recognised the 'intergenerational burden-sharing' dimension of mitigation, but the doctrinal foundation rested on Article 8's positive obligations, informed by climate science and international climate law indicators of adequacy. On standing, the ECtHR broke with its established doctrine by accepting the association's representative claim precisely because climate change presents diffuse, systemic and intergenerational risks.[32]

Despite their differing approaches, all three courts clearly emphasised the intergenerational dimension, paving the way for the crucial conceptual shift needed to recognize future generations as right-holders. This shift is already manifest in the swelling body of domestic practice, translating intergenerational equity reasoning into enforceable rights.[33] The Philippine Supreme Court's landmark 1993 *Oposa* ruling treated intergenerational responsibility as a justiciable basis for standing and for constraints on resource depletion.[34] In 2018, the Colombia's Supreme Court acknowledged the rights of future generations and of the Amazon, ordering the government to adopt a plan to halt

[31] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

[32] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, cit.

[33] S. Bookman and M. Wewerinke-Singh, *Intergenerational Equity*, in M. Wewerinke-Singh, S. Mead (Eds), *The Cambridge Handbook on Climate Litigation*, Cambridge, 2025, 344-368.

[34] *Oposa v Factoran* (G.R. No. 101083, 30 July 1993) (Philippines Supreme Court).

deforestation.[35] In 2021, the *Neubauer* judgment by the German Federal Constitutional Court found that excessive delays in emission reductions violate constitutional rights by disproportionately placing mitigation burdens onto younger and future generations.[36] Together, these lines of authority mark a departure from equity *infra legem* to concrete obligations and remedies, which shaped the ICJ's interpretation of the normative landscape and are poised to guide other courts in future.

The trend is visible across jurisdictions. The Grantham Research Institute[37] identifies a further uptick in cases engaging human rights arguments,[38] youth claimants and intergenerational reasoning,[39] with courts increasingly scrutinising the adequacy of national pathways against science-based indicators and international commitments. This picture reinforces the role of human rights as a vehicle for translating climate objectives into State duties, including duties owed to those not yet born.

3. *Systemic Integration, Duty of Cooperation and Good Faith*

The ICJ's Opinion is a sustained exercise in systemic integration.[40] Throughout, the Court reads treaty obligations in light of

[35] Salamanca Mancebo and Others v Ministerio de Ambiente y Desarrollo Sostenible y otros (Corte Suprema de Justicia de Colombia, Sala de Casación Civil, STC4360-2018, 5 April 2018).

[36] *Neubauer et al. v Germany,* Bundesverfassungsgericht (Federal Constitutional Court), 1 BvR 2656/18 (2021).

[37] J. Setzer and C. Higham, *Global Trends in Climate Change Litigation: 2025 snapshot*, Grantham Research Institute on Climate Change and the Environment. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2025/06/Global-Trends-in-Climate-Change-Litigation-2025-Snapshot.pdf.

[38] A. Savaresi and J. Setzer, *Rights-based Litigation in the Climate Emergency: mapping the landscape and new knowledge frontiers*, in 13 *Journal of Human Rights and the Environment* 1 (2022), 7-34.

[39] N. Koistinen, *Litigating for the Future: Rights-based Argumentation in Future Generations Climate Litigation*, in 24 *L'Ircocervo* (2025), 119-153.

[40] J. Arato and J. Uriburu, *Treaty and Custom in the ICJ's Climate Change Opinion, EJIL: Talk!*, 24 July 2025. Available at: https://www.ejiltalk.org/treaty-and-custom-in-the-icjs-climate-change-opinion/.

one another and of general international law, including human rights – doing precisely what Article 31(3)(c) of the Vienna Convention on the Law of Treaties prescribes: interpreting treaties 'in the light of any relevant rules of international law applicable in the relations between the parties'.[41] Thus, the climate treaties' provisions are construed in a manner that factors in the human rights implications of climate harm and the collective temperature goals implications for State obligations concerning climate change mitigation and finance. The ICJ aligns with the ECtHR's[42] – and, before it, the Dutch courts'[43] – 'integrated reading' of the European Convention on Human Rights alongside the UN Framework Convention on Climate Change[44] and the Paris Agreement, confirming that this approach should be regarded as the general interpretive ethic for this complex legal field. Rejecting the view that climate change treaties alone constitute the relevant law, the ICJ interprets them in conjunction with other environmental agreements of particular human rights significance – namely the Convention on Biological Diversity[45] and the Convention to Combat Desertification[46] – identifying these instruments as part of the directly applicable legal framework.[47]

The Advisory Opinion also affirms that the duty to cooperate has customary force and is governed by good faith. In doing so, the ICJ connected good faith cooperation to human rights in two ways. First, by recognising that the protection of the climate system is an *erga omnes* concern, it aligns the cooperative duties that make mitigation possible with interests shared by all peoples, including future generations. Second, by affirming that environ-

[41] Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980) United Nations Treaty Series, vol. 1155, p. 331.

[42] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (n 8).

[43] Urgenda (n 15).

[44] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

[45] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

[46] United Nations Convention to Combat Desertification (adopted 17 June 1994, entered into force 26 December 1996) 1954 UNTS 3.

[47] ICJ *Obligations of States in Respect of Climate Change,* cit., paras. 113-172.

mental protection is a precondition for human rights enjoyment and by engaging the right to a clean, healthy and sustainable environment, it treats human rights norms as part of the matrix that informs what due diligence and cooperation require *in concreto*.

4. *The Opinion's Contribution and Future Directions*

The ICJ's views on States' human rights obligations provide a clear normative direction for future climate law-making and enforcement, informing future climate litigation, legislation, and diplomacy.

On *mitigation*, the ICJ clarifies that equity and the principle of Common but Differentiated Responsibilities and Respective Capabilities broadly shape States' obligations, while endorsing the ECtHR's approach by translating intergenerational concerns into concrete governance requirements on targets, pathways, and credible implementation. Its views are likely to influence proportionality and adequacy reviews by other courts.

On *cooperation*, the ICJ aligned with the International Tribunal on the Law of the Sea's Advisory Opinion on Climate Change[48] by emphasizing good faith and due diligence, and supporting closer scrutiny of whether finance, technology, and capacity-building measures are commensurate with the Paris Agreement's temperature goals and evolving capabilities.

On *extraterritorial effects*, the ICJ indicates that human rights obligations related to climate change must be interpreted instrument by instrument, yet cannot be limited to a narrow territorial perspective when the harm is inherently transboundary.

On *participation and remedies*, the United Nations Committee on the Rights of the Child's General Comment No. 26[49] and the

[48] International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law,* Advisory Opinion, 21 May 2024 (List of cases: No. 31).

[49] United Nations Convention on the Rights of the Child, *CRC/C/GC/26: General Comment No. 26 (2023) on Children's Rights and the Environment with a Special Focus on Climate Change,* 22 August 2023.

UN General Assembly's recognition of the right to a clean, healthy and sustainable environment[50] have become key interpretive anchors for youth and community claimants seeking forward-looking relief.

As noted above, the Court left open the question of whether the right to a clean, healthy, and sustainable environment has attained customary status. However, the Court's systematic engagement – together with its treatment of *erga omnes* obligations – signals a readiness to treat human rights norms as interpretive constraints on both treaty and customary law in the climate context.

In sum, the ICJ's Opinion makes crystal-clear that human rights norms – both treaty-based and customary – are essential reference points for defining States' climate obligations, including those owed to future generations. This marks a significant advance, establishing a human rights-based approach to climate change that recognises time as a distinct and relevant dimension.

With its Advisory Opinion, the ICJ has not drafted a human rights code for the climate emergency. Rather, it has taken a subtler – and potentially more influential – approach: mainstreaming human rights and the interests of future generations into the interpretation of climate treaties and customary law, reinforcing the duties of cooperation and due diligence through human rights standards, and reframing climate protection duties as *erga omnes* obligations. Read alongside the other landmark climate rulings cited above, the ICJ's Advisory Opinion consolidates a transnational body of emerging global law on climate change grounded in human rights norms and obligations. The task for lawmakers, implementers, and practitioners is to use this evolving corpus of law to craft rules that prevent further harm to present and future generations – and to redress harms already suffered.

[50] UNGA, *The Human Right to a Clean, Healthy and Sustainable Environment*, UN Doc A/RES/76/300, 28 July 2022.

CLIMATE JUSTICE AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: CHALLENGES AND PERSPECTIVES

Flávia Piovesan - Isabelle Cristine Rodrigues Magalhães

Abstract: *This article aims to reflect on the challenges and prospects of climate justice within the Inter-American System for the Protection of Human Rights, from a multilevel perspective of human rights protection. It is guided by three central questions: How can we understand the Latin American context? Considering the regional context, how can we understand the transformative impact of the Inter-American System for the Protection of Human Rights in relation to the climate emergency? What are the challenges and prospects for climate justice in light of the Inter-American System for the Protection of Human Rights? To this end, the article examines the structural and contemporary challenges faced by Latin America, based on the region's specific characteristics, the Inter-American normative framework, advisory opinions, and jurisprudence related to climate change and environmental protection. It argues that the Inter-American System plays a transformative role in Latin America, including on the issue of climate change, and that, from an integrated perspective with national arena, it faces some challenges that need to be overcome.*

Keywords: Climate Justice, Inter-American Human Rights System, Right to a Healthy Environment, Climate Emergency, Advisory Opinions.

1. *Introduction*

This article aims to analyze the challenges and perspectives related to climate justice considering the Inter-American System for the Protection of Human Rights (IAHRS), from a multilevel rights protection perspective. Three main questions guide our analysis:

1. How can we understand the Latin American context?
2. Considering the regional context, how can we understand

the transformative impact of the Inter-American System for the Protection of Human Rights in relation to the climate emergency?

3. What are the challenges and prospects for climate justice considering the Inter-American System for the Protection of Human Rights?

The first question proposes an analysis of the specificities related to the Latin American regional context that are relevant to the issue of climate justice. In this sense, the main structural and contemporary challenges facing the region will be analyzed.

The second question seeks to understand the transformative impact that the Inter-American Human Rights Protection System has had in the region. To this end, the Inter-American normative framework concerning the issue will be analyzed, in addition to advisory opinions and Inter-American jurisprudence on climate change and the environment.

Finally, this article seeks to highlight the main challenges and prospects for addressing climate change in the region.

These three questions allow for an integrated analysis of the regional context, the impact that the Inter-American System has had on the region, and the challenges and prospects surrounding the issue. The article starts from the premise that the Inter-American System is located in a region with unique characteristics related to the protection of human rights and, from a multilevel perspective, promotes transformative change through integration with the national level.

This impact is achieved mainly through three key elements: institutional – related to the institutions and norms involved in implementing Inter-American standards; sociopolitical – which considers the strong social and political action aimed at mobilizing national and international human rights protection institutions; and cultural – which can catalyze or impede the implementation of the standards developed by the Inter-American human rights system.[1]

[1] M. Morales Antoniazzi, F. Piovesan, J.C. da Cunha Cruz, *Inter-American Human Rights System. Sociopolitical, Institutional, and Cultural Dimensions of*

2. *How Can We Understand the Latin American Context?*

Understanding the Latin American context is essential to addressing the transformative impact that the Inter-American system has on the region. The context itself justifies the need for integrated and multilevel action by the IAHRS with national institutional and social mechanisms related to the protection of human rights. In this sense, this section will seek to address the structural and emerging challenges that Latin America faces, with an emphasis on climate change.

The challenges facing Latin America can be divided into two main groups: structural challenges (2.1), which include inequality with discriminatory patterns; epidemic violence; and systemic deficits concerning the rule of law. There are also contemporary challenges (2.2) related to new technologies, climate emergency, and business and human rights. In this regard, we will briefly analyze each of these challenges, given that they impact the enjoyment of various human rights, including those related to climate, given the cross-cutting nature of violations.

2.1 *Structural Challenges*

As discussed above, the Latin American context is marked by three structural challenges: inequality with discriminatory patterns; epidemic violence; and weak rule of law.

Extreme poverty and poverty are still realities that permeate Latin America. In 2024, 25.5% of the population of the 18 countries in the region was living below the poverty line, while 9.8% of the population was living in extreme poverty.[2] This situation

Its Transformative Impact, in A. Von Bogdandy, F. Piovesan, E. Ferrer Mac-Gregor, M. Morales Antoniazzi (Eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground,* New York, 2024, 49-75.

[2] ECLAC, *Social Panorama of Latin America and the Caribbean, 2025: How to Escape the Trap of High Inequality, Low Social Mobility and Weak Social Cohesion.* < https://repositorio.cepal.org/server/api/core/bitstreams/03763434-905f-4b15-b04a-80e44b451743/content > (accessed December 15, 2025).

directly contributes to social inequality with discriminatory patterns, which is one of the great challenges in the Latin American context. According to the Economic Commission for Latin America and the Caribbean, high levels of inequality are historical and structural obstacles to social progress in the region and can be explained by six main elements: low local economic growth, with informal labor markets, disparate productivity, and unequal wages; regressive tax systems; weak social policies and social protection policies; education systems with serious deficiencies; gender inequality; and high levels of inequality and spatial segregation in urban areas.[3]

This inequality, in turn, is marked by historical and structural patterns of discrimination and exclusion against vulnerable groups, especially Afro-descendants, indigenous communities, and women.[4] Thus, inequality with discriminatory patterns directly affects the enjoyment of human rights, constituting an obstacle to the full realization of the rights of people who face poverty and extreme poverty on a daily basis in Latin America.

A second structural challenge relates to the epidemic violence facing the region. According to the United Nations Office on Drugs and Crime, 'The Americas have the highest regional homicide rate in the world, and high rates of homicidal violence related to organized crime'.[5] There is also increased vulnerability to situations of violence in the region. As an example, we can cite data on violence against human rights defenders, a group direct-

[3] ECLAC, *Social Panorama of Latin America and the Caribbean, 2025: How to Escape the Trap of High Inequality, Low Social Mobility and Weak Social Cohesion,* 6. < https://repositorio.cepal.org/server/api/core/bitstreams/03763434-905f-4b15-b04a-80e44b451743/content > (accessed December 15, 2025).

[4] M. Morales Antoniazzi, F. Piovesan, J.C. da Cunha Cruz, *Inter-American Human Rights System. Sociopolitical, Institutional, and Cultural Dimensions of Its Transformative Impact,* in A. Von Bogdandy, F. Piovesan, E. Ferrer Mac-Gregor *et al.* (Eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground*, New York, 2024, 51.

[5] UNODC, *Global Study on Homicide 2023: Homicide and Organized Crime in Latin America and the Caribbean, United Nations Office on Drugs and Crime,* Vienna/New York, 2023, 3, <https://www.unodc.org/documents/data-and-analysis/gsh/2023/GSH_2023_LAC_web.pdf (accessed December 15 2025).

ly related to environmental protection and climate change. According to a survey conducted by the organization Front Line Defenders, in its global analysis for 2023/2024, the American continent had the highest number of murders of human rights defenders, accounting for 79% of the total. The countries that lead the statistics are Colombia, Mexico, and Brazil.[6] The pattern of structural violence, which has persisted for years, is therefore a challenge directly related to the context of Latin America.

Finally, a third characteristic of the region is related to the consolidation of the rule of law and trust in its institutions. Institutional corruption is still characterized as a central problem in the region,[7] so that, according to *Latinobarómetro* 2024, the perception of the population interviewed in Latin American countries is that internal corruption has increased significantly in relation to previous years.[8] Such trust levels are related to violations of social, civil, political, and economic rights, given that reliable governance structures are directly associated with their enjoyment. In addition, it should be noted that the region still faces a significant legacy marked by the weakening of the democratic rule of law in the face of past dictatorial regimes, characterized by impunity and various human rights violations.

In addition to these structural challenges, there are contemporary challenges marked by profound changes that the region has been experiencing, as well as issues that are prevalent throughout the world, such as climate change, which is the focus

[6] Front Line Defenders, *Global Analysis 2023/24,* Dublin, 2023 <https://www.frontlinedefenders.org/sites/default/files/1578_fld_ga23_online_u03.pdf> (accessed December 15 2025).

[7] M. Morales Antoniazzi, F. Piovesan, J.C. da Cunha Cruz, *Inter-American Human Rights System. Sociopolitical, Institutional, and Cultural Dimensions of Its Transformative Impact,* cit., 51.

[8] In most countries, more than 50% of respondents believe that corruption in their country has increased. In this regard, it is worth noting that, of the 17 countries analyzed by *Latinobarómetro*, only Mexico, El Salvador, and Argentina recorded rates below 50% for the response that corruption has increased significantly in their country. In this regard: *Corporación Latinobarómetro,* report 2024, < https://www.latinobarometro.org/latinobarometro-2024> (accessed 1 Jan. 2026).

of this article. In this regard, we will now briefly analyze each of these challenges.

2.2 *Contemporary Challenges*

Beyond the structural challenges, Latin America faces a set of contemporary issues shaped by profound social, economic, and environmental transformations. Many of these challenges are not only regional but also global in scope, such as climate change.

In this regard, we can mention the three emergent challenges: new technologies, climate emergency, business and human rights. The first contemporary challenge is related to the direct relationship between human rights and new technologies. Much has been said about the multidimensional impact of new technologies on human rights. It is about the potential of new technologies to promote rights, but also to violate them. In terms of promoting human rights, we can mention the possibility of access to the internet, the right to data protection, the right to privacy, the fight against online discrimination, and the use of new technologies disseminate information about a wide range of rights.[9] Nevertheless, new technologies can also represent a particularly significant challenge for Latin America, especially when combined with the structural challenges already mentioned, such as the consolidation of the rule of law and trust in institutions. In addition to this, the Latin American region faces the challenge of promoting the protection of human rights and reducing the negative impact of these technologies on vulnerable groups.

The second challenge related to contemporary issues concerns climate change. This is a complex and multidimensional issue that has directly impacted the enjoyment of various human rights,[10]

[9] F. Piovesan, L. E. C. O. Hernandes, O impacto dos direitos humanos nas novas tecnologias: Internet, inteligência artificial e neurotecnologia*,* in F. Piovesan (Ed.), *Temas de Direitos Humanos,* São Paulo, 2025, 558.

[10] In this regard, the Inter-American Court of Human Rights has already stated: 'the adverse effects of climate change can affect the effective enjoyment of human rights'. Inter-American Court of Human Rights, *Infographic: Advisory Opinion on the Environment and Human Rights,* San José, Costa Rica,

with the right to a healthy environment[11] at its core, affecting not only the rights of present and future generations, but also ecosystems and all species on the planet.[12] In this context, there is a social and environmental dimension to issues related to climate change, making it essential to bring environmental protection and human protection closer together.[13]

Addressing the causes and consequences of climate change requires the progressive development of appropriate regulations capable of fostering the construction of a global space governance[14] and an effective space,[15] based on the recognition of the link between climate change and human rights. Furthermore, it is necessary to recognize that climate change has a cross-cutting aspect in that it affects groups in particularly vulnerable situations, with an emphasis on poverty,[16] which is a structural chal-

2018, 6. <https://www.corteidh.or.cr/sitios/libros/todos/docs/infografia-eng.pdf> (accessed 1 Jan. 2026).

[11] In this regard, see: Inter-American Commission on Human Rights, *Resolution No. 3/2021: Climate Emergency: Scope of Inter-American Human Rights Obligations*, Washington, D.C., 31 Dec. 2021, 5-6, <https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf> (accessed 1 Jan. 2026).

[12] In this regard, see: Inter-American Commission on Human Rights, *Resolution No. 3/2021: Climate Emergency: Scope of Inter-American Human Rights Obligations*, Washington, D.C., 31 Dec. 2021, 8, <https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf> (accessed 1 Jan. 2026).

[13] A. A. Cançado Trindade, Direitos humanos e meio-ambiente: paralelo dos sistemas de proteção internacional*,* Porto Alegre, 1993, 23.

[14] On the concept of global governance and its developments, see M. Torelly, *Do direito internacional à governança global: mudanças estruturais do espaço transnacional*, in 15 *Revista de Direito Brasileira* 6 (2016), 20-46.

[15] Regarding legal effectiveness, Gabriela Garcia states that it is related to the fidelity and consistency in the enforcement of the norm, referring to the 'realization of the law in the concrete performance of its social function'. G. G. Batista Lima, *O conceito de governança global do desenvolvimento sustentável no estudo da efetividade da norma jurídica: reflexões epistemológicas,* in *32 Nomos (Fortaleza)* 2 (2012), 157-178. In the same sense, see: M. D. Varella, *A efetividade do direito internacional ambiental: análise comparativa entre as convenções da CITES, CDB, Quioto e Basiléia no Brasil*, in A. F. Barros-Platiau, M. D. Varella (Eds), *A efetividade do direito internacional ambiental*, *Brasília, UNICEUB, UNITAR e UnB*, 2009, 34-35.

[16] In this regard: 'This would have devastating consequences, especially

lenge presented in the previous section. Thus, different impacts are generated depending on the situation in which a person finds themselves.

In this context, the challenge of addressing climate change has also been invoked in the context of regional human rights protection systems, particularly through increasing climate litigation and requests for advisory opinions. With the expansion of environmental law at the international level, there is a trend toward the justiciability of climate matters before regional human rights courts.[17] For context, it is worth noting the statement by the Inter-American Commission on this subject.

In 2021, the Inter-American Commission adopted a landmark document on climate issues. This is Resolution No. 3/2021, which outlines State duties and the scope of inter-American obligations, based on the Inter-American Court's[18] recognition of the right to a healthy environment as a human right. Thus, the reso-

for millions of people living in poverty, who even in the best of scenarios, would face food insecurity, forced migration, disease and death. This threatens the very future of human rights and would undo the last fifty years of progress in development, health and poverty reduction'. Inter-American Commission on Human Rights, *Resolution No. 3/2021: Climate Emergency: Scope of Inter-American Human Rights Obligations*, Washington, D.C., 31 Dec. 2021, 5-6, <https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf> (accessed 1 Jan. 2026).

[17] M. Feria-Tinta, *Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee*, in I. Alogna, C. Bakker, J.-P. Gauci (Eds), *Climate Change Litigation: Global Perspectives*, Leiden, 2021, 310. In the same sense: I. Alogna; C. Bakker; J.-P. Gauci, *Climate Change Litigation: Global Perspectives - An Introduction*, in I. Alogna; C. Bakker; J.-P. Gauci (Eds), *Climate Change Litigation: Global Perspectives*, cit., 10.

[18] 'This is the first document of the Inter-American human rights system specifically dedicated to the issue of climate change. In its preparation, both the normative and jurisprudential developments of the Inter-American and universal systems have been considered; among them, Advisory Opinion 23 of the Inter-American Court of Human Rights, which develops the human right to a healthy environment'. Inter-American Commission on Human Rights, *The IACHR and REDESCA publish Resolution on Climate Emergency and Human Rights in the Americas*, Washington, D.C., 2022, <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/045.asp> (accessed 14 July 2024).

lution 'recognizes that climate change is a human rights emergency, constituting one of the greatest threats to the full enjoyment of human rights by present and future generations, to the health of ecosystems and all species that inhabit the hemisphere'.[19] It is assumed that there is a consensus, both internationally and regionally, on the relationship between human rights and climate change, and that this presupposes 'the increase in risks to societies, people, and natural systems'.[20] It should also be noted that the Resolution provides guidelines and recommendations to the States of the Organization of American States on climate issues, with an emphasis on the state's duty to 'guarantee and protect the rights of individuals or groups who are in situations of vulnerability or who are particularly vulnerable to the damage and adverse impacts of climate change because they have historically and systematically borne the greatest burden of structural inequality'.[21]

Finally, a contemporary challenge directly related to the previous one concerns the issue of business and human rights. Based on an integrated analysis, it is clear that 'a significant part of global greenhouse gas GHG) emissions are caused by the activities, products and services of companies and that current systems of heavy consumption contribute substantially to climate change and environmental degradation and put at risk the enjoyment of human rights'.[22] In this sense, it is extremely important to focus

[19] Inter-American Commission on Human Rights, *The IACHR and REDESCA publish Resolution on Climate Emergency and Human Rights in the Americas*, Washington, D.C., 2022, <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/045.asp> (accessed 14 July 2024).

[20] In this regard, see: Inter-American Commission on Human Rights, *Resolution No. 3/2021: Climate Emergency: Scope of Inter-American Human Rights Obligations*, Washington, D.C., 31 Dec. 2021, 4, <https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf> (accessed 1 Jan. 2026).

[21] Inter-American Commission on Human Rights, *Resolution No. 3/2021: Climate Emergency: Scope of Inter-American Human Rights Obligations*, Washington, D.C., 31 Dec. 2021, 15, <https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf> (accessed 1 Jan. 2026).

[22] Inter-American Commission on Human Rights, *Resolution No. 3/2021: Climate Emergency: Scope of Inter-American Human Rights Obligations*, Wa-

on business and human rights in the climate context, especially the issue of corporate accountability, as well as the adoption of measures aimed at mitigating and reducing the damage caused by climate change. As will be highlighted below, the Inter-American system, when addressing climate change, emphasizes the issue of accountability and the adoption of preventive measures aimed at companies in the region.

Considering these regional challenges, both structural and contemporary, we will analyze how the Inter-American System for the protection of human rights has a transformative impact in addressing climate change.

3. *Considering the Regional Context, How Can We Understand the transformative impact of the Inter-American System for the Protection of Human Rights in Relation to the Climate Emergency?*

Climate litigation has been increasingly addressed in the Inter-American Human Rights System in recent years, considering the issues that are on the international agenda. However, it is a pioneering regional system in environmental matters which, based on an evolving interpretation of the American Convention on Human Rights, has granted autonomy to the right to a healthy environment and recognized the possibility of transboundary damage in environmental matters.[23] In addition, through its advisory opinion on climate change of May 29, 2025, the Court adopted provisions with several innovative State obligations in relation to the matter, including General Human Rights Obligations in the Context of the Climate Emergency, Obligations Arising from Substantive Rights, Obligations Arising from Procedur-

shington, D.C., 31 Dec. 2021, 9, <https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf> (accessed 1 Jan. 2026).

[23] B. G. Guimarães Silva, F. F. Tonetto, C. C. de Oliveira, *A atuação vanguardista da Corte Interamericana de Direitos Humanos em matéria ambiental (2017-2020)*, in 23 *Espaço jurídico journal of law* (EJJL) 2 (2022), 213-237, < https://periodicos.unoesc.edu.br/espacojuridico/article/view/30909 > (accessed 1 Jan. 2026).

al Rights, and Obligations Arising from the Principle of Equality and the Prohibition of Discrimination in the Context of Climate Emergency.

In this regard, this section will seek to demonstrate the impacts of the Inter-American System on climate issues by analyzing (3.1) the legal framework it uses in environmental and climate matters; (3.2) the main legacies of advisory opinions on the subject, with a focus on AO-23/2017 (Environment and Human Rights) and AO-32/2025 (The Climate Emergency and Human Rights); (3.3) the jurisprudence of the Inter-American Court related to the environment and climate, based on the analysis of two emblematic cases on the subject, which reinforce the possibility of justiciability of socio-environmental rights before the Inter-American Court – the case of Lhaka Honhat v. Argentina, decided in 2020, and the case of Comunidad de La Oroya v. Peru, decided in 2023.

3.1 *The Continuous Development of the Inter-American Legal Framework on Environmental Matters in light of Jurisprudential Developments*

The legal framework related to the environment and human rights within the Inter-American System remains in continuous development, based mainly on a progressive interpretation. It is a system that, like the European system and unlike the African system,[24] does not have an express conventional provision for environmental protection in the context of human rights protection. Although the American Convention on Human Rights (ACHR) does not expressly provide for the right to a healthy

[24] Article 24 of the African Charter on Human and Peoples' Rights: 'All peoples shall have the right to a general satisfactory environment favourable to their development'. African Union, *African Charter on Human and Peoples' Rights*, adopted 27 June 1981, entered into force 21 October 1986,<https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> (accessed 2 Jan. 2026).

environment, the growth in environmental demands is evident in the two bodies that make up the IAHRS.

Therefore, the justiciability of socio-environmental rights before the IAHRS is marked mainly by protection based on advances in case law. Therefore, it is argued that the Inter-American System has a progressive interpretation of the American Convention on Human Rights that allows for the justiciability of environmental issues, such as the climate change issues that have been addressed in recent years.

It is important to note that the right to a healthy environment is expressly established in Article 11 of the Protocol of San Salvador, signed in 1988 and entered into force in 1999, after the deposit of the instruments of ratification or accession by the countries. The Protocol consolidates economic, social, cultural, and environmental rights (ESCER) in the Inter-American System. Regarding the right to a healthy environment, the Protocol states: 'Everyone shall have the right to live in a healthy environment and to have access to basic public services'. In addition, it establishes the state's duty to 'promote the protection, preservation, and improvement of the environment'.[25] Thus, it can be observed that there has been regional normative recognition of the right to a healthy environment since 1988. It should be noted that this right was recognized as a universal human right in 2021 by the UN Human Rights Council,[26] followed by a resolution adopted by the United Nations General Assembly in 2022, which 'Recognizes the right to a clean, healthy, and sustainable environment as a human right'.[27] Therefore, the regional protocol constituted a

[25] Organization of American States, *Protocol of San Salvador: Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights*, adopted 17 Nov. 1988, <https://www.oas.org/en/sare/social-inclusion/protocol-ssv/docs/protocol-san-salvador-en.pdf> (accessed 2 Jan. 2026).

[26] United Nations Human Rights Council, *Resolution A/HRC/RES/48/13: The human right to a clean, healthy and sustainable environment,* adopted 8 October 2021, < https://documents.un.org/doc/undoc/gen/g21/289/50/pdf/g2128950.pdf?OpenElement> (accessed 2 Jan. 2026).

[27] United Nations General Assembly, *Resolution A/RES/76/300: The Human Right to a Clean, Healthy and Sustainable Environment,* adopted 28 July 2022, <https://docs.un.org/en/a/res/76/300> (accessed 2 Jan. 2026).

real advance, even in the 21st century, in recognizing the right to the environment in the Inter-American sphere.

However, the Protocol of San Salvador conferred jurisdiction on the Court only in relation to trade union rights and the right to education, as provided for in Article 19.6 of the document. Thus, at the time, the possibility of individual petitions related to the right to a healthy environment provided for in Article 11 was ruled out.

As noted in the previous section, climate change, as part of environmental demands, constitutes a contemporary challenge in international law. In the Latin American context, the issue is marked by a profound relationship with human rights, especially when viewed from an intersectional perspective in relation to vulnerable groups and combined with the other challenges that were analyzed previously.

Currently, the Inter-American System has already recognized the interrelationship between environmental issues and human rights.[28] Nevertheless, in the first cases that the Inter-American Court dealt with regarding the environment, and in the absence of conventional provisions on the subject, there was indirect litigation, in which environmental issues were dealt with in the light of civil and political rights,[29] such as the right to life, the right to private property, personal integrity, and the right to access to information.[30] The claims were also related to vulnerable popula-

[28] *See supra note 12.*

[29] 'No obstante, los desarrollos más frecuentes se han realizado a través de la interpretación de otros derechos civiles o políticos: inter alia, integridad personal, vida, propiedad comunal, participación política, identidad cultural, acceso a la información y deberes de respeto y garantía de los derechos de la Convención Americana de Derechos Humanos (CADH)'. J. G. Gamboa, Medio Ambiente frente a la Corte Interamericana de Derechos Humanos: una ventana de protección, in A.A. Cançado Trindade, C. Barros Leal (Eds), *Derechos Humanos y Medio Ambiente, Fortaleza*, 2017, 104.

[30] See Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs,* Judgment of November 25, 2015. Series C No. 309; Inter-American Court of Human Rights, *Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations,* Judgment of June 27, 2012. Series C No. 245.

tions, with a focus on the communal rights of traditional peoples.[31]

In 2017, however, the Court began a new interpretation in relation to the environment. With the issuance of Advisory Opinion 23/2017, which will be detailed in the topic below, there was an innovation that impacted the legal and conventional role related to environmental protection. Thus, for this section, which focuses on the Inter-American legal framework, it is worth noting that the Court recognized that the right to a healthy environment is included in the list of economic, social, and cultural rights provided for in Article 26 of the American Convention. According to the Court, the right to a healthy environment must be covered by Article 26, given that the norm derives from 'economic, social, educational, scientific, and cultural provisions of the Organization of American States OAS Charter, the American Declaration of the Rights and Duties of Man, and those resulting from an interpretation of the Convention that accords with the criteria established in its article 29'.[32]

As one of the immediate consequences of this recognition, environmental claims that began to arrive at the Court began to be analyzed in light of the evolving interpretation provided by the advisory opinion, as can be seen below in the case of Lhaka Honhat v. Argentina, decided in 2020, and the case of Comunidad de La Oroya v. Peru, decided in 2023. It can thus be concluded that the conventional provision currently constitutes an important normative source in the Inter-American regional context.

Finally, in the Latin American regional context, the Escazú Agreement stands out as one of the most important normative sources for environmental protection, including climate change. It is a document adopted in 2018, which entered into force in

[31] In this regard, see: Inter-American Court of Human Rights, *Case of Mayagna Awas (Sumo) Tingni Community v. Nicaragua,* Judgment of August 31, 2001, Series C No. 79.

[32] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17: Environment and Human Rights*, Series A No. 23, San José, Costa Rica, 15 Nov. 2017, para. 57, <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf> (accessed 2 Jan. 2026).

2021 and aims to ensure the full and effective application of environmental rights. In this sense, it aims to guarantee 'the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development'.[33] By early 2026, the treaty had been ratified by 18 States in the region and is a key document for climate protection, as it provides for the protection not only of current generations but also of future generations, considering intergenerational equity, as highlighted above.

It can therefore be observed that the Inter-American System has a legal framework aimed at environmental protection that remains in development and is marked by progressiveness. Although there is no express provision for the right to a healthy environment within the Inter-American System, this right has been consolidated as a justiciable human right at the regional level through a progressive interpretation of Article 26 of the ACHR. In addition, the Protocol of San Salvador and the Escazú Agreement reinforce the centrality of socio-environmental rights and environmental justice in the region. This progressiveness is mainly aligned with the advisory opinions issued by the Inter-American Court of Human Rights in 2017 and 2025, which, as will be demonstrated below, are essential for promoting the transformative impact of the Inter-American Human Rights System on climate matters.

[33] Economic Commission for Latin America and the Caribbean (ECLAC), *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement)*, adopted 4 March 2018,<https://observatoriop10.cepal.org/en/treaty/regional-agreement-access-information-public-participation-and-justice-environmental-matters > (accessed 4 Jan. 2026).

3.2 *Advisory Opinions and Their Transformative Impact on Human rights and climate change*

The advisory opinions issued by the Inter-American Court of Human Rights on environmental and climate matters are key mechanisms that enable us to visualize the transformative impact of the Inter-American system on the matter under analysis. As highlighted above, a real change in jurisprudential interpretation occurred with the issuance of AO 23/2017, which recognized the broad interpretation of Article 26 of the ACHR to encompass the right to a healthy environment. In addition to this innovation, advisory opinions are responsible for different interpretations focused on environmental protection and, consequently, climate protection. Based on the advisory opinions, regional and innovative environmental standards are consolidated to integrate an interpretation of climate and environmental issues into the Inter-American legal framework.

In this regard, this section will analyze the two advisory opinions issued by the Inter-American Court on environmental and climate matters, (3.2.1) AO-23/2017 (Environment and Human Rights) and (3.2.2) AO-32/2025 (The Climate Emergency and Human Rights).

3.2.1 *Advisory Opinion 23/2017: a Milestone for the Inter-American System*

The Inter-American System is marked by its transformative impact in the Latin American region due to its innovative interpretations, based on the principle of full reparation and the centrality of victims.[34] In the socio-environmental sphere, a milestone for the Court was Advisory Opinion 23/2017. This topic will therefore focus on demonstrating some of the main advances

[34] To a thematic view of the impact of the Inter-American Human Rights System, see: A. von Bogdandy, F. Piovesan, E. Ferrer Mac-Gregor *et al.* (Eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground,* Oxford (OAPEN Library), 2024, <https://library.oapen.org/handle/20.500.12657/88112> (accessed 4 Jan. 2026).

of the advisory opinion for the construction of the Inter-American *corpus iuris* on environmental matters, highlighting the recognition of the right to a suitable environment as an autonomous right, also in light of a human rights approach (3.2.1.1), the substantive and procedural duties of the state that derive from it, as well as the need for States to adopt a differentiated approach in light of the principle of equity (3.2.1.2).

3.2.1.1 *The Important Recognition of the Right to a Suitable Environment as an Autonomous and Justiciable Right*

In 2017, the Inter-American Court, through Advisory Opinion 23/2017, adopted a human rights approach to the environment, while recognizing the autonomy of the right to a healthy environment. Although not binding, the Court, through an advisory opinion requested by the Colombian State on the risks to the marine environment in the Caribbean region, recognized the autonomy and independence of the right to a healthy environment.[35]

To this end, the Court considered that the right to a healthy environment has the power to protect environmental components, such as forests, rivers, and seas, as legal interests in themselves. Thus, this right protects nature and the environment not only in view of the benefits they may bring to human beings, but also in view of their importance to nature as a whole, including other organisms that inhabit the planet.[36] Therefore, the right to

[35] See: Inter-American Court of Human Rights, *Advisory Opinion OC-23/17: Environment and Human Rights*, Series A No. 23, San José, Costa Rica, 15 Nov. 2017, para. 62, <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf> (accessed 2 Jan. 2026).

[36] 'The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right'. Inter-American Court

a healthy environment has its own dimension, marked by its autonomy, due to the protection that goes beyond human beings.

Furthermore, the Court recognized that the right to a healthy environment is included in the list of economic, social, and cultural rights provided for in Article 26 of the American Convention, as mentioned above. This gives rise to the possibility of direct justiciability of the right in question, based on a progressive reading of Article 26 of the ACHR. As will be highlighted below, since the issuance of AO 23/2017, contentious cases that have reached the Court on the environment are directly related to that article. Thus, it appears that the recognition of the autonomy of the right to a healthy environment, as well as its possibility of justiciability, has led to a significant advance in environmental protection – given the creation of a normative and interpretative basis for future environmental issues to be analyzed based on a conventional provision, in light of Article 26 of the ACHR.

3.2.1.2. *Inter-American Innovation in Defining Substantive and Procedural State Duties in Light of the Principle of Equity in the Face of Differentiated Approaches*

Among other advances in the advisory opinion, the definition of state duties in environmental matters is noteworthy. Throughout the document, the Court affirmed that there are several rights related to the environment. Among them are substantive rights, such as the right to life, the right to housing, the rights to food and water, the right to health, among others. There are also procedural rights, which are aimed at guaranteeing substantive rights. These include freedom of expression, freedom of association, access to information, among others.

In order to guarantee these rights, the Court affirms State obligations in environmental matters, with emphasis on the duty to prevent significant environmental damage (precautionary princi-

of Human Rights, *Advisory Opinion OC-23/17: Environment and Human Rights*, Series A No. 23, San José, Costa Rica, 15 Nov. 2017, para. 62, <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf> (accessed 2 Jan. 2026).

ple); the duty to regulate, supervise, and inspect activities that may cause environmental damage; the duty to conduct environmental impact studies in situations of risk to the environment; the duty to act in accordance with the precautionary principle; as well as the duty to cooperate for environmental protection. In addition to these substantive state duties, there are procedural state duties to guarantee the right to access information, participation, and access to justice[37] in environmental matters.

Another substantial advance concerns the adoption of a differentiated approach to vulnerable groups, with the Court emphasizing that such groups suffer disproportionately more harmful impacts from environmental damage.[38] Thus, 'States have an obligation to take into account how environmental degradation can differentially impact various communities. This is required so they can fulfill their environmental obligations in a way that respects and guarantees the principle of equality before the law as well as the prohibition of discrimination'.[39]

It can therefore be observed that AO 23/2017 is a document that represents significant progress in environmental matters, given that it consolidated the recognition of the right to a suitable environment as an autonomous right, in light of a human rights approach; in addition to enabling the direct justiciability of the right through a progressive interpretation of Article 26. Furthermore, the Advisory Opinion 23 established substantive and procedural state duties arising from socio-environmental matters, in light of the principle of equity in the face of differentiated approaches. In addition, as will be demonstrated in the

[37] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17: Environment and Human Rights*, Series A No. 23, San José, Costa Rica, 15 Nov. 2017, para. 242, <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf> (accessed 2 Jan. 2026).

[38] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17: Environment and Human Rights*, Series A No. 23, San José, Costa Rica, 15 Nov. 2017, para. 67, <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf> (accessed 2 Jan. 2026).

[39] Inter-American Court of Human Rights, *Infographic: Advisory Opinion on the Environment and Human Rights,* San José, Costa Rica, 2018, 8. <https://www.corteidh.or.cr/sitios/libros/todos/docs/infografia-eng.pdf> (accessed 1 Jan. 2026).

following topics, AO 23/2017 served as the basis for AO 32/2025 on climate emergency.

3.2.2 *Advisory Opinion 32/2025: an Innovation in Climate Matters*

Another document issued by the Inter-American Court in its advisory function reveals the transformative impact of the System in relation to the climate emergency on human rights. This is Advisory Opinion 32/2025, the result of a request made by the Republic of Chile and the Republic of Colombia for the Inter-American Court to rule with the aim of 'clarifying the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law […]'.[40]

The document is considered innovative in view of several legacies it has provided to the issue of climate change. First, it provided a deep understanding of the climate emergency, based on the analysis in Chapter V of the background of climate change and its effects on individuals and the environment (3.2.2.1). Second, similar to AO 23, the new document defines general, substantive, and procedural State obligations considering Inter-American provisions (3.2.2.2). Finally, the document addresses the rights of vulnerable individuals and groups, in light of the principles of non-discrimination and equity, which give priority to persons living in conditions of vulnerability (3.2.2.3).

It should be noted that these legacies are the result of the *corpus iuris* built up to date in socio-environmental matters, in addition to the guarantee of broad and active participation by the international community in public hearings held by the Court. In the first half of 2024, public hearings were held in the States of Barbados and Brazil[41] regarding the advisory opinion, at which

[40] Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 25, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

[41] Regarding the public hearing held by the Inter-American Court of Hu-

victims, civil society organizations, and States were heard on the requested topic. In this context, we now turn to an analysis of the main legacies provided by the document.

3.2.2.1 *The Understanding, under International Law, of the Background of Climate Change and its Effects on Individuals and the Environment*

A first legacy of great importance conferred by AO 32/2025 on international law concerns the possibility of understanding the background of climate change and its effects on individuals and the environment, based on a focus on Latin America and the Caribbean. The document published by the Court is structured into two parts. The first part is entirely dedicated to the formation of this important understanding. This legacy is important in that the document is based on the analysis of scientific data, mainly from reports prepared by the Intergovernmental Panel on Climate Change (IPCC), to address the issue of integrating scientific knowledge into international law. Thus, in addition to the participation of the international community, the Court's actions are legitimized by scientific data on the subject.

In this sense, the Court analyzed the causes, consequences, and risks of climate change. As causes, it highlighted that climate change results from several natural factors, such as 'volcanic eruptions and fluctuations in the amount of solar energy received by the Earth', and anthropogenic factors, such as activities involving 'fossil fuel combustion, land-use changes, solid waste management, and transportation'.[42] In this sense, it pointed out

man Rights in Brazil, it is worth highlighting that 'During the four days of hearings in Brasilia and Manaus, the Court heard 116 delegations, including representatives of States – Brazil, Costa Rica, Honduras and Paraguay – international organizations, national bodies, representatives of indigenous and tribal peoples, academic institutions, scientists, non-governmental organizations and civil society'. Inter-American Court of Human Rights, *Historic Sessions in Brazil: Hearing on the Climate Emergency Concludes,* Press Release PR-36/2024, San José, Costa Rica, 30 May 2024, <https://corteidh.or.cr/docs/comunicados/cp_36_2024_eng.pdf > (accessed 5 Jan. 2026).

[42] Inter-American Court of Human Rights, *Advisory Opinion OC-32/25,*

that such human activities generate greenhouse gas emissions, which directly contribute to climate change.

In addition, the Court ruled that the impacts of climate change are undeniable at the global level, as they are deeply interconnected and are evolving rapidly. Furthermore, these impacts are generated both on people and on natural systems. Thus, in relation to natural systems, the Court ruled that climate change directly affects global temperatures and climate, oceans, the cryosphere, biodiversity, and ecosystems. As for the impacts on individuals, the Court listed a series of impacts related to a dignified existence, such as those related to health, food and water security, democracy, as well as the intensification of poverty in the face of economic losses, in addition to the impacts on the cultural heritage of humanity.[43] Furthermore, from a cross-cutting approach, the impacts of climate change on territories with special vulnerability in the Americas, especially the Amazon region and the small island States of the Caribbean, were addressed.

The Inter-American Court then proceeded to describe the main standards and initiatives adopted at the international and regional levels in relation to climate change, as well as regulatory developments in OAS Member States, concluding that the climate emergency is caused by the rapid rise in global temperatures resulting from anthropogenic activities, which are also produced by the States that make up the international community. Thus, the impacts of these activities 'affect and seriously threaten humanity, especially the most vulnerable populations' found in the Latin American and Caribbean region, in addition to exacerbating the inequality discussed earlier in this article.[44] It further

Climate Emergency and Human Rights, Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 45, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

[43] Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 64-104, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

[44] In this regard: 'The Court underscored the particular severity of the climate crisis for Latin America and the Caribbean due to their high exposure to various climate-related phenomena and the vulnerability of large sectors of

concludes that the situation can only be addressed through the adoption of 'urgent and effective mitigation and adaptation measures, and progress toward sustainable development'.[45]

It can therefore be observed that one of the great legacies of AO 32/2025 is precisely to enable an understanding of the background of climate change and its effects on individuals and the environment, with an emphasis on the Latin American region and the Caribbean territories. In this context, we turn to the analysis of the second legacy left by the Court: the establishment of State obligations related to climate emergency.

3.2.2.2 *The delimitation of State obligations in the context of climate emergency considering the Inter-American provisions*

A major innovation in Advisory Opinion 32/2025 concerns the establishment of various State obligations in relation to climate change, in light of the obligations they have assumed internationally. The document ushers in 'a new era of debate on the relationship between the protection of human rights in the context of climate change'[46] by defining a wide range of obligations for Member States based on the Inter-American *corpus iuris* and the scientific conclusions analyzed above.

In this context, the Member States of the Organization of

the population due to the high levels of inequality prevailing in the region'. Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 3, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[45] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 3, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[46] L. C. Lima, *Controle de convencionalidade climático e a opinião consultiva da Corte Interamericana*, 7 Jul. 2025, available at https://www.conjur.com.br/2025-jul-07/controle-de-convencionalidade-climatico-e-a-opiniao-consultiva-da-corte-interamericana/ (accessed 12 Jan. 2026) – translation by the authors.

American States (OAS) must now consider the interpretation provided in the Advisory Opinion, given that it is based on the American Convention, the Protocol of San Salvador, and other documents that are binding on all OAS[47] Member States. Thus, in addition to respecting human rights, these States must now guarantee them through the adoption of various actions that constitute State obligations, based on a standard of enhanced due diligence.[48]

This section will therefore analyze some of the main State obligations that have the power to impact and contribute in overcoming the contemporary challenge of combating climate change. We will now move on to general State obligations (3.2.2.2.1) and obligations arising from substantive and procedural rights (3.2.2.2.2).

3.2.2.2.1 *General State Obligations: General Duties Derived from the Inter-American Corpus Iuris*

Several general State obligations were consolidated in the advisory opinion on climate emergency. The main source used to

[47] In this regard, the Court ruled: 'Considering that the provisions of the American Convention and the Protocol of San Salvador that are the subject of this request are closely related to other instruments which are binding for all Member States of the Organization of American States (hereinafter 'OAS'), particularly the organization's Charter, the Inter-American Democratic Charter, and the American Declaration of the Rights and Duties of Man, the interpretation provided in this Advisory Opinion should be considered in its entirety by all OAS Member States'. Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 2, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[48] 'In this context, States are called not only to respect human rights but also to guarantee them through actions guided by a standard of heightened due diligence – especially to protect populations exposed to risks exacerbated by climate impacts'. L. C. Lima, *Controle de convencionalidade climático e a opinião consultiva da Corte Interamericana*, 7 Jul. 2025, available at https://www.conjur.com.br/2025-jul-07/controle-de-convencionalidade-climatico-e-a-opiniao-consultiva-da-corte-interamericana/ (accessed 12 Jan. 2026) – translation by the authors.

support the Court's considerations was the Inter-American *corpus iuris*, with an emphasis on the American Convention and the Protocol of San Salvador.

The obligation to respect rights is the first general obligation highlighted by the Inter-American Court. It is derived mainly from Article 1.1 of the ACHR,[49] related to respecting the rights and freedoms recognized in the American Convention, and can be realized in different ways, depending on the type of right being referred to and the specific circumstances. Nevertheless, according to the Court, the obligation to respect is connected, in most cases, to negative duties of State abstention – 'in general, to comply with the obligation to respect human rights in the context of the climate emergency, States must refrain from any conduct that results in a setback or delay or that limits the results of measures required to protect human rights from the impacts of climate change'.[50]

There is also an obligation to guarantee rights, in the sense that States must adopt the measures necessary to reduce the risks arising from the degradation of the global climate system. In addition, they must adopt the necessary measures to reduce the risks 'from exposure and vulnerability to the effects of such degradation'.[51] From this obligation, together with the duty of pre-

[49] 'Article 1. Obligation to Respect Rights – 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'. Organization of American States, *American convention on human rights (pact of san josé, Costa Rica)*, 22 Nov. 1969, San José, Costa Rica, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> (accessed 05 Jan. 2026).

[50] Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A 32, San José, Costa Rica, 29 May, 2025, para. 221, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

[51] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 4, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

vention, arises the need for action based on enhanced due diligence.[52]

In addition, the Court ruled that States have a duty to allocate the maximum available resources to mitigate such impacts and protect the most affected groups, based on the obligation to ensure the progressive development of economic, social, cultural, and environmental rights. From this obligation, we can already see the differentiated approach used by the Inter-American Court in view of the challenges facing the Latin American region.

Another general duty that the Court established in its advisory opinion derives from Article 2 of the American Convention, which establishes the obligation of the States Parties to the treaty to adopt legislative or other measures that are sufficient to give effect to those rights or freedoms protected by the Convention.[53]

[52] Regarding enhanced due diligence, see: 'Enhanced due diligence requires, among other relevant aspects: (i) identification and thorough, detailed and in-depth assessment of the risks; (ii) adoption of proactive and ambitious preventive measures to avoid the worst climate scenarios; (iii) utilization of the best available science in the design and implementation of climate actions; (iv) integration of the human rights perspective in the formulation, implementation and monitoring of all policies and measures related to climate change to ensure that these do not create new vulnerabilities or exacerbate existing ones; (v) permanent and adequate monitoring of the effects and impacts of the adopted measures; (vi) strict compliance with the obligations arising from procedural rights, particularly access to information, participation, and access to justice; (vii) transparency and accountability regarding State climate action; (viii) appropriate regulation and supervision of corporate due diligence; and (xi) enhanced international cooperation, particularly regarding technology transfer, finance, and capacity-building'. Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 4, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[53] 'Article 2. Domestic Legal Effects – Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms'. Organization of American States, *American Convention on Human Rights (Pact of San José, Costa Rica)*, 22 Nov. 1969, San José, Costa Rica, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> (accessed 05 Jan. 2026).

In the climate context, domestic regulations 'should provide guidance to the State and individuals subject to their jurisdiction on how to address the causes and consequences of climate change effectively and comprehensively',[54] in order to ensure regulatory developments that guarantee the climate commitments that have been internationally assumed by States.

The obligation to cooperate on environmental matters was also addressed in AO 32/2025. This is a general environmental obligation, already addressed by the Court on other occasions, including in AO 23/2017, and is provided for in various instruments binding on States.[55] Regarding climate change, the new advisory opinion established that cooperation should not be limited to cases involving transboundary damage or threats.[56] It must be observed for the international community to achieve common goals or define collective solutions and must be observed in light of the principle of equity, especially in cases involving 'climate disasters and direct and indirect migration flows resulting from climate change'.[57] Cooperation should also be viewed in light of the principle of good faith, aimed at achieving common international goals, excluding, in the climate context, 'evasive, retrogressive, or merely declarative conduct that thwarts

[54] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 4, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[55] Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 251, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

[56] Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 253, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

[57] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 4, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

the effective realization of the rights and principles established in the treaties'.[58]

It is important to note that such obligations were already set forth in the Inter-American *corpus iuris*, particularly AO 23/2017, which was discussed earlier. Thus, it can be concluded that the Inter-American Court played a role in densifying general obligations in light of the particularities of the climate emergency. Having highlighted the main aspects of the Scope of General Human Rights Obligations in the Context of the Climate Emergency, we now turn to the analysis of the obligations arising from rights that have special links to the environment, substantive and procedural rights.

3.2.2.2.2 *The Obligations Arising from Substantive and Procedural Rights: the Rights that Have Links to the Environment*

Obligations directly related to guaranteeing rights that have a link to the environment constitute major advances in the Advisory Opinion on climate emergency. They are commonly classified into two groups: procedural obligations, generally linked to environmental policies; and substantive obligations, related to environmental degradation that causes harm to people.

Substantive State obligations derive mainly from the right to a healthy environment. As already seen in AO 23/2017, the Court emphasized that this right is included in Article 26 of the American Convention, since states have an obligation to achieve the 'integral development' of their people. Thus, the right to a healthy environment constitutes a fundamental right for human existence itself, from individual and collective dimensions. It should be noted that the Court, when dealing with the right to a healthy environment, refers directly to its jurisprudence, which will be analyzed below, as well as to AO 23/2017. This reflects

[58] Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 252, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

the ongoing interpretative construction of the Inter-American *corpus iuris*, as well as the direct relationship between environmental issues, including climate issues, and human rights.

Given this direct interrelationship between the environment and human rights, the Court reaffirmed that, in cases of transboundary damage that violates conventional rights, there will be a shift in jurisdiction, in the sense that the victims 'are under the jurisdiction of the State where the cause of the environmental damage originated, if there is a causal relationship between that fact and the violation of the human rights of those persons outside its territory'.[59]

A regional innovation with a major impact on the issue is the possibility of recognizing nature as a subject of rights, based on an ecological approach. This approach considers that ecosystems are complex and interdependent, so that each of their components performs essential environmental functions[60] and recognizes the direct interdependence between the environment and human beings. This possibility is also based on other international norms that have an integrative perspective.[61] This perspective of recognizing nature as a subject of rights is a development 'that strengthens the protection of the integrity and functionality of ecosystems in the long term, providing effective legal tools to address the triple planetary crisis and facilitating the prevention of existential damage before it becomes irreversible'.[62]

[59] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 6, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[60] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 6, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[61] See: Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 252, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

[62] Inter-American Court of Human Rights, *Official Summary issued by the*

Also stemming from the right to a healthy environment, the Inter-American Court innovated by recognizing the *jus cogens* nature of the obligation to not cause irreversible damage to the climate and the environment.[63] Thus, in addition to a stance of abstention, it is incumbent upon all States to adopt a cooperative stance aimed at ceasing conduct that violates the right to a healthy environment.

Furthermore, a regional innovation concerns the recognition of the right to a healthy climate. This is a derivation of the right to a healthy environment, already recognized by the Inter-American *corpus iuris*. This derivation stems from the fact that the climate system is an essential part of the environment. To this end, the Court understands that the right to a healthy climate involves a climate system free from human interference that poses a danger to humanity and nature.[64] Thus, it is incumbent upon States to comply with international obligations aimed at protecting the right to a stable climate. These obligations must be fulfilled in accordance with the principle of intergenerational equity[65] and involve the duty to mitigate GHG emissions, protect nature and its components, promote a transition focused on sustainable development, and define and update climate goals and plans with the utmost ambition possible.

Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 6, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[63] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 7, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[64] See: Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 298-304, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

[65] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 8, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

On the other hand, the Court analyzed the obligations derived from procedural rights in the context of climate emergency. Based on the connection between democracy, the rule of law, and human rights, the Court emphasized that it is incumbent upon States to guarantee procedural rights, based on a standard of enhanced due diligence. By way of example, the Court emphasized that it is necessary for States to make decisions on climate in a participatory, open, and inclusive manner.[66] In addition, it is incumbent upon States, among other things, to promote climate action for empowerment, facilitate dialogue, through participatory channels in public policies, ensure environmental auditing, reporting, and other mechanisms of transparency, ethics, and integrity, as well as promote ways to integrate the interests of nature and future generations in their climate actions.

As an innovation, the Inter-American Court of Human Rights has provided that States must ensure the right to science, the right to access information on climate matters, given that it is an essential condition for the other substantive rights mentioned above, in addition to the right to access justice in situations related to the climate emergency, and ensure the right to defend rights through special protection for environmental defenders.[67]

It can therefore be observed that the Inter-American *corpus iuris* now encompasses various state duties derived from substantive and procedural rights that are directly affected by climate change. These duties reveal the innovative and transformative potential of the IAHRS, as they require not only the abstention from harmful conduct, but also the adoption of positive, preven-

[66] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 11, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

[67] Inter-American Court of Human Rights, *Official Summary issued by the Inter-American Court of Advisory Opinion OC-32/25: Climate Emergency and Human Rights*, Series A No 32 (Summary), San José, Costa Rica, 29 May, 2025, 12-16, <https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_32_en.pdf> (accessed 04 Jan. 2026).

tive, and cooperative measures guided by the protection of ecosystems, in addition to consideration of intergenerational equity.

We now turn to the analysis of obligations arising from the principle of equality and the prohibition of discrimination in the context of climate emergency.

3.2.2.3 *The Rights of Vulnerable Individuals and Groups, in Light of the Principles of Prohibition of Discrimination and Equality*

As already done in AO 23/2017, the Inter-American Court ruled on the need to adopt differentiated approaches to vulnerable populations. However, in the context of the 2025 opinion, the Court deepened its analysis in light of the particularities of climate emergency. This is a confluence of the challenges outlined in part 2 of this article, revealing an intersectionality between the contemporary challenges and the structural challenges facing Latin America.

In this sense, the Inter-American Court of Human Rights highlighted that some groups suffer from increasingly serious risks of human rights violations resulting from climate change. Groups in situations of poverty and inequality stand out. Thus, those who face such situations tend to suffer from the most serious consequences of climate change, given the scarcity of resources to address crises.

In this context, the Court ruled that States must gather and consider information on the risks to which vulnerable populations are exposed to formulate public policies aimed at addressing emergency situations. This duty aims to ensure the effective enjoyment of climate-related human rights. In this regard, the Court highlighted the following groups that may be vulnerable to climate causes: children and adolescents; Indigenous and Tribal Peoples; Afro-descendant, peasant, and fishing communities, and population groups such as women, persons with disabilities, and older persons. Poverty and inequality, which are regional challenges, can further aggravate this situation of vulnerability.

Therefore, in light of the principles of prohibition of discrimination and equality, it is incumbent upon States to adopt meas-

ures aimed at vulnerable groups that guarantee access to a dignified life in the context of climate emergency. At the same time, States must eradicate the causes of vulnerability, taking advantage of the opportunity to integrate these people so that they can enjoy their rights.

It can therefore be observed that the 2025 Advisory Opinion, in light of the principles of Prohibition of Discrimination and Equality, reinforces and deepens the need for differentiated protection in the context of the climate emergency, recognizing that the impacts of climate change do not affect the population homogeneously, but fall disproportionately on historically marginalized groups.

3.3 *The Emblematic Jurisprudence of the Inter-American Court Related to the Environment and Climate Change: an Analysis Based on Autonomy of the Right to a Healthy Environment*

Like advisory opinions and the legal framework, the jurisprudence of the Inter-American Court of Human Rights on environmental matters has developed significantly in recent years, and the issue has gained a central place in the Inter-American System as a whole. Based on innovative arguments, in line with normative developments, the Inter-American System has issued groundbreaking rulings on environmental matters. In this context, this section will analyze two emblematic cases judged by the Court on environmental matters, considering their interpretative innovations, in line with the normative developments already discussed, as well as the innovations obtained by the advisory function of the Inter-American Court. In this regard, we will now briefly analyze the case of Lhaka Honhat v. Argentina, decided in 2020,[68] and the case of Comunidad de La Oroya v. Peru, decided in 2023.[69]

The first case was decided in 2020 and concerns the Argen-

[68] Inter-American Court of Human Rights, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) association v. Argentina, Merits, Reparations and Costs,* Judgment of February 6, 2020. Series C No. 400.

[69] Inter-American Court of Human Rights, *Case of the inhabitants of La*

tine State's liability for the violation of various rights, among which Article 26 of the ACHR stands out, due to its failure to respect the right to a healthy environment in relation to indigenous communities. This is a pioneering precedent in which the Inter-American Court of Human Rights 'recognized the international responsibility of the State for the autonomous violation of the economic, social, cultural, and environmental rights of indigenous communities, […] based on Article 26 of the American Convention'.[70] In this case, it is clear that the innovations of the Inter-American advisory opinion have had a direct impact on its contentious jurisprudence, particularly regarding the autonomy of the right to a healthy environment.

The second case also strengthened the jurisprudential trend toward the direct justiciability of economic, social, cultural, and environmental rights. This is the case of *Comunidad de La Oroya v. Peru*, in which, for the first time, the Inter-American Court held the State responsible for violating the right to a healthy environment, based on Articles 26 and 1 and 2 of the American Convention, both in terms of its immediate enforceability and the prohibition of regression, in its individual and collective dimensions. It also declared the State responsible for violating the right to health, also based on Articles 26 and 1 and 2 of the American Convention, the right to a dignified life and personal integrity, the rights of children, as well as the right to access to information, political participation, and to an effective judicial remedy.

The factual context of the case points to a situation of serious human rights violations suffered by a group of inhabitants of La Oroya, resulting from contamination at the La Oroya metallurgical complex, resulting in the State's failure to act with due diligence in regulating, supervising, and controlling the activities of the metallurgical complex with respect to the rights to a healthy environment, life, and personal integrity. It should also be noted

Oroya v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 27, 2023. Series C No. 511.

[70] F. Piovesan, *Direitos Humanos e o Direito Constitucional Internacional,* São Paulo, vol. 20, 2022, 398 – translation by the authors.

that the State failed to ensure the victims' right to public participation and access to relevant information about measures that affected their rights.

Among the operative paragraphs of the judgment, the Inter-American Court ordered the State to carry out a 'baseline' assessment and an action plan to remedy the environmental damage that had occurred, while also bringing its environmental legislation into line with the effective protection of the environment and health. It also determined that the State had a duty to ensure the effectiveness of a warning system in La Oroya and to adopt measures to ensure that the operations of the metallurgical complex were carried out in accordance with international environmental standards, in light of the Guiding Principles on Business and Human Rights. It endorsed that the State has a duty to prevent human rights violations perpetrated by companies, and that companies have a responsibility to prevent violations caused by their business activities.

It can therefore be observed that Inter-American jurisprudence on environmental matters has a vision that reinforces the justiciability of the right to a healthy environment. Consequently, following the main lines of jurisprudence, as well as the provisions of AO 23/2017 and AO 32/2025, it is expected that, in future cases that may reach the Inter-American system on climate change, the Court will adopt a stance increasingly focused on the comprehensive protection of human rights, the right to a healthy environment, and a healthy climate. This is a moment that can consolidate more rigorous normative parameters of state responsibility, strengthening the role of the Inter-American System as a transformative space for the advancement of climate justice in the region.

After a brief analysis of two emblematic cases in the socio-environmental sphere, we will now address the main challenges and perspectives on the issue of climate change within the Inter-American System, from a multilevel perspective of human rights protection.

As demonstrated, regulations and jurisprudence on climate change have been developed, both in the global system and in regional human rights protection systems, in different ways and

with varying degrees of intensity, depending on the context, the role of social actors, and regional needs. However, there are common challenges to be faced in all areas concerning climate emergency and human rights. In this sense, seven central challenges to climate justice stand out from a multilevel perspective of human rights protection.

4. *Challenges and Perspectives of Climate Justice in Light of the IAHRS*

As demonstrated above, the legal framework, advisory opinions, and jurisprudence on climate change in the Inter-American System have been developed steadily and focused mainly on aligning environmental protection with the protection of human rights. However, there are challenges to be faced in all areas related to this issue.

In this regard, seven central challenges to climate justice stand out from the multilevel perspective of human rights protection.

4.1 *Strengthening the Recognition of the Right to a Clean, Healthy, and Sustainable Environment as a Universal Human Right*

The contemporary conception of human rights is marked by two main processes: internationalization and universalization.[71] It should be noted that, based on the dignity of the human person, the 1948 Universal Declaration expressly recognizes basic values of a universal nature. Its text states that 'All human beings are born free and equal in dignity and rights'.[72] Furthermore, the 1993 Vienna Declaration, in its fifth paragraph, reinforces this understanding by stating that 'All human rights are universal, in-

[71] F. Piovesan. *Proteção dos direitos sociais: desafios do ius commune sul-americano*, in 3 *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito (RECHTD)* 2 (2011), 209.

[72] United Nations, *Universal Declaration of Human Rights*, adopted 10 Dec. 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 9 Jan. 2026).

divisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.[73]

In this context, it is necessary to strengthen the universality of human rights for the growing judicialization at the international level of the issue of climate change. In the climate context in particular, it is necessary to strengthen the recognition of the right to a clean, healthy, and sustainable environment as a universal human right. Climate litigation involves cross-border impacts, which mainly affect developing countries and people in vulnerable situations. Thus, it is essential to strengthen the universality of this right, which has already been recognized by the UN Human Rights Council,[74] followed by a resolution adopted by the United Nations General Assembly in 2022. The aim is to ensure that the rights impacted by climate change are guaranteed in an equitable and comprehensive manner. It is important to highlight the indispensability of this strengthening in the face of the development of minimum protective parameters in human rights and climate justice that are universally applicable, through 'the opening of dialogue between cultures, with respect for diversity and based on the recognition of the other'.[75]

4.2 *Strengthening the Justiciability of the Right to a Healthy Environment and the Right to a Healthy Climate*

As noted above, States now have positive and negative obligations to protect against rights violations resulting from climate change. In this sense, climate justice has become increasingly rel-

[73] United Nations, Vienna Declaration and Programme of Action, adopted 25 June 1993 at the World Conference on Human Rights (Vienna, Austria), <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> (accessed 9 Jan. 2026).

[74] United Nations Human Rights Council, *Resolution A/HRC/RES/48/13: The human right to a clean, healthy and sustainable environment,* adopted 8 October 2021, < https://documents.un.org/doc/undoc/gen/g21/289/50/pdf/g2128950.pdf?OpenElement> (accessed 2 Jan. 2026).

[75] F. Piovesan, *Direitos Humanos e o Direito Constitucional Internacional*, cit., 259.

evant in global governance spaces, given the dramatic impact caused by climate emergency.

From a comprehensive view of human rights, marked by indivisibility, interdependence, and interrelation, two impacts are generated: 'a) the interrelation and interdependence of the various categories of human rights; and b) parity in the degree of relevance of social, economic, and cultural rights and civil and political rights'.[76]

In this context, it is necessary to ensure, from a multilevel perspective, the progressive development of the direct justiciability of the right to a healthy environment and the right to a healthy climate, on a par with other human rights, with a view to strengthening climate litigation at different jurisdictional levels.

4.3 *Protecting the Rights of Future Generations Considering the Principle of Intergenerational Equity*

Climate change profoundly impacts the enjoyment of various human rights. In addition to causing cross-border impacts, it also impacts the guarantee of rights for future generations, such as the right to life and personal integrity, as the Inter-American System has already recognized in its *corpus iuris* and reaffirmed in 2025.

In this context, with a view to guaranteeing the enjoyment of human rights for future generations, including the viability of life in the years to come,[77] without diminishing guarantees as a result of climate change, it is necessary that, in governance spaces, in-

[76] F. Piovesan, *Proteção dos direitos sociais: desafios do ius commune sul-americano*, cit., 208 – translation by the authors.

[77] By way of example, it is worth mentioning that the Inter-American Court of Human Rights, when analyzing the case of the Inhabitants of Oroya v. Peru, highlighted the relationship between the principle of environmental precaution and the duty of States to preserve the environment not only for present generations, but also for future generations. Inter-American Court of Human Rights, *Case of the inhabitants of La Oroya v. Peru, Preliminary Objections, Merits, Reparations and Costs,* Judgment of November 27, 2023. Series C No. 309. In the same vein, Advisory Opinion 32/2025.

cluding at the global, regional, and local levels, the principle of intergenerational equity be observed, as already recognized by the Inter-American Court in its Advisory Opinion on climate emergency.

4.4 *Protecting Nature as a Subject of Rights*

Another challenge regarding climate justice concerns the recognition of nature as a subject of rights in various legal and governance spheres. In this sense, the Inter-American Court of Human Rights has already recognized the right to a healthy environment as an autonomous right. In Advisory Opinion 23/2017, the Court emphasized that the protection of nature stems 'not only from its connection to its usefulness to humans or the effects that its degradation could have on other human rights'. Nature must be protected 'because of its importance to the other living organisms with which we share the planet that also merit protection in their own right'.[78] Furthermore, the Inter-American Court advances by recognizing nature as a subject of rights in the Advisory Opinion on climate emergency in 2025, and this substantial advance should be observed in different jurisdictional and governmental perspectives, from a multilevel perspective.

4.5 *Adopt Differentiated Approaches*

The impacts of climate change are transboundary and intergenerational. However, they are more intense in the case of populations in situations of increased vulnerability or who are subject to historical discrimination. Women, children, adolescents, indigenous peoples, Afro-descendant peoples, people living in poverty, among other vulnerable groups, tend to face greater

[78] Inter-American Court of Human Rights, *Advisory Opinion OC-23/17: Environment and Human Rights*, Series A No. 23, San José, Costa Rica, 15 Nov. 2017, para. 62, <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf> (accessed 2 Jan. 2026).

consequences from climate change, such as food insecurity, curtailment of the right to housing, forced migration, among other rights that are strongly impacted. This is known as climate vulnerability.[79]

It is therefore necessary to adopt and reinforce measures for the prevention, minimization, and mitigation of climate change that take into account a perspective of differentiated approaches. In this regard, the Inter-American Commission on Human Rights has already stated: 'States must immediately adopt measures that take into account the perspectives of gender equality and intersectionality, in addition to differentiated approaches, which make visible the aggravated risks to human rights against individuals, groups, and communities in a situation of vulnerability and historical exclusion in the hemisphere'.[80] There must therefore be a priority and a differentiated approach to those who are climate vulnerable, in line with the particularities of each type of vulnerability and the different situations of the countries that make up Latin America. This approach must be adopted and reinforced in different jurisdictional spheres, demanding a reinforced duty of protection on the part of States.

4.6 *Strengthening State Duties in Environmental Matters*

Environmental damage, including that resulting from climate change, constitutes violations in itself, but also affects several other human rights. Examples include the right to life, health,

[79] Regarding climate vulnerability, see: N. Brooks, *Vulnerability, Risk and Adaptation: A Conceptual Framework.* Tyndall Centre for Climate Change Research, Vol. 38, (2003), 1-16. <https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=5463> (accessed 2 Jan. 2026). Also see: N. Adger, *Social Vulnerability to Climate Change and Extremes in Coastal Vietnam.* World Development, v. 27, n. 2, p 249-269, 1999. <https://www.start.org/Projects/AIACC_Project/meetings/Norwich_02/Norwich_CD/APPENDICES/ARTICLES_VULN_ADAPTCAP/VULN_VIETNAM.PDF> (accessed 1 Jan. 2026).

[80] Inter-American Commission on Human Rights, *Resolution No. 3/2021: Climate Emergency: Scope of Inter-American Human Rights Obligations*, Washington, D.C., 31 Dec. 2021, 15, <https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf> (accessed 1 Jan. 2026).

personal integrity, and housing. These are the substantive rights addressed by AO 32/2025.

In this sense, in order to prevent, minimize the causes, or mitigate the effects of climate change, States must strengthen the implementation of their duties in environmental matters, including climate issues. In this regard, States must carefully observe the general, substantive, and procedural duties set forth in the 2025 advisory opinion, including allocating the maximum available resources to mitigate impacts and protect the most affected groups, based on the obligation to ensure the progressive development of economic, social, cultural, and environmental rights.

4.7 *Strengthening the Duty of International Cooperation Based on the Principle of Solidarity*

When it comes to climate change, it is necessary to strengthen the duty of international cooperation based on the principle of solidarity. This is due to two main factors: (i) climate change is the result of a set of actions by different countries; (ii) the effects of climate change translate into cross-border damage. Global challenges demand global responses, based on the duty of international cooperation.

It is, therefore, a common concern of humanity,[81] which has individual and collective aspects and, as such, must be addressed jointly. It is important to note that international cooperation, based on the principle of solidarity, must be observed from a multilevel perspective, given the complementarity of jurisdictional spheres.

In this regard, it should be noted that this principle is enshrined in various international instruments, such as Article 1 (3) of the United Nations Charter[82] and the landmark UN General Assembly resolution on the recognition of the right to a safe,

[81] In this sense, see: United Nations, *Paris Agreement*, Paris, 2015, <https://unfccc.int/sites/default/files/english_paris_agreement.pdf>, (accessed 7 Jan. 2026).

[82] 'Article 1 - The Purposes of the United Nations are: To achieve interna-

clean, healthy, and sustainable environment as a human right. This resolution calls on international actors and other stakeholders *to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all*.[83]

Furthermore, cooperation was established as a general state obligation by the Advisory Opinion on climate emergency. Compliance should not be limited to cases involving transboundary damage or threats.[84] It must be observed so that the international community can achieve common goals or define collective solutions to climate issues.

tional co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. United Nations, *Charter of the United Nations*, San Francisco, 1945, <https://www.un.org/en/about-us/un-charter/full-text> (accessed 7 Jan. 2026).

[83] United Nations General Assembly, *Resolution A/RES/76/300 (The human right to a clean, healthy and sustainable environment)*, adopted 28 July 2022, < https://docs.un.org/en/a/res/76/300>, (accessed 6 Jan., 2026).

[84] Inter-American Court of Human Rights, *Advisory Opinion OC-32/25, Climate Emergency and Human Rights,* Series A No. 32, San José, Costa Rica, 29 May, 2025, para. 253, <https://corteidh.or.cr/docs/opiniones/seriea_32_en.pdf> (accessed 5 Jan. 2026).

PROTECTING THE ENVIRONMENT THROUGH HUMAN RIGHTS: A COMPARATIVE STUDY OF ECTHR AND IACTHR CASE LAW

Giacomo Giorgini Pignatiello

Abstract: *This paper explores the evolving relationship between environmental sustainability and human rights within the jurisprudence of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). It argues that environmental sustainability has emerged as a foundational normative principle in the Anthropocene, demanding a reorientation of legal systems toward intergenerational and ecological responsibility. Through a comparative analysis, the study highlights the ECtHR's incrementalist strategy of integrating environmental claims within established rights and the IACtHR's transformative recognition of the autonomous right to a healthy environment and, more recently, the rights of nature. By situating these regional courts in dialogue, the paper assesses their distinct contributions, limitations, and potential convergence. It concludes that the legitimacy and effectiveness of human rights law in the twenty-first century will depend on its capacity to reconcile anthropocentric legal traditions with ecological imperatives, ensuring both enforceability and normative ambition.*

Keywords: Environmental Sustainability, Human Rights Adjudication, European Court of Human Rights, Inter-American Court of Human Rights, Anthropocene.

1. *Environmental Sustainability, Human Rights, and the Transformative Role of Regional Courts in the Twenty-First Century*

This article offers a comparative analysis of the case law on environmental protection developed by the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). While the ECtHR explicitly employs the notion of 'environmental sustainability' only in *KlimaSeniorinnen* – and not in earlier or later judgments such as *Cannavacciuolo* or *Greenpeace Nordic* – the IACtHR more frequently refers to

'sustainable development', though it also cites environmental sustainability on occasion. Given the focus of this contribution on environmental protection, it is nonetheless necessary to engage with the broader idea of environmental sustainability, a theme at the forefront of contemporary public debate and central to the discussions of this Conference. Here, the term is not used in a narrow technical sense; rather, acknowledging the conceptual ambiguity that surrounds it, environmental sustainability is understood in its widest meaning as a form of environmental justice, carrying substantial normative implications, particularly from an intergenerational perspective.

The emergence of environmental sustainability as a guiding principle of law in the twenty-first century represents not only a significant doctrinal development but also a profound reconfiguration of the normative architecture through which law engages with the existential challenges of the Anthropocene,[1] and any inquiry into its evolution must take into account the complex interplay between international instruments, domestic constitutional frameworks, and the jurisprudence of regional human rights courts, particularly the ECtHR and IACtHR, which stand today as the two most dynamic laboratories for articulating the interrelationship between environmental protection and human rights.[2] The urgency of this inquiry cannot be overstated: climate change, biodiversity loss, desertification, deforestation, ocean acidification, and large-scale pollution are not merely environmental problems but existential threats to the very conditions of human civilization, undermining the rights to life, health, housing, food,

[1] On the impact of the Anthropocene on legal systems, see: L.J. Kotzé, *Environmental Law and Governance for the Anthropocene*, Oxford, 2019; L.J. Kotzè, *Global Environmental Constitutionalism in the Anthropocene*, Oxford, 2019; W.F. Baber, J.R. May (Eds), *Environmental Human Rights in the Anthropocene*, Cambridge, 2023; P.D. Burdon, J. Martel (Eds), *The Routledge Handbook of Law and the Anthropocene*, Abingdon, 2023.

[2] N. Kobylarz, E. Grant (Eds), *Human Rights and the Planet*, Cheltenham, 2022; E. Sobenes, S. Mead, B. Samson (Eds), *The Environment Through the Lens of International Courts and Tribunals*, Cham, 2022; L. Lizarazo Rodríguez, D. Casalin, *Regional Protection of Human Rights and the Environment*, in P. De Lombaerde (Ed.), *Handbook of Regional Cooperation and Integration*, Cheltenham, 2024, 197-222.

water, and cultural identity, while also destabilizing political institutions, exacerbating inequalities, and generating displacement and conflict.[3] Against this backdrop, environmental sustainability emerges not as a rhetorical aspiration but as a normative imperative that demands the reorientation of legal systems from short-term anthropocentric exploitation toward long-term stewardship of the biosphere, and the question is no longer whether law should integrate sustainability but how it can do so effectively, coherently, and legitimately. The jurisprudence of the ECtHR and the IACtHR provides a uniquely valuable prism for addressing this question, because these courts have gradually transformed environmental concerns from peripheral policy matters into central issues of human rights adjudication, though they have done so in markedly different ways, with Strasbourg embodying a strategy of incrementalism rooted in the elasticity of existing Convention rights, and San José embracing a transformative vision that affirms the autonomous right to a healthy environment and, more recently, the rights of nature themselves. Understanding the significance of this divergence, as well as its convergences, is crucial for mapping the future trajectory of environmental sustainability in law, for it reveals both the opportunities and limitations of judicial intervention in an era defined by ecological interdependence and intergenerational responsibility.

From a conceptual standpoint, the principle of environmental sustainability occupies a peculiar position in legal theory:[4] it is

[3] D. French, L.J. Kotzé (Eds), *Research Handbook on Law, Governance and Planetary Boundaries*, Cheltenham, UK, 2021; T. Cadman, M.A. Hurlbert, A.C. Simonelli (Eds), *Earth System Law: Standing on the Precipice of the Anthropocene*, London, 2022; G. Garver, *Ecological Law and the Planetary Crisis*, Abingdon, 2022.

[4] K. Bosselmann, *The principle of sustainability: transforming law and governance*, Routledge, London, 2017; D. Rupo, L. Tarquinio, V. Mauerhofer (Eds), *Sustainability and Law*, Cham, 2020; K. Bosselmann, *A Normative Approach to Environmental Governance: Sustainability at the Apex of Environmental Law*, in D. Fisher (Ed.), *Research Handbook on Fundamental Concepts of Environmental Law*, Cheltenham, UK, 2022, 23-44; T. Groppi, *Sustainability and Constitutions: Constitutional Law and the Dilemma of the Future*, in 13 *Wroclaw Review of Law, Administration & Economics* 1 (2023), 44-55; V. Mauerhofer, *The Role of Law in Governing Sustainability*, Oxford, 2023.

simultaneously descriptive and prescriptive, at once a reflection of the systemic interdependence between ecological processes and human activity, and a normative command that requires the reorganization of political, economic, and legal structures to ensure that development does not compromise the capacity of future generations to meet their own needs. In this dual character, environmental sustainability differs from other legal principles, because it is not confined to a single branch of law but pervades constitutional interpretation, international treaty obligations, private corporate regulation, and administrative decision-making. It is also temporally distinct, insofar as it compels law to internalize long-term risks, uncertainties, and tipping points that extend far beyond the traditional temporal horizon of adjudication, thus embedding intergenerational justice as a constitutive dimension of legal reasoning. Regional human rights courts have been particularly influential in translating this abstract principle into enforceable standards, because their interpretative methodologies allow them to expand the scope of existing human rights provisions in light of evolving societal needs and emerging global norms, and because they are situated at the intersection of domestic and international law, giving their pronouncements both normative authority and practical impact across jurisdictions.[5] Yet the manner in which they perform this task reflects their distinct institutional contexts: the ECtHR, operating in a region with consolidated democracies, strong regulatory regimes, and deep political integration, must balance judicial innovation with respect for state sovereignty and democratic processes, often resorting to the doctrine of the margin of appreciation; the IACtHR,

[5] E. Grant, *International Human Rights Courts and Environmental Human Rights: re-Imagining Adjudicative Paradigms*, in 6 *Journal of Human Rights and the Environment* 2 (2015), 156-176; R. Pavoni, *Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights*, in B. Boer (Ed.), *Environmental Law Dimensions of Human Rights*, Oxford, 2015; A. Rocha, R. Sampaio, *Climate Change Before the European and Inter-American Courts of Human Rights: Comparing Possible Avenues Before Human Rights Bodies*, in 32 *Review of European, Comparative & International Environmental Law* 2 (2023), 279-289; A. Savaresi, *Environment and Human Rights*, in *Max Planck Encyclopaedias of International Law*, Oxford, 2023.

by contrast, operates in a region marked by weak institutions, socio-economic inequalities, and acute ecological vulnerability, where supranational intervention is often perceived as necessary to protect communities against extractivist policies and structural inaction, and thus it has embraced a more openly transformative role, pushing the boundaries of the American Convention to articulate new rights and obligations.[6]

The evolution of the ECtHR's jurisprudence illustrates the strengths and limitations of an incrementalist approach.[7] Beginning with *López Ostra v. Spain* (1994),[8] the Court acknowledged that severe environmental pollution could interfere with the right to private and family life under Article 8, thereby opening the door to environmental claims within the Convention framework, though without recognizing a freestanding right to a healthy environment. Subsequent cases such as *Fadeyeva v. Russia* (2005)[9] reinforced this approach by establishing criteria for severity and state responsibility, while still maintaining the focus on individualized harm. The real paradigm shift occurred with *Verein KlimaSeniorinnen Schweiz v. Switzerland* (2024),[10] where the Grand Chamber recognized climate change as a systemic threat to the rights to life and private life, thereby imposing positive obligations on states to implement adequate climate policies. This judgment marked a dramatic expansion of the Court's jurisprudence, moving from localized nuisances to global threats, and from remedial justice to structural obligations. The subsequent case of *Cannavacciuolo and Others v. Italy* (2025),[11] recognizing a violation of Article 2 in relation to large-scale pollution in the

[6] L. Burgorgue-Larsen, *The 3 Regional Human Rights Courts in Context: Justice That Cannot Be Taken for Granted*, Oxford, 2024.

[7] J. Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, in 18 *Human Rights Law Review* 3 (2018), 495-515.

[8] ECtHR, *López Ostra v. Spain*, App. no. 16798/90, 09 December 1994.

[9] ECtHR, *Fadeyeva v. Russia*, App. no. 55723/00, 9 June 2005.

[10] ECtHR, *KlimaSeniorinnen Schweiz v. Switzerland*, App. no. 53600/20, 9 April 2024.

[11] ECtHR, *Cannavacciuolo and Others v. Italy*, App. no. 51567/14 + 3, 27 February 2025.

'*Terra dei Fuochi*' region, further expanded the Court's willingness to address systemic environmental risks and to use the pilot judgment procedure to impose general measures on states. Yet even in these groundbreaking rulings, the ECtHR maintained its reluctance to recognize an autonomous right to a healthy environment, preferring instead to subsume environmental claims under existing Convention rights, thereby preserving doctrinal continuity at the expense of transformative clarity. This strategy reflects both prudence and limitation: prudence, because it preserves the legitimacy of the Court in a politically diverse region; limitation, because it fails to articulate sustainability as an independent normative principle that transcends anthropocentric categories.

The IACtHR, by contrast, has taken a more ambitious path, beginning with contentious cases involving indigenous peoples and extractive industries, and culminating in *Advisory Opinion OC-23/17* (2017),[12] which explicitly recognized the autonomous right to a healthy environment, affirmed the interdependence of human rights and ecological integrity, and extended state obligations extraterritorially. This opinion represents a doctrinal leap, moving beyond the derivative protection of environmental interests to a full recognition of their intrinsic value. In *Advisory Opinion OC-32/25* (2025),[13] the Court went even further, explicitly situating the climate emergency at the centre of human rights adjudication, affirming the rights of nature, and establishing reinforced standards of due diligence for states to mitigate, adapt, and cooperate in response to climate change. These opinions are visionary, situating the Inter-American system at the forefront of global human rights and environmental jurisprudence, and providing a normative template for the integration of environmental sustainability into law. Yet they also raise questions about enforceability, given the political and institutional realities of Latin America, and about legitimacy, since such expansive interpretations risk being perceived as judicial overreach. Nevertheless, their normative impact cannot be underestimated: they have in-

[12] IACtHR, *Advisory Opinion OC-23/17*, November 15, 2017.
[13] IACtHR, *Advisory Opinion OC-32/25*, May 29, 2025.

fluenced domestic constitutional jurisprudence, inspired scholarly debates, and contributed to the global recognition of the right to a clean, healthy, and sustainable environment by the United Nations in 2022.[14]

The comparative perspective thus reveals two contrasting but complementary pathways for integrating environmental sustainability into human rights law. The ECtHR demonstrates the power of incrementalism, whereby environmental protection is gradually incorporated into existing rights through the living instrument doctrine,[15] preserving continuity and legitimacy but limiting transformative potential. The IACtHR demonstrates the power of visionary innovation, whereby sustainability is openly recognized as a foundational right and principle, expanding the normative horizon but risking gaps in enforcement. For the future of environmental sustainability in law, both approaches offer lessons: Strasbourg shows the importance of procedural safeguards, democratic legitimacy, and enforceability; San José shows the necessity of conceptual clarity, normative ambition, and recognition of ecological interdependence. Together, they suggest that the future of environmental sustainability in the twenty-first century may depend on a synthesis of incremental legitimacy and transformative vision, ensuring that law not only responds to immediate harms but also addresses systemic risks and intergenerational responsibilities.[16]

This paper positions itself within this broader intellectual and normative landscape by examining the evolution of environmen-

[14] UN, General Assembly, Resolution A/RES/76/300, July 28, 2022.

[15] A. Jenab, *Unravelling the 'Living Instrument' Approach: Unveiling Flaws in the Elastic Interpretation of Human Rights Law and Its Impact on ECHR Interpretation*, in 48 *Exeter Law Review* (2023), 57-65; K. Ksiazek, *The living instrument doctrine and effectiveness of human rights*, in *European Human Rights Law Review* 6 (2024), 507-24; I. Jelić, E. Fritz, *The 'Living Instrument' at the Service of Climate Action: The ECtHR Long-Standing Doctrine Confronted to the Climate Emergency*, in *Journal of Environmental Law* 36 (2024), 141-58.

[16] D. Bertram, *'For You Will (Still) Be Here Tomorrow': The Many Lives of Intergenerational Equity*, in 12 *Transnational Environmental Law* 1 (2023), 121-49; A. Gosseries, *What is Intergenerational Justice?*, Cambridge, 2023; E.B. Weiss, *In Fairness to Future Generations International Law, Common Patrimony, and Intergenerational Equity*, Nijhoff, 2025.

tal sustainability – understood, as noted, as a broad and conceptually rich expression of environmental protection that includes its equitable and intergenerational dimensions. Through a comparative analysis of the case law of the ECtHR and the IACtHR, it evaluates the strengths and limitations of their respective approaches and reflects on the future trajectory of environmental sustainability as a principle of twenty-first-century law. It argues that environmental sustainability must be understood as both a principle of limitation – imposing ecological boundaries on human activity – and a principle of empowerment – providing communities and individuals with the normative tools to claim justice against environmental degradation. It further argues that regional human rights courts play a central role in this process, not only because they translate abstract principles into enforceable rights but also because they shape the global discourse through transjudicial dialogue and normative cross-fertilization.[17] By situating the jurisprudence of Strasbourg and San José in dialogue, the paper demonstrates that environmental sustainability is neither the monopoly of the Global North nor the Global South but a universal concern that acquires richer meaning through the plurality of regional perspectives. In doing so, it seeks to contribute to the broader scholarly and policy debates on the role of law in the Anthropocene, and to underscore that the legitimacy of human rights law in the twenty-first century will depend on its capacity to address the existential threats posed by ecological collapse. Ultimately, the introduction establishes the framework for a comprehensive exploration of environmental sustainability in

[17] Specifically on the dialogue between the European Court of Human Rights and the Inter-American Court of Human Rights in literature, see, albeit in Spanish: T. Groppi, A.M. Lecis Cocco-Ortu, *El uso de precedentes extrasistémicos en el diálogo entre la Corte Interamericana y el Tribunal europeo de Derechos Humanos: una investigación empírica*, in 21 *Iuris Dictio* (2018), 29-47. More generally on dialogue between Courts: A.M. Slaughter, *A Global Community of Courts*, in 44 *Harvard International Law Journal* 1 (2003), 191-219; D.S. Law, M. Tushnet, *The Politics of Judicial Dialogue*, in M. Tushnet, D. Kochenov (Eds), *Research Handbook on the Politics of Constitutional Law*, Edward Elgar Publishing, Cheltenham, 2023, 286-309; T. Groppi, I. Spigno, M.C. Ponthoreau (Eds), *Judicial Bricolage: the Use of Foreign Precedents by Constitutional Judges in the 21st Century*, Oxford, 2025.

law: as a principle that redefines the temporal horizon of legal responsibility, as a bridge between environmental protection and human rights, and as the cornerstone of a new normative order that must reconcile human development with the integrity of the biosphere.

2. *The Principle of Environmental Sustainability as a Foundational Paradigm for Law and Humanity in the Twenty-First Century*

The principle of environmental sustainability has emerged as one of the most pressing normative and conceptual frameworks for both law and humanity in the twenty-first century, occupying a central position at the intersection of constitutional, international, and private regulatory regimes while simultaneously embodying an ethical imperative that transcends disciplinary boundaries.[18]

Unlike other legal principles whose scope is largely confined to a specific area of governance or adjudication, environmental sustainability operates as a meta-principle: it is at once descriptive, in that it reflects the systemic interdependence between ecological processes and human development, and prescriptive, insofar as it imposes upon legal systems, political communities, and individual actors a duty to reorganize social, economic, and political structures in ways that ensure the endurance of the bio-

[18] R. Khalid, F. Jalil, M.B. Mokhtar, *Environmental Sustainability as a Human Right*, in V. Mauerhofer (Ed.), *Legal Aspects of Sustainable Development*, Cham, 2015, 81-94; S. Clayton, E. Kals, I. Feygina, *Justice and Environmental Sustainability*, in C. Sabbagh, M. Schmitt (Eds), *Handbook of Social Justice Theory and Research*, New York, 2016; N. Atta, A. Sharifi, *A Systematic Literature Review of the Relationship between the Rule of Law and Environmental Sustainability*, in 32 *Sustainable Development* 6 (2024), 7051-68; D. Kovach *et al.*, *Legal Aspects of Environmental Sustainability and Climate Change: The Role of International and National Legislation*, in 4 *Journal of Environmental Law & Policy* 2 (2024), 149-79. With a highly critical tone on the concept of environmental sustainability: J. Jaria-Manzano, *Beyond Sustainability: Challenges for Environmental Law in the Era of Uncertainty*, in 52 *Environmental Policy and Law* 2 (2022), 93-104.

sphere. Its contemporary relevance cannot be separated from the growing awareness of planetary limits, the anthropogenic drivers of climate change, biodiversity loss, and ecosystem degradation, and the recognition that legal orders constructed upon anthropocentric and short-term logics of resource exploitation are insufficient to guarantee intergenerational justice.[19] Environmental sustainability, therefore, calls into question not only the manner in which law regulates human activity but also the foundational assumptions of law itself, demanding a paradigmatic shift from instrumental exploitation toward a model of stewardship grounded in ecological rationality.[20]

Within international law, the principle has gradually acquired normative density, finding expression in soft-law instruments such as the 1987 Brundtland Report,[21] which famously defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs, and subsequently in legally binding treaties, including the Paris Agreement,[22] where environmental sustainability is implicitly embedded in the long-term temper-

[19] R.E. Kim, L.J. Kotzé, *Planetary Boundaries at the Intersection of Earth system Law, Science and Governance: A State-of-the-art Review*, in 30 *Review of European, Comparative & International Environmental Law* 1 (2021), 3-15; L.J. Kotzé, D. French, *Staying Within the Planets Safe Operating Space? Law and the Planetary Boundaries*, in Id. (Eds), *Research Handbook on Law, Governance and Planetary Boundaries*, Cheltenham, 2022, 1-19.

[20] C. Sbert *et al*., *From Environmental to Ecological Law*, London, 2022.

[21] I. Borowy *Defining Sustainable Development for Our Common Future*, Routledge, London, 2013; K. Gerasimova, *An Analysis of The Brundtland Commission's Our Common Future* London, 2017; M. Hajian, S. Jangchi Kashani, *Evolution of the Concept of Sustainability. From Brundtland Report to Sustainable Development Goals*, in C. Mustansar Hussain, J.F. Velasco-Muñoz (Eds), *Sustainable Resource Management*, Amsterdam, 2021, 1-14.

[22] D. Bodansky, *The Legal Character of the Paris Agreement*, in 25 *Review of European, Comparative & International Environmental Law* 2 (2016), 142-50; L. Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, in 28 *Journal of Environmental Law* 2 (2016), 337-358; J.H. Knox, *The Paris Agreement as a Human Rights Treaty*, in D. Akande *et al.* (Eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment*, Oxford, 2020, 323-47; C. Voigt, *The power of the Paris Agreement in international climate litigation*, in 32 *Review of European, Comparative & International Environmental Law* 2 (2023), 237-49.

ature goals and mechanisms of differentiated responsibility. At the constitutional level, several jurisdictions have elevated environmental sustainability to a guiding principle of state action: Germany, for instance, explicitly references intergenerational responsibility in its jurisprudence, most notably in the Federal Constitutional Court's 2021 decision on climate protection,[23] which linked environmental sustainability with the duty to safeguard the freedom of future generations; other states, such as Ecuador and Bolivia,[24] have gone further by incorporating the rights of nature directly into their constitutional orders, thereby radicalizing the environmental sustainability discourse beyond anthropocentric frames. Such developments reveal that environmental sustainability is not a mere rhetorical aspiration but increasingly a legal standard against which governmental measures, corporate strategies, and individual behaviour are assessed.

Yet, the relevance of environmental sustainability for the twenty-first century extends beyond codification or judicial interpretation: it signifies the profound reorientation of law's temporal horizon. Whereas traditional legal reasoning has been largely retrospective or immediate, focusing on past conduct or present disputes, environmental sustainability forces law to internalize long-term risks, uncertainties, and systemic vulnerabilities, thereby making the protection of future interests a constitutive element of present adjudication and legislation. This temporal extension of legal responsibility is emblematic of a broader ethical revolution, whereby humanity recognizes itself not only

[23] BVerfG, *Neubauer et al. v. Germany*, Order of the First Senate of 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20. For a comment of the decision: L.J. Kotzé, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, in 22 *German Law Journal* 8 (2021), 1423-44.

[24] R. Lalander, *Rights of Nature and the Indigenous Peoples in Bolivia and Ecuador: A Straitjacket for Progressive Development Politics?*, in 3 *Iberoamerican Journal of Development Studies* 2 (2015), 148-72; I.Z.P. Calaça *et al.*, *La naturaleza como sujeto de derechos: análisis bioético de las Constituciones de Ecuador y Bolivia*, in 18 *Revista Latinoamericana de Bioética* 1 (2018), 155-171; M.V. Berros, *Challenges for the Implementation of the Rights of Nature: Ecuador and Bolivia as the First Instances of an Expanding Movement*, in 48 *Latin American Perspectives* 3 (2021), 192-205.

as a beneficiary of ecological goods but also as a custodian of planetary systems upon which all life depends.[25]

From a theoretical perspective, the principle of environmental sustainability has a dual character: on the one hand, it embodies continuity with established notions of justice, equality, and solidarity, particularly insofar as it rearticulates them in an intergenerational dimension; on the other hand, it marks a rupture, insofar as it requires abandoning the illusion of infinite growth and embracing ecological limits as normative constraints.

Such tension between continuity and rupture generates a rich field for legal scholarship, prompting reflection on the adequacy of existing legal categories, the possibility of developing new

[25] E.B. Weiss, *Our Rights and Obligations to Future Generations for the Environment*, in 84 *American Journal of International Law* 1 (1990), 198-207; E. Agius, *Obligations of Justice Towards Future Generations: A Revolution in Social and Legal Thought,* in E. Agius, S. Busuttil (Eds), *Future Generations and International Law*, London, 1998; D.A. Farber, *From Here to Eternity: Environmental Law and Future Generations*, in *University of Illinois Law Review* (2003), 289-336; P. Häberle, *A Constitutional Law for Future Generations – the 'Other' Form of the Social Contract: the Generation Contract*, in J. Chet Tremmel (Ed.), *Handbook of Intergenerational Justice*, Cheltenham, 2006; K.S. Ekeli, *Green Constitutionalism: The Constitutional Protection of Future Generations*, in 20 *Ratio Juris* 3 (2007), 378-401; A.P. Gosseries, *Constitutions and Future Generations*, in 17 *The Good Society* 2 (2008), 32-7; K. Mathis (Ed.), *Efficiency, Sustainability, and Justice to Future Generations*, Dordrecht, 2012; L. Westra, *Environmental Justice and the Rights of Unborn and Future Generations*, London, 2012; J. Brännmark, *Future generations as rightholders*, in 19 *Critical Review of International Social and Political Philosophy* 6 (2015), 680-98; J. Boston, T. Stuart, *Protecting the Rights of Future Generations: Are Constitutional Mechanisms an Answer*, in 11 *Policy Quarterly* 2 (2015), 60-71; S. Riley, *Architectures of Intergenerational Justice: Human Dignity, International Law, and Duties to Future Generations*, in 15 *Journal of Human Rights* 2 (2016), 272-90; B. Lewis, *The Rights of Future Generations within the Post-Paris Climate Regime*, in 7 *Transnational Environmental Law* 1 (2018), 69-87; P. Lawrence, J. Linehan, *Introduction to Giving Future Generations a Voice: Normative Frameworks, Institutions and Practice*, in Id. (Eds), *Giving Future Generations a Voice*, Cheltenham, 2021, 1-20; S. Behrendt, *Facing the Future: Conceiving Legal Obligations Towards Future Generations*, in 12 *Politics and Governance* (2024); K. Sulyok, *Transforming the Rule of Law in Environmental and Climate Litigation: Prohibiting the Arbitrary Treatment of Future Generations*, in 13 *Transnational Environmental Law* 3 (2024), 475-501.

rights and duties that correspond to ecological realities, and the potential of environmental sustainability to serve as a constitutional principle of global order.[26]

In practice, environmental sustainability compels states to redesign economic policies toward decarbonization and circularity, to develop mechanisms of environmental accountability that transcend borders, and to engage in cooperative forms of governance that recognize the indivisibility of the global commons. For corporations, it entails rethinking fiduciary duties, redefining corporate purpose beyond shareholder profit, and integrating environmental, social, and governance criteria not as optional policies but as legal obligations. For individuals, it translates into behavioural expectations, consumption patterns, and forms of civic engagement that are increasingly mediated through law, such as waste management, energy efficiency requirements, or carbon taxation.

Yet, environmental sustainability is not merely a catalogue of duties; it is also a principle of empowerment, providing a normative vocabulary through which communities articulate claims for justice against extractive industries, against environmental racism, and against global inequities that exacerbate vulnerability to ecological collapse. In this sense, environmental sustainability is inseparable from human rights,[27] since the degradation of the environment systematically undermines the enjoyment of rights to life, health, housing, food, and water, while environmental sustainability-oriented legal frameworks can provide the structural conditions necessary for their realization.[28]

[26] C. Cullinan, *Wild Law: A Manifesto for Earth Justice*, Cambridge, 2011; P. Burdon, *Exploring Wild Law: the Philosophy of Earth Jurisprudence*, Kent Town, 2012; K. Anker et al., *From Environmental to Ecological Law*, London, 2022; G. Garver, *Ecological Law and the Planetary Crisis: a Legal Guide for Harmony on Earth*, Abingdon, 2022.

[27] D.K. Anton, D. Shelton, *Environmental Protection and Human Rights*, Cambridge, 2011; A. Grear, L.J. Kotzé (Eds), *Research Handbook on Human Rights and the Environment*, Cheltenham, 2015; J.R. May, W.F. Baber, *Environmental Human Rights in the Anthropocene*, Cambridge, 2023.

[28] D. R. Boyd, *The Constitutional Right to a Healthy Environment*, in 54 *Environment: Science and Policy for Sustainable Development* 4 (2012), 3-15; J.H. Knox, R. Pejan, *The Human Right to a Healthy Environment*, Cambridge,

The United Nations' recognition of the right to a healthy environment in 2022 illustrates the convergence of human rights law and environmental sustainability, reinforcing the notion that environmental protection is not an external limitation upon development but its indispensable precondition. At the same time, environmental sustainability's relevance is amplified by the geopolitical realities of the twenty-first century, marked by increasing competition over scarce resources, the destabilizing effects of climate-induced migration, and the risk of conflict triggered by ecological collapse. In this context, environmental sustainability is not a utopian aspiration but a condition for global security, peace, and stability, thereby becoming a cornerstone of international relations.

The urgency of environmental sustainability also arises from the asymmetries between the Global North and Global South:[29] while developed countries bear historical responsibility for the majority of greenhouse gas emissions, developing countries face disproportionate impacts of climate change and biodiversity loss, which exacerbate poverty, inequality, and social fragmentation.

2018; P. de Vilchez, A. Savaresi, *The Right to a Healthy Environment and Climate Litigation: A Game Changer?*, in 32 *Yearbook of International Environmental Law* 1 (2021), 3-19; E. Cima, *The right to a healthy environment: Reconceptualizing human rights in the face of climate change*, in 31 *Review of European, Comparative & International Environmental Law* 1 (2022), 38-49; N. Bryner, *A Constitutional Human Right to a Healthy Environment*, in D. Fisher (Ed.), *Research Handbook on Fundamental Concepts of Environmental Law*, Cheltenham, 2022, 141-59; R. Mwanza, *Framing the Normative Role of the Right to a Healthy Environment: Thinking with Internormativity, Embodiment and Emergence*, in 13 *Journal of Human Rights and the Environment* 2 (2022), 349-70; B.E. Umukoro, O. Ituru, *Conceptual Challenges to the Recognition and Enforcement of the Right to Clean, Safe and Healthy Environment*, in *Journal of Environmental Law & Policy* 2 (2022), 1-28; P. Alston, *The Right to a Healthy Environment: Beyond Twentieth Century Conceptions of Rights*, in 117 *American Journal of International Law* (2023), 167-72; L.J. Kotzé, *The Right to a Healthy Environment and Law's Hidden Subjects*, in 117 *American Journal of International Law* (2023), 194-8; H. Schoukens, F. Bouquelle (Eds), *The Right to a Healthy Environment in and Beyond the Anthropocene*, Cheltenham, 2024.

[29] On this point see: ICJ, Advisory Opinion 'Obligations of States in Respect of Climate Change', General list no. 187/25, 23 July 2025.

Addressing environmental sustainability in legal terms therefore requires mechanisms of distributive justice at the global level, ranging from climate finance and technology transfer to fair trade regimes and the recognition of ecological debt. For humanity as a whole, the relevance of environmental sustainability is existential: it defines the boundary between a liveable future and a trajectory of irreversible collapse. Unlike previous epochs in which environmental degradation could be conceived as localized or reversible, the twenty-first century is defined by the recognition that ecological tipping points[30] – such as the melting of polar ice caps, the acidification of oceans, or the dieback of tropical forests – have planetary consequences that no legal order can ignore.

The law's ability to internalize these realities, through constitutional provisions, international agreements, and judicial activism, will be decisive in shaping the contours of human civilization in the decades to come. Thus, environmental sustainability is not merely a principle among others; it is the principle through which law must reinvent itself in order to remain relevant in the Anthropocene. It embodies the reconciliation between humanity's aspiration for development and the recognition of the ecological conditions of its existence, and in doing so, it elevates the legal discourse from the management of conflicts among human actors to the preservation of life in its entirety. The challenge, however, lies in operationalization: translating the lofty ambition of environmental sustainability into enforceable standards, justiciable rights, and effective institutions without reducing its richness to technocratic formulae or bureaucratic formalities. In this respect, the role of legal scholarship is crucial,[31] for it can articu-

[30] T.M. Lenton *et al.*, *Operationalising Positive Tipping Points Towards Global Sustainability*, in *Global Sustainability*, 2022; J.M. Anderies *et al.*, *A Modeling Framework for World-Earth System Resilience: Exploring Social Inequality and Earth System Tipping Points*, in *Environmental Research Letters* 18 (2023); V. Lam, Y. Rousselot, *Anthropocene, Planetary Boundaries and Tipping Points: Interdisciplinarity and Values in Earth System Science*, in *European Journal for Philosophy of Science* 14 (2024).

[31] T. Khaitan, *On Scholactivism in Constitutional Studies: Skeptical Thoughts*, in 20 *International Journal of Constitutional Law* 2 (2022), 547-56.

late conceptual frameworks that resist reductionism, illuminate normative tensions, and provide guidance for coherent and transformative jurisprudence. Ultimately, the principle of environmental sustainability, by linking law to the survival of humanity and the integrity of nature, represents the most profound legal and ethical challenge of the twenty-first century: whether legal systems can transcend the inertia of traditional categories and embrace a future-oriented, ecologically grounded conception of justice that ensures the flourishing of both present and future generations.

3. *Inter-Regional Comparative Perspectives on Environmental Sustainability: The Jurisprudence of the ECtHR and the IACtHR*

The comparative analysis of the jurisprudence of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) in matters relating to environmental sustainability constitutes a particularly innovative and intellectually fruitful line of inquiry, precisely because it transcends the confines of intra-systemic comparisons and instead bridges two distinct regional human rights regimes with different historical trajectories, normative frameworks, and socio-political contexts.[32] While much of the existing literature on environmental law has focused either on domestic constitutional provisions or on the role of global instruments, such as the Paris Agreement or the Aarhus Convention, the decision to examine these two regional courts together rests on the recognition that they represent the most advanced and dynamic judicial bodies in terms of developing an environmental jurisprudence grounded in human rights. The ECtHR, although traditionally reluctant to recognize a freestanding right to a healthy environment, has gradually con-

[32] On the inter-regional comparison as an innovative methodology of research in comparative studies, see: A. Cuyvers, *Comparing Regional Law*, in M. Siems, P.J. Yap (Eds), *The Cambridge Handbook of Comparative Law*, Cambridge, 2024, 649-673.

structed a robust case law linking environmental harm to established Convention rights, most notably Article 8 (the right to private and family life) and Article 2 (the right to life), thereby demonstrating the interpretative elasticity of the European Convention on Human Rights in addressing contemporary ecological challenges. By contrast, the IACtHR has adopted a far more explicit and transformative approach, culminating in its Advisory Opinion OC-23/17, which unequivocally recognized the autonomous right to a healthy environment as justiciable under the American Convention on Human Rights. The juxtaposition of these two approaches – one grounded in a jurisprudential strategy of incrementalism and indirect protection, the other in a bold and overt recognition of environmental rights – offers a unique opportunity to assess the evolving relationship between human rights and environmental sustainability from a comparative perspective.

The innovativeness of this comparison lies in its inter-regional character: unlike intra-European studies, which often remain confined within a shared legal culture, or intra-American analyses, which presuppose a common colonial legacy and socio-political reality, an inter-regional comparison forces the scholar to confront differences in legal reasoning, cultural values, institutional design, and the socio-economic conditions that shape adjudication.[33] In doing so, it enriches the conceptual toolkit available for understanding environmental sustainability as a universal principle of human rights law while also shedding light on the limitations of regional specificities.

From a methodological perspective, the comparative exercise is grounded in a functionalist approach,[34] combined with elements of contextual analysis and normative evaluation. The functionalist lens allows the study to move beyond the mere catalogu-

[33] M. Siems, *Comparative Law*, Cambridge, 2022, 322-348.

[34] M. Graziadei, *The functionalist heritage*, in P. Legrand, R. Munday (Eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003, 100-28; R. Michaels, *The Functional Method of Comparative Law*, in M. Reimann, R. Zimmermann (Eds), *The Oxford Handbook of Comparative Law*, Oxford, 2012, 339-82.

ing of judicial outcomes and to interrogate how each Court addresses analogous problems – namely, the protection of individuals and communities against environmental harm – through the interpretive tools available within their respective treaties. At the same time, the comparison is not conducted in abstraction but is carefully situated within the socio-political and institutional contexts of Europe and Latin America, thereby avoiding the risk of decontextualization that often undermines comparative work.[35] In this sense, the analysis employs a contextual methodology that acknowledges that jurisprudence is shaped not only by doctrinal reasoning but also by historical legacies, institutional capacities, and socio-economic realities.[36] Furthermore, the research adopts a normative dimension, insofar as it does not limit itself to descriptive comparison but evaluates the transformative potential of each Court's jurisprudence for advancing environmental sustainability as a principle of human rights law.[37] This threefold methodology – functional, contextual, and normative – ensures that the inter-regional comparison yields insights that are both analytically rigorous and normatively meaningful. It also responds to the increasing scholarly call for comparative legal studies that transcend formalistic juxtaposition and instead highlight how judicial practices can mutually inform and enrich one another across regions.

The choice of these two courts is also justified by their increasing mutual visibility: ECtHR decisions are frequently cited as persuasive authority beyond Europe, and the IACtHR's

[35] N. Creutzfeldt, A. Kubal, F. Pirie, *Introduction: Exploring the Comparative in Socio-Legal Studies*, in 12 *International Journal of Law in Context* 4 (2016), 377-89; A. Riles, *Comparative Law and Socio-Legal Studies*, in M. Reimann, R. Zimmermann (Eds), *The Oxford Handbook of Comparative Law*, Oxford, 2019, 772-804.

[36] I. Spigno, *Methodologies of Comparative Constitutional Law: Contextual Approach*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, 2017.

[37] R. Hirschl, *Comparative Methodologies*, in R. Masterman, R. Schütze (Eds), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, 2019, 11-39; J. Husa, *The Traditional Methods of Comparative Law*, in M. Siems, P.J. Yap (Eds), *The Cambridge Handbook of Comparative Law*, Cambridge, 2024, 15-31.

avant-garde jurisprudence has attracted scholarly attention in European debates on environmental constitutionalism and climate litigation, suggesting the emergence of a transjudicial dialogue that is only beginning to be theorized.

Moreover, by comparing Europe – a region marked by high levels of economic development, strong institutional integration, and comparatively consolidated environmental regulation – with Latin America – a region historically burdened by socio-economic inequalities, extractivist development models, and acute ecological vulnerability – the study highlights the multifaceted nature of environmental sustainability as both a legal principle and a socio-political imperative. Such a comparison therefore not only identifies convergences and divergences in doctrinal approaches but also underscores the normative potential of cross-regional learning, whereby the cautious, incremental strategies of the ECtHR might benefit from the transformative vision of the IACtHR, while the latter might in turn draw from the institutional experience and procedural safeguards developed in Strasbourg to enhance the enforceability of its own ambitious pronouncements.

Ultimately, the innovative character of this inter-regional comparative exercise resides in its ability to move beyond the mere cataloguing of case law and instead to conceptualize environmental sustainability as a principle that acquires richer meaning through the cross-pollination of diverse legal traditions. By situating the ECtHR and IACtHR in dialogue, the analysis demonstrates that environmental sustainability is not confined to the Global North or South, nor to specific historical legacies, but is rather a universal concern whose juridical articulation depends on a plurality of voices. In this way, the comparative study offers a genuinely novel contribution to legal scholarship,[38] showing how inter-regional jurisprudential engagement can deepen our understanding of environmental sustainability as a guiding principle of twenty-first century human rights law.

[38] G. Frankenberg, *Comparative Law as Critique*, Cheltenham, 2020, 17-33.

4. *From* López Ostra *to* Greenpeace Nordic and Others v. Norway*: The Development of Environmental Jurisprudence under the ECHR*

The jurisprudence of the European Court of Human Rights (ECtHR) concerning environmental protection and sustainability has traversed a remarkable trajectory from its early engagement with localized nuisances to its landmark recognition of systemic climate imperatives, yet this evolution is marked by doctrinal caution and interpretative elasticity which remains open to critical scrutiny. In its seminal decision *López Ostra v. Spain* (9 December 1994),[39] the Court first enunciated that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely', even if such pollution does not reach the threshold of serious health risks (para. 51). This foundational case established the principle that environmental harm – including odour, noise, and smog – from industrial facilities can constitute an interference with the right to private and family life under Article 8 of the Convention: the underlying logic was unmistakably that environmental degradation impairs quality of life in a way that activates human rights protection.

The Court, however, did not treat such nuisances lightly: in paragraphs 56 and 57, it stressed the failure of Spanish authorities to act promptly. It observed that the municipality had not only failed to implement the necessary closures of the polluting plant following court orders, but had also resisted judicial decisions, delaying enforcement of closure by nearly two years and leaving the *López Ostra* family to endure the nuisances for more than three years before being able to relocate (paras 56-57). The Court concluded that this represented an imbalance: the State prioritized the economic interests of the town over the effective enjoyment of the applicant's right to private and family life (para. 58). Although an important step, the case remained anchored in indemnifying individual harm and did not provide a more expansive doctrinal framework for systemic environmental protection.

[39] ECtHR, *López Ostra v. Spain*, App. no. 16798/90, 9 December 1994.

Subsequently, *Fadeyeva v. Russia* (9 June 2005)[40] developed the doctrine further. The Court reaffirmed that Article 8 may indeed be invoked in environmental contexts, but only where two cumulative elements are met: (i) there must be an 'actual interference with the applicant's private sphere'; and (ii) this interference must reach a 'level of seriousness' (para. 70). The Court found that the applicant's prolonged exposure to toxic emissions from a steel plant located close to her residence constituted such an interference. The plant's emissions repeatedly exceeded permissible legal limits, and the State, while asserting it had no obligation to cease operations, had failed to offer any alternative protection or resettlement to the applicant. The Court noted that domestic courts had been ineffective: the resettlement order was suspended, and available remedies were inadequate, undermining distributive equity and the fair balance between collective economic interests and the applicant's rights (paras 123, 132-133, paras 117). This constituted a violation of Article 8: the Court applied its 'living instrument' doctrine to interpret the Convention in light of evolving societal needs (paras 103-105). Yet again, the focus remained on individual, localized harm and enforcement gaps, rather than a broader conception of sustainability or structural environmental rights.

Despite these advances, the ECtHR's jurisprudence remained confined within traditional interpretive modes – Article 8 as a prism for environmental harm, a high bar for severity, and the margin of appreciation doctrine affording states considerable discretion.

This doctrinal circumscription was dramatically disrupted by the Grand Chamber's decision in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (9 April 2024)[41] – a watershed

[40] ECtHR, *Fadeyeva v. Russia*, App. no. 55723/00, 9 June 2005.

[41] ECtHR, *KlimaSeniorinnen Schweiz v. Switzerland*, App. no. 53600/20, 9 April 2024. For a comment to the decision in the literature, see: C. Heri, *KlimaSeniorinnen and Its Discontents: Climate Change at the European Court of Human Rights*, in *European Human Rights Law Review* 4 (2024), 317-31; A. Hoffmann, *Five Key Points from the Groundbreaking European Court of Human Rights Climate Judgment in Verein KlimaSeniorinnen Schweiz v Switzerland*, in 26 *Environmental Law Review* 2 (2024), 91-9; A. Hösli, M. Rehmann,

in the Court's engagement with climate change. For the first time, the Court held that States Parties have positive obligations under Article 8 ECHR (right to respect for private and family life) to adopt and effectively implement measures capable of mitigating the existing and future harmful effects of climate change, thereby integrating environmental protection into the core scope of Convention rights (paras. 541-543, 548). In particular, the Court clarified that a State must undertake substantial and progressive reductions in greenhouse gas emissions with a view to achieving climate neutrality within an ambitious timeframe, leaving a reduced margin of appreciation for domestic choices (para. 543) and disapproving Switzerland's failure to provide intermediate targets for 2025-2030 as part of its regulatory framework (paras. 561, 566)

Another noteworthy innovation is the Court's refinement of victim-status criteria in climate-related cases: although the four individual applicants did not satisfy the necessary 'high intensity of exposure' threshold to establish victim status (paras. 527, 531, 533), the applicant association was granted locus standi 'in the interests of the proper administration of justice', recognizing the special nature of climate change as a common concern of humankind and the need for collective legal action (para. 523). This represents a delicate balancing between avoiding *actio popularis* and ensuring access to justice where national remedies are unavailable. On the procedural front, the Court also found a violation of Article 6 §1 (access to court) because the Swiss domestic system provided no effective avenue for the association's climate

Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: *the European Court of Human Rights' Answer to Climate Change*, in 14 *Climate Law* 3-4 (2024), 263-84; J. Laffranque, *KlimaSeniorinnen – Climate Justice and Beyond*, in 5 *European Convention on Human Rights Law Review* 4 (2024), 433-43; L. Nordlander, *Constitutional Boundaries After Verein KlimaSeniorinnen: Lessons on Domestic Rights-based Climate Change Litigation from the Swedish Supreme Court's Aurora Judgment*, in 34 *Review of European, Comparative & International Environmental Law* 2 (2025), 566-71; A. Savaresi, *Verein KlimaSeniorinnen Schweiz and Others v Switzerland: Making Climate Change Litigation History*, in 34 *Review of European, Comparative & International Environmental Law* 1 (2025), 279-87.

complaint after repeated dismissals by administrative and judicial authorities. While Article 2 (right to life) was engaged in principle, the Court chose to examine the merits under Article 8 alone (paras. 537-538), noting similarities in the protective scope of both rights. Collectively, these innovations establish a precedent for human-rights-based climate protection under the Convention, likely to influence other Council of Europe member States' climate policies and future litigation strategies

This judgment is doctrinally innovative for several reasons: (i) it broadens Article 8 to encompass systemic, long-term threats like climate change; (ii) it articulates positive state obligations aligned with international commitments (e.g., Paris Agreement) and scientific benchmarks; (iii) it expands access to justice for civil society organizations; and (iv) it underscores procedural deficiencies in domestic climate litigation. Yet it stops short of recognizing an autonomous right to a healthy environment – a gap that invites criticism, especially in light of inter-American jurisprudence (e.g., IACtHR Advisory Opinion OC-23/17).

From a critical standpoint, several concerns emerge. First, expanding Article 8 in this manner relies on interpretive elasticity – this is both the judgment's strength as a living instrument but also its risk, as it can be seen as judicial policymaking beyond the Convention's text. The partly dissenting opinion by Judge Eicke even accused the majority of 'inventing' new rights (paras 16 et seq.). Second, while the decision prescribes obligations, it lacks doctrinal clarity on implementation standards: terms like 'appropriate', 'in good time', or 'net neutrality within three decades' are vague and may generate inconsistent application in future cases. Third, reliance on the margin of appreciation remains; the ruling may only apply tightly to Swiss domestic climate policy, limiting translatability across diverse European contexts.

Moreover, the judgment's enforceability is uncertain. As widely reported, the Swiss Parliament reacted through a vote rejecting the decision's implications – a clear expression of democratic resistance and signalling limits of supranational judicial authority. This reveals a tension between judicial innovation and democratic legitimacy, especially in deeply political policy areas like climate.

Methodologically, the ECtHR in *Verein KlimaSeniorinnen* adopted a functional-normative strategy, linking external scientific benchmarks and international commitments to Article 8 rights – an encouraging shift from individualized nuisance claims to rights grounded in collective, existential threats. Its endorsement of organizational standing also enhances access to justice in environmental contexts. Yet, the approach remains case-specific and lacks the doctrinal architecture to support future sustainability litigation – to date, there is no generalizable formula on burdens of proof, threshold levels, temporal parameters, or remedy packages.

Building upon the European Court of Human Rights' evolving approach to environmental protection and climate-related rights, the judgment in *Cannavacciuolo and Others v. Italy* (30 January 2025)[42] marks a significant development in the Court's environmental jurisprudence, particularly concerning the application of Article 2 ECHR – the right to life – in the context of large-scale environmental pollution. This case, involving the '*Terra dei Fuochi*' region in Campania, Italy, where illegal dumping and burning of hazardous waste by criminal organizations have led to severe health risks for residents, represents the first time the Court has found a violation of the right to life due to environmental pollution.

The Court's reasoning in this judgment is multifaceted. It emphasized the state's positive obligations under Article 2 ECHR, noting that protecting the right to life requires the state to take appropriate steps to prevent real and imminent risks to life, even in the absence of a direct causal link between the exposure and specific health outcomes. The Court highlighted the prolonged inaction of the Italian authorities in addressing the widespread and systematic pollution in the affected areas, despite being aware of the situation for many years. This inaction was deemed

[42] ECtHR, *Cannavacciuolo and Others v. Italy*, App. no. 51567/14 + 3, 27 February 2025. In the literature, see: I. Domenici, *The European Court of Human Right's landmark judgment in the case of Cannavacciuolo and Others v Italy*, in 34 *Review of European, Comparative & International Environmental Law* 2 (2025), 582-588.

to constitute a failure to fulfill the state's duty to protect life. Furthermore, the Court applied the pilot judgment procedure under Article 46 ECHR, recognizing the systemic nature of the problem and the need for general measures to address it. The Court required Italy to develop and implement a comprehensive strategy to tackle the environmental crisis in the '*Terra dei Fuochi*' region, including measures to monitor and prevent illegal waste disposal, protect public health, and inform the affected population. The Court set a two-year deadline for the implementation of these measures, underscoring the urgency of the situation.

In terms of procedural aspects, the Court addressed the admissibility of applications. It granted standing to individual applicants who were residents of the affected municipalities, acknowledging the direct impact of the pollution on their lives and health. However, the Court denied standing to associations, reiterating its established case-law that only natural persons can claim to be victims under Articles 2 and 8 ECHR. This decision underscores the Court's restrictive approach to standing in environmental cases, which has been a subject of critique among legal scholars.

The judgment also underscores the importance of transparency and public participation in environmental governance. The Court noted the lack of adequate information provided to the public about the risks associated with the pollution and the measures taken to address it. This omission was deemed to contravene the state's obligations under Article 2 ECHR, highlighting the integral role of informed public participation in the protection of human rights.

In its following decision in *Greenpeace Nordic and Others v. Norway*, the European Court of Human Rights articulated several doctrinally significant principles for climate-related human rights litigation, addressing climate change as part of a broader environmental problem. The core of the dispute concerned the compatibility of Arctic oil exploration licences with Article 112 of the Norwegian Constitution, which enshrines the right to a healthy environment for present and future generations. From this perspective, the case was formally and legally environmental in nature, as it revolved around the scope and justiciability of a

constitutional provision on environmental protection. Substantively, however, the applicants' argumentation was strongly climate-centred, grounding the alleged constitutional violation primarily in the contribution of new petroleum extraction activities to greenhouse gas emissions, global climate change, and the resulting long-term deterioration of the environment, including in an intergenerational perspective. More traditional environmental concerns – such as local pollution, direct harm to Arctic ecosystems, biodiversity loss, and impacts on marine fauna – were not absent, but remained peripheral to the central issue, namely the nexus between energy policy, fossil fuel exploitation, and the climate crisis.[43]

The Court reaffirmed that climate change is capable, in principle, of falling within the scope of Articles 2 and 8 ECHR, thereby consolidating its earlier case law on environmental harm and human rights. However, it adopted a strict interpretation of victim status under Article 34 ECHR, holding that NGOs and individual applicants must demonstrate a sufficiently direct and individualized impact, which was not satisfied by abstract or collective climate risks. The Court further emphasized the necessity of a close causal link between the impugned State conduct – namely, the granting of petroleum licenses – and the alleged interference with Convention rights, particularly where emissions result from downstream and extraterritorial activities. Additionally, it underscored the relevance of the margin of appreciation afforded to States in complex matters of energy policy and economic regulation. While declining to engage in substantive proportionality review, the Court clarified the procedural thresholds for climate claims, thereby delineating the admissibility architecture for future climate and environmental litigation before the Strasbourg Court.

Taken together, these cases demonstrate the European Court of Human Rights' progressive, albeit cautious, engagement with environmental protection. From the localized nuisance concerns

[43] For an initial scholarly commentary, see: P. Ganesan, *Leaving Out 'Leaving it in the Ground': The ECtHR's Greenpeace Nordic Judgment*, in *EJIL:Talk!*, November 10, 2025.

in *López Ostra* to the systemic climate obligations recognized in *Verein KlimaSeniorinnen*, and the unprecedented application of Article 2 to large-scale pollution in *Cannavacciuolo and Others*, the Court has incrementally expanded the interpretive scope of the Convention to address both immediate and long-term environmental threats. Within this trajectory, *Greenpeace Nordic and Others v. Norway* occupies a distinctive, if restrictive, position: while the application was declared inadmissible, the Court expressly acknowledged that climate change and environmental damages may, in principle, fall within the ambit of Articles 2 and 8 ECHR, thereby consolidating the Convention's applicability to global environmental risks. At the same time, the decision articulated innovative – yet constraining – principles concerning victim status, causation, and the evidentiary threshold required to challenge State climate-related policies, particularly in the context of extraterritorial and downstream emissions. This jurisprudential evolution reflects a shift from compensatory, individual-focused remedies toward the tentative acknowledgment of structural and collective environmental interests, coupled with an emphasis on positive State obligations, procedural guarantees, and public participation. Nonetheless, the Court's continued reliance on a wide margin of appreciation and restrictive standing rules underscores persistent doctrinal and practical challenges. The cumulative effect of this case law signals both the potential and the limitations of human rights law as a framework for environmental sustainability, highlighting the need for further refinement of admissibility standards, clearer guidance on States' implementation duties, and more effective mechanisms to safeguard human life and well-being in the face of escalating environmental crises.

5. *From Advisory Opinion OC-23/17 to OC-32/25: The Inter-American Court and the Legal Framework for Environmental Sustainability*

The jurisprudence of the Inter-American Court of Human Rights (IACtHR) has undergone a significant transformation in

recent years, evolving from a primarily anthropocentric approach to environmental protection to a more expansive and integrated understanding that recognizes the intrinsic link between human rights and the environment. This shift reflects a broader trend in international human rights law, where environmental considerations are increasingly seen as essential to the enjoyment of fundamental rights.

The Inter-American Court of Human Rights' Advisory Opinion OC-23/17, delivered on 15 November 2017 in response to a request by the Republic of Colombia, represents one of the most significant normative developments in the articulation of the interrelationship between human rights and environmental protection within international law, and it has been described as a landmark moment in the jurisprudence of the Court because it both consolidates prior case law and projects a new trajectory that situates the environment as an autonomous dimension of human rights protection under the American Convention on Human Rights.[44] The Colombian request was framed around the issue of transboundary environmental harm and the potential obligations of States under the Convention to prevent damage to marine ecosystems in the Caribbean that could have adverse

[44] C. Campbell-Duruflé, S.A. Atapattu, *The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law*, in 8 *Climate Law* 3-4 (2018), 321-37; R. Abello-Galvis, W. Arevalo-Ramirez, *Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, procedural and substantive implications of human rights duties in the context of environmental protection*, in 28 *Review of European, Comparative & International Environmental Law* 2 (2019), 217-22; L.C. Lima, *The Protection of the Environment before the Inter-American Court of Human Rights*, in *Revista do Instituto Brasileiro de Direitos Humanos* 21 (2021), 133-48; P. Siwior, *The Inter-American Court of Human Rights Advisory Opinion OC-23/17 on the Relationship between Human Rights and the Environment*, in *Review of European and Comparative Law* 3 (2021), 177-88; M.A. Tigre, N. Urzola, *The 2017 Inter-American Court's Advisory Opinion: changing the paradigm for international environmental law in the Anthropocene*, in 12 *Journal of Human Rights and the Environment* 1 (2021), 24-50; P. Trincado Vera, *Rights of nature in the Inter-American Court of Human Rights: Understanding the Ecocentric Approach to the Right to a Healthy Environment*, in 33 *Review of European, Comparative & International Environmental Law* 3 (2024), 521-35.

consequences for individuals both within and beyond national borders, but the Court seized the opportunity to issue a much more ambitious and expansive interpretation, going beyond the narrow focus of Colombia's submission in order to provide a systematic conceptualization of environmental rights in the Inter-American system. The opinion is thus not only a direct response to the specific question raised by Colombia but also a jurisprudential milestone that reconceptualizes the scope of States' obligations in light of contemporary global environmental challenges such as climate change, biodiversity loss, and pollution, challenges that have transboundary and intergenerational dimensions and that threaten the effective enjoyment of the rights to life, personal integrity, health, and even cultural identity. In order to justify this expansion, the Court drew upon the text and spirit of several provisions of the American Convention, most notably Articles 4 and 5, which guarantee the rights to life and personal integrity, and Article 26, which refers to the progressive realization of economic, social, and cultural rights, but it also relied heavily on the interpretative principle of effectiveness and the pro hominy approach, according to which the Convention must be read in the manner most conducive to the protection of the individual. In addition, the Court integrated into its reasoning the corpus juris of international environmental law, invoking principles such as prevention, precaution, and intergenerational equity, as well as references to soft law instruments like the Stockholm Declaration of 1972, the Rio Declaration of 1992, and the Paris Agreement of 2015, thereby situating its interpretation within a broader normative and institutional framework that reflects the increasing convergence of human rights and environmental protection in global legal discourse. What makes OC-23/17 particularly remarkable is the Court's recognition of the existence of an autonomous right to a healthy environment, a right that is not merely instrumental to the enjoyment of other rights but which possesses intrinsic value and is held both by individuals and by humanity as a whole, including future generations; this recognition not only consolidates the Court's earlier jurisprudence on the environmental dimensions of indigenous peoples' rights, as in cases like *Saramaka People v.*

Suriname[45] and *Yakye Axa Indigenous Community v. Paraguay*,[46] but also marks a doctrinal leap by detaching environmental protection from its exclusively derivative function and granting it an independent normative status. At the same time, the Court emphasized that environmental degradation can have direct and indirect impacts on the effective enjoyment of rights expressly enshrined in the Convention, particularly the rights to life and personal integrity, thereby affirming the indivisibility and interdependence of human rights and environmental protection and reinforcing the idea that environmental harm constitutes not merely an ecological issue but a human rights violation. The Court also went further by addressing the thorny issue of extraterritorial obligations, holding that States may bear responsibility under the American Convention for environmental harm that originates within their territory but produces serious effects on the enjoyment of rights beyond their borders, provided that there is a causal connection between the conduct of the State and the harm in question; in this respect, the Court drew upon general international law principles of jurisdiction and control, emphasizing that the decisive criterion is not territorial presence but rather the effective control that a State exercises over activities that generate a risk of significant transboundary harm. This interpretation is of profound importance because it extends the reach of human rights obligations in a manner consistent with the transboundary nature of environmental problems, and it resonates with parallel debates at the global level about the extraterritorial application of human rights treaties in contexts such as counterterrorism, migration, and corporate accountability. The Court also gave detailed consideration to procedural environmental rights, recognizing that the right to a healthy environment is operationalized through guarantees of access to information, public participation in decision-making, and access to justice in environmental matters, thereby aligning the In-

[45] IACtHR, *Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007.

[46] IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005.

ter-American system with developments under Principle 10 of the Rio Declaration, the Aarhus Convention in Europe, and more recently the Escazú Agreement in Latin America and the Caribbean. By emphasizing these procedural dimensions, the Court highlighted the democratic character of environmental governance and the necessity of ensuring that affected individuals and communities, particularly those in vulnerable situations such as indigenous peoples, Afro-descendant communities, and rural populations, have a meaningful voice in decisions that affect their environment and livelihoods. This procedural emphasis also serves as a safeguard against the arbitrary exercise of State power in the pursuit of economic development projects, requiring States to carry out prior environmental impact assessments, to disclose relevant information in a timely and accessible manner, and to provide effective judicial remedies against environmental harm, thereby strengthening the rule of law and the accountability of public authorities. The opinion also articulated a due diligence standard for States in relation to environmental protection, stressing that States must take preventive measures to avoid significant environmental damage, must apply the precautionary principle in situations of scientific uncertainty, and must cooperate with other States in addressing transboundary environmental risks, thus embedding environmental obligations within the broader framework of international cooperation and solidarity. Importantly, the Court underscored that these obligations are not merely aspirational but are enforceable under the Convention, thereby creating new avenues for litigation and advocacy within the Inter-American system. Scholars have noted that OC-23/17 is innovative in several respects: it confirms the autonomous status of the right to a healthy environment, it extends the reach of the Convention beyond territorial boundaries, it integrates principles of international environmental law into human rights interpretation, and it affirms procedural environmental rights as essential components of democratic participation and accountability. At the same time, the opinion has generated debates about its coherence, legitimacy, and practical implications. Some critics argue that the Court has stretched the text of the Convention beyond its original meaning, engaging in

a form of judicial activism that may undermine the legitimacy of its jurisprudence, while others contend that such an expansive interpretation is necessary to ensure the relevance of the Convention in the face of contemporary global challenges that were unforeseen at the time of its adoption. Another debate concerns the enforceability of the right to a healthy environment: while the Court affirms its autonomous status, it remains unclear how national courts and governments will translate this recognition into concrete policies, particularly given the structural obstacles of weak institutions, entrenched economic interests, and limited resources in many States of the region. Nonetheless, the normative impact of OC-23/17 should not be underestimated, as it has already influenced domestic constitutional courts and legislatures in Latin America, many of which have incorporated or strengthened environmental rights in their legal frameworks. Moreover, the opinion contributes to a broader global trend in which regional and international human rights bodies, such as the United Nations Human Rights Committee and the African Commission on Human and Peoples' Rights, are increasingly recognizing the interdependence of human rights and environmental protection, culminating in the United Nations General Assembly's recognition in 2022 of the right to a clean, healthy, and sustainable environment as a universal human right. In comparative perspective, the Inter-American Court's contribution is distinctive in its comprehensiveness and in its explicit acknowledgment of extraterritorial obligations, which goes beyond what many other bodies have so far been willing to affirm. This makes OC-23/17 a paradigmatic reference point not only for the Inter-American system but also for the global evolution of human rights law, as it exemplifies the capacity of regional courts to act as laboratories of normative innovation that may eventually influence global standards. Ultimately, Advisory Opinion OC-23/17 embodies a transformative vision of human rights, one that acknowledges that the protection of the environment is not merely an external policy concern but a constitutive dimension of the dignity, equality, and survival of human beings and communities, both present and future, and one that redefines the responsibilities of States in an era where ecological in-

terdependence is as decisive as political sovereignty. By situating environmental protection at the heart of the Inter-American human rights system, the Court has both responded to the pressing challenges of its regional context and contributed to the global legal conversation on the future of human rights in the Anthropocene, demonstrating that the legitimacy and authority of human rights law depend on its capacity to address the existential threats posed by environmental degradation.

Expanding the Inter-American Court's jurisprudential framework established in OC-23/17, Advisory Opinion OC-32/25 addresses the escalating climate emergency and its profound implications for the protection of human rights across the region. The Inter-American Court of Human Rights' Advisory Opinion OC-32/25, issued on July 3, 2025, represents a pivotal moment in the evolution of international human rights law, particularly concerning the intersection of environmental protection and human rights within the Americas.

Requested by the Republics of Chile and Colombia, this advisory opinion addresses the obligations of States in responding to the climate emergency, emphasizing the intrinsic link between human rights and environmental sustainability. The Court's analysis is grounded in the interpretation of various articles of the American Convention on Human Rights, including Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25, and 26, as well as the Protocol of San Salvador. The Court's reasoning reflects a comprehensive understanding of the multifaceted nature of the climate crisis and its profound implications for human rights across the region.

In its opinion, the Court acknowledges the climate emergency as an urgent and existential threat that undermines the enjoyment of fundamental human rights. The Court emphasizes that States have an obligation to prevent, mitigate, and remedy environmental harm that threatens human rights, including the rights to life, personal integrity, health, and a healthy environment. This obligation extends beyond national borders, recognizing the extraterritorial impact of environmental degradation and the need for international cooperation in addressing transboundary environmental harm. The Court underscores the importance of adopting a human rights-based approach to climate action, en-

suring that measures taken to address the climate crisis are inclusive, equitable, and respect the rights of all individuals, particularly those in vulnerable situations.

The Court further elaborates on the procedural dimensions of States' obligations, highlighting the necessity of ensuring access to information, public participation, and access to justice in environmental matters. These procedural rights are essential for effective environmental governance and for holding States accountable for their actions and omissions concerning the climate emergency. The Court also emphasizes the importance of protecting environmental defenders, recognizing the risks they face in advocating for environmental protection and the need for States to provide adequate safeguards to ensure their safety and enable their work.

A significant aspect of the advisory opinion is the Court's recognition of the rights of nature. For the first time, the Court affirms that nature possesses rights, including the right to exist, persist, and regenerate its vital cycles. This groundbreaking recognition underscores the intrinsic value of the natural world and the need for legal frameworks that protect the environment not merely as a resource for human use but as a subject with inherent rights deserving of protection.

The Court's opinion also addresses the disproportionate impacts of the climate emergency on Indigenous peoples, Afro-descendant communities, women, children, and other marginalized groups. It stresses that these communities often bear the brunt of environmental degradation and climate change, and therefore, States must adopt targeted measures to protect their rights and ensure their participation in decision-making processes related to climate action.

In terms of legal obligations, the Court establishes a reinforced standard of due diligence for States, requiring them to take immediate, effective, and sustained action to address the climate emergency. This includes adopting and implementing policies and measures to reduce greenhouse gas emissions, enhance resilience to climate impacts, and restore ecosystems. The Court emphasizes that these obligations are not aspirational but are legally binding, grounded in the States' commitments under the

American Convention on Human Rights and the Protocol of San Salvador.

The advisory opinion also discusses the role of businesses, particularly those in high-emission sectors such as fossil fuels and cement, in contributing to the climate crisis. The Court underscores the responsibility of States to regulate corporate activities to prevent environmental harm and to ensure that businesses respect human rights in their operations. It highlights the need for States to establish legal frameworks that hold businesses accountable for environmental degradation and human rights violations, including mechanisms for remedy and redress for affected individuals and communities.

Furthermore, the Court addresses the issue of climate-related displacement, recognizing that climate change can lead to forced migration and displacement, particularly among vulnerable populations. It underscores the obligation of States to protect the rights of climate migrants and to cooperate internationally to address the challenges posed by climate-induced displacement. The Court calls for the development of legal instruments and policies that provide protection and assistance to individuals and communities displaced by the impacts of climate change.

The Court also emphasizes the importance of education and awareness-raising in addressing the climate emergency. It calls on States to promote environmental education and to raise awareness about the human rights implications of climate change, ensuring that individuals are informed about their rights and the actions they can take to contribute to climate protection.

In its opinion, the Court reaffirms the principle of common but differentiated responsibilities, recognizing that while all States have an obligation to address the climate emergency, the extent of their responsibilities may vary based on their historical contributions to greenhouse gas emissions, their economic capacities, and their vulnerability to climate impacts. The Court underscores the need for international cooperation and solidarity in addressing the climate crisis, ensuring that resources and support are provided to those most in need.

The advisory opinion concludes by reiterating the urgency of the climate emergency and the need for immediate and sustained

action by States to protect human rights and the environment. It calls for a paradigm shift in how States approach climate action, emphasizing the integration of human rights considerations into environmental policies and the adoption of a holistic approach that recognizes the interdependence of human rights and environmental protection.

In light of these developments, it becomes evident that Advisory Opinion OC-23/17 laid the doctrinal foundations for a transformative reconceptualization of environmental protection within the Inter-American system, while Advisory Opinion OC-32/25 builds upon and extends this trajectory by explicitly situating the climate emergency at the center of the human rights agenda. Taken together, these opinions signal a decisive move away from a narrow, anthropocentric framework toward a holistic vision that embraces the interdependence of human rights, environmental integrity, and the rights of nature. They also underscore the Court's willingness to act as a normative pioneer, projecting a jurisprudence that both responds to the existential challenges of the Anthropocene and redefines the obligations of States in terms of prevention, cooperation, and intergenerational justice. The significance of this evolution lies not only in its capacity to shape domestic and regional legal orders but also in its contribution to the global dialogue on the role of human rights law in addressing ecological collapse and climate change, thus reinforcing the legitimacy of the Inter-American system as a key actor in the defence of both humanity and the planet.

6. *Between Incrementalism and Transformation: The ECtHR and IACtHR on Environmental Sustainability*

The jurisprudence of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) on environmental protection and sustainability offers a fertile ground for comparative analysis, since both courts have progressively expanded the interpretative scope of their respective human rights instruments in order to respond to ecological crises, yet they have done so through distinct doctrinal strategies,

institutional postures, and socio-political contexts, thereby producing two parallel but partially convergent trajectories that invite critical assessment. The ECtHR, beginning with *López Ostra v. Spain* (1994) and continuing through *Fadeyeva v. Russia* (2005), *Verein KlimaSeniorinnen Schweiz v. Switzerland* (2024), *Cannavacciuolo and Others v. Italy* and *Greenpeace Nordic and Others v. Norway* (2025), has developed a body of case law characterized by incrementalism, doctrinal caution, and reliance on the interpretative elasticity of existing Convention provisions, most notably Article 8 (right to private and family life) and, more recently, Article 2 (right to life), gradually adapting traditional human rights guarantees to the challenges posed by environmental degradation and climate change. In this framework, environmental harms are not recognized as violations of an autonomous right to a healthy environment but are instead refracted through the prism of rights traditionally conceived as civil and political, thereby requiring applicants to demonstrate that environmental degradation has reached a threshold of seriousness sufficient to impair life, health, or private life. This approach reflects the Strasbourg Court's general methodology of constitutional avoidance, whereby judicial legitimacy is preserved by anchoring innovation in existing treaty provisions rather than articulating new rights outright, yet it also generates significant limitations, as seen in the Court's restrictive approach to standing for associations and its reliance on the margin of appreciation doctrine, which allows states wide discretion in balancing ecological protection against economic interests. In contrast, the Inter-American Court, particularly through its Advisory Opinions OC-23/17 (2017) and OC-32/25 (2025), has pursued a jurisprudence of overt innovation and normative transformation, explicitly recognizing the autonomous right to a healthy environment as justiciable under the American Convention on Human Rights, affirming the intrinsic value of nature itself, and extending states' obligations beyond territorial borders in light of the transboundary and intergenerational nature of environmental harm. Unlike the ECtHR, the IACtHR did not confine itself to incremental extensions of existing rights but instead situated environmental protection at the very core of human rights law, grounding its rea-

soning in the *pro homine* principle, the interpretative rule of effectiveness, and a systematic integration of international environmental law principles such as prevention, precaution, intergenerational equity, and common but differentiated responsibilities. The differences in methodology are striking: whereas the ECtHR relies heavily on the 'living instrument' doctrine to adapt existing provisions to new threats, the IACtHR assumes a more constitution-making role, reconstructing the American Convention in light of contemporary global challenges and openly affirming novel legal concepts such as the rights of nature. This divergence has profound implications. On the one hand, the ECtHR's cautious incrementalism ensures greater acceptance within member states, as demonstrated by the continuing (if contested) domestic incorporation of its judgments, but it also risks undercutting the transformative potential of human rights law in the face of existential ecological threats, as states can invoke the margin of appreciation to delay or dilute climate obligations. On the other hand, the IACtHR's bold proclamations expand the normative horizon of international human rights law, offering a visionary template for integrating environmental sustainability and rights, but they also confront serious challenges of enforceability given the structural weaknesses of many Latin American states, the prevalence of extractivist economic models, and political resistance to supranational mandates. From a critical standpoint, the ECtHR's jurisprudence can be characterized as anthropocentric, reactive, and state-centred, primarily concerned with mitigating harms already suffered by individuals rather than preventing systemic ecological collapse, whereas the IACtHR advances a holistic, preventive, and ecocentric vision that foregrounds interdependence, solidarity, and intergenerational justice. Yet the comparison also reveals convergences: both courts emphasize procedural environmental rights – access to information, public participation, and access to justice – as indispensable to democratic environmental governance, and both have begun to articulate positive obligations of due diligence, requiring states not only to refrain from harm but to actively protect individuals from environmental risks, regulate private actors, and adopt adequate legal frameworks. The inter-regional comparison also exposes the

differential treatment of extraterritoriality: while the ECtHR has been reluctant to recognize obligations beyond territorial jurisdiction in environmental matters, the IACtHR has embraced extraterritorial duties as central to its jurisprudence, reflecting the transboundary nature of ecological harm in the Americas. Critically, one may argue that the ECtHR's reticence stems from the political sensitivity of expanding jurisdiction in a highly integrated and sovereignty-conscious Europe, whereas the IACtHR, operating in a region with acute ecological vulnerabilities and weaker domestic enforcement, perceives greater necessity in asserting supranational responsibility. Another divergence lies in the recognition of collective actors: while the ECtHR only recently and narrowly accepted the standing of associations in climate litigation, the IACtHR has consistently emphasized the rights of communities, indigenous peoples, and vulnerable groups, and in OC-32/25 went further by recognizing the rights of nature itself, thereby breaking with the anthropocentric paradigm that still shapes Strasbourg's jurisprudence. Nonetheless, the boldness of the IACtHR is tempered by its reliance on advisory opinions rather than contentious cases, raising questions about the concrete justiciability of its doctrines, whereas the ECtHR, though more cautious, grounds its jurisprudence in binding judgments that produce tangible, if limited, obligations on states. The cross-fertilization potential is evident: European jurisprudence could benefit from the inter-American vision of environmental rights as autonomous and intrinsically valuable, while the Inter-American Court could draw lessons from Strasbourg's procedural discipline, incrementalism, and mechanisms of supervision to enhance the enforceability of its ambitious pronouncements. Ultimately, the critical comparison reveals that both courts are engaged in a process of stretching the boundaries of their respective conventions to address the existential challenges of the Anthropocene, but they embody different judicial philosophies: the ECtHR as a guardian of gradual constitutional evolution and legitimacy within a politically diverse Europe, the IACtHR as a normative pioneer willing to reconceptualize human rights law in light of ecological collapse. The future of environmental human rights adjudication may depend on a synthesis of these approach-

es: a jurisprudence that combines the ECtHR's doctrinal rigor and enforceability with the IACtHR's visionary recognition of environmental rights as foundational to human dignity, intergenerational justice, and the survival of humanity and nature alike.

SUSTAINABILITY, CIVIL SOCIETY AND COURTS: WHAT ROLE FOR LOCAL GOVERNMENTS?*

Christina Binder

Abstract: *The contribution explores the role of the local level, in particular cities, in addressing climate change, with a specific focus on their relationship with civil society and the judiciary. It first examines the general role of cities/the local level as regards human rights implementation and the fight against climate change on a more general level, including as 'bridge-builders' to civil society and courts. In a next step, it will then turn to the example of the European Urban Charter III, whose 2nd revision was adopted by the Congress of Local and Regional Authorities of the Council of Europe in October 2023, and which incorporates promising approaches to fight climate change. Here, too, particular attention is given to mechanisms for facilitating civil society participation and to the role of courts. Overall, it is argued that the local level/cities turn to be ever more important; they are the level closest to the (urban) population.*

Keywords: European Urban Charter III (2023), Civil Society, Human Rights Culture, Climate Crisis, Local Level

1. *Introduction*

To explore the role of local governments in the context of sustainability and especially as regards the facilitation of civil society participation and the strengthening of courts seems most topical. This in particular is true in light of the complexity and the many facets of the climate crisis and the need for all actors, including the subnational/local level and most importantly cities to address it. Indeed, we understand sustainability in this contribution mainly in relation to the climate crisis and the various means how to fight climate change.

* The contribution is partly based on Christina Binder, Human Rights in the Face of the Climate Crisis: What Role for the Local Level? The Example of the European Urban Charter III (2023), ZfMR 2024/1, 66 ff.

With this focus, this contribution will first explore the role of the local level/cities to human rights implementation and the fight against climate change more generally, including as 'bridge-builders' to civil society and courts (Part 2). It will then turn to the example of the European Urban Charter III, whose 2nd revision was adopted by the Congress of Local and Regional Authorities of the Council of Europe in October 2023[1] and which incorporates, in our view, most promising approaches to fight climate change, including through the facilitation of civil society participation and by strengthening the role of courts (Part 3). Overall, it is argued that the role of cities/the local level is becoming increasingly important, as they are the level closest to citizens.

2. *The Climate Crisis and the Local Level: What Role for Cities from a Human rights perspective?*

The local level, especially cities, may play a crucial role in the fight against climate change, including for civil society and courts. This becomes evident, on the one hand, when exploring the increasingly important role of cities in human rights realisation as well as in the fight against climate change more generally (Section 2.1). On the other hand, it is reflected in their specific role in supporting civil society and courts as stakeholders in the fight against the climate crisis (Section 2.2).

2.1 *Cities as Human Rights Actors, Including in the Field of Climate Change*

A focus on the local level in relation to climate change corresponds to the growing importance of cities in human rights protection and when it comes to countering climate change more generally.

[1] CoE Congress of Local and Regional Authorities, European Urban Charter III (2023): Urban Living in the Era of Transformations, CG(2023)45-20, 25 October 2023.

In fact, several (soft law) instruments refer to the role of local and regional authorities in human rights protection. Recommendation 280 (2010) of the Congress of Local and Regional Authorities insists that 'local and regional authorities are not only agents of the central government: they secure human rights at the same time as they fulfil local self-government'. Also the Advisory Committee of the Human Rights Council noted that whilst '[i]t is the central government which has the primary responsibility for the promotion and protection of human rights, […] local government has a complementary role to play'.

An increasing role of local authorities and cities should indeed contribute to the broadest possible anchoring of human rights at both, the national and especially the subnational levels. This holds true even more, since human rights are not a purely legal project, but also based on political, sociological-anthropological and other factors, which makes their embedding in society as a whole all the more necessary. Such embedding may best be achieved when, alongside organized civil society, national human rights and ombudsman institutions as well as the media, also municipalities and cities are involved in the realization and, more specifically, the implementation of human rights. Since the local level is generally most directly in touch with the population, this ideally contributes to the development of a 'human rights culture' (a 'vernacularisation' of human rights). There is thus much to say in favour of the role of cities from a human rights perspective.

So, the local level becomes increasingly important for the implementation of human rights (as well as in countering climate change). Its potential is acknowledged likewise in legal scholarship. To cite, for instance, Federic Mégret:

> […] the embrace by many local actors of their human rights responsibilities remains a productive moment in the history of human rights, one which questions international human rights law's relentless focus on the state, whilst not giving up on the specificity of public obligations when it comes to governance. It can help us rethink how international law can actually be constituted from below rather than simply enforced from above. It is also one that has potential for enhancing democratic life as well

> as transnational cooperation and emulation. It represents an inherently pluralistic form of implementation of rights.[2]

Also when addressing the climate crisis, the relevance of the subnational level has been explicitly recognized. For example, in the context of climate action, the local level's potential in fostering popular backing and increasing legitimacy has been emphasized. Local authorities have also been praised for their practical effectiveness. Cities therewith become important human rights actors including in the context of climate change. They complement the national level in relevant areas especially as regards human rights implementation/sustainability and the fight against the climate crisis.

Conceptually, such increasing role of local governments in international law may also be argued on the basis of the principles of subsidiarity and participation. Especially the subsidiarity principle seems of key relevance. Thus, as affirmed by Ricardo Pavoni in the context of sustainable development:

> local authorities constitute the level of government closest to, and most immediately representative of, their citizens. They are therefore best placed to assess the needs and interests of citizens, and are – to a greater or lesser degree – directly accountable to them in case of regulatory failures […].[3]

Put differently, in line with the subsidiarity principle, the local level, as the one closest to citizens/urban resident, is frequently best placed to identify the most adequate policies for upholding human rights as well as in relation to climate change. In the context of the climate crisis, this was also put in terms of appropriateness. According to Oomen:

> […] one of the key challenges in combating climate change is the complexity of its causes and the vast array of potential ways

[2] F. Mégret, *Local and Regional Governments and Human Rights Cities*, in C. Binder et al. (Eds), *Elgar Encyclopedia of Human Rights*, London, 2022, 433 ff.

[3] R. Pavoni, *Sustainable Development as a Cornerstone of Cities Engagement with International Law*, in *Italian Yearbook of International Law* 30 (2020), 59 ff.

> to address them. The best fit will differ from sunny suburb to monumental town to tribal community. A strong role for subnational authorities allows for a focus on those measures that form an optimal fit with the people, place and purpose.[4]

So, the local level/cities have an important role in countering climate change. They facilitate the implementation of relevant obligations. Therewith, ideally, they should reduce the pressure on civil society and courts. At the same time, there is also a more specific contribution and role of the local level which will be discussed next.

2.2. *The Local Level Contribution to Civil Society and Courts in the Fight Against Climate Change*

The possible role for cities/the local level in relation to civil society and courts is particularly apparent if one considers the specific characteristics and comparative strengths of both, civil society and courts respectively.

To start with, civil society is of crucial importance as actor in the fight against climate change. Indeed, civil society's role in standing up against the climate crisis is multi-facetted and ranges from awareness raising in society at large and bridging the link to the broader population by drawing attention to the risks and consequences of climate change;[5] to political lobbying; and more specifically to providing expert advice and legal input (e.g. as *amicus curiae* in climate change proceedings).[6] Partly, these tasks

[4] B. Oomen, *Subnational Authorities and Climate Change*, in D. Ismangil, K. van der Schaaf, L. van Troost (Eds), *Climate Change, Justice and Human Rights*, Netherlands, 2020, 35 ff.

[5] See e.g. the Climate Change Campaign by Greenpeace, https://www.greenpeace.org.uk/challenges/climate-change/, or climate advocacy work by Global 2000, https://www.global2000.at/en.

[6] See e.g. the *amicus curiae* briefs submitted to the European Court of Human Rights and the Inter-American Court of Human Rights in relation to climate change proceedings before these tribunals (see e.g. ECCHR, Climate change before the European Court of Human Rights, https://www.ecchr.eu/en/case/klimawandel-vor-dem-europaeischen-gerichtshof-fuer-menschen-

are overlapping or complementary. So, civil society may be considered as a 'megaphone' of environmental/climate change-related concerns and contribute to drawing attention to the pressing need for climate action.

This is exactly where the possible role of cities and the local level lies in relation to civil society: the local level – as the level closest to the population – can strengthen civil society's crucial role in the fight against climate change, including by facilitating the link to the people. This may be achieved through the provision of communication channels, the facilitation of awareness raising in relation to climate change with focused projects, as well as by amplifying the role of civil society more generally. It also includes concrete support and empowerment of civil society, for example through the creation of a forum for their concerns but also through the provision of funding for relevant activities. Overall, the local level thus has an important role to play in supporting civil society/NGO activities. This holds true in relation to climate change action in general as well through support of civil society's role in protecting and realising the rights of the most marginalized sectors of the population (the poor, older persons, foreigners) who are generally particularly exposed to the challenges of climate change as well as in relation to the youth as generation which is specifically affected.

Similar considerations apply to courts. In fact, courts have turned to be most important actors in the fight against climate change. They may 'force' governments to act, e.g., when the legislative branch is blocked due to lacking majorities, or when the executive branch/government takes insufficient action. Several contributions in this volume focus in more detail on their role.[7] Regional human rights courts, for instance, have held govern-

rechte/; see generally, R. Heepen, *The Role of the Amicus Curiae before the Inter-American Court of Human Rights: How Growing Civil Society Participation in the Form of a Third Intervenor Has the Potential to Shape Human Rights-Based Climate Litigation*, WTI Working Paper No. 8 (2025).

[7] See e.g. Annalisa Savaresi, *Climate Justice at the ICJ: Human Rights Implications of the Advisory Opinion;* Flávia Piovesan, Isabelle Cristine Rodrigues Magalhães, *Climate Justice and the Inter-American Human Rights System: Challenges and Perspectives* in this volume.

ments accountable by establishing violations of relevant (human rights) treaty obligations in case of insufficient state action in relation to climate change. The *Verein klimaseniorinnen against switzerland* as decided by the European Court of Human Rights (ECtHR) in April 2024 is a relevant case in point.[8] The Advisory Opinion AO-32/25 of the Inter-American Court of Human Rights 'Climate Emergency and Human Rights' of 29 May 2025 establishes far-reaching obligations of states, including in relation to vulnerable population groups.[9] Likewise, domestic courts and tribunals point to the failure of governments for insufficient climate action in relevant judgments.[10] A particular strength of courts respectively is the concretisation of vague concepts such as 'safe environment' and the establishment of binding obligations which may be subject to enforcement. Indeed, especially in relation to the climate crisis, another crucial role of courts becomes apparent, namely to correct public wrongs (in addition to protecting individual rights).

On the other hand, there are certain constraints that courts are subjected to. These reside, on the one hand, in courts' institution-

[8] ECtHR (GC), *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland*, Appl. No. 53600/20, Judgment, 9 April 2024. Currently pending cases which could further detail the obligations of states in relation to climate change are ECtHR, *Müllner v Austria*, Appl No 18859/21, lodged in March 2021; ECtHR, *Greenpeace Nordic and Others v Norway*, Appl No 34068/21, application lodged in December 2021. See for further information also ECtHR, Factsheet – Climate Change, April 2024.

[9] IACtHR, Advisory Opinion AO-32/25 of 29 May 2025 'Climate Emergency and Human Rights'. See also the Advisory Opinion by the International Court of Justice (ICJ) 'Obligations of States in respect of Climate Change' of 23 July 2025; as well as the request for an Advisory Opinion on the human rights obligations of African states in addressing the climate crisis addressed to the African Court on Human and Peoples' Rights by the Pan African Lawyers Union of May 2025. See furthermore IACtHR, *Human Rights and the Environment,* Advisory Opinion OC-23/17, 15 November 2017; see also IACtHR, *Lhaka Honhat Association (Our Land) v. Argentina*, Series C No 400, Judgment, 6 February 2020.

[10] See eg UNEP, Global Climate Litigation Report: 2023 Status Review, 27 July 2023 which refers to a total of 2.180 climate related cases filed in 65 jurisdictions as of December 2022, https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review.

al limitations: courts might not be best placed to decide broad questions with respective financial implications in relation to measures addressing climate change. In such cases, parliaments are better suited, as they offer broader platforms for debate. Indeed, one may consider the role of courts rather in putting forward relevant considerations for decision-making. The weighing/proportioning of the respective considerations and the final decision lies in the hands of governments/the executive or parliaments. This reflects the fact that courts are generally bipolar in their decisions, whereas politics operates in a multipolar arena. Moreover, in light of the political dimension of climate litigation and its societal implications, courts risk backlash and opposition.

This is where the local level may come into play. In fact, likewise in relation to courts, the local level/cities have a crucial role to play. It can take multiple forms, be more direct or also more indirect. For example, more direct forms include the involvement of local authorities in court proceedings, through the provision or facilitation of factual information, statistical data etc. Cities/the local level may also inform the population/urban residents about the various forms of climate litigation; and also support relevant initiatives of *amicus curiae* briefs or strategic litigation. Examples for a more indirect backing would be attempts to increase the standing and legitimacy of courts: it includes an explicit commitment to the rule of law and the endorsement (of the independence) of courts as crucial institutions. It likewise comprises all kinds of good governance initiatives which foster transparency. So, the toolset of beneficial local government involvement is broad.

In sum, the subnational/local level has a crucial role to play in both, human rights and climate change. In abstract terms, through relevant mitigation and adaptation strategies[11] and more concretely, in fostering the role of civil society and courts in the fight against climate change. The role is multi-dimensional and the

[11] See CoE Congress of Local and Regional Authorities, A fundamental right to the environment: A matter for local and regional authorities, Report CG(2022)43-15final, 26 October 2022. According to Bakker, "[…] cities are progressively claiming a role as normative global climate actors […] by deve-

room for local level engagement is broad. A good example thereof is the European Urban Charter III (2023). Indeed, it appears as a perfect showcase of how the local level/cities can contribute to deal with climate change in a human rights-respectful way.

3. *The role of cities in the fight against climate change from a human rights perspective: the European Urban Charter III (2023)*

What can the local level – cities and local communities – add to 'human rights in the face of the climate crisis'? The European Urban Charter III (2003) may indeed serve as model here. The following first offers some general remarks on the Charter (Section 3.1) and a subsequent discussion of its/the Charter's approaches to the climate crisis (Section 3.2). Still, also on a more general level, when adopting a broader view, the Charter contains important guidance in the fight of climate change (Section 3.3).

3.1. *Generalities on the European Urban Charter III*

The European Urban Charter III was adopted in October 2023 by the Congress of Local and Regional Authorities, as second revision of the first European Urban Charter of 1992. The revision was considered necessary against the backdrop of changes in European urban life, being *inter alia* the climate crisis (next to Covid-19, Ukraine war, digitalisation/smart cities).[12] This is alluded to in the Charter's telling name which reads in full 'The European Urban Charter III (2023): Urban living in the era of transformations' and is likewise reflected in the comprehensive approach to climate change throughout the Charter.

loping and implementing climate laws and policies at the domestic level. […] the coordinated efforts by local governments have resulted in an explicit recognition that cities […] should be involved in national climate action". (C. Bakker, *Are Cities Taking Center-Stage? The Emerging Role of Urban Communities as 'Normative Global Climate Actors',* in *Italian Yearbook of International Law* 30 (2020), 81, 105).

[12] See the Preamble of the European Urban Charter III (*supra* n 1436).

3.2. *The European Urban Charter III's Approaches to the Climate Crisis*

Most generally, how to best respond to the climate crisis plays a prominent role in the European Urban Charter III; as regards mitigation and adaptation measures as well as in terms of participation and procedural tools. To exemplify, among the Charter's six Sections,[13] the entire Section 3 'Sustainable Development, Protection of Environment and Climate Change' features measures to address (amongst others) the climate crisis.[14] It contains a total of six principles, all of which may be, more or less directly, linked to climate action.

Climate change is also 'mainstreamed' as a cross-cutting theme and reflected in several principles/Sections throughout the Charter. The Charter therewith provides important guidance for climate change-related policies at the local level. On a general level, local authorities are directed to 'adopt multi-dimensional policies and streamline environmental protection and the fight against climate change into urban policies; mitigate the consequences and reduce the impact of climate change'.[15]

In doing so, urban residents' *participation in (environmental) decision making* is considered key. For example, the Charter di-

[13] The six Sections are the following: 1. Democracy and Urban Residents' Participation; 2. Social Rights, Economic and Cultural Development; 3. Sustainable Development, Protection of the Environment and Climate Change; 4. Integrity and Prevention of Corruption; 5. Security and Crime Prevention; 6. Digitalisation and Artificial Intelligence.

[14] As stated in the Explanatory Memorandum to the European Urban Charter: "[…] the consequences of the climate crisis are having an imminent impact on towns and cities, with a general rise in temperatures as well as an increase in the frequency and intensity of extreme weather phenomena as thunderstorms, heat-waves and heavy rain falls. Against the background of these threats affecting urban life, environmental issues and climate action in cities and regions are high on the agenda. Living conditions must be radically improved by implementing innovative local policies that respect the environment and combat climate change. In doing so, the respective principles should guide local authorities in their action". (European Urban Charter III (supra n 1436) Explanatory Memorandum, para. 48).

[15] Section 3, Principle 1 of the European Urban Charter III (*supra* n 1436).

rects local authorities to engage in awareness-raising and information campaigns, as well as the general education of urban residents in environmental affairs, to strengthen the participation of residents, including of resident foreigners, in environmental decision-making; intensify scientific research on various effects of climate change on different segments of the urban population; involve urban residents prior to development projects through environmental impact assessments. (Section 3, principle 2).

Likewise, a more general emphasis on consultation and participatory tools in the Charter's Section 1 'Democracy and Urban Residents' Participation' adds to and further refines the possibilities of urban residents' participation, including in environmental/climate change related decision making. Therewith, from awareness raising to the creation of conditions for informed participation, environmental (climate change) impact assessments, consultation and grass roots participation, a comprehensive toolset to involve the population (i.e. urban residents) in environmental/climate action is outlined in the Charter.

Also, possible *mitigation measures* to prevent climate change are referred to in the Charter. In terms of natural wealth and resources, *inter alia* the promotion of renewable energy and energy efficiency as well as the furtherance of green technology is emphasized (Section 3, principle 4). Likewise, the promotion of a *circular economy* as mentioned in the Charter should contribute to this objective by furthering the production of goods and services in a sustainable way (Section 3, principle 5). In Section 2 'Social Rights, Economic and Cultural Development', one principle – 'economic development and infrastructure' – more generally refers to the necessary support of a 'balanced and forward-looking economic development, taking into account environmental protection'. Also this could be relied upon to foster a climate change sensitive economy in most general terms.

The objective of *mitigation* is also acknowledged when it comes to *mobility*. The aspired 'sustainable mobility', the promotion and improvement of the attractiveness of climate friendly means of mobility – including affordable and adequate public transportation, the reduction of private cars and the city of 'short ways', where access to various urban services is situated in imme-

diate vicinity – contributes to counteracting climate change (Section 3, principle 6). This is also evidenced in relation to 'architecture and heritage' (Section 2, principle 9) with the reference to inclusive cities where 'the needs and expectations of various groups for a healthy, safe and stimulating living environment' (Section 2, principle 9) are accounted for and a quality urban landscape is developed with accessible distances to local services.

Moreover, the need of *adaptation* is duly reflected in the Charter**.** In relation to food security, resilient, cost efficient urban agrifood systems are considered, with specific mention of their necessary adaptation to climate change. Additionally, in the Section 'Security and Crime Prevention', the principle 'resilience' foresees the necessary provision of 'effective and adequate responses to crises and emergencies as natural disasters (e.g. heats and droughts, earthquakes, floods etc.)' as may likewise be caused by climate change.

Thus, numerous dimensions of relevance in the fight against climate change are addressed in the European Urban Charter III. The Charter contains a comprehensive catalogue of what could be done to deal with climate change; from participation in decision making to mitigation and adaptation policies. Therewith, the Charter is an important tool to guide climate relevant action of local authorities who are requested to comprehensively respond to the challenges of the climate crisis. It has a lot of potential. Indeed, the Charter's relevance is supported by the concise, Convention-style way in which it is drafted: the division in actionable principles and a more extensive/narrative explanatory memorandum should facilitate operationalisation.

In supporting the fight against climate change at the local level, ideally, the European Urban Charter III could alleviate the role of courts (and civil society). If all relevant mitigation and adaptation policies are adopted, the pressure on both actors will be reduced. Obviously, this remains an ideal. Reality looks different. That is why we will now explore broader – not necessarily directly climate-related – approaches in relation to civil society and courts in the European Urban Charter III and examine the role of the local level there.

3.3. *The Local Level and Its Role for Civil Society and Courts from the Perspective of the Charter*

The European Urban Charter III contains entry points for enhancing the role of both, civil society and courts also more generally. They relate to democracy and political participation, social issues, anti-corruption/rule of law, security and crime prevention as well as digitalisation and Artificial Intelligence (AI). The guidance provided by the Charter is considerable and thus may be useful in the fight against climate change.

To start with, the various – more general – instruments to further democracy and improve urban residents' participation should safeguard and support civil society action. Indeed, Section 1 of the Charter directs local authorities to guarantee the *basic freedoms of expression, assembly and association* within their sphere of competence.[16] This should ensure safe spaces for public debate and particularly the expression of the voices of vulnerable and marginalised groups of the population. Likewise, through the commitment to strengthening free, independent, plural and diverse media, the local level may contribute to civil societies' role in the fight against climate change.

Moreover, *consultation and participation* as provided in the Charter should further exchange with civil society.[17] This holds particularly true as regards the foreseen youth involvement, as

[16] European Urban Charter III (*supra* n 1436): "…FREEDOM OF EXPRESSION: recognise the fundamental value of the freedom of expression for democratic societies; strengthen free, independent, plural and diverse media; ensure safe spaces for public debate and expression for vulnerable and marginalised groups of the population. – FREEDOM OF ASSEMBLY AND ASSOCIATION: safeguard the right to peaceful assembly and association; secure interactions between citizens and guarantee safe spaces for individuals to gather in order to collectively express, promote, pursue and defend common interests. – FREEDOM OF MOVEMENT: ensure that everyone lawfully within the territory of a State enjoys the right to liberty of movement and freedom to choose their residence. …" (Ibid.)

[17] "…CONSULTATION AND PARTICIPATION: support inclusive dialogue between citizens and local authorities; promote citizens' consultation on projects affecting the community; ensure inclusive, responsive and informed forms of participation and decision making; promote direct involvement, in particular through local referendums and citizen assemblies. …" (Ibid.)

generation particularly affected by climate change;[18] and for the *involvement, inclusion, non-discriminatory participation* of particularly vulnerable and marginalised groups, which is likewise called for in the Charter.[19] Thus, especially the procedures to strengthening democracy and fostering participation in Section 1 of the European Urban Charter should open space for especially civil society in the fight against climate change.

Similar positive effects may be derived from the principles of Section 2 on *social rights, cultural and economic development* which should assist the fight against climate change, especially the role of civil society and courts, from a broader perspective. In fact, the principles of the second Section acknowledge urban living against the backdrop of rising social inequalities. They outline cities' possible contribution to counter challenges with a particular focus on social rights and issues; namely health, housing, education, work, social security and welfare.[20] Again, the re-

[18] '…YOUTH INVOLVEMENT: ensure and promote the participation of young people; encourage youth involvement and active citizenship through political education and lowering the minimum voting age to 16; involve the youth in planning, implementation, evaluation and decision-making processes'. (Ibid.)

[19] '… INCLUSION AND NON-DISCRIMINATION: ensure full, equal and effective participation for all, irrespective of race, colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity, sexual orientation, or other status; promote participation of vulnerable and marginalised groups'. (Ibid.)

[20] '…HEALTH: safeguard equal access to affordable and quality health care, including preventive healthcare; *ensure an environment and facilities conducive to the physical and psychological health*; promote proactive behaviours, sports and recreational activities; encourage community-based health initiatives and participation. … ECONOMIC DEVELOPMENT AND INFRASTRUCTURE: *support a balanced and forward-looking economic development, taking into account environmental protection***;** develop urban-rural interplay especially inter alia through adequate infrastructure; develop cooperation between public and private sectors; promote protected heritage as an asset for economic development. ARCHITECTURE AND HERITAGE: protect urban architecture and heritage; ensure space for arts and culture; ensure design for inclusive cities, *taking into account the needs and expectations of various groups for a healthy, safe and stimulating living environment; promote architectural creation and development for a high quality urban townscape*'. (Ibid, emphasis added).

spective dimensions may contribute to strengthening civil society; in particular the commitment to ensure an environment and facilities conducive to the physical and psychological health; as well the adherence to economic development, taking into account environmental protection; and the commitment to develop high quality urban landscape. All these commitments contained in the Charter may contribute to strengthen and back the claims by civil society to push for environmental protection and measures addressing climate change.

Further (indirect) guidance may be derived from Section 4, *integrity and prevention of corruption*.[21] Good governance (e.g. required integrity policies and ethical rules; transparency and oversight) furthers pro-active policies to mitigate climate change as it fosters the mobilization of all forces in achieving the overarching public/societal objective (here the fight against climate change), rather than deviating resources for private gain. The rule of law is strengthened which ideally (indirectly) supports the fight against climate change in the name of public-wellbeing. In a most abstract sense, this may contribute to the legitimacy of courts which enhances their standing in the fight against climate change.

Further guidance may be found in Section 5 of the Charter, *security and crime prevention*. Potential lies, as shown, especially in the field of adaptation, e.g., in case of natural catastrophes caused by climate change. More specifically, Principle 3 focuses on resilience,[22] building up responses to crises and emergencies

[21] More particularly, the principles of Section 4 establish the following. Principle 1 focusses most generally on integrity policy and ethical rules through various dimensions, including codes of conduct, fair recruitment and adequate training as well as the protection of whistle-blowers. The subsequent principles 'zoom in' on relevant key areas, principle 2 deals with potential conflicts of interests; principle 3 with dimensions relating to public procurement; and principle 4 most generally with measures relating to transparency and oversight. So, overall, the elements of good governance are provided for.

[22] "RESILIENCE: provide effective and adequate responses to crises and emergencies as natural disasters (e.g. heats and droughts, earthquakes, floods etc.), terrorist attacks or wars; develop contingency plans based on risk and needs assessments to strengthen resilience, including measures on rescue, food and energy security, water as well as essential services". (Ibid.)

as natural disasters inter alia through contingency plans. This should support civilian efforts in disaster relief, eg, when natural catastrophes (heat waves, storms etc) are caused by climate emergencies. All this indirectly contributes to civil societies' work in the fight against climate change.

Finally, Section 6, which deals with the various challenges/dimensions stemming from *digitalisation and Artificial Intelligence*, their potential but also their risks, may facilitate the work of civil society as well as of courts. In particular smart cities (in accordance with human rights), the furtherance of e-governance and e-decision making in line with the SDGs[23] may contribute to fight climate change by professionalising local level administration. For example, new information technologies may foster the participation of the local population in environmental and climate change related decision making. Guidance provided in the Charter may thus, indirectly, facilitate the work of civil society and courts in the fight against climate change accordingly.

In sum, the European Urban Charter III, by guiding local authorities, contributes to support the role of civil society and courts when it comes to countering climate change; in both, direct and indirect ways.

4. *Concluding appreciation*

Local authorities/cities may play an important role in states' endeavour to live up to the challenges caused by the climate crisis. Therewith, the local level becomes an important factor in the realisation of states' (human rights) obligations in relation to climate change. In fact, local authorities may most effectively complement the national level in the design and implementation of climate change related policies in a human rights respectful way.

[23] Principle 1 addresses the challenges stemming from new technologies especially for human rights through continuous evaluation and management. So, the fundamental transformations urban living has gone through because of digitalisation and artificial intelligence are acknowledged in this final Section.

This is most evident by taking the example of the European Urban Charter III which guides the action of local authorities (including) in relation to climate change. The European Urban Charter III is a great example of how to operationalize the contribution of the local level to international (human rights) obligations to address climate change. This may support the respective efforts of civil society and courts in various ways. So, in sum, the local level has a considerable – and so far underestimated – role to play in the fight against the climate crisis.

CIVIL SOCIETY STANDING IN SUSTAINABILITY LITIGATION: SHIFTING RESPONSIBILITY FROM STATES TO CIVIL SOCIETY

Alice Murgier

Abstract: *This article examines how evolving rules on legal standing are reshaping sustainability litigation by positioning civil society as a primary enforcement actor. Through a comparative analysis of climate and corporate accountability cases in Europe, it shows how courts increasingly relax admissibility requirements for NGOs while public authorities remain largely absent from litigation. Focusing on human rights-based climate cases and the French Duty of Vigilance Law, the article questions whether this procedural shift produces effective governance or risks institutionalising state passivity. It argues for a rebalanced enforcement model combining civil society participation with renewed public responsibility.*

Keywords: Sustainability Litigation; Legal Standing; Access to Justice; Civil Society; Environmental Governance

Introduction

Legal standing, or the ability of a party to bring a claim before a court, is a determining condition to bring any case in front of a court. It determines who may access judicial mechanisms and, by extension, who holds part of the enforcement power. Indeed, notably in the context of sustainability, legal standing is increasingly recognized as a major tool in the enforcement of environmental and human rights obligations.[1] Over the past decade, courts

[1] R.S. Abate, *Standing*. In *The Cambridge Handbook on Climate Litigation*, *Cambridge*, 2025, 105-130.

See also M.A. Martin, J. Landman, *Standing: Who Can Sue to Protect the Environment?*, in 19 *Insights on Law & Society* 1 (2020). See also G. Ghinelli, G., *Standing, Justiciability, and Burden of Proof in Climate Litigation: Challenges and Proposals*, in *YSEC Yearbook of Socio-Economic Constitutions* (2023). See also K. Sulyok, *Transforming the Rule of Law in Environmental and Climate Litigation: Prohibiting the Arbitrary Treatment of Future Generations*, in 13

across jurisdictions have opened their doors to civil society actors, particularly NGOs and municipalities (cities, towns, agglomerations), allowing them to initiate accountability cases for breaches of environmental and human right obligations, both against States and corporations. Civil society actors often lack a direct or individualized harm, which would complicate their ability to satisfy traditional standing requirements rooted in administrative and constitutional doctrines and justify the current movements to change the procedural rules. Lawmakers and courts across Europe and beyond have demonstrated a growing openness toward claims brought by civil society actors, particularly where collective interests or intergenerational harm are at stake. Landmark rulings such as *Urgenda v. The Netherlands*[2] and *Verein KlimaSeniorinnen Schweiz v. Switzerland*[3] have expanded the boundaries of admissibility, underscoring the evolving role of the judiciary in sustainability governance. This judicial receptiveness marks not just a procedural development, but a transformation in the allocation of responsibility for sustainable development: from the State alone to a broader network of societal actors. This development has empowered non-state actors and opened many possibilities for litigation. However, it also raises a critical governance question: is this power shifting responsibility for sustainability enforcement away from States and onto civil society?

This paper explores how courts, through standing rules and procedural decisions, are shaping sustainability governance. Specifically, it examines whether courts are delegating enforcement to civil society, either deliberately or through procedural constraints that take away executive State bodies-initiated enforcement. Through doctrinal analysis and case law from key jurisdictions, while focusing primarily on sustainability litigation in Eu-

Transnational Environmental Law 2 (2024), 475-501. See also Harvard Human Rights Program, *Intersectionality and Standing in Climate-Related Human Rights Cases*, 2024.

[2] Dutch Supreme Court, *Urgenda Foundation v. The Netherlands*, ECLI:NL:HR:2019:2007.

[3] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, Judgment of 9 April 2024.

rope, the paper questions whether the reliance on civil society as enforcers in this type of litigation is sustainable in the long term, or whether it institutionalizes State passivity in environmental governance.

1. *What Is Sustainability Litigation?*

Sustainability litigation refers to the body of judicial and quasi-judicial legal actions aimed at holding actors accountable for breaches of their legal obligations concerning environmental protection, social justice, and economic development, under the conceptual umbrella of sustainable development. It is the application of legal processes to compel or encourage compliance with environmental laws or treaties, and in the context of sustainability litigation, these processes are used to safeguard broader public goods such as clean air, safe water, and a stable climate.[4] This form of litigation engages legal mechanisms to advance climate goals, safeguard biodiversity, enforce corporate accountability, and promote environmental human rights. As courts, through hearing these cases, have increasingly become referees of environmental and social governance, sustainability litigation has emerged as a key tool to enforce both national and international sustainability norms. This definition is supported by a growing academic consensus that sustainability litigation is distinguished from traditional environmental litigation by its integration of legal principles from administrative, constitutional, international, and corporate law.[5]

[4] *UNEP, Global Climate Litigation Report: 2020 Status Review, 26 January 2021,* https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review

[5] J. Peel, H. M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge, 2015, chapters 2 and 5; J. Setzer, C. Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, *Grantham Research Institute on Climate Change and the Environment*, London School of Economics, July 2022 https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/; C. Voigt, *Courts and the Environment: Jurisprudence, Principles and Practice*, Oxford, 2020.

Peel and Osofsky (2015) note that sustainability litigation differs from traditional environmental lawsuits by focusing not only on ecological concerns but on interconnected human and developmental dimensions as well. Their work underscores the use of litigation as a strategic response to regulatory gaps and political inaction.[6]

The nature itself of sustainability litigation means related cases are on a wide spectrum, and several academics argue that courts are evolving into venues for broader sustainability governance. According to Burger & Gundlach (2017), looking at the landscape of climate litigation, sustainability litigation increasingly involves private actors, fiduciary duties, and transnational soft law.[7] Srivastav & Rafaty (2023) argue from a political economy perspective that litigation offers a counter-strategy to climate policy obstructionism.[8]

Prominent examples that reflect this multisectoral approach include the *Urgenda Foundation v. Netherlands* (2019) case, in which the Dutch Supreme Court ruled that insufficient emissions reductions violated Articles 2 and 8 ECHR:[9] the *Milieudefensie et al. v. Royal Dutch Shell* (2021) case, in which Shell was ordered to reduce emissions based on Dutch tort law and the UNGPs;[10] *Verein KlimaSeniorinnen Schweiz v. Switzerland* (ECtHR, 2024): Switzerland was found in violation of Articles 2 and 8 ECHR for failing to adequately protect elderly women from climate risks.[11] In the Paris case (*L'Affaire du Siècle*, 3 févri-

[6] J. Peel, H. M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, cit.

[7] M. Burger, J. Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, in 41 *Harvard Environmental Law Review* (2017), 109-168. Also published as a white paper by the Sabin Center for Climate Change Law.

[8] S. Pai, A. Srivastav, R. Rafaty, *Litigating the Transition: Climate Change, Energy, and the Courts in the Global South*, in *Nature Energy* 8 (2023), 14-25.

[9] Dutch Supreme Court, *Urgenda Foundation v. The Netherlands*, ECLI:NL:HR:2019:2007.

[10] District Court of The Hague, *Milieudefensie et al. v. Royal Dutch Shell*, C/09/571932 / HA ZA 19-379, Judgment of 26 May 2021.

[11] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, Judgment of 9 April 2024.

er 2021), the Tribunal administratif de Paris held the French State responsible for ecological harm by failing to meet its greenhouse gas reduction targets, recognized an ecological injury, and ordered the implementation of remedial measures in kind. [12]

Sustainability litigation is also determined regionally. The Grantham Research Institute at LSE has documented an exponential rise in climate and sustainability-related litigation. According to their 2022 snapshot, over 2,300 cases had been filed globally across 65 jurisdictions, including emerging economies such as Colombia, South Africa, and India.[13] In Latin America, sustainability-related litigation is being shaped by extractivist politics and supported by constitutional environmental rights.[14] In the EU, procedural access to sustainability litigation is a true challenge, and authors call for harmonized citizen suit mechanisms.[15]

Similar procedural obstacles have been observed in Asia, where despite robust environmental legislation in countries like the Philippines and India, access to courts remains uneven and often depends on judicial activism rather than institutional guarantees.[16] These regional disparities underscore the need for procedural reforms to ensure equitable access to justice across jurisdictions.

Sustainability litigation thus emerges not only as a tool to counter States' inability or unwillingness to adopt meaningful policies but increasingly as a proactive strategy for redefining governance obligations and institutional accountability. For the

[12] Tribunal administratif de Paris, *L'Affaire du Siècle*, N°1904967, 1904968, 1904972, 1904976/4-1, Judgement of 3 February 2021.

[13] J. Setzer, Ca. Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, *cit.*

[14] M. Tigre, N. Urzola, A. Goodman, *Climate Litigation in Latin America: Is the Region Quietly Leading a Revolution?*, in 14 *Journal of Human Rights and the Environment* 1 (2023), 67-93; D. De Carvalho, R. Santos Martins Da Rosa, *Climate Constitutionalism as a Foundation for Climate Litigation in Latin America*, im 16 *Journal of Human Rights Practice* 1 (2024), 71-88.

[15] G. Ghinelli, *Climate Litigation and Citizen Suits in the EU*, in *International Journal of Procedural Law* 14 (2024).

[16] E. Chaturvedi, *Climate Change Litigation: Indian Perspective*, in 22 *German Law Journal* 8 (2021) 1459-70.

purposes of this paper, the developments will be focused on environmental and climate cases.

2. *The Primary Responsibility of States in Enforcing Sustainability Laws*

Despite the rising visibility of civil society actors in initiating sustainability litigation, it is argued in this paper that the primary duty to enforce environmental and human rights obligations resides with the State. This responsibility is enshrined in international legal instruments, judicial doctrine, and normative principles.

The normative instruments that serve as foundations for sustainability litigation are mainly international conventions and treaties, which do not prevent national laws to be applied. The Rio Declaration for example, although adopted in 1992, remains foundational. Principle 2 affirms that 'States have… 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'.[17] Principle 10 also articulates the State's role in ensuring access to environmental justice, suggesting that citizen participation depends on institutional mechanisms under State control.

It is set out in article 4 of the Paris Agreement that ratifying States must develop and implement domestic climate policies consistent with their NDCs. The Agreement contains a transparency framework and a compliance mechanism that presuppose domestic enforcement by public authorities.[18]

Under human rights law, the UN Human Rights Committee[19] and the UN Committee on Economic, Social and Cultural Rights emphasize that States have positive obligations to regulate, monitor, and enforce laws to prevent environmental harms that affect protected rights. These obligations extend beyond non-interfer-

[17] UN Rio Declaration, 1992
[18] UNFCCC Paris Agreement
[19] UN General Comment No. 36, 2018

ence to active engagement.[20] Voigt (2020) discusses this proactive dimension of State responsibility under the ECHR, arguing that courts like the ECtHR have increasingly interpreted environmental degradation as falling within the scope of Articles 2 and 8, which place enforceable duties on governments.[21]

The UN Guiding Principles on Business and Human Rights (2011) further codify the State's obligation to regulate business impacts on the environment and human rights. Pillar I states that governments must ensure corporate compliance with human rights norms through legislation, policy, and adjudication.[22] We will later develop on corporate accountability in sustainability litigation, keeping in mind States are still the primary bearers of accountability in these matters.

Article 11 1) of the July 2024 EU Directive on corporate sustainability due diligence states that:

> Member States shall ensure that companies take appropriate measures to bring actual adverse impacts that have been, or should have been, identified pursuant to Article 8 to an end, in accordance with Article 9 and with this Article.[23]

Later on, article 15 states that Member States are the ones that must ensure that companies carry out periodic assessments of their own operations and measures, *those of their subsidiaries and, where related to the chain of activities of the company, those of their business partners*, to assess their compliance with their obligations as provided for in the directive.

As Knox and Pejan (2018) argue in their book *The Human Right to a Healthy Environment*, while civil society may act out of necessity, State failure to enforce environmental and social standards should be viewed as a dereliction of duty. The normative

[20] UN HRC, 2018

[21] C. Voigt, *Courts and the Environment: Jurisprudence, Principles and Practice*, Oxford, 2020.

[22] UNGPs, 2011

[23] European Union, *Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, OJ L, 2024

architecture of international law clearly places primary enforcement obligations on States.[24]

Thus, while civil society can, and often must, act to trigger legal accountability through a lawsuit, it is ultimately the State that bears or should bear the institutional and legal responsibility for enforcement. Effective sustainability governance requires restoring this balance.

3. *Legal Standing in Sustainability Litigation*

Legal standing (*locus standi*) refers to the eligibility of a party to initiate a legal action. Traditionally, standing doctrines have required claimants to demonstrate a direct, personal interest in the matter, effectively excluding collective or diffuse interests like environmental protection. In recent decades, however, courts have gradually expanded standing rules in response to the growing urgency of environmental harm and human rights violations.

Several international legal instruments in sustainability law provide for a broad access to justice in environmental matters. While individuals have no legal standing unless they have been personally harmed, civil society actors like collectives, groups and NGOs are the main claimants in these cases. Article 9 of the Aarhus Convention, for instance, obliges Parties to ensure access to justice for members of the public, including NGOs, in matters related to environmental law. The Convention emphasizes that barriers to justice must be reduced in environmental cases because of their importance to society at large.[25]

Similarly, Articles 6 and 13 of the European Convention on

[24] J. H. Knox, R. Pejan (Eds), *The Human Right to a Healthy Environment*, Cambridge, 2018, Chapter 1 and Chapter 8.

[25] United Nations Economic Commission for Europe. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). United Nations, Treaty Series, vol. 2161, 1998, p. 447. United Nations Economic Commission for Europe, https://unece.org/environment-policy/public-participation/aarhus-convention/text.

Human Rights (ECHR) support access to judicial remedies in human rights cases. These instruments form the legal backbone of an evolving jurisprudence that increasingly accepts the standing of civil society actors. Domestic legal systems have increasingly incorporated these norms through legislative and judicial developments, often as a response to public demand for climate accountability.

3.1 *Broadening Legal Standing*

In several countries and across several national jurisdictions, there is a movement toward widening access to justice in sustainability cases. In the United Kingdom, courts have traditionally imposed a high threshold for legal standing, particularly in judicial review cases. However, the concept of 'sufficient interest' as set out in the case of *R v Inland Revenue Commissioners,* has allowed for some degree of public interest standing.[26] Environmental NGOs have successfully invoked this principle in cases such as *R (Friends of the Earth) v Heathrow Airport Ltd*, where the UK Supreme Court had to assess compliance with the Paris Agreement in the context of airport expansion.[27]

Conversely, in Germany, the Federal Constitutional Court has shown greater openness. In its 2021 ruling on the Federal Climate Change Act, the court found that insufficient climate action violated future generations' rights under the German Basic Law.[28] The case was initiated by individual claimants supported by NGOs, illustrating how the court recognized both the intergenerational dimension of sustainability and the legitimacy of civil society-supported litigation.

In French law, an *action collective* is a legal procedure allowing multiple individuals, typically affected by the same or similar

[26] UK House of Lords, *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

[27] UK Supreme Court, *R (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52.

[28] *BVerfG,* 24 March 2021, 1 BvR 2656/18.

harm, to seek redress collectively, usually through representation by an association or other approved entity. While France was historically cautious about adopting class-action style mechanisms, significant reforms in the last decade have expanded access to collective litigation, especially in areas such as consumer rights, health, discrimination, environmental harm, and data protection. Introduced by the *loi Hamon* in 2014, the initial framework for class actions (*action de groupe*) was limited to consumer protection and required representation by accredited consumer associations.[29] Since then, the scope has gradually been broadened by legislation. A major evolution came with the law n°2022-401 of 21 March 2022 (known as the *Loi DDADUE*), which overhauled the collective action framework in France and came into force on March 24th, 2023. This law created a unified procedural regime applicable across various fields: consumer, environmental, anti-discrimination, health, and digital rights. Under this new regime, legal standing requirements to initiate a collective action is typically granted to designated associations, trade unions, and public entities, depending on the sector. One of the requirements is that the *objet social*, the main purpose of the organization is closely related to the claim and the case. For environmental actions, for example, standing is usually reserved for environmental protection associations (*associations agréées*) under Article L.141-1 of the *Code de l'environnement*. This requirement maintains a filtered access model, balancing procedural access with safeguards against abusive litigation.[30]

These developments illustrate that while legal standing for civil society actors is increasingly inscribed, its application remains uneven across jurisdictions. In some countries, courts have adopted a rights-based or public interest approach, enabling civil society organizations to litigate environmental and sustainability issues. For instance, in South Africa, Section 38 of the Constitution provides broad standing rules, allowing "*anyone acting in the pub-*

[29] *Loi n° 2014-344 du 17 mars 2014 relative à la consommation*; See *Deffains & Langlais, 2014*; Cour de cassation, Rapport annuel 2015

[30] See X. Delpech*, Vers une réforme de l'entreprise individuelle?, in Revue Lamy Droit Civil* 202 (2022).

lic interest" to approach the courts. This provision has enabled NGOs to bring environmental cases without needing to prove direct personal harm.[31] Similarly, in Colombia, the constitutional action of tutela allows individuals and groups to seek protection of fundamental rights, including environmental rights, in a flexible and accessible manner. Colombian courts have further recognized the *rights of nature*, notably in the Atrato River case,[32] setting a precedent for collective and ecosystem-based standing.[33]

In Europe, some national courts have expanded standing for environmental NGOs. For example, the Netherlands Supreme Court in *Urgenda Foundation v. State of the Netherlands* accepted standing for a public interest organization to sue on behalf of current and future generations based on Articles 2 and 8 of the ECHR.[34]

3.2. *Standing Disparities*

By contrast, jurisdictions that retain a narrow reading of standing continue to restrict civil society access to courts. In the United States, Article III of the Constitution requires plaintiffs to show a concrete and particularized injury, as reinforced in cases like *Juliana v. United States*, where the Ninth Circuit found the youth plaintiffs lacked standing despite significant climate-related concerns.[35]

[31] L. Feris, *Constitutional Environmental Rights: An Under-Utilised Resource*, in 24 *South African Journal on Human Rights* 1 (2008), 29-49.

[32] Corte Constitucional, Judgment T-622/16

[33] Case T-330/18, Greenpeace Nordic and Others v. European Commission (General Court, 25 March 2021)

[34] Dutch Supreme Court, *Urgenda Foundation v. The Netherlands*, ECLI:NL:HR:2019:2007; J. Peel & H. M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge University Press, 2015, chapters 2 and 5; J. Setzer & Ca. Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot', *Grantham Research Institute on Climate Change and the Environment*, London School of Economics, July 2022.

[35] M. Wilensky, *Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation*, in 26 *Duke Environmental Law & Policy Forum* 1 (2015), 131-179; United States District Court for the District of Oregon, *Juliana v. United States*, Case No. 6:15-cv-01517.

In the United States, standing remains more restrictive due to the constitutional requirement under Article III that litigants demonstrate a concrete and particularized injury. This limitation has posed challenges for environmental and climate litigants. In *Juliana v. United States*, youth plaintiffs alleged that the U.S. government's fossil fuel policies violated their constitutional rights.[36] Although the case gained international attention, the Ninth Circuit Court of Appeals ultimately dismissed it on the grounds that the plaintiffs lacked standing, reinforcing the difficulty of pursuing broad environmental claims in federal court.

Well-recognized environmental NGO Greenpeace has had many successes as plaintiffs in litigation. In Norway, Greenpeace successfully brought litigation alongside Nature and Youth in the People v. Arctic Oil case (2016-2020), challenging the government's oil exploration licenses in the Barents Sea.[37] The Oslo District Court admitted the case, and although the Supreme Court ultimately ruled against the claimants in 2020, Greenpeace's standing was not contested, with the Court recognizing its legitimacy to act on behalf of environmental concerns under Norway's Constitution (HR-2020-2472-P, para. 55). In the United Kingdom, Greenpeace was granted standing in a 2022 judicial review against the UK government's decision to authorise a new oil and gas licensing round in the North Sea. The High Court accepted Greenpeace's role as a public interest litigant but dismissed the case on the merits in July 2023. In the European Union however, Greenpeace has repeatedly faced procedural hurdles in accessing the courts. Notably, in *Greenpeace Nordic and Others v. European Commission*, the General Court dismissed the case for lack of standing, holding that Greenpeace was not individually concerned under Article 263(4) TFEU, despite its interest in challenging EU State aid for a Polish coal plant.[38]

Together, these cases show that civil society's ability to act as a

[36] United States District Court for the District of Oregon, *Juliana v. United States*, Case No. 6:15-cv-01517.

[37] Norwegian Supreme Court, *People v. Arctic Oil*, HR-2020-2472-P, Judgment of 22 December 2020.

[38] T-330/18 Greenpeace Nordic and Others v. European Commission

claimant is highly context-dependent**.** These disparities raise fundamental concerns. Legal systems that continue to limit standing to individually harmed parties may be structurally ill-equipped to address the collective, intergenerational nature of sustainability challenges. Where civil society is excluded, the burden of enforcement falls solely on the State, which is often the very actor whose inaction is being challenged.

Moreover, the expansion of civil society standing reflects not only legal change but also shifts in judicial culture. Specialized courts that hear more international human rights and environmental law cases tend to adopt a broader interpretation of standing, emphasizing the role of litigation in upholding public interest rulings. In contrast, jurisdictions where judicial restraint is emphasized, or courts used to hear cases on private matters who suddenly must assess a defendant's compliance of human rights standards (e.g. duty of vigilance litigation in France, as seen later on in this paper), tend to resist such expansions, leaving enforcement primarily to the executive or legislature.

As civil society actors continue to push the boundaries of legal standing in sustainability litigation, it is essential to examine to what extent, if any, courts are endorsing a new model of bottom-up governance. This question becomes particularly important when considering the broader governance implications of shifting enforcement from public to private actors. Indeed, the evolution of the legal landscape shows that sustainability litigation defendants can be States as well as corporations.

To summarize, the evolving landscape of legal standing in sustainability litigation illustrates a broader transformation in access to justice. Civil society actors are increasingly positioned or positioning themselves as legal enforcers of sustainability obligations, supported by international frameworks and a variable judicial willingness to broaden procedural access.

4. *Civil Society as the Driving Force in Climate Litigation*

In the last decade, the legal world has witnessed a profound transformation in the role of civil society within climate litiga-

tion. According to the United Nations definition, civil society encompasses 'associations, organizations and movements that are independent of the government and that represent the interests, will and values of citizens'.[39] This includes non-governmental organizations (NGOs), Indigenous peoples' groups, youth-led climate coalitions, and other organized networks acting in the public interest.

Courts in various jurisdictions have increasingly recognized the right of NGOs, community groups, youth movements, and municipalities to bring forward claims aimed at finding a judicial way to compel stronger environmental governance. These actors are not only gaining procedural recognition through procedural rules but are also achieving substantial outcomes in terms of court-ordered policy change. This section explores emblematic cases in Europe that illustrate civil society's rise as a litigation force, both against States and corporations, and highlights the absence of equivalent State-led initiatives.

Landmark rulings such as *Urgenda v. The Netherlands* and *Verein KlimaSeniorinnen Schweiz v. Switzerland*[40] have significantly broadened the scope of admissibility in climate litigation, marking a shift in the judiciary's role within environmental governance.

4.1 *Urgenda Foundation v. Netherlands (2019)*

In *Urgenda*, the Dutch Supreme Court held that the government had violated its positive obligations under Articles 2 and 8 of the ECHR by failing to take sufficient measures to prevent dangerous climate change. This was the first case in which a national court ordered its government to increase its climate ambitions based on human rights law. Brought by an NGO on behalf of current and future generations, the decision gave rise and en-

[39] *UN Civil Society Unit*, https://www.un.org/en/civil-society

[40] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, Judgment of 9 April 2024.

couraged to global movements and showed that civil society litigation could directly influence national policy.[41]

In *Urgenda*, the Dutch courts accepted that a civil society organization could bring a case on behalf of the general public to compel the state to reduce greenhouse gas emissions. This decision expanded standing by recognizing collective interests and grounding the case in fundamental rights under the European Convention on Human Rights (ECHR), specifically the rights to life and private life. Notably, the courts also implicitly acknowledged the importance of protecting future generations, even in the absence of direct, individualized harm.

The first instance court acknowledged Urgenda's capacity to represent the interests of current and future generations of Dutch residents, emphasizing the organization's aim to protect the living environment.[42] The Court of Appeals confirmed the judgment on the legal standing, but the Dutch Supreme Court affirmed that Urgenda had standing to act on behalf of the current generation of Dutch residents. The court noted that the interests represented by Urgenda were sufficiently similar and suitable for collective action under Article 3:305a DCC, but did not include future generations explicitly.[43]

4.2 *Verein KlimaSeniorinnen Schweiz v. Switzerland (ECtHR, 2024)*

The *KlimaSeniorinnen* case further expanded the jurisprudence on civil society standing. The European Court of Human Rights recognized that a group of elderly women could be considered victims under Article 34 of the ECHR due to their specific vulnerability to heatwaves and other climate impacts. The court's finding of a violation of Articles 2 and 8 established a precedent for recognizing collective standing based on demo-

[41] Dutch Supreme Court, *Urgenda Foundation v. The Netherlands*, ECLI:NL:HR:2019:2007.

[42] Hague District Court, 24 June 2015, semantius.nl

[43] Dutch Supreme Court, 20 December 2019, Brill+1semantius.nl+1

graphic vulnerability and inadequate climate policy. The European Court of Human Rights took a historic step by recognizing the admissibility of a climate case brought by a group of elderly women and their association, who claimed heightened vulnerability to climate-related harms due to their age and gender.

The ECtHR recognized the association's standing under Article 34 of the ECHR, noting that it was lawfully established, had a dedicated purpose aligned with its statutory objectives, and was genuinely qualified to represent affected individuals. The court emphasized the importance of allowing associations to bring claims in the context of climate change, given the collective nature of the interests involved (paragraphs 502 to 505 of the judgment). However, the court declared the individual applications inadmissible, stating that the applicants did not meet the criteria for victim status under Article 34 of the ECHR. The ECtHR outlined that, in climate change cases, individuals must demonstrate a high intensity of exposure to the adverse effects of climate change and a pressing need for individual protection. The court found that the applicants did not sufficiently establish these criteria (paragraphs 486-488 and 532-534 of the judgment).[44]

By doing so, the Court not only confirmed the justiciability of climate inaction but also reinforced the legitimacy of public interest litigation. This ruling shows a growing judicial willingness to address systemic environmental harms and to hold states accountable for inadequate climate policies, thereby redefining the role of courts as active participants in environmental governance.

4.3 *The Case of the Century or* Notre Affaire à Tous

In the context of the 'Affaire du Siècle', the issue of legal standing (*intérêt à agir*) was pivotal in the proceedings against the French State for its alleged inaction on climate change. The administrative courts recognized the standing of the four claimant

[44] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, Judgment of 9 April 2024.

organizations: Notre Affaire à Tous, Greenpeace France, Oxfam France, and the Fondation pour la Nature et l'Homme. To do so, the court acknowledged their statutory missions (*objet social*) focused on environmental protection and their sustained engagement in climate advocacy. This recognition was crucial in establishing their legitimacy to bring the case before the courts.[45]

However, a procedural challenge arose when the Paris administrative court in charge of executing the terms of the judgement (again, proceedings initiated by the NGO), in its December 2023 decision, deemed the State's obligations under the 2021 judgment fulfilled, primarily because the imposed penalty was for the symbolic sum of one euro.[46] This rendered the case ineligible for appeal under standard procedures, as low-value indemnity cases typically only permit cassation appeals (which is at the judicial and not the administrative level). The claimant organizations contended that their primary objective was not monetary compensation but the enforcement of ecological restoration measures. Responding to this argument, the *Conseil d'État*, France's highest administrative court, on December 13, 2024, authorized the appeal, emphasizing the significance of non-monetary remedies in environmental litigation. This difficult execution procedure, spear-headed by the NGOs, shows the role of civil society organizations in holding the State accountable for its climate commitments.

4.4. *Global Expansion and Going After Corporate Actors: Milieudefensie v. Shell, Youth for Climate Cases*

Outside the cases brought directly against States, civil society has also led the charge in litigation against corporate actors. In *Milieudefensie v. Royal Dutch Shell*, a Dutch court in 2021 or-

[45] Tribunal administratif de Paris, *L'Affaire du Siècle*, N°1904967, 1904968, 1904972, 1904976/4-1, Judgement of 3 February 2021.

[46] Administrative Court of Paris, 4th Section – 1st Chamber. (2023, December 22). Judgment No. 2321828/4-1: *Oxfam France, Notre Affaire à Tous, Greenpeace France v. The State*.

dered Shell to reduce its global carbon emissions by 45% by 2030 compared to 2019 levels, citing the company's duty of care under Dutch tort law. The case was brought by an NGO coalition and relied on both domestic legal principles and international soft law standards such as the UN Guiding Principles on Business and Human Rights.

Similarly, the *Youth for Climate* lawsuits in countries like Germany, Colombia, and the Philippines demonstrate the growing mobilization of younger generations to hold States accountable. These cases often involve strategic collaborations with legal NGOs, climate scientists, and international experts, again filling gaps left by State actors.[47]

In France, 14 individuals and civil society organization filed a lawsuit against France for failure to adopt pre-emptive measures to face the effects of climate change.[48]

These examples show that civil society is not just litigating but innovating legal argumentation, pushing courts to apply principles of intergenerational equity, planetary boundaries, and extra-territorial responsibility. In the next section, the paper will turn to a related area of civil society activism: corporate accountability litigation under the French Duty of Vigilance Law, where the State is similarly absent.

5. *Corporate Accountability and the French Duty of Vigilance Law: a Case Study*

The French Duty of Vigilance Law, adopted in 2017, marked a groundbreaking step in corporate accountability by requiring large companies headquartered in France to identify and mitigate human rights and environmental risks associated with their

[47] Federal Constitutional Court (Germany), *Neubauer et al. v. Germany*, Judgment of 24 March 2021, BVerfG, 1 BvR 2656/18; Supreme Court of Colombia, *Future Generations v. Ministry of Environment and Others*, Judgment STC4360-2018 (Tutela Judgment), 5 April 2018; Commission on Human Rights of the Philippines, *National Inquiry on Climate Change*, Final Report 2022.

[48] Tribunal judiciaire de Paris, *Notre Affaire à Tous et al. v. BNP Paribas*, 28 February 2023.

operations, subsidiaries, and suppliers. The law imposes a legal obligation to produce and implement a vigilance plan, with specific monitoring and remedial actions. What makes this law unique is not just its extraterritorial scope, but the fact that its enforcement mechanism is entirely dependent on civil society. The law specifically grants standing to NGOs and trade unions, while technically allowing any person who has '*quality to act*' or '*personal interest to act*' to file a claim.[49] Given the all-encompassing subject-matter of the law, it is difficult to picture any lawsuit spearheaded by an individual unrepresented by an NGO or a trade union.

This section examines how litigation under the Duty of Vigilance Law has developed in practice and analyses the implications of this exclusive reliance on civil society for sustainability enforcement. It further considers whether this model promotes access to justice and corporate accountability or whether it undermines the State's institutional responsibility. The cases highlighted here show how broad the scope of the law is: from greenhouse gas emissions to plastic pollution and fossil fuel financing, they promise a way forward in sustainability litigation.

5.1 *TotalEnergies and Greenhouse Gas Emissions*

Perhaps the most cross-cutting case brought under the Duty of Vigilance law, this case is a climate case, but brought against a company: in January 2020, fourteen municipalities along with six NGOs took the oil giant TotalEnergies to court, arguing it did not comply with its obligations under the law and requesting it be ordered to take the necessary measures to drastically reduce its greenhouse gas emissions. This is the first litigation in France that aimed to go after a multinational oil company for its impact on climate change.

In June 2024, after much back and forth regarding the competency of the court, the case was finally deemed admissible on its substance and claims. The court reaffirmed that environmen-

[49] *French Commercial Code*, Art. L. 225-102-4(II) (2024).

tal NGOs such as Sherpa and Notre Affaire à Tous had standing (*intérêt à agir*) to bring the claim, based on their statutory missions and sustained engagement with climate-related corporate accountability. Their recognised interest in environmental protection and long-standing activity in climate litigation were deemed sufficient to meet the standing requirements under Article 31 of the French Code of Civil Procedure, as interpreted in the context of the Duty of Vigilance Law.[50] Conversely, the court rejected the standing of several local authorities (*collectivités territoriales*) that had joined the proceedings as *parties civiles*. These included municipalities that argued that TotalEnergies' failure to reduce greenhouse gas emissions undermined their climate plans and exposed their populations to future harm. The court held that their claims lacked the specificity and proximity necessary to demonstrate a 'direct, personal and present' interest (*intérêt personnel, direct et actuel*), as required by French procedural law. In particular, the judges emphasized that the alleged climate-related impacts were too diffuse and general to meet this standard, especially in the absence of evidence of particularized harm within the claimant municipalities' territories.[51]

This reasoning illustrates a critical distinction in French climate litigation: while NGOs with relevant statutory missions are increasingly accepted as legitimate plaintiffs in cases involving systemic environmental harm, public entities must demonstrate localized and concrete impacts that differentiate their claim from the general public interest. The ruling underscores how procedural filters – particularly around legal standing – continue to shape access to justice in climate-related vigilance claims, potentially excluding actors who may suffer real but diffuse harm.

[50] See the three judgements rendered on the same day Court of Appeal of Paris, Division 5 – Chamber 12, June 18, 2024, No. 23/14348; Court of Appeal of Paris, Division 5 – Chamber 12, June 18, 2024, No. 21/22319; Court of Appeal of Paris, Division 5 – Chamber 12, June 18, 2024, No. 23/10583. (Cour d'appel de Paris, pôle 5 - ch. 12, 18 juin 2024, n° 23/14348; Cour d'appel de Paris, pôle 5 - ch. 12, 18 juin 2024, n° 21/22319 ; Cour d'appel de Paris, pôle 5 - ch. 12, 18 juin 2024, n° 23/10583)

[51] Debevoise & Plimpton, French Vigilance Law – Paris Courts Provide Clarifications, 17 July 2024 Debevoise & Plimpton, 2024

In addition, French law limits who can challenge urban planning authorizations. Article L. 600-1-1 of the *Code de l'urbanisme* (ELAN Law, 2018) restricts standing to organizations whose statutory purpose directly concerns urban planning. While intended to prevent abusive litigation, this rule can exclude environmental NGOs from contesting projects with significant ecological impacts, illustrating how legislative choices shape access to sustainability enforcement.

5.2 *Danone and Plastic Pollution*

In 2023, three NGOs sued the multinational food company Danone, alleging that its use of plastic packaging contributed significantly to plastic pollution and that its vigilance plan failed to mitigate these environmental harms. In this case that is still ongoing, the plaintiffs sought an order requiring Danone to develop a strategy for reducing plastic use, arguing that environmental degradation linked to plastic production and disposal is a form of human rights harm.

This case also shows how broad the scope of the Duty of Vigilance Law can be, testing whether it could apply not just to pollution and environmental damage through immediate supply chains but also to more diffuse environmental risks associated with a company's business model. Again, the litigation is led entirely by civil society actors without any participation by government regulators, even though many legal instruments against single-use plastic exist in France and the EU.

5.3 *BNP Paribas and Fossil Fuel Financing*

On an even more advanced sustainability goal level, in 2023, a coalition of NGOs brought a case against the French bank BNP Paribas, claiming that the bank's financing of fossil fuel projects violated its duty of vigilance under the law. Indeed, the plaintiffs argued that financing decisions which directly enable climate-damaging activities should fall within the scope of a com-

pany's due diligence obligations. In this case, the NGOs who brought the suit claim that BNP Paribas was making these financial decisions to the detriment of the fight against climate change.

The case represents an innovative use of the vigilance law to challenge indirect environmental harm. Yet again, the case was initiated by NGOs, highlighting the exclusive burden placed on civil society to drive forward legal interpretations and enforcement.

5.4 *Casino and Deforestation*

In the 2021 Casino case, a coalition of civil society organisations led by the French NGO Sherpa and the *Fédération des peuples autochtones du Brésil* filed a lawsuit in the French courts against the French retail group Casino, alleging the company's involvement in deforestation and human rights violations in the Amazon rainforest. The plaintiffs argued that Casino violated the French Duty of Vigilance Law by failing to prevent environmental harm and violations of Indigenous rights in its Brazilian and Colombian supply chains, notably through its subsidiaries and suppliers engaged in cattle ranching linked to illegal deforestation. This case is notable for being the first time a company has been sued under the Duty of Vigilance Law for environmental and human rights violations abroad related to deforestation. It also exemplifies the power of transnational civil society coalitions – including French, Brazilian, and Colombian organisations – in strategically using corporate accountability laws to extend environmental protection beyond national borders. The action illustrates how NGOs are increasingly mobilising legal tools to enforce climate and biodiversity obligations in the Global South, leveraging both domestic legislation and international human rights norms to challenge systemic environmental harms.

5.5 *Comparative Insights and Analytical Reflections*

Unlike in France, most other jurisdictions with corporate due

diligence laws, such as Germany's Supply Chain Act[52] or Norway's Transparency Act,[53] include roles for public authorities in enforcement. In Germany, for instance, the Federal Office for Economic Affairs and Export Control (BAFA) is empowered to investigate and impose administrative sanctions. This dual-track model offers an interesting contrast: enforcement is not left entirely to civil society, and the State keeps a role in overseeing compliance.

The July 2024 EU Directive on corporate sustainability due diligence, in its article 24, also clearly states that Member states shall appoint one or more supervisory authorities to supervise compliance with 'the obligations laid down in the provisions of national law adopted pursuant to Articles 7 to 16 and Article 22'.[54]

The French experience, by contrast, reflects a more privatized model of enforcement. Courts have become the main forum for interpreting and applying due diligence standards, and litigation outcomes depend on the strategic and financial capacities of NGOs and trade unions who solely initiate the cases. This raises concerns about fragmentation, and selective enforcement: companies may perceive litigation risk only where NGOs are active, leading to patchy compliance and legal uncertainty. The French model thus embodies a paradox: it formally recognizes corporate obligations to prevent harm but delegates their enforcement to actors with limited resources and no public mandate. While empowering in some respects, this approach may ultimately undercut the institutional accountability that sustainability governance requires.

Courts have largely become reactive institutions, responding to well-prepared claims from NGOs, thus decisions becoming policy and governance instruments rather than proactive enforcement actions by governments. This phenomenon raises important normative questions: Should courts continue to rely on private litigants to ensure compliance with obligations that are born

[52] Germany, *Lieferkettensorgfaltspflichtengesetz* (Supply Chain Due Diligence Act), 2021

[53] The Transparency Act - Forbrukertilsynet, 1 July 2022

[54] Directive 2024/1760

by public actors? Can such reliance be sustainable, given the financial, strategic, and institutional limits of civil society actors?

There is also an emerging risk of asymmetry: while civil society litigants expand doctrinal frontiers and push for accountability, States can then remain passive, even when national, international obligations, or public mandates would justify a more active legal role. This asymmetry distorts enforcement of sustainability measures, placing a disproportionate burden on civil society actors to initiate litigation.

In the next section, the paper turns to how judicial reasoning itself reinforces this model by shaping procedural thresholds and structuring access to sustainability enforcement.

6. *Judicial Reasoning and the Reallocation of Responsibility*

Courts have increasingly had to rule on civil society-led sustainability litigation. Consequently, these judgments play a key role in shaping who is allowed to litigate, under what conditions, and through which procedural pathways. Judicial interpretation of procedural rules, particularly those concerning standing, admissibility, and evidentiary burdens, directly influences the sustainability of civil society's role in enforcement of sustainability measures.

Courts act as procedural gatekeepers, deciding not only the substance of sustainability claims but also determining whether claims are admissible at all. In doing so, courts embed structural signals into their rulings: they may reinforce the primacy of civil society as enforcers, marginalize the potential role of State actors as proactive litigants, and indirectly institutionalize a model where environmental and human rights norms are pursued through private initiative alone (directly applying the legal provisions allowing civil society actors to be claimants).

6.1 *Relaxed Standing and Expansive Interpretation for Civil Society*

A recurring feature of judicial practice is the willingness to relax standing requirements for civil society litigants, particularly

NGOs and local authorities, when claims involve diffuse or intergenerational interests. For example, in the *Urgenda* case, the Dutch courts recognized that the NGO could represent the interests of future generations, although the first instance and appellate courts did so more clearly. Similarly, in *KlimaSeniorinnen*, the ECtHR broadened the interpretation of Article 34 of the ECHR to include a group with shared vulnerability rather than requiring individual harm.

This flexible interpretation of standing thresholds has a two consequences. On one hand, it democratizes access to justice and allows important sustainability issues to be adjudicated. On the other, it emphasizes civil society's procedural centrality without offering a corresponding expansion of the State's own standing or enforcement tools to pursue sustainability claims against private actors or foreign States. Thus, while NGOs gain access, public institutions are not compelled or incentivized to enforce their own laws.

6.2 *Admissibility Doctrines and the Procedural Hurdles faced by Public Bodies*

In contrast to this expansive approach for civil society, courts often impose more rigid procedural expectations on public bodies. For instance, in cases where municipalities or States seek to intervene in transnational litigation or initiate claims under international law, courts frequently invoke doctrines such as sovereign immunity, lack of jurisdiction, or inadmissibility on procedural grounds.

A comparative illustration comes from U.S. federal courts, where State-led climate lawsuits against fossil fuel companies have frequently faced removal battles and justiciability challenges. In *City of Oakland v. BP* and similar cases, it has been debated in courts whether climate torts raised by public plaintiffs belong in state or federal court, often resulting in prolonged procedural stalemates that weaken the momentum of State litigation.[55]

[55] United States Court of Appeals for the Ninth Circuit, *City of Oakland v. BP p.l.c.*, No. 18-16663, 2020.

In *Grande-Synthe v. France* (Conseil d'État, 2021), the municipality of Grande-Synthe – supported by other local governments and NGOs – challenged the French State for failing to meet its climate targets under the Paris Agreement and national law. The Conseil d'État ruled that France had a legal obligation to take additional measures to ensure compliance with its emissions reduction commitments, reinforcing the judiciary's role in monitoring State responsibility in climate action.[56]

In *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) (ICJ, 2015), the International Court of Justice (ICJ) ruled that Costa Rica had legal standing to bring claims against Nicaragua for environmental harm to its wetlands, reinforcing the principle that States can invoke international environmental law obligations.[57]

However, in the duty of vigilance *TotalEnergies* case developed previously, the Court of Appeals also excluded local authorities from having any legal standing. In its decision of 18 June 2024, the Paris Court of Appeal offered significant clarification regarding the conditions under which local authorities may claim standing in climate litigation. The court emphasized that while climate change is a global phenomenon, individual municipalities must demonstrate a specific and localized impact on their territory to justify their admissibility. It held that the mere fact that all regions are affected by global warming does not suffice to establish a local public interest necessary for legal standing; instead, a distinct and measurable effect of climate change on the applicant's territory must be shown (p. 19 of the judgment). However, the court also showed flexibility in its assessment: it acknowledged the City of Paris's standing on the basis of its climate risk exposure, the existence of its municipal climate action plans, and its inclusion in the European Union's "100 Cli-

[56] Conseil d'État (France), *Commune de Grande-Synthe et autres*, 1 July 2021, No. 427301.

[57] International Court of Justice, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment of 16 December 2015.

mate-Neutral Cities by 2030" initiative.[58] Notably, the ruling also referred to precedent from the Conseil d'État, which had previously accepted Paris's admissibility in national climate proceedings, thereby suggesting a broader effort to harmonize judicial reasoning across jurisdictions in the context of climate justice.[59]

6.3 *Procedural Justice and the Question of Institutional Balance*

While civil society participation enriches sustainability litigation, an overreliance on civil society to carry the procedural burden changes the institutional balance of accountability. Procedural justice is not only about who gets to speak, but about who is expected to act. If courts expect NGOs to enforce corporate accountability and climate targets through litigation, they risk transforming what should be a State responsibility into an outside force.

This dynamic raises concerns about equality of arms. Civil society organizations can lack stable funding, face intimidation, and operate under restrictive legal regimes. Access to courts can be limited by cost, procedural complexity, and the unpredictability of judicial outcomes. In contrast, State actors possess formal authority, enduring legal mandates, and access to institutional expertise – yet they are increasingly absent from enforcement of sustainability measures and local authorities often excluded from sustainability litigation.

Judicial reasoning should therefore be examined not only for its outcomes but for the institutional models it reinforces. Courts may unintentionally perpetuate a division of labor in which enforcement is privatized while State responsibility is diluted. A more balanced model would involve not only procedural openness to civil society, but also clearer expectations and institutional reforms with precise enforcement mechanisms and timelines to enable proactive State participation.

[58] Cour d'appel de Paris, *Amnesty International France et autres v. TotalEnergies*, 18 June 2024, RG n° 23/14348, page 29.

[59] Ibid.

In the next and final substantive section, the paper reflects on whether this division of responsibility is tenable, legitimate, and conducive to long-term sustainability enforcement.

7. *Is Civil Society a Sustainable Substitute for the State?*

7.1 *Structural Risks of Over-Reliance on Civil Society*

One of the central concerns is the excessive burden placed on civil society organizations (CSOs) to drive complex, costly transnational litigation in sustainability matters. Cases brought under the French Duty of Vigilance Law, the European Convention on Human Rights, or emerging due diligence laws require intricate legal strategies, cross-border coordination, access to expert evidence, and long-term financial commitment. As Peel and Osofsky (2015) in chapters 2 and 5 of their book, note, climate litigation often imposes severe material and procedural burdens on NGOs, especially in transnational cases, amplifying resource asymmetries between civil society and corporate defendants.[60] Similarly, Osofsky's 2023 essay in the Northwestern University Law Review emphasizes that the increasing complexity of technical evidence in sustainability litigation widens resource disparities, limiting equitable access to justice.[61]

This asymmetry can lead to selective enforcement. High-profile cases often reflect the strategic priorities of better-funded NGOs in the Global North, while widespread environmental harms affecting Indigenous populations or communities in the Global South remain under-litigated.[62] This imbalance risks re-

[60] J. Peel & H. M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge, 2015.

[61] H. M. Osofsky, *Litigating Climate Change Infrastructure Impacts*, Nw. U. L. Rev. Colloquy (2023). https://scholarlycommons.law.northwestern.edu/nulr_online/336.

[62] M. Tigre, N. Urzola, and A. Goodman, *Climate Litigation in Latin America: Is the Region Quietly Leading a Revolution?*, in 14 *Journal of Human Rights and the Environment* 1 (2023): 67-93. D. De Carvalho, and R. Santos Martins Da Rosa. *Climate Constitutionalism as a Foundation for Climate Liti-*

producing global inequalities in access to environmental justice, and civil society actors must take it into account when initiating litigation, so as not to take over the issue. Moreover, litigation is specific to certain breaches and cannot include a wider scope (subject-matter, time and space must be limited) violations rather than structural or policy-based remedies. Courts are limited by procedural and jurisdictional constraints, and their capacity to order far-reaching institutional reforms is inherently constrained.

An additional challenge is the escalating use of retaliatory legal tactics against civil society actors. Strategic Lawsuits Against Public Participation (SLAPPs) have become increasingly prevalent as responses to sustainability litigation. In Europe, the European Centre for Press and Media Freedom and the Coalition Against SLAPPs in Europe (CASE) have documented over 570 SLAPP suits as of 2022, many targeting environmental defenders, journalists, and NGOs involved in sustainability litigation.[63]

Energy Transfer LP v. Greenpeace International is part of a series of aggressive legal actions taken by pipeline developer Energy Transfer against environmental NGOs. The first case was filed in 2017, accusing Greenpeace and other defendants of engaging in 'eco-terrorism' and violating the Racketeer Influenced and Corrupt Organizations Act (RICO). That case was dismissed in 2019 due to lack of plausible allegations of fraud or criminal conduct. Subsequently, in 2019, Energy Transfer filed a second suit in the U.S. District Court for the District of North Dakota, alleging defamation and tortious interference related to the defendants' opposition to the Dakota Access Pipeline.[64] Greenpeace and co-defendants characterized the case as a textbook example of a SLAPP suit, aiming to suppress legitimate activism. In March 2025, a North Dakota jury found Greenpeace Inc., Greenpeace International, and Greenpeace Fund, Inc. liable for

gation in Latin America, in 16 *Journal of Human Rights Practice* 1 (2024): 71-88.

[63] CASE & Greenpeace, *SLAPPs in Europe: How the Rich and Powerful Silence Environmental Activists*, 2022; ECPMF, 2022.

[64] North Dakota District Court, Energy Transfer LP v. Greenpeace International, 30-2019-0V-00180

nearly $667 million in damages to Energy Transfer LP and its subsidiary, Dakota Access, LLC. The lawsuit stemmed from Greenpeace's involvement in the 2016-2017 protests against the Dakota Access Pipeline (DAPL), which Energy Transfer alleged caused significant delays and financial losses.[65]

The mere filing of this case had a chilling effect on environmental advocacy, but the outcome and its proportion showed the vulnerability of CSOs in adversarial legal contexts.[66]

In France, TotalEnergies has similarly initiated defamation proceedings against environmental activists and NGOs critical of its climate record. These tactics mirror a global trend where powerful entities use legal systems not to pursue justice, but to silence dissent.[67] The result is a double burden for civil society: they are the primary actors to enforce sustainability norms which should be enforced by State actors, while simultaneously facing punitive litigation and retorsion, further draining their resources.

7.2 *Legitimacy and Democratic Accountability*

Beyond questions of capacity, the democratic legitimacy of a civil society-led enforcement model warrants scrutiny. NGOs, while often deeply connected to citizens through advocacy networks and community engagement, are not elected bodies. Their governance structures, decision-making processes, and strategic litigation choices are not subject to public accountability. This raises important questions about who gets to define priorities in the sustainability agenda and through what enforcement mechanisms.[68]

[65] North Dakota Monitor, February 2025 ; South Dakota Search Light, March 2025; Sabin Center for Climate Change Law. *Energy Transfer LP v. Greenpeace International*. Climate Case Chart

[66] EarthRights International, *Strategic Litigation Against Greenpeace Dismissed*, 2020

[67] Sherpa, *TotalEnergies and Legal Threats Against Civil Society*, 2023.

[68] V. C. Keating, F. Thrandardottir*, NGOs, Trust, and the Accountability Agenda*, in 19 *The British Journal of Politics and International Relations* 1 (2016), 134-51.

The problem is further seen in contexts where civic space is shrinking. Reports by the UN Special Rapporteur on Environmental Defenders and civil society coalitions have documented a rise in legal repression, surveillance, and violence targeting environmental defenders across the globe.[69] This, as well as SLAPP suits, show that legal empowerment without parallel institutional protection can expose activists to unacceptable risks, especially in jurisdictions lacking rule-of-law guarantees.

Moreover, while some civil society organisations operate transparently and with wide community engagement, there is no guarantee they will always represent all citizens. This variance complicates the argument that civil society can substitute for public regulation in a legitimate or representative way. The growing concentration of enforcement responsibility in unelected, donor-funded entities, without sufficient oversight or coordination with public authorities, risks undermining the legitimacy of the broader sustainability regime.

7.3 *A Path Toward Institutional Rebalancing*

Rather than scaling back civil society's role, the goal must be to re-integrate States as central enforcers of sustainability obligations. Judicial and legislative reforms should aim to clarify the responsibilities of public authorities in voted legislation, with clear targets and objectives to fulfill, lower procedural barriers for State-led litigation, and establish frameworks for coordinated action between governmental and non-governmental actors.

For example, the French Duty of Vigilance Law could be amended to allow public prosecutors or administrative authorities to initiate claims against non-compliant corporations, thereby institutionalising enforcement beyond accredited NGOs. As seen in earlier sections, the 2024 EU Corporate Sustainability Due Diligence Directive (CSDDD) already takes steps in this direction by requiring Member States to designate supervisory au-

[69] UN OHCHR, *Report of the Special Rapporteur on Human Rights Defenders*, 2022.

thorities with investigatory and sanctioning powers. National parliaments should take this opportunity to embed judicial review mechanisms that complement civil society litigation.

Moreover, hybrid enforcement models could be adapted to sustainability governance. These involve information-sharing protocols, joint investigations, and shared legal standing between regulators and NGOs. Such collaboration can leverage the legitimacy and authority of public institutions with the agility and grassroots intelligence of civil society (Stephenson, 2020). Quasi-judicial procedures and advisory opinions could also take a larger place in the framework.

Although courts play a role in signalling institutional expectations, enforcement is still difficult and civil society actors often must make sure the State is complying with its obligations as set out by judicial rulings. In *Urgenda v. The Netherlands* (2019), the Dutch Supreme Court explicitly urged the government to strengthen climate policy, grounding its decision in Articles 2 and 8 ECHR. [70] More recently, in *Verein KlimaSeniorinnen v. Switzerland* (ECtHR, 2024), the European Court of Human Rights acknowledged the structural nature of State inaction and underscored the need for legislative and policy reform.[71] The case raises the question of whether such litigation could have been brought by a State actor. Although Switzerland was the respondent, no domestic public authority initiated a proactive claim seeking stronger international commitments or actions by third parties. Instead, the burden of enforcement once again fell to civil society at the judiciary level and is still ongoing on the political level. As part of the implementation process overseen by the Council of Europe's Committee of Ministers (representing all 46 member states), on October 9, 2024, Switzerland submitted an action plan to the Committee, signaling its intent to take limited steps but falling short of fully executing the Court's verdict

[70] Dutch Supreme Court, *Urgenda Foundation v. The Netherlands*, ECLI:NL:HR:2019:2007.

[71] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20, Judgment of 9 April 2024.

by selecting only a handful of measures and laws voted and to be implemented starting in 2025.[72]

Finally, international and regional bodies – such as the UN Human Rights Council, the OECD, and the European Union – should articulate standards that compel proactive State participation in sustainability enforcement.

7.4 *Conclusion: Shared Responsibility for Sustainable Enforcement*

Civil society actors have been at the forefront of sustainability litigation, stepping in where States have failed to act. Their role has been essential in shaping legal doctrine, raising public awareness, and holding States and corporations to account. Yet the current model, in which enforcement is de facto outsourced to NGOs, is neither stable, reliable nor equitable.

A robust and resilient enforcement system must rest on a foundation of shared responsibility. This entails empowering and compelling public authorities to fulfil their obligations while continuing to support the critical role of civil society. It requires legal frameworks that protect activists from retaliation, provide public bodies with adequate resources, and promote collaborative mechanisms across sectors. Only through such institutional rebalancing can sustainability litigation evolve into a durable pillar of environmental and human rights governance.

[72] Communication from Switzerland concerning the case of Verein Klima-Seniorinnen Schweiz and Others v. Switzerland (Application No. 53600/20), October 9th, 2024

CLIMATE CHANGE LITIGATION IN JAPAN AND THE STANDING TO ASSERT THE INTERESTS OF 'FUTURE GENERATIONS'*

Miki Kadota

Abstract: *Recent climate change litigation in Japan asserts the freedom of future generations. Unlike in other countries, no legal precedents in Japan are observed regarding the issues of rights of future generations. This paper examines the claims of 'future generations' as an issue of asserting third-party rights, a topic of long-standing debate in Japan, presenting them as a way of potential argument. While third-party standing has been rejected in principle under the incidental constitutional review system, this paper suggests that such claims should also be heard, particularly given the seriousness of climate change and the lack of alternative redress.*

Key Words: Comparative Constitutional Law, Climate Change Litigation, Third-Party Standing, German and U.S. Law, Future Generations

1. *Introduction*

Can citizens today decide the fate i.e. the interests or burdens of future generations? Under the key concept of 'interests of future generations',[1] how should we consider the interests of 'unborn citizens'? This paper examines, from a comparative constitutional perspective, how the interests of future generations are

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[1] Although it is often discussed as the 'rights' of future generations, this paper uses the term 'interests', taking into account the skepticism as to whether such a concept truly entails the nature of subjective rights. For reference, see the following link. https://www.un-ilibrary.org/content/papers/10.18356/27082245-24

being considered at the constitutional level, focusing on climate change litigation and discussions in Asia, particularly in Japan.

In Japan, despite the fact that a constitutional provision explicitly mentions future generations,[2] discussions concerning the interests of future generations, particularly regarding environmental issues are relatively recent as well as fiscal and social security problems. However, influenced by environmental litigation in a global community, the efforts and movements by young people in East Asia are attracting attention to initiate climate change lawsuits, centered in Kyoto, Japan.[3] Recently, public interest litigation has become popular in Japan, with civil society increasingly initiating lawsuits for the public good through crowdfunding and other efforts.[4] Climate change litigation is no exception. One such initiative, Youth Climate Case Japan, involves collaboration among young people in Taiwan, South Korea, and Japan. In this movement, younger generations invoke not only their own rights but also the rights of future generations.

Referring to relevant cases on climate change litigation in various countries, this paper examines whether Japan, with its distinct legal system, can assert human rights of future generations. Specifically, it argues that Japan, since its provisions lack its Constitutional provisions lack environmental protection clauses or *Staatsziel* provisions, should be able to invoke human rights of abstract and unspecified third-party. Based on existing case law and academic discourse, it contends that the requirements for asserting third-party standing should be eased under certain circumstances.

[2] See the discussion below.

[3] The fact that this lawsuit is based in Kyoto seems to be related to the signing of the Kyoto Protocol in 1997. 'KIKO Network', an NGO based in Kyoto, which supports this lawsuit, was 'established in April 1998 following the adoption of the Kyoto Protocol in 1997', suggesting a geographical connection between Kyoto and climate change. *See,* the following message of the head of this organization (written in Japanese). https://kikonet.org/about/staff

[4] 'CALL 4' is known as the most successful platform for public litigation in Japan, currently filing lawsuits involving same-sex marriage. *See*, the following link. https://www.call4.jp/

2. *Possibilities and Challenges for Asserting the Freedom in the Future*

2.1 *Youth Climate Change Litigation*

Inspired and encouraged by some successful cases on climate change in other countries, a youth climate change litigation was filed in Japan in August 2024. This lawsuit was filed by 16 young people residing in Japan – aged between 15 to 29 at the time of filing – against Japan's ten major thermal power generation companies, which were estimated to be responsible for approximately 30% of Japan's energy-related CO2 emissions. It is a civil lawsuit demanding that these companies reduce CO2 emissions by at least the standards indicated by the IPCC (Intergovernmental Panel on Climate Change), namely by 48% by 2030 and 65% by 2035 compared to 2019 levels.[5] The legal basis for the claim is Civil Code Articles 709 (Damages in Torts)[6] and 719 (Joint Torts).[7] The plaintiffs assert that the following rights have been violated by these companies: namely, the right to life (Article 13 of the Constitution of Japan),[8] the right to health (Article 13), the

[5] Guest Blog: First Youth Climate Lawsuit brought in Japan, https://blogs.law.columbia.edu/climatechange/2024/08/15/guest-blog-first-youth-climate-lawsuit-brought-in-japan/

[6] 'A person that has intentionally or negligently infringed the rights or legally protected interests of another person is liable to compensate for damage resulting in consequence'. *See, Japanese Law Translation*, https://www.japaneselawtranslation.go.jp/en/laws/view/3494#je_pt3ch5at1

[7] "(1)If more than one person has inflicted damage on another person by a joint tort, each of them is jointly and severally liable to compensate for the damage. The same applies if it cannot be ascertained which of the joint tortfeasors inflicted the damage. (2) A person who has abetted or aided a perpetrator is deemed to be a joint tortfeasor, and the provisions of the preceding paragraph apply". *See*, *Japanese Law Translation*, https://www.japaneselawtranslation.go.jp/en/laws/view/3494#je_pt3ch5at1

[8] 'All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs'. *See, Japanese Law Translation,* https://www.japaneselawtranslation.go.jp/en/laws/view/174#je_ch3at4

right to their property (Article 29(1)),[9] the right to development (Article 6(2) of the Convention on the Rights of the Child), the right not to be exposed to climate change concerns (Article 13), and the right to self-determination (Article 13). These youth climate change lawsuits are distinctive in that they assert not only the rights of the plaintiffs themselves – who are still young and must live on this planet for a long time – but also the rights of people living in other regions of the Earth and even the rights of future generations.

2.2. *The Previous Climate Cases in Japan*

As will be discussed later, numerous lawsuits related to climate change measures have been filed at a global scale. A distinctive feature of Japan's climate change litigation is its targeting of coal-fired power plants. Several reasons exist for this, but foremost among them is the delay in decarbonization within the power sector.[10] In Japan, since the 2011 Fukushima Daiichi nuclear accident, plans to build new thermal power plants have been announced one after another to compensate for the power shortage caused by the shutdown of most nuclear power plants. Particularly since 2011, CO^2 emissions from thermal power generation have increased due to this situation, making it necessary to reduce coal-fired power. While the global consensus calls for phasing out thermal power generation by 2030,[11] Japan has not implemented policies to reduce coal-fired power. Against this situation, lawsuits seeking injunctions against power plant construction were filed in Sendai, Kobe, and Yokosuka, as discussed later. Second, lawsuits in Japan are limited to seeking injunctions against the construction and operation of coal-fired power plants.

[9] 'The right to own or to hold property is inviolable'. *See, Japanese Law Translation*, https://www.japaneselawtranslation.go.jp/en/laws/view/174#je_ch3at20

[10] Takeshi Shimamura, *Nihon-no Kikōhendō Soshō*, in *28 Hōgaku-kan Kenpō Kenkyū*-jyo 102 (2023), 105.

[11] IEA, *Net Zero by 2050*, https://www.iea.org/reports/net-zero-by-2050.

This is because, unlike in other countries, it is difficult in Japan to directly challenge the government's delayed climate change policies. Consequently, as a practical approach, two methods have been adopted: filing civil lawsuits seeking injunctions against construction and operation when new power plants are proposed or built, or filing lawsuits seeking the revocation of administrative decisions such as permits and approvals granted for power plant construction.[12]

First, let us review the litigation in Sendai. In September 2017, a civil lawsuit was filed seeking to halt operations at the Sendai Power Station, a coal-fired power plant in Sendai City. This plant is projected to emit 670,000 tons of CO2 annually, and the impact of constructing such a new power plant on climate change is significant. The plaintiffs argued for an injunction based on personality rights. However, while the social utility and public interest of the plant were emphasized, the court found no concrete risk of health hazards arising specifically from climate change.[13]

The second litigation was filed against the Kobe Coal-fired Power Plant.[14] "On April 26, 2022, the Osaka High Court upheld the judgment by the Osaka District Court rejecting the request for revoking the Notice of Finalization. In this judgment, the Osaka High Court ruled that the interest of the appellants do not include climate damage and that CO2 emissions are not recognized as a legally protected interest in the current society, further stating that this interest should be pursued in the policy-making process as a general public interest. While the court does not deny the possibility of a future change of this interpretation into the one to recognize the individual interest for the CO2 emissions, according to a change in the social situation or understanding, the litigation itself remains unsuccessful.

The third case was the Yokosuka Climate Case.[15] The Tokyo

[12] Takeshi Shimamura, *Nihon-no Kikōhendō Soshō*, cit., 107.

[13] *Sendai Citizens v. Sendai Power Station*, https://climatecasechart.com/non-us-case/sendai-citizens-v-sendai-power-station/.

[14] Citizens' Committee on the Kobe Coal-Fired Power Plant v. Japan, https://climatecasechart.com/non-us-case/citizens-committee-on-the-kobe-coal-fired-power-plant-v-japan/.

[15] *Yokosuka Climate Case*, https://climatecasechart.com/non-us-case/

District Court delivered a judgment on the request to cancel the Notice of Confirmation issued by the Minister of Economy, Trade and Industry, who confirmed the Environmental Impact Assessment of JERA under Article 46 (17) (ii) of the Electricity Business Act. The judgment, as well as other points, discussed if the plaintiffs had standing and what requests are to be made. The Court stated, while those who lived close to the power plant and directly suffer significant damage from air pollution had legal interests, the damage from climate change could not be considered an individual interest to be protected by law. As a result, the Court recognized the standing of the plaintiffs who lived in the neighborhood of the power plant related to air pollution but did not recognize the standing and claims related to climate change and CO2 emissions.

2.3. *Considering the Freedom in the Future: From a Comparative Law Perspective*

As outlined above, sufficient standing has not been recognized even to the current generation, who will suffer from the ongoing climate impact in previous climate change lawsuits. A similar issue is observed in other countries as well. For instance, in Austria, in the case of Austrian Constitutional Court (VfGH),[16] over 8,000 people asserted that they choose rail as public transportation for environmental reasons and objected to the tax advantages granted to air transport companies under Section 150 of the UStG 1994 and Section 151 of the Mineral Oil Tax Act 1995. The contested provisions, in summary, exempt cross-border passenger transport by aircraft from consumption tax and exempt aviation fuel from mineral oil tax. The applicants (non-business entities) primarily argued, based on Article 2 of the European Convention on Human Rights and Article 2 of the Charter of Fundamental Rights, as well as Article 8 of the European Convention on Human Rights and Article 7 of the Charter

yokosuka-climate-case/.

[16] VfGH, Beschl. v. 30.9.2020, G 144-145/2020-13, V 332/2020-13.

of Fundamental Rights, that the tax exemptions for air traffic constituted an unjustified interference with their constitutionally guaranteed rights due to the harmful effects on the climate and the resulting extreme weather events and increasing heatwaves. In response, the VfGH dismissed the application in September 2020 for lack of standing. This was based on the reasoning that the applicants lacked standing because they had no direct bearing on the substance of the claims concerning the 1994 Value Added Tax Act and the 1995 Mineral Oil Tax Act.

Additionally, the Swiss Federal Supreme Court ruled that claims alleging violations of fundamental rights or breaches of the state's duty to protect due to delays in climate protection – where the plaintiff's own personal interests are not at issue – cannot be reviewed under Swiss Art. 25a VwVG.[17] The court held that this law does not permit abstract review of breaches of the duty to protect fundamental rights, and that such concerns should be enforced through political rather than legal means.

On the other hand, some cases have attracted attention: Frequent discussions and references are on the *Urgenda* case in the Netherlands[18] and the *Klimaschutzgesetz* case in Germany.[19] As is well known, the *Urgenda* ruling was handed down by the Dutch Supreme Court in December 2019. This case was filed by the NGO for the climate protection and is a landmark decision that ordered the government, based on the state's fundamental duty to protect rights under Articles 2 and 8 of the European Convention on Human Rights, to take measures to achieve at least a 25% reduction in emissions compared to 1990 levels by 2020. Such rulings are considered groundbreaking, or even 'aberrational',[20] because while the existence of the protection obligation under the European Convention on Human Rights is not disputed, it was typically understood to apply only when a concrete violation

[17] BGE 146 I 145.

[18] ECLI: NL: RBDHA: 2015: 7145, Rechtbank Den Haag, C/09/456689/ HA ZA 13-1396.

[19] BVerfGE 157, 30.

[20] Yuki Tamamushi, *Kenpō-jyō no Kenri ni Motozuku Kikō-hogo no Kanōsei*, in 28 *Hōgaku-kan Kenpō Kenkyū-jyo* 19 (2023), 21.

arises for an individual,[21] and member states were granted broad 'margin of appreciation' in fulfilling it.[22] In contrast, the *Urgenda* case affirmed the existence of a positive obligation on the state, after confirming the standing of the plaintiff, the NGO 'Urgenda', mainly focusing on the interests of the current generation. The parties do not dispute that Urgenda has standing to pursue its claim, since in Netherland, lawsuits can be filed within the scope of the articles of organizations. According to the Dutch Supreme Court, it is entirely plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced. After recognizing admissibility of the plaintiff, the Court continues to the issue of the positive obligation: "In this context, the term 'real and immediate risk' must be understood to refer to a risk that is both genuine and imminent. The term 'immediate' does not refer to imminence in the sense that the risk must materialize within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialize in the longer term". This affirms the urgency of risks even before they materialize, based on the direct impact on those affected. Furthermore, in contrast to the Swiss Federal Supreme Court's case,[23] while the government and parliament make judgments within the political domain, the courts are not entirely barred from making judgments on political matters. They are permitted to determine whether government or parliamentary decisions violate the duty to protect.

Following the *Urgenda* case, Germany's *Klimaschutzgesetz* decision is now positively and frequently being introduced in Japan as well. The decision concerned Germany's 2019 Federal Climate Protection Act, which stipulated a 55% reduction in greenhouse

[21] ECHR, Judgement 22.5.2003, 41666/98.

[22] ECHR, Judgement 8.7.2003, 36022/97.

[23] Yuki Tamamushi, *Kenpō-jyō no Kenri ni Motozuku Kikō-hogo no Kanōsei*, cit., 21.

gas emissions by 2030 compared to 2019 levels. While it set permissible emission levels for each sector until 2030, the complaints, mostly residents in Germany, but also minors and people in Bangladesh and Nepal, particularly vulnerable to the climate change, argued these did not mandate sufficient reductions, asserting violations of Article 2(2) sentence 1, Article 14(1), and Article 20a of the Basic Law. The primary issue addressed in this decision was whether a violation of the duty to protect fundamental rights had occurred. Regarding the standing issue, while rarely introduced in Japan, it should be noted that the Federal Constitutional Court held that the complainants living in Bangladesh and Nepal also have standing 'because it cannot be ruled out from the outset that the fundamental rights of the Basic Law also oblige the German state to protect them against the impacts of global climate change'.[24] The Court follows this argument further, stating that the duty to protect derived from Article 2(2) sentence 1 applies also in relation to future generations.[25] The state is obligated to take measures to curb global warming and climate change and to prevent the dangers arising from climate change.[26] However, the decision states that a violation of the duty to protect fundamental rights only occurs when no preventive measures have been taken at all, when the measures adopted are clearly unsuitable or completely inadequate for achieving the prevention goals, or when they fall significantly short of the protection goals. In the present case, since none of these circumstances exist, a breach of the duty to protect cannot be confirmed at this time.[27] Thus, while denying a breach of the duty to protect in this case, the decision establishes a breach of the legislature's duty by introducing the concept of 'preemptive action equivalent to intervention' (*eingriffsähnliche Vorwirkung*).[28] According to the decision, the Basic Law obligates the state to protect freedoms safeguarded by fundamental rights across generations and

[24] BVerfGE 157, 30, Rn. 90.
[25] BVerfGE 157, 30, Rn. 146.
[26] BVerfGE 157, 30, Rn. 149 f.
[27] BVerfGE 157, 30, Rn. 152.
[28] BVerfGE 157, 30, Rn. 183.

to distribute opportunities for freedom proportionally between generations. Fundamental rights are protected as intertemporal freedom safeguards (*intertemporale Freiheitssicherung*) from the unilateral strengthening of greenhouse gas reduction obligations mandated by Article 20a of the Basic Law in the future.[29] Here, the notion of an 'unproportionate burden on future freedom' is derived from two aspects: the intergenerational nature of Article 20a and the requirement of proportionality.[30] Put more succinctly: if the current generation imposes only lax regulations on CO2 emissions, resulting in climate change progressing further than it is now, and future generations must then implement strict regulations, then our actions today will bind negatively the future generations.

The logic of this ruling, while highly complicated, has been described as 'a hybrid of the duty to protect fundamental rights and the right to defense'.[31] Indeed, as noted above, the decision shows a shift toward a defense-rights framework in that it rejects a violation of the duty to protect while acknowledging negative effects equivalent to intervention on future generations. However, the defense rights theory here – beyond merely extending the temporal scope of fundamental law guarantees of liberty – draws a clear line from traditional defense rights theory. This is because it concerns not an intervention at the present moment against the defense rights of a specific individual, but rather a hypothetical future intervention against the freedom of an abstract entity:[32] future generations. Until now, it has been the state's constitutional duty to protect fundamental rights that has provided a constitutional basis for objective protection of abstract entities – including, for example, unborn fetuses – rather than relief based on current and subjective rights.[33] From this perspective, the theory of 'preemptive action equivalent to intervention' can be

[29] BVerfGE 157, 30, Rn. 183.

[30] BVerfGE 157, 30, Rn. 192.

[31] Yuki Tamamushi, *Kenpō-jyō no Kenri ni Motozuku Kikō-hogo no Kanōsei*, cit., 34.

[32] Ibid.

[33] Ibid.

understood not as a purely subjective rights issue, but as a hybrid with protection through objective law.

3. *The Issue of 'Human Rights of Future Generations' and Standing*

While the aforementioned foreign cases represented a turning point in the judicial practices of those nations, Japan faces additional challenges. The Japanese Constitution not only lacks provisions establishing environmental protection obligations – similar to 'national goals' – but also cannot be said to have sufficiently established theory of objective law, including the theory of duty of the state to protect fundamental rights. Thus, this paper attempts an experimental examination of how to incorporate the human rights of future generations – that is, the human rights of third parties – into constitutional theory.

3.1. *Subjectivity of the Future Generations?*

When considering 'human rights' or 'freedom' of future generations under the constitutional theory, conceiving future generations as subjects of rights would be the most natural and straightforward approch. When deriving the 'rights' of future generations constitutionally, Article 11 of the Japanese Constitution is also regarded as authoritative in comparative law.[34] This article stipulates as follows: 'The people shall not be denied the enjoyment of any fundamental human rights. The fundamental human rights guaranteed to the people by this Constitution shall be granted to the present and future generations as inviolable and perpetual rights'. Certainly, since the Constitution possesses the nature of a 'contract' between generations, irrespective of changes in its members, it is conceivable to assume the human rights of future generations. However, basing this on the explicit

[34] Joerg Chet Tremmel, *A Theory of Intergenerational Justice*, Earthcan, 2009, 58.

provision of Article 11 could enhance its persuasiveness. This provision, separate from the question of which specific fundamental rights are guaranteed to individuals under positive law in individual fundamental rights clauses, refers to the inviolability and universality of human rights as guaranteed to any future generation of citizens as a supra-positive principle. The position seeking to assert the 'rights' of future generations attempts to recognize, based on this article, the rights-bearing capacity – in the present – of distant future generations not yet born.

However, this interpretation is also controversial. This is because Article 11 can be read not as a provision recognizing future generations as subjects of human rights, but merely as guaranteeing that future citizens can only become subjects of human rights 'after their birth'. [35] There exists a theoretical gap between conceptualizing future generations as a single 'collective' and granting them human rights comprehensively, and the universality of human rights. Furthermore, this provision could be interpreted as not conferring specific individual human rights, but merely recognizing the capacity to hold rights concerning human rights after the birth of future generations. Recognizing future generations as subjects of human rights presents numerous difficulties.

In order to overcome these difficulties and to protect the interests of future generations, the following discussion of this article considers ways to recognize the standing-holders to assert the interests of third parties, more specifically the future generation. To understand the following argument, it would be necessary to differentiate three concepts: right-holders, (subjects entitled with rights), the groups with interests (beneficiaries of a policy even if not right-holders) and standing-holders (person with standing). As discussed above, Japanese courts do seldom recognize the subjectivity of rights for the current generation, let alone future generations. Therefore, asserting the interests of future genera-

[35] Takayuki Kira, *Sedaikan Seigi to Shōrai-sedai no Kenri-ron*, in Koji Aikyo (Ed.), *Kōza Jinken-ron no Sai-teii*, Hōritsu Bunkasha, 2010, 56. Furthermore, as a literature which argues that the interests of future generations cannot be represented, *see*, Toru Mori, *Die Bedeutung der Generationengerechtigkeit für das Verfassungsrecht*, in 185 *Kyoto law review* 5-6 (2020), 12-26.

tion by the standing-holders (often the current generation) would be the possible way left to protect the interests of future generation.

3.2. *Asserting the Rights of Third Party*

3.2.1 *Cases and Theories in the United States*

Instead of recognizing future generations as rights holders, it is proposed that the current generation act as their 'representative' based on reasonable and general arguments. What the young applicants of current climate litigation in Japan is attempting could fall under this category.

The question of whether future generations' human rights can be 'represented' is not discussed within the context of future generations' human rights alone. A more generalized context of this issue has a long history of discussion within Japanese Constitutional law. This is the problem of 'third-party standing', or the standing of third parties to assert constitutional rights. While the principle is that only those whose own rights are infringed assert the unconstitutionality of state actions, cases arise where plaintiffs assert violations of others' constitutional rights, and such instances are occasionally seen in various countries. While Japan does not have a constitutional court, the power of constitutional review is stipulated by Article 81 of the Constitution, which states: 'The Supreme Court shall be the court of last resort having the power to determine whether any law, order, regulation, or disposition is in conformity with the Constitution or not'. The system adopted here is called the incidental (or concrete) review system (*Fuzui-teki Iken Shinsa-sei* – 付随的違憲審査制).[36] That is, the constitutionality of state actions, such as laws, is reviewed only to the extent necessary to resolve the specific case before it.

[36] Japan Compliance, *Q: What is the System of Judicial Review of Constitutionality in Japan, and How Does it Compare to US and German Models?*, https://japancompliance.com/q-what-is-the-system-of-judicial-review-of-constitutionality-in-japan-and-how-does-it-compare-to-us-and-german-models/.

Abstract constitutional review is thus rejected, a position solidified by the National Police Reserve case.[37] Nevertheless, as discussed later, there are certain situations where it becomes necessary to assert the constitutional rights of third parties.

When this issue arises, Japanese legal scholarship has primarily examined and compared with the American debate, which also adopts an incidental review system.[38] In the United States, the standing issue is divided into 'standing to sue' and 'standing to assert (*jus tertii*)', the latter being the concept discussed here. While the former concerns the fulfillment of the requirements of case and controversy, the latter concerns the interest in asserting the claim.[39] That is, *jus tertii* is discussed at a stage after the litigation requirements have been satisfied.

In the United States, third-party standing is generally prohibited, which relates to the 'doctrine of constitutional avoidance doctrine'. This doctrine was established in *Ashwander v. Tennessee Valley Authority*.[40] According to this doctrine, standing to raise a constitutional challenge is generally recognized only when: (1) a party's own constitutionally protected right or liberty is (2)

[37] Grand Bench judgment, October 8, 1952 [Shōwa 27]. This case held as follows: "When the relevant institutions of other countries are examined, it is true that, in addition to countries where the power to review questions of constitutionality is vested in the judicial courts, there are other countries where this is not the case and where, instead, a special organ established for that purpose has been empowered to issue general and abstract declarations concerning the constitutionality of laws, orders, and the like and to render such laws, orders, and the like null and void, irrespective of the existence of concrete legal disputes. However, the authority that has been vested in our courts under the system now in force consists of the authority to exercise judicial power, and for judicial power to be invoked a concrete legal dispute must be brought before the courts. Our courts cannot exercise a power whereby, in the absence of such a concrete legal dispute, they render an abstract judgment anticipating the future and relating to a doubtful or controversial matter concerning the interpretation of the Constitution or other law, order, and the like". https://www.courts.go.jp/app/hanrei_en/detail?id=4

[38] However, the similar discussion could be observed also in Germany. See, Thorsten Koch, *Der Grundrechtsschutz des Drittbetroffenen*, Tübingen, 2000.

[39] Hideki Shibutani, *Daisansha no Kenri wo Shuchō-suru Tōjisha-tekikaku*, in 729 *Jichi Kenkyu* 112 (1984).

[40] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

actually or substantially, and directly infringed.[41] The 'principle prohibiting third-party standing' is derived from this doctrine. That is, under the incidental review system, plaintiffs generally cannot challenge constitutionality based on infringements of others' rights, regardless of whether the third party could be specified or not.[42] While this principle is treated as established through precedent, more substantive reasons support its authenticity. Those include: 1) Since under the separation of powers, the Supreme Court should not be treated as superior to other institutions, constitutional judgments should be made with restraint; 2) The autonomous decision-making of third parties regarding claims of unconstitutionality should be respected; 3) Third parties themselves, not the plaintiffs, may be best positioned to make the most incisive and effective arguments.[43]

However, even in the United States, this principle is not absolute. In certain cases, standing has been recognized in this country, and correspondingly, it has also been recognized in Japan. Before referring to the Japanese cases and theories, let us first confirm the leading cases in the United States. Prof. Nobuyoshi Ashibe was the first to introduce this issue through his thorough comparative research. Professor Ashibe referenced three leading cases to derive the elements necessary for standing under his theory.[44] First, he cites the 1949 decision in *Tileston v. Ullmann*.[45] In this case, a physician sued seeking a declaratory judgment that a Connecticut law prohibiting the use of contraceptive drugs or devices, or advising or assisting in their use, was unconstitutional because it endangered patients' lives without due process. The court held that the physician did not assert that his freedom to practice medicine was infringed and denied standing to assert the rights of the patients, who were third parties.

However, there are exceptional cases where standing is affirmed for third-party rights. Typically, standing is affirmed in

[41] Nobuyoshi Ashibe, *Kenpō-soshō no Riron*, Yuhikaku, 1973, 62.
[42] Masayuki Atarashi, *Kenpōsoshō-ron*, Hōritugaku no Mori, 2008, 417.
[43] Ibid.
[44] Nobuyoshi Ashibe, *Kenpō-soshō no Riron*, cit., 68 ff.
[45] *Tileston v. Ullman*, 318 U.S. 44 (1943).

two scenarios: first, when the invoking party and the third party are closely bound by a professional relationship, and the third-party right invoked holds high value within the catalog of human rights; second, when the plaintiff and the third party have a relationship between an organization and its member, respectively.

The first category includes professional relationships that are not solely bound by economic ties but involve a concept of trust, such as doctor-patient, attorney-client, or teacher-student relationships. A famous case falling under this category is *Pierce v. Society of Sisters* case.[46] In this case, parents of children aged 8 to 16 sued a private parochial school seeking an injunction against the enforcement of an Oregon state law requiring enrollment in the district's public schools and imposing a misdemeanor penalty for noncompliance. The private school argued that the law infringed upon their rights by imposing a direct and irreparable damages, as parents would cease sending their children to private schools. They also contended that the law violated parents' constitutional right to choose a school. The Supreme Court concluded that the Oregon law was unconstitutional, ruling it constituted an improper interference with the freedom of parents and guardians to educate and instruct their children.

The second category in which standing is affirmed concerns the relationship between an organization and its members. The leading case cited here is the 1958 decision in *NAACP v. Alabama* case.[47] In this case, an Alabama law requiring foreign organizations to register before conducting activities within the state mandated the NAACP, which is based in New York, to submit records containing the names and addresses of its members. The NAACP refused to comply and was consequently subject to criminal penalties. The Supreme Court's decision compelled disclosure of the organization's membership list, recognizing that the organization could assert the interests of its members. This is a landmark decision in recognizing the asserting the members' interests, concluding that the compelled disclosure was unconstitutional. While third-party standing is recognized only in limited

[46] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[47] *NAACP v. Alabama*, 357 U.S. 449 (1958).

circumstances, this landmark decision was made because the organization and its members are, in substance, 'identical' entities.[48]

3.2.2 *Introduction to Japan*

From the above leading cases, Professor Ashibe has derived four elements to consider on this issue. According to Professor Ashibe, when considering whether to exceptionally grant standing to a party asserting a third party's constitutional rights, four factors should be weighed: 1) the degree of the party's interest, 2) the nature of the third party's rights, 3) the relationship between the party and the third party, and 4) whether the third party could realistically assert their own rights in an independent lawsuit.[49] Applying these factors to the earlier *NAACP v. Alabama* decision, the following conclusion would be made: Regarding the first factor, the degree of interest in the suit, if the NAACP could not invoke its members' interests, it would face criminal penalties. Furthermore, if compelled to produce its membership list, the organization itself would likely suffer detriment, such as a reduction in membership. Second, the nature of the constitutional right being invoked: it was noted that the right to freedom of association holds a superior status. Third, the relationship between the plaintiff and the third party: it was stated that the relationship must not be merely incidental or economic, but that 'a substantive relationship existed between the plaintiff and the third party prior to the event'. Fourth, regarding the element of whether it is practically possible for the third party to assert infringement of their own rights in an independent lawsuit, in this case, it can be said that it was extremely difficult for members to file an independent lawsuit. The reason is that if the members themselves must assert the infringement, their rights and interest for the confidentiality about the membership to the organization would be infringed by the very act of asserting them.[50]

[48] *NAACP v. Alabama*, 357 U.S. 449, 459 (1958).
[49] Nobuyoshi Ashibe, *Kenpō-soshō no Riron*, cit., 68 ff.
[50] Ibid.

Similarly, Professor Hideki Shibutani proposes three elements: 1) whether the actions of the litigants are indispensable for the realization of the third party's rights, i.e., whether the rights in question exhibit a pronounced dependence on others and interconnection rather than independence and distinctiveness; 2) whether the litigants can effectively serve as defenders of the rights; and 3) whether there exists a forum or opportunity to eliminate infringements upon and provide remedies for the rights in question.[51]

Although the theories above still remain influential, some argue that third parties should always be permitted to assert constitutional rights. For example, Professor Koji Tonami cites the following grounds: 1) Even in the United States, the doctrine of standing for constitutional challenges is not a constitutional constraint but a rule of judicial restraint, remaining within the courts' discretionary standards; 2) In the operation of litigation in Japan, a party-driven approach as thorough as that in the United States is not adopted, and especially regarding constitutional issues, ex officio review is not uncommon; 3) Absolutizing the principle of standing for constitutional challenges runs counter to the modern demand for flexible exercise of judicial review.[52]

This relaxation of standing requirements is also observed in Japan. A frequently cited case in Japan is the *Aum Shinrikyo Dissolution Order Case*.[53] In this case, third-party standing became an issue when the religious corporation argued that the dissolution order issued under the Religious Corporations Act against Aum Shinrikyo – which had planned and systematically produced sarin with the intent of mass murder – violated the religious freedom of its followers.

The High Court ruling states that a special relationship exists between a religious corporation or religious organization and its

[51] Hideki Shibutani, *Kenpōsoshō Yōkenron*, Shinzansha, 1995, 454 f.

[52] Koji Tonami, *Daisansha Shoyu-butsu no Bosshu to Tekihō-tetsuzuki*, in Yoichi Higuchi, Toshihiko Nonaka (Eds), *Kenpō no Hannrei,* Yuhikaku, 1996, 156.

[53] Decision of the First Petty Bench, 1996 (Ku) 8, Minshu vol. 50 (1), at 199.

affiliated believers regarding matters of faith, and that when the freedom of religion of an individual believer within a religious organization is infringed upon, it may weaken the religious corporation to which that believer belongs and potentially affect its very existence, indicating a close relationship between the individual believer's freedom of religion and the existence of the religious corporation. It further noted that in proceedings for a dissolution order against a religious corporation, the believers of that religious corporation cannot be parties to the proceedings. Consequently, believers have no opportunity to defend their right to freedom of religion under Article 20 of the Constitution, and there is a risk that the effectiveness of this right may be lost. However, the court stated that as to what specific consequences the dissolution order against the appellant and the subsequent liquidation based on it will bring about for each of these believers, and to what extent it will impose disadvantages on them, the court must await the concrete progress of the liquidation. Therefore, it is not necessary to further make a substantive constitutional judgment on the dissolution order under the Religious Corporations Act or on the nature and degree of significance of the secular purpose or public interest to be achieved through the dissolution order and the liquidation based on it, or to weigh this against the aforementioned disadvantages suffered by the appellant's believers due to the dissolution order. whether more restrictive alternative methods or means exist to achieve the secular purpose or protect the public interest than the dissolution order itself. It should be concluded that a substantive constitutional judgment on the dissolution order itself is not required.

This establishes an extremely strict standard for religious organizations seeking to claim infringement of their followers' freedom of religion.[54] However, there remain some possibilities to reconsider whether such a strict standard should have been imposed. Some argue that if the disadvantages suffered by believers due to the dissolution of the organization are asserted to a certain degree of actuality, it should not be assumed that the extent of

[54] Masato Ichikawa, *Shihō-sinsa no Riron to Genjitsu*, Nihon Hyoronsha, 2020, 347.

individual restrictions cannot be clarified until liquidation process proceeds, thereby preventing the court from conducting an appropriate balancing test.[55] Mindful of such criticism, the decision of Supreme Court on this case added a substantive judgment concerning freedom of religion without addressing the issue of third-party standing.

The cases above involved claims that the application of a law to oneself simultaneously caused disadvantage to oneself and infringed upon the constitutional rights of identifiable third parties. In contrast, another type involves claims that a law applied to oneself is unconstitutional when it applies to unspecified hypothetical third parties.[56] Such arguments present greater difficulty than the former type. This is because, in cases where a government action causing harm to the individual is also alleged to infringe the rights of a third party, the litigation parties must resolve the dispute while simultaneously determining the infringement of the third party's rights.[57] In contrast, hypothetical constitutional review concerning hypothetical third parties is generally argued against.

However, even in such cases, third-party standing may be recognized as a further exception. This occurs when the vagueness or excessive breadth of penal statutes or similar regulations becomes an issue. Particularly when these regulations target expressive activities, there is persistent argument that, as an exception to prevent chilling effects, claims that the application to others is unconstitutional may be recognized. That said, in Japan, rulings like the Hiroshima City Ordinance on Elimination of Motorcycle Gangs case[58] have rejected the idea of non-application to individuals who are clearly subject to regulation by ordinances and who could be constitutionally regulated, based solely on the ordinances' vagueness or broadness. Even in such cases where unconstitutional application has not yet occurred, subjecting citizens to the risk of being placed in a state of uncertainty

[55] Ibid.
[56] Masato Ichikawa, *Shihō-sinsa no Riron to* Genjitsu, cit., 314.
[57] Masato Ichikawa, *Shihō-sinsa no Riron to* Genjitsu, cit., 318.
[58] Judgment of the Third Petty Bench, 2005 (A) 1819, Keishu vol. 61 (6).

about whether such vaguely defined regulations might or might not be applied to them, and given that this impact extends broadly to an unspecified multitude of individuals, the societal detriment is extremely significant. Therefore, it can be argued that it is necessary to consider the rights of third parties as well – not merely as a matter of policy consideration.

3.3.3. *Summary*

In Japan, cases have traditionally been divided into two categories: those involving the constitutional rights of a 'specified third party' and those involving the constitutional rights of an 'unspecified third party'. Regarding the former, the Japanese Supreme Court has, under certain circumstances, recognized broader standing for third parties. However, future generations cannot yet be identified as individuals and thus fall under the latter category of human rights. Indeed, judicial precedent tends to be negative regarding the recognition of standing for unspecified third parties. Nevertheless, as academic doctrine also argues, when or when leaving the situation unaddressed could potentially lead to the loss of a very large number of liberties in the future, as is often the case with a chilling effect, it is argued that courts must conduct a review in light of the specific characteristics of the liberties at issue. Concluding this paper, we need to look back to foreign inspiration. The recent ECtHR case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*[59] judgment stressed the specific nature of environmental issues in the passage to grant the standing to the organization. The specific considerations the Court paid was the climate change being a matter of a common concern of humankind and the necessity of promoting intergenerational burden-sharing. In that specific context, the Court notes the importance for recourse to legal action by associations for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change. This argument

[59] No. 53600/20, Judgment 9.4.2024 [GC].

resonates with the current state of discussion regarding standing to assert the interests of third-parties in Japan, but ultimately, a path to effective rights protection will be required through a flexible expansion of standing according to the context and subject matter.

4. *Conclusion and Implications for Japan*

This paper sought to examine whether the Japanese Constitution – which lacks provisions like national goals that consider the human rights of future generations, though some argue for intergenerational equity based on Articles 11 and 12 – can accommodate consideration of some abstract, the interests of 'future generations', unborn citizens at this moment. While direct examination of this issue awaits further detailed discussion, this paper sought to connect it to the problem of asserting third-party rights. It found that even in countries like the United States and Japan, which adopt an incidental review system, there are cases where third-party interests should be considered as an objective legal aspect. Furthermore, it was argued that in certain cases – such as the ruling on the dissolution order for Aum Shinrikyo – it is necessary to consider the impact on fundamental rights that is certainly expected to occur in the future. Furthermore, even regarding unspecified third parties, it is argued that consideration of their interests must be applied relatively leniently, taking into account factors such as the chilling effect theory, the nature of the fundamental right, and the gravity of its infringement. Climate change is particularly problematic because it involves the rights of third parties, future generations, who have at this moment no accessible path to redress and cannot influence or bind the present generation in a democratic system. The consequences of inaction on climate change caused by this structural inequality could be immense, potentially affecting many people both geographically and temporally. The climate change litigation might encourage us to reconsider the possibility for asserting the third-party standing.

THE CJEU'S ROLE IN COURTING A PRINCIPLE OF SUSTAINABILITY: AN EU ENERGY LAW PERSPECTIVE

Kenny Ng

Abstract: *This chapter aims to investigate the Court of Justice of the European Union's role in developing sustainability as a principle of law, from an energy lens. It argues that the Court is a key contributor and refiner of general doctrines in law because of its ability to influence the conceptualisation of legal principles, exemplified by sustainability as a principle in European Union energy law. To support this claim, the chapter examines the Court and several of its energy case-law on sustainability from institutional and doctrinal viewpoints, respectively.*

Keywords: Legal Principles; Court of Justice of the European Union; Energy Law; Sustainability; General Doctrines

1. *Introduction*

This chapter investigates the role of the Court of Justice of the European Union (CJEU or the Court), consisting of the Court of Justice and the General Court, in developing a principle of sustainability in European Union (EU or Union) law, from an energy perspective. While much research exists on the separate themes of principles, sustainability, and courts generally,[1] studies on the role of courts in explicating sustainability as a principle in energy law have been limited. Exploring the legal principle of

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See, e.g., U. Bernitz, J. Nergelius, C. Cardner (Eds), *General Principles of EC Law in a Process of Development*, Alphen aan den Rijn, 2008; L. Thiele, *Sustainability*, 3rd edition, Cambridge and Hoboken, 2024; M. Shapiro, *Courts: A Comparative and Political Analysis*, Chicago, 1986.

sustainability through the Court's viewpoint can offer novel insights into the role of courts as doctrine builders. This research does so by tapping into the Court as the highest judicial body of the EU, a jurisdiction which has consistently been at the global forefront of energy and sustainability governance,[2] and its case-law, from institutional and doctrinal viewpoints respectively.

The chapter argues that the Court is a key contributor and refiner of general doctrines in law, on top of its regular judicial functions in interpreting and applying the law,[3] because of its ability to influence the conceptualisation of legal principles, exemplified by sustainability as a principle in EU energy law. General doctrines (*allgemeine Lehren*) can be understood from the continental European legal tradition as foundational tenets consisting of general legal principles, concepts, and theories that systematically order each distinct branch of law, equipping them with structure, identity, rationality, and coherence.[4] The CJEU can significantly expand the general doctrines of EU energy law by developing its principles, including the principle of sustainability. This research does not endeavour to detail the theoretical nature and status of sustainability as a legal principle, which warrants thorough exploration in a separate study. Instead, the research nurtures a better understanding of the CJEU, a top supranational court, and its role in fostering a conception of the principle of sustainability through its energy case-law. It offers insights into the CJEU's involvement in sustainability, energy law, and general doctrines, in particular legal principles.

This chapter is structured in the following manner. Section 2

[2] See, e.g., P. Cameron, X. Mu, V. Roeben, *The Concept of Global Energy Transition and its Agenda*, in P. Cameron, X. Mu, V. Roeben (Eds), *Global Energy Transition: Law, Policy and Economics for Energy in the 21st Century*, Oxford, 2021; K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, New York, 2016, 215-20.

[3] See, e.g., R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration*, London, 1998; B. Preston, *Leadership by the Courts in Achieving Sustainability*, paper presented at the Resource Management Law Association of New Zealand Conference (2009).

[4] K. Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law*, New York, 2011, xv, xvi, xix and chapter 6.

examines principles and other common elements of legal reason to establish an understanding of principles within the normative-conceptual legal taxonomy. This understanding of principles is then applied to sustainability to examine it as a principle of energy law in Section 3. Section 4 subsequently provides a perspective on the CJEU's role in developing the legal principle of sustainability by analysing the Court as an institution and several of its energy case-law.

2. *Principles as Tools in the Taxonomy of Legal Reason*

This section sets the context for examining sustainability as a legal principle. It delineates the theoretical nuances distinguishing the building blocks of law, namely principles, concepts, and theories, which form the general doctrines of a legal discipline.[5] Alongside laws, they comprise the elementary tools of legal reason which can justify the use of legal authority.[6]

2.1 *Principles, Laws, Concepts, and Theories*

While principles exist across many subjects, for instance mathematics and science, the principles of interest in this chapter are those of law. Laws are formalistic expressions of general doctrines. They are norms that affix particular consequences to targeted behaviours under ascribed imperatives such as 'must' or 'must not', possessing a single legitimate interpretation to regulate firmly in a dispositive or 'all-or-nothing fashion'.[7]

In contrast, concepts are abstract foundational ideas that have a categorical objective of conveying a symbolic or descriptive sta-

[5] See also K. Tuori, *Ratio and Voluntas*, cit., chapter 6; K. Tuori, *Critical Legal Positivism*, New York, 2016, 67.

[6] See also L. Carter, T. Burke, *Reason in Law*, Chicago, 2016.

[7] R. Dworkin, *Taking Rights Seriously*, Cambridge (MA), 1987, 24. See also, K. Ng, *Carrots and Sticks: Is There Room for More Anti-pollution Incentives?*, in 38 *Environmental and Planning Law Journal* 4 (2021) 356-62.

tus at the most rudimentary level.[8] Concepts could possess several acceptable interpretations as multifaceted deconstructions of knowledge.[9] They can eventually evolve into either laws or principles, to carry greater prescriptions as norms which can assume the forms of fundamental assumptions, propositions, and standards.[10]

Principles apply concepts,[11] attaching a normative value to them to advance a position with substance and direction, flexibly.[12] Principles, often abstract or high-level expressions of reason which are aspired towards, nudge and inspire to coax a range of action with less defined specificity over broader segments of a legal discipline than laws.[13] If a function of the law is to bestow acceptability and legitimacy upon ideas based on concepts and theories to transform them into norms,[14] then principles of law can guide such transformations. Principles do so by seeking to uphold, from a legal positivist viewpoint, a particular chosen method of governance,[15] or from a natural law viewpoint,

[8] K.O. Solomon, D. Medin, E. Lynch, *Concepts Do More than Categorize*, in 3 *Trends in Cognitive Sciences* 3 (1999), 99-105.

[9] W. Gallie, *Essentially Contested Concepts*, in 56 *Proceedings of the Aristotelian Society* 1 (1955), 167-98.

[10] See, e.g., R. Dworkin, *Taking Rights Seriously*, cit., 22.

[11] See also T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, in 13 *Review of European Administrative Law* 2 (2020), 5-31; *Principle, N.*, in *Oxford English Dictionary*, Oxford, 2025, available at: https://doi.org/10.1093/OED/4000158049; N. Jareborg, *A Lecture on Principles*, in H. Müller-Dietz *et al.*, *Festschrift für Heike Jung*, Baden-Baden, 2007.

[12] See also *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Separate Opinion of Vice President Weeramantry, 25 Sept. 1997, *ICJ Reports* (*Gabcikovo-Nagymaros*), 88; E. Lees, *Environmental Principles and Legitimacy*, in E. Lees, M. Eliantonio (Eds), *The Legitimacy of EU Environmental Governance and the Role of the European Courts*, Oxford, 2025, 64-5, 73-4; A. Barak, *Purposive Interpretation in Law*, Princeton, 2011, 198.

[13] M. Van Hoecke, F. Ost, *Legal Doctrine in Crisis: Towards a European Legal Science*, in 18 *Legal Studies* 2 (1998), 197-215.

[14] M. Bartl, *Reimagining Prosperity*, Cambridge, 2024, 41-4.

[15] See also J. Austin, *The Province of Jurisprudence Determined*, London, 1832; H. Kelsen, *Pure Theory of Law*, Berkeley, Los Angeles, London, 1967; A. Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford, 2000, 36.

morality and its facets such as justice, responsibility, and fairness.[16]

As fundamental normative propositions rooted in a legal construct as their system of values,[17] principles guide legal interpretation and application.[18] Principles may not be strictly required for a legal system to function, but normatively enhance the law's coherence and completeness as it asserts prescriptions on human behaviour, sealing gaps to reduce fragmentation within an uneven patchwork of written laws.[19] They are a softer form of standards than laws, enlivened by more advisory terms such as 'should' and 'should not' that express a desire or aspiration,[20] to assist the binary operation of laws in determining whether an act is lawful or not.[21] Principles promote social order under the comprehensive implementation of common values to, alongside laws, sustain their governed community,[22] particularly when exercising judicial discretion and other modes of governance.

If laws are instruments that compulsorily *enact* and *enforce* an ideal, principles would be those that persuasively *enunciate* and *impart* such ideal, both based on concepts that *encase* or *symbolise* an element of that ideal. Laws are often more rigorous than principles, harnessing greater definition to their content, nature, role, responsibility, function, enforceability, remedies, and outcomes. Compared to the relatively stable principles, laws, par-

[16] R. Dworkin, *Taking Rights Seriously*, cit., 22; A. Sweet, *Governing with Judges*, cit., 36.

[17] See also J. Bengoetxea, *General Legal Principles Navigating Space and Time*, in U. Bernitz, X. Groussot, F. Schulyok (Eds), *General Principles of EU Law and European Private Law*, Alphen aan den Rijn, 2013, 47.

[18] See also Separate Opinion of Vice President Weeramantry, *Gabcikovo-Nagymaros*, cit., 88.

[19] See, e.g., T. Tridimas, *The General Principles of EU Law*, 2nd edition, Oxford, 2006.

[20] See also J. Bengoetxea, *General Legal Principles Navigating Space and Time*, cit., 56.

[21] R. Dworkin, *Taking Rights Seriously*, cit.; S. Vogenauer, *The Prohibition of Abuse of Law: An Emerging General Principle of EU Law*, in R. De La Feria, S. Vogenauer (Eds), *Prohibition of Abuse of Law: A New General Principle of EU Law*, Oxford, 2011, 566.

[22] See also T. Parsons, *The Social System*, New York, 1964, 41-2.

ticularly those at the visible surface such as statutes and judicial decisions,[23] are more susceptible to change, being more easily and accurately annulled, modified, or overridden by their system's rule-maker to adapt to the fleeting exigencies of shifting times.[24] Principles at most may gradually evolve,[25] given their greater theoretical breadth, abstractness, durability, and stability than the more rigid and dynamic laws. Unlike laws, principles can coexist even when they conflict with one another.[26] In law, principles, systematically established through legal sources, reasoning, and practice, generally attain wider acceptance than theories, which provide plausible explanations based on concepts and often on principles.[27]

As opposed to laws, legal principles are usually not mass-manufactured but are gradually crafted over a process of discovery involving identification, formulation, realisation, articulation, and affirmation.[28] Such discoveries emerge within the community of legal experts, including legal scholars and judges, who are increasingly influenced by non-legal knowledge, for instance from science and economics, especially when dealing with cross-disciplinary legal fields such as energy, climate, and environmental law.[29] Legal principles can be derived inductively from finer laws, along with their applications and interpretations.[30] Si-

[23] K. Tuori, *Critical Legal Positivism*, cit., 147.

[24] See also J. Bengoetxea, *General Legal Principles Navigating Space and Time*, cit., 49-50; K. Tuori, *Critical Legal Positivism*, cit., chapter 6.

[25] In an EU context, see P. Neuvonen, K. Ziegler, *General Principles in the EU Legal Order: Past, Present and Future Directions*, in K. Ziegler, P. Neuvonen, V. Moreno-Lax (Eds), *Research Handbook on General Principles in EU Law*, Cheltenham, Northampton, 2022, 10-1; M. Van Hoecke, *Legal Doctrine in Crisis*, cit., 212-3.

[26] N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, 1978, 155.

[27] K. Tuori, *Ratio and Voluntas*, cit., chapter 6; K. Tuori, *Critical Legal Positivism*, cit., 174-83.

[28] A. Sweet, *Governing with Judges*, cit., 36; N. MacCormick, *Legal Reasoning and Legal Theory*, cit., 156-7, 230-4. See also T. Khaitan, S. Steel, *Theorising Areas of Law: A Taxonomy of Special Jurisprudence*, in 28 *Legal Theory* 4 (2022), 325-51; T. Khaitan & S. Steel, *Areas of Law: Three Questions in Special Jurisprudence*, in 43 *Oxford Journal of Legal Studies* 1 (2023), 76-96.

[29] K. Bosselmann, *The Principle of Sustainability*, cit., 54, 57.

[30] See also S. Prechal, M. De Leeuw, *Transparency A General Principle of*

multaneously, such laws and policies can be derived deductively from their underlying principles.[31]

Moreover, legal principles can influence the design and development of a particular legal discipline's general doctrines.[32] In energy law, principles are important for determining how energy resources should be used in a legal-centric manner, particularly given the current technical and directional inadequacies in international energy law,[33] lacking frameworks that can effectively direct and govern the energy transition to limit anthropogenic climate change and environmental degradation. Principles in EU energy law supplement the Union's authoritative and moral positions to present a more complete view of its supranational legal system on energy, structuring the discipline's content and general doctrines to improve coverage, cohesion, and coherence.[34]

The distinction between concepts, principles, and laws can be blurred.[35] Whether a concept becomes a norm by being actualised as a principle or a law, or possesses the characteristics of both, depends on how it is appreciated within its local system that grants its meaning and purpose. Principles could concurrently be laws, or eventually become formulated into laws.[36] Certain principles of law may be more legally enforceable than oth-

EU Law, in U. Bernitz, J. Nergelius, C. Cardner (Eds), *General Principles of EC Law in a Process of Development*, Alphen aan den Rijn, 2008, 203; P. Neuvonen, *General Principles in the EU Legal Order*, cit., 11; K. Tuori, *Ratio and Voluntas*, cit., 85.

[31] See also Opinion of AG Lagrange, Case 3-54, *Associazione Industrie Siderurgiche Italiane (ASSIDER) v High Authority* ECLI:EU:C:1954:6; R. Dworkin, *Taking Rights Seriously*, cit., 83; K. Tuori, *Ratio and Voluntas*, cit., 85.

[32] See also R.J. Heffron *et al.*, *A Treatise for Energy Law*, in 11 *Journal of World Energy Law and Business*, N 1 (2018), 34-48; R.J. Heffron, *Energy Law: An Introduction*, 2nd edition, Cham, 2021.

[33] See, e.g., T. Nordtveit, L. Reins, *Energy Law Principles or Rather a Functional Approach?*, in 33 *European Energy and Environmental Law Review* 6 (2024), 300-8.

[34] P. Neuvonen, *General Principles in the EU Legal Order*, cit., 8; M. Van Hoecke, *Legal Doctrine in Crisis*, cit., 212.

[35] See also K. Tuori, *Ratio and Voluntas*, cit., 188; R. Dworkin, *Taking Rights Seriously*, cit., 24-9, 77.

[36] See also S.L. Armstrong, L.R. Gleitman, H. Gleitman, *What Some Concepts Might Not Be*, in 13 *Cognition* 3 (1983), 263-308.

ers to carry greater legal weight and influence, which could vary across jurisdictions and contexts.[37] For example, general principles of EU law assume the binding and consequential qualities of laws, while as an unwritten source of EU law, maintain the directional generality of principles.[38]

2.2 *General Principles in EU Law*

General principles of law are fundamental normative legal standards that broadly apply across multiple jurisdictions and their legal systems, to not be solitarily confined to specific contexts.[39] Besson contended that adding the precursory descriptor 'general' (or 'fundamental', for that matter) before principles of law is insignificant, since legal principles themselves naturally are already general and fundamental.[40] However, it should be noted that the qualification could usefully distinguish principles with wider scope and application over several segments of law, such as the principle of proportionality, from more specific legal principles that apply exclusively within certain systems or situations,[41] exemplified by a hypothetical principle uniquely adopted by a remote tribal community.

In the EU, general principles of EU law have legally binding constitutional status.[42] They can give rise to legal rights and obli-

[37] See also K. Bosselmann, *The Principle of Sustainability*, cit., 54-5.

[38] S. Besson, *General Principles and Customary Law in the EU Legal Order*, in S. Vogenauer, S. Weatherill (Eds), *General Principles of Law: European and Comparative Perspectives*, Oxford, 2017, 110.

[39] See, e.g., D. Edward, *Judging General Principles*, in S. Vogenauer, S. Weatherill (Eds), *General Principles of Law: European and Comparative Perspectives*, Oxford, 2017, 405; Case C-101/08, *Audiolux SA and Others v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* ECLI:EU:C:2009:626 (*Audiolux*), paras 42, 50, 63; T. Tridimas, *The General Principles of EU Law*, cit., chapter 1.

[40] S. Besson, *General Principles and Customary Law in the EU Legal Order*, cit., 110.

[41] See also S. Vogenauer, *The Prohibition of Abuse of Law*, cit., 564-5; M. Horspool, M. Humphreys, M. Wells-Greco, *European Union Law*, 11th edn, Oxford, 2021, 141.

[42] See, e.g., Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-*

gations to be more than just a theoretical ideal,[43] while possessing the standard functions of general legal principles in their interstitial role within the EU legal order.[44] They are 'discovered', developed, and determined by the CJEU as the Union's highest judicial body,[45] from the laws and constitutional traditions of member states; EU primary law, and to a derivative extent, secondary law;[46] and international law,[47] notably the European Convention

und Vorratsstelle für Getreide und Futtermittel ECLI:EU:C:1970:114, para. 4; Case C-222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206, para. 18; *Audiolux*, cit., para. 63; Case C-174/08, *NCC Construction Danmark A/S v. Skatteministeriet* ECLI:EU-:C:2009:669, paras 42, 45; T. Tridimas, *The General Principles of EU Law*, cit., 50-1; T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, cit.

[43] See, e.g., S. Vogenauer, S. Weatherill (Eds), *General Principles of Law: European and Comparative Perspectives*, Oxford, 2017, 1-3; D. Galetta, J. Ziller, *EU Administrative Law*, Cheltenham, Northampton, 2024, 25.

[44] A. Arnull, *European Union Law: A Very Short Introduction*, Oxford, 2017, 73-4.

[45] Consolidated Version of the Treaty on European Union [2016] OJ C 202/13 (TEU) Art. 19; Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47 (TFEU) Arts 263, 267, 370. See, e.g., H. Hofmann, *General Principles of EU Law and EU Administrative Law*, in S. Peers, C. Barnard (Eds), *European Union Law*, 4th edition, Oxford, 2023, 219; Craig, G. De Búrca, *EU Law: Text, Cases, and Materials,* 8th edition, Oxford, 2024, chapters 5 and 16; Opinion of AG Tesauro, Case C-367/96, *Alexandros Kefalas and Others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* ECLI:EU-:C:1998:41, point 19; D. Galetta, *EU Administrative Law*, cit., 29; S. Weatherill, *From Myth to Reality: The EU's 'New Legal Order' and the Place of General Principles Within It*, in S. Vogenauer, S. Weatherill (Eds), *General Principles of Law: European and Comparative Perspectives*, Oxford, Hart Publishing, 2017, 21; S. Vogenauer, *The Prohibition of Abuse of Law*, cit., 569-70; A. Arnull, *European Union Law*, cit., 73-4.

[46] T. Tridimas, *The General Principles of EU Law*, cit., 1. See also P. Neuvonen, *General Principles in the EU Legal Order*, cit., 14-6.

[47] See S. Vogenauer, *The Prohibition of Abuse of Law*, cit., 565-9. See also D. Galetta, *EU Administrative Law*, cit., 25; S. Prechal, *Transparency A General Principle of EU Law*, cit., 203; A. Arnull, *European Union Law*, cit., 73-4; T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, cit.; S. Seyad, *Contribution of General Principles to EC Financial Market Integration*, in U. Bernitz, J. Nergelius, C. Cardner, *General Principles of EC Law in a Process of Development*, Alphen aan den Rijn, 2008, 179; TEU Art. 6.

for the Protection of Human Rights and Fundamental Freedoms (ECHR).[48] Such unwritten principles are consecrated in the Court's judgments,[49] and subsequently reverberated in legal scholarship, Advocates General opinions, and the Union's acts,[50] ensuring through interpretation and application adherence to EU law.[51] They can also become expressly codified in primary law.[52] A general principle of EU law need not exist across all legal systems of member states as their lowest common denominator nor require their unanimous consensus, but should be rooted in the common traditions of at least several member states.[53]

[48] Council of Europe, 4 Nov. 1950. See also P. Neuvonen, *General Principles in the EU Legal Order*, cit., 16.

[49] J. Ziller, *Advanced Introduction to European Union Law*, Cheltenham, Northampton, 2023, 114; X. Groussot, H. Lidgard, *Are There General Principles of Community Law Affecting Private Law?*, in U. Bernitz, J. Nergelius, C. Cardner, *General Principles of EC Law in a Process of Development*, Alphen aan den Rijn, 2008, 159.

[50] S. Prechal, *Transparency A General Principle of EU Law*, cit., 203; P. Neuvonen, *General Principles in the EU Legal Order*, cit., 14. See also TFEU Art. 288.

[51] P. Neuvonen, *General Principles in the EU Legal Order*, cit.; J. Bengoetxea, *General Legal Principles Navigating Space and Time*, cit., 50; J. Ziller, *General Principles of European Union Law: Their Origins and Role in the Evolution of European Integration*, in 2 *CERIDAP* (2025), 199-200; J. Ziller, *Advanced Introduction to European Union Law*, cit., 114.

[52] See TEU Art. 6(3); Charter of Fundamental Rights of the European Union [2012] OJ C 326/391; T. Tridimas, *The General Principles of EU Law*, cit., 1.

[53] J. Ziller, *Advanced Introduction to European Union Law*, cit., 114. See, e.g., Case C-144/04, *Werner Mangold v. Rüdiger Helm* ECLI:EU:C:2005:709 (*Mangold*); M. Herdegen, *General Principles of EU Law: The Methodological Challenge*, in U. Bernitz, J. Nergelius, C. Cardner, *General Principles of EC Law in a Process of Development*, Alphen aan den Rijn, 2008, 346-7; A. Arnull, *What is a General Principle of EU Law?*, in R. De La Feria, S. Vogenauer (Eds), *Prohibition of Abuse of Law: A New General Principle of EU Law*, Oxford, 2011, 9; Opinion of AG Léger, Case C-87/01 P, *Commission v. CEMR* ECLI:EU:C:2002:501, point 64. See also C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights*, Cheltenham, Northampton, Edward Elgar Publishing, 2018, chapter 4; T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, cit.; P. Neuvonen, *General Principles in the EU Legal Order*, cit., 15-6; T. Tridimas, *The General Principles of EU Law*, cit., 1; X. Groussot, J. Hettne, G. Petursson, *General Principles and the Many Faces of Coherence*, in S. Vogenauer, S. Weatherill

General principles of EU law have regularly been conflated with primary law,[54] the supreme source of EU law in the Union's hierarchy of norms, but should not be as they merely supplement primary law from below.[55] By convention, they cannot invalidate primary law, nor can the Court deny an amendment to primary law that repeals a general principle of EU law.[56] This acknowledges that the unelected Court technically does not have powers to make primary law, in deference to the principle of institutional balance.[57] Nevertheless, general principles of EU law are positioned above other sources of EU law,[58] including secondary law and international agreements concluded by the EU under the Treaty on the Functioning of the European Union (TFEU),[59] useable as bases to review the legality of such non-primary forms of EU law and annul them.[60]

Due to the supremacy of EU law, general principles of EU law are grounds for judicial review of the legality of Union conduct.[61] They bind the EU's institutions and member states as enforceable Union obligations,[62] subjecting them to judicial scrutiny and

(Eds), *General Principles of Law: European and Comparative Perspectives*, Oxford, 2017, 159.

[54] See, e.g., A. Cuyvers, *General Principles of EU Law*, in E. Ugirashebuja et al. (Eds), *East African Community Law*, Leiden, Brill Nijhoff, 2017, 219; T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, cit., 18; T. Tridimas, *The General Principles of EU Law*, cit., 51; P. Neuvonen, *General Principles in the EU Legal Order*, cit., 11; A. Arnull, *European Union Law*, cit., 73-4; S. Besson, *General Principles and Customary Law in the EU Legal Order*, cit., 111.

[55] D. Galetta, *EU Administrative Law*, cit., 26.

[56] D. Galetta, *EU Administrative Law*, cit., 26. See also A. Cuyvers, *General Principles of EU Law*, cit., 219, 225.

[57] Case C-70/88, *Parliament v Council* ECLI:EU:C:1990:217.

[58] A. Cuyvers, *General Principles of EU Law*, cit., 219; D. Galetta, *EU Administrative Law*, cit., 26; Ziller, *General Principles of European Union Law*, 191-2, 200.

[59] See TFEU Arts 216, 217.

[60] See also D. Galetta, *EU Administrative Law*, cit.

[61] TFEU Arts 263, 267; M. Horspool, *European Union Law*, cit., 143.

[62] Michael Dougan, *Some Comments on the Idea of a General Principle of Union Law Prohibiting Abuses of Law in the Field of Free Movement for Union Citizens*, in R. De La Feria, S. Vogenauer (Eds), *Prohibition of Abuse of Law: A New General Principle of EU Law*, Oxford, 2011; H. Hofmann, *General*

review as principles of administrative law to uphold the rule of law.[63] General principles of EU law provide a signal and basis of assessment on the validity under EU law of a secondary law or other Union act, or a member state's action or law.[64] They reinforce a general and comprehensive reading of the law, growing with the EU legal community's consciousness even when the law stagnates.[65]

Despite possessing profound significance in the EU legal architecture, the CJEU's methodology for identifying and subsequently recognising a general principle of EU law remains obscure, ad hoc, and without unequivocal consistency.[66] General principles of EU law currently do not have a stringent process nor criteria to their formation under the EU legal framework, drawing uncertainty as to whether certain notions are indeed such binding principles.[67] They are open to new additions or reinterpretations, perhaps due to an evolution in the CJEU's jurisprudence or law[68] with social and technological progress, without being officially recorded in a single register. Besson posited that the Court has not defined a strict method for identifying

Principles of EU Law and EU Administrative Law, cit., 219; A. Arnull, *European Union Law*, cit., 73-4; S. Besson, *General Principles and Customary Law in the EU Legal Order*, cit. See, e.g., Case C-354/04 P, *Gestoras Pro Amnistia, Juan Mari Olano Olano and Julen Zelarain Errasti v. Council* ECLI:EU-:C:2007:115, para. 51; Case C-355/04 P, *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v. Council* ECLI:EU:C:2007:116, para. 51.

[63] A. Arnull, *European Union Law*, cit., 10, 21; Opinion of AG Tesauro, Case C-367/96, cit., point 19. See also S. Vogenauer, *The Prohibition of Abuse of Law*, cit., 565; D. Galetta, *EU Administrative Law*, cit., 63.

[64] M. Horspool, *European Union Law*, cit., 141, 143; J. Ziller, *Advanced Introduction to European Union Law*, cit., 114.

[65] See, e.g., Opinion of AG Tesauro, Case C-367/96, cit., points 19-20; A. Arnull, *What is a General Principle of EU Law?*, cit., 19.

[66] See also S. Vogenauer, *The Prohibition of Abuse of Law*, cit., 564; S. Besson, *General Principles and Customary Law in the EU Legal Order*, cit., 112; P. Neuvonen, *General Principles in the EU Legal Order*, cit., 11, 14, 17.

[67] See, e.g., R. De La Feria, S. Vogenauer (Eds), *Prohibition of Abuse of Law: A New General Principle of EU Law*, Oxford, 2011.

[68] D. Galetta, *EU Administrative Law*, cit., 30; M. Horspool, *European Union Law*, cit., 141, 146; A. Cuyvers, *General Principles of EU Law*, cit., 219; A. Arnull, *European Union Law*, cit., 73-4; S. Besson, *General Principles and Customary Law in the EU Legal Order*, cit., 114.

general principles of EU law beyond those that are derived from primary law.[69] This issue would in actuality also apply to less-defined aspects of primary law. While certain areas in primary law have been explicitly labelled as general principles of EU law such as fundamental rights,[70] others have not, such as energy solidarity,[71] to require further legal analysis and extraction.

The CJEU has regularly stated in its case-law that a 'general principle of EU law' exists. However, in other instances, it may not use the identical term for an exact or another general principle of EU law, alternating between terminologies including 'principle',[72] 'general principle', 'general principle(s) of law',[73] 'fundamental principle',[74] 'one of the fundamental principles of EU law',[75] 'among the fundamental principles of EU law',[76] or 'essential principle'.[77] This could undermine the Union's reliance on general principles of EU law as a source of law.[78]

Nevertheless, it has been suggested that the Court is more likely to acknowledge the existence of a new general principle of EU law if it is grounded in primary law, namely the Charter of

[69] S. Besson, *General Principles and Customary Law in the EU Legal Order*, cit., 112.

[70] TEU Art. 6(3).

[71] Case C-848/19 P, *Germany v. Poland* ECLI:EU:C:2021:598 (*OPAL*).

[72] See, e.g., C-390/99, *Canal Satélite Digital SL v. Adminstración General del Estado, and Distribuidora de Televisión Digital SA* ECLI:EU:C:2002:34.

[73] See, e.g., C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* EU:C:1991:254; C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* EU:C:2008:461.

[74] See, e.g., Case C-143/93, *Gebroeders van Es Douane Agenten BV v. Inspecteur der Invoerrechten en Accijnzen* ECLI:EU:C:1996:45.

[75] See, e.g., *OPAL*, cit., para. 38.

[76] See, e.g., Case T-596/22, *PGI Spain, SL and Others v. Commission* ECLI:EU:T:2025:251, para. 88.

[77] See, e.g., Case C-441/21 P, *Ryanair DAC v. Commission* ECLI:EU-:C:2024:477, para. 17. See also T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, cit., 8; P. Neuvonen, *General Principles in the EU Legal Order*, cit., 9, 11.

[78] See also T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, cit., 8.

Fundamental Rights (CFR)[79] and the EU treaties. General principles of EU law have additionally been suggested to share the common traits of being judicially enforceable; having a comprehensive and foundational character underpinning the legal system with normative certainty, clarity, and legally binding substance; and being sufficiently important to have constitutional status.[80]

3. *Sustainability as a Principle of Energy Law*

Sustainability's modern coinage is a product of the Age of Enlightenment.[81] Its earliest contemporary usage was in the 1970s and early 1980s,[82] growing with the Brundtland Report's 1987 publication.[83] The report referred to 'sustainable development' as a social, economic, and environmental concept centred on human needs, promoting harmony among humans and between humanity and nature, within the definition of meeting present needs without compromising those of future generations.[84] It identified energy as a necessary component within sustainability, being a requirement for human survival as a source of life.[85]

[79] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391. See, e.g., P. Neuvonen, *General Principles in the EU Legal Order*, cit., 17.

[80] T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, cit. See also *Audiolux*, cit., paras 34, 42; Opinion of AG Trstenjak, Case C-282/10, *Dominguez v. CICOA* EU:C:2011:559, point 113.

[81] K. Bosselmann, *The Principle of Sustainability*, cit., 15. See also R. Kim, K. Bosselmann, *Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law*, in 24 *Review of European, Comparative & International Environmental Law* 2 (2015), 198.

[82] See, e.g., I. Barbour, *Justice, Participation and Sustainability at MIT*, in 31 *Ecumenical Review* 3 (1979); L. Thiele, cit.; K. Bosselmann, *The Principle of Sustainability*, cit., 14.

[83] World Commission on Environment and Development, *Our Common Future*, Annex to UN GA Res A/42/427 (4 August 1987) (*Brundtland Report*).

[84] See, e.g., *Brundtland Report*, cit., 24, 73, paras 27, 81.

[85] *Brundtland Report*, cit. See also Case C-72/83, *Campus Oil Ltd and Others v. Minister for Industry and Energy and Others* ECLI:EU:C:1984:256, para. 34.

Meanwhile, since the 1992 Maastricht Treaty,[86] sustainability and sustainable development have been broadly referred to across primary law,[87] but without being further defined nor linked to energy.

The modern terminology and conception of sustainability post-dates sustainability's actual applications across humankind's history.[88] A principle of sustainability cannot be said to be a contemporary phenomenon, being one that begins with any natural appreciation for the sanctity of human existence, although it has been reconceptualised to befit the ontological consciousness of more contemporary contexts and audiences. It stems from the ordinary, constant, and innate living desire to survive.[89]

The first modern environmental laws were drafted in the 1960s, heavily influenced by European legal systems.[90] Analogously, the Court's energy case-law has been steadily growing since *Costa v. ENEL* in 1964, a case on the nationalisation of a member state's electricity sector without otherwise having a substantive link to energy law, being more influential in EU constitutional law jurisprudence for establishing the principle of primacy.[91] Modern energy law's beginnings in the EU started about a decade earlier with the Union's establishment as the European Coal and Steel Community under the 1951 Paris Treaty that recognised coal as a primary energy source,[92] although legislation on

[86] Treaty on European Union [1992] OJ C 191/1.

[87] See TEU preamble, Arts 3, 21(2)(d), (f); TFEU Arts 11, 119(3), 140(1); CFR preamble, Art. 37.

[88] L. Thiele, *Sustainability*, cit., chapter 1; K. Bosselmann, *The Principle of Sustainability*, cit., 14; I. Russell, *The Sustainability Principle in Sustainable Energy*, in 44 *Tulsa Law Review* (2008), 124.

[89] See also L. Thiele, *Sustainability*, cit.; I. Russell, *The Sustainability Principle in Sustainable Energy*, cit., 124.

[90] K. Bosselmann, *The Principle of Sustainability*, cit., 12.

[91] Case 6-64, *Flaminio Costa v E.N.E.L.* ECLI:EU:C:1964:66. See, e.g., M. Claes, *The Primacy of EU Law in European and National Law*, in D. Chalmers, A. Arnull (Eds), *The Oxford Handbook of European Union Law*, Oxford, 2015.

[92] See, e.g., Treaty establishing the European Coal and Steel Community [1951] OJ L 137/3 (Paris Treaty); Treaty establishing the European Atomic Energy Community [1957] OJ 2012 C 327/1 (Euratom Treaty).

electricity had existed since the 1920s, including the Federal Power Act in the United States.[93] Even earlier examples are laws governing oil and gas that supported 19th century industrialisation; and pre-modern energy law such as the London coal ban of 1306, the first Royal Charter to dig coal granted in 1239 by Henry III,[94] and solar rights under Roman law.[95]

Sustainability, rudimentarily conceptualised from its overall lowest common denominator uniting all its definitions, is a certain state's (in the sense of a condition) ability to continue existing.[96] This definition can be overly general and ambiguous if not used under a particular context, purpose or perspective,[97] because the interpretations of sustainability are fluid and can be diversely characterised under various situations. They can be based on its substance as a subject matter, exemplified by economic or financial,[98] fiscal, social, cultural, political, environmental, energy, ecological, and even technological sustainability,[99] and sustainable (social)[100] development and sustainable mobility.[101] Alternatively, they can be based on the foundational typological device they are purposed and packaged as, such as a concept, principle, law, or theory as noted in Section 2. Nevertheless,

[93] Federal Power Act, 16 USC §§ 791a-828c (1920).

[94] E. Armstrong, *An Elizabethan Colony of Craftsmen*, in 126 *Nature* 3174 (1930), 316-8.

[95] B. Jordan, J. Perlin, *Solar Energy Use and Litigation in Ancient Times*, in 1 *Solar Law Reporter* 3 (1979), 583 ff.

[96] See also L. Thiele, *Sustainability*, cit.; K. Ng, *Sustainable Sides of Taxation: An International Law Approach*, in 26 *Environmental Law Review* 1 (2024), 33-4.

[97] K. Bosselmann, *The Principle of Sustainability*, cit., 63.

[98] See, e.g., Opinion of AG Rantos, Case C-833/21, *Endesa Generación SAU v. Tribunal Económico Administrativo Central* ECLI:EU:C:2023:66, point 28.

[99] See, e.g., Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L328/82; R. Vos, *Defining Sustainability: A Conceptual Orientation*, in 82 *Journal of Chemical Technology & Biotechnology: International Research in Process, Environmental & Clean Technology* (2007).

[100] Opinion of AG La Pergola, Case C-268/94, *Portugal v. Council* ECLI:EU:C:1996:207.

[101] Case C-211/01, *Commission v. Council* ECLI:EU:C:2003:452.

sustainability's usage in the context of protecting the natural environment has taken centre stage today.[102]

Adapting from the previous section, sustainability as a concept is a descriptive foundational idea captured by the phenomenon *to sustain* and what it entails. Operationalising this concept, the legal principle of sustainability presents a normative position, elaborating on how we *ought to* sustain, doing so in respect of energy resources in energy law. It provides legal, normative, and moral weight to the concept, serving prescriptive and directional functions to systematically guide decision-making, application, and interpretation. A legal theory of sustainability builds on such concepts and principles to invoke a reasonable explanation of sustainability in law.

Several scholars have expressed support for sustainability as a legal principle. Bosselmann has dedicated a monograph to this principle from an environmental constitutional law angle.[103] Heffron identified the principle of prudent, rational, and sustainable use of natural resources as one of seven core principles of energy law,[104] which he later elaborated as the use of natural resources that balances economic development and environmental concerns.[105] Within energy justice, Sovacool described the principle of sustainability as the depletion of energy resources with consideration for savings, community development, and precaution.[106] Others have gone further to consider sustainability as possibly evolving into a general principle of EU law at the Court.[107]

Sustainability as a principle and a concept have been at times used interchangeably and unsystematically in legal scholarship. For example, Horspool, Humphreys, and Wells-Greco considered sustainability to be an overarching general principle of the

[102] See, e.g., K. Bosselmann, *The Principle of Sustainability*, cit.

[103] K. Bosselmann, *The Principle of Sustainability*, cit.

[104] R. Heffron, *A Treatise for Energy Law*, cit., 40-8.

[105] R. Heffron, *Energy Law: An Introduction*, cit.

[106] B. Sovacool, M. Burke, L. Baker *et al., New Frontiers and Conceptual Frameworks for Energy Justice*, in 105 *Energy Policy* (2017), 677, 687; B. Sovacool, M. Dworkin, *Energy Justice: Conceptual Insights and Practical Applications*, in 142 *Applied Energy* (2015), 435.

[107] M. Horspool, *European Union Law*, cit., 152-4.

EU legal order[108] before referring to it as a concept.[109] Similarly, Affolder referred to the legal concept of sustainability[110] before subsequently alternating to an overarching principle of sustainability,[111] without addressing their different theoretical statuses and implications. The International Court of Justice has meanwhile referred to sustainable development on separate occasions as a principle[112] and a concept,[113] both under the same expression of involving the 'need to reconcile economic development with protection of the environment'.

The applications of sustainability as a principle and a concept could gain from a more precise appreciation of their nuancedly different albeit interrelated characteristics, highlighted in Section 2. A concept of sustainability is neither synonymous with, independent of, nor mutually exclusive of the principle of sustainability, even though principles, as with laws, could be portrayed under reductionism as 'normative concepts',[114] being normatively founded upon concepts. This chapter focuses on sustainability as a legal principle in energy law because principles are teleologically driven, supporting a functioning social order by malleably guiding the use of energy resources, providing directionality to the discipline amidst its patchwork of rules and governance.[115] Concepts on the other hand lack such functions to

[108] M. Horspool, *European Union Law*, cit., 140, 143, 152.

[109] M. Horspool, *European Union Law*, cit., 153. Scotford also regarded environmental principles as concepts: E. Scotford, *Environmental Principles Across Jurisdictions: Legal Connectors and Catalysts*, in E. Lees, J. Viñuales (Eds), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019.

[110] N. Affolder, *The Legal Concept of Sustainability*, in *A Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage March 23-24 2012*, Calgary, 2012, 1.

[111] N. Affolder, *The Legal Concept of Sustainability*, cit., 5.

[112] Advisory Opinion, *Obligations of States in respect of Climate Change* (ICJ, 23 July 2025), 52, para. 147.

[113] *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 Sept. 1997, *ICJ Reports*, 78, para. 140.

[114] See, e.g., E. Scotford, *Environmental Principles Across Jurisdictions*, cit., 654.

[115] See, e.g., K. Huhta, *The Disciplinary Foundations of Energy Law*, in K.

contain less advocative and normative value than principles. Accordingly, these two foundational elements of general doctrines should be distinctly treated within each specific context consistently,[116] supporting their seamless symbiotic co-existence to uphold their unique qualities with semantic accuracy.

4. *The Court's Role in Developing the Sustainability Principle in Energy Law*

4.1 *The Court as an EU Institution*

The EU institutions, including the CJEU which was originally established as the Court of Justice of the European Coal and Steel Communities, have been paving way for greater cooperation in Union-wide energy matters embodied by the European Commission's Energy Union Strategy.[117] At the Union level, no specialised courts to date have been set up to adjudicate on energy, let alone constitutional nor environmental matters unlike those of other jurisdictions, such as the German Federal Constitutional Court or the Land and Environment Court of New South Wales in Australia.[118] As such, these issues fall under the CJEU's broad remit to ensure the observation of EU law, in accordance with Article 19 of the Treaty on European Union.

Unlike judges of the common law tradition,[119] the CJEU's judges under the Union's institutional and legal framework established by primary law cannot officially create EU law. They can only apply and interpret EU law to ensure its uniformity

Talus, *A Research Agenda for International Energy Law*, Northampton, 2024, 7-24.

[116] Note K. Tuori, *Ratio and Voluntas*, cit., 188.

[117] European Commission, *A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy* COM/2015/080 final.

[118] See, e.g., D. Craig, *Profiles in Sustainability: The Hon. Justice Brian J. Preston, FRSN SC FAAL, Chief Judge of the Land and Environment Court of New South Wales*, in 66 *Environment: Science and Policy for Sustainable Development* 3 (2024), 37-47.

[119] See, e.g., B. Preston, *Leadership by the Courts in Achieving Sustainability*, cit.; A. Barak, *The Judge in a Democracy*, Princeton, 2009.

across the Union,[120] and these applications and interpretations of the law must be followed by the Union's member states and institutions to avoid being sanctioned.[121] Nevertheless, by applying and interpreting the law, courts could be creating new legal norms to generate supplementary rules or 'make laws' under a legal fiction to instrumentally develop EU law.[122]

Despite not being bound by *stare decisis*, the CJEU can refer to and uphold its previous decisions. While the CJEU's decisions are a source of law that is technically binding only *inter partes*,[123] the Court has placed a high normative value on them,[124] often drawing and not detracting from them, especially when a line of settled cases and legal principles, particularly general principles of EU law, has been established to clarify EU law with a generally binding *erga omnes* effect.[125] Such path dependency benefits the CJEU's institutional quest for justice, judicial unity, uniformity, consistency, certainty, stability, predictability, reliability, and therefore continuity as the Union's final arbiter, strengthening

[120] TEU Art. 19(1).

[121] M. Kawczyńska, *The Court of Justice of the European Union as a Law-maker: Enhancing Integration or Acting Ultra Vires?*, in M. Florczak-Wątor (Ed.), *Judicial Law-Making in European Constitutional Courts*, New York, 2020; J. Komarek, *Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation*¸ in 11 *Cambridge Yearbook of European Legal Studies* (2009), 399-42.

[122] M. Kawczyńska, *The Court of Justice of the European Union as a Law-maker*, cit.; J. Komarek, *Precedent and Judicial Lawmaking in Supreme Courts*, cit. See also H. Schermers, *Judicial Protection in the European Communities*, Dordrecht, 1983, 76; R. Dehousse, *The European Court of Justice*, cit., 70-82.

[123] See, e.g., K. Purnhagen, L. Gormley, *Court Cases*, in *The Oxford Encylopedia of EU Law* (last updated 2022), available at: https://opil.ouplaw.com/display/10.1093/law-oeeul/law-oeeul-e159; J. Komarek, *Precedent and Judicial Lawmaking in Supreme* Courts, cit., 400.

[124] J. Komarek, *Precedent and Judicial Lawmaking in Supreme* Courts, cit.; Case C-224/01, *Gerhard Köbler v. Republik Österreich*, ECLI:EU:C:2003:513, paras 53-6.

[125] S. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law*, Oxford (2018), 61; A. Arnull, *European Union Law*, cit., 97. See, e.g., Case C-176/12, *Association de Médiation Sociale v. Union Locale des Syndicats CGT et al* ECLI:EU:C:2014:2, paras 27, 42, 50.

Union integration and rule of law.[126] Alternatively, the CJEU may deviate from them to advance its jurisprudence.[127]

There are few cases in EU energy law, or even in EU law generally, that expressly refer to a principle of sustainability. Those that do fail to meaningfully expound the principle in detail.[128] Nonetheless, an examination of several CJEU energy law cases in the next sub-section can reveal underlying characteristics of how the Court has implicitly dealt with the sustainability principle.

4.2 *Selected Energy Jurisprudence on Sustainability*

An early case that demonstrated how the Court had implicitly applied the principle of sustainability in the context of renewable energy is *PreussenElektra* from 2001.[129] While the case has significance in developing the law on the prohibition of state aid and the free movement of goods within the EU's internal market, the case's involvement with the latter theme has implications for sustainability. A question for the Court's determination was whether a German national renewable energy support scheme that required electricity suppliers to purchase green electricity generated in their area of supply, at minimum higher prices than their real economic value, had violated the EU's rules on the free movement of goods.[130]

The CJEU found that the scheme was not incompatible with

[126] S. Schmidt, *The European Court of Justice and the Policy Process*, cit., 33, 61, 91-2; U. Sadl, S. Hink, *Precedent in the Sui Generis Legal Order: A Mine Run Approach*, in 20 *European Law Journal* (2014).

[127] S. Schmidt, *The European Court of Justice and the Policy Process*, cit., 61. See, e.g., Case C-205/20, *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld* ECLI:EU:C:2022:168.

[128] See, e.g., Case C-36/98, *Spain v. Council* ECLI:EU:C:2001:64; Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v. Ipourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others* ECLI:EU:C:2012:560; Case T-356/15, *Austria v. Commission* ECLI:EU:T:2018:439; Case C-594/18 P, *Austria v. Commission* ECLI:EU:C:2020:742 (*Hinkley*).

[129] Case C-379/98, *PreussenElektra AG v. Schhleswag AG* ECLI:EU:C:2001:160 (*PreussenElektra*).

[130] *PreussenElektra*, cit., para. 27.

the EU's primary law rules on the free movement of goods that prohibited trade discrimination in the internal market, with a basis in environmental sustainability. The Court referred to the scheme's promotion of the use of renewable sources of electricity, citing how such renewable forms of energy were beneficial to humans and the environment, while helping to attain the EU's environmental protection objectives and international climate commitments.[131] Along with these environmental aims, the Court considered the unique characteristics of the energy market, observing that it was difficult to identify the origin and source of energy from which the electricity was produced once it enters the distribution system.[132] The Court held these grounds warranted an exception to primary law's general prohibition on trade restrictions.

The Court's approach in *PreussenElektra* seemingly deviated from its previous position in *Outokumpu*. In *Outokumpu*, the Court had held that even though environmental protection was one of the 'essential objectives' of the Community,[133] it could not justify a member state's differentiated rates of internal taxation that discriminated against similar products from other member states in spite of its apparent basis in ecological considerations, contravening primary law.[134] The Court in *Outokumpu* did not address the potential of environmental considerations to justify derogations from primary law's prohibition of internal tax discrimination, and had not accepted the same argument on the difficulty in determining the energy source of electricity to justify an exemption from such a prohibition.[135]

The case-law development in *PreussenElektra* signified a turn in the Court's approach as it began to adjudicate on such cases that supported cleaner sources of energy away from fossil fuels. This could possibly reflect the Court's stronger awareness of sus-

[131] *PreussenElektra*, cit., paras 73-6.

[132] *PreussenElektra*, cit., para. 79.

[133] Case C-213/96, *Outokumpu Oy* ECLI:EU:C:1998:155 (*Outokumpu*), paras 32-3.

[134] *Outokumpu*, cit., paras 34-5.

[135] *Outokumpu*, cit., paras 37-9.

tainability as a principle within energy law, with sustainability's growing institutionalisation and integration in global governance.[136]

The Court in its 2014 judgments of *Ålands Vindkraft*[137] and *Essent Belgium*,[138] which similarly concerned renewable energy support schemes involving tradeable green certificates for green electricity production, followed the position adopted in *PreussenElektra* that affirmed environmental sustainability and consolidated its methodology. The Court ruled that those measures constituted discriminatory quantitative restrictions on imports, hindering intra-Union trade to normally be prohibited under the Union's free movement of goods rule. Yet, they were justifiable by either overriding requirements, such as environmental protection, or an express public interest exception under primary law, including the protection of the health and life of humans, animals, or plants.[139] For a measure to be capable of justifying barriers to the free movement of goods in the internal market, it must genuinely be able to achieve a legitimate objective, such as promoting the use of renewable energy sources for electricity production, and must do so proportionately.[140]

The CJEU's 2020 judgment in *Hinkley* on nuclear development and its intersection with EU rules on state aid again did not explicitly elaborate on the principle of sustainability.[141] The Court did not accept Austria's argument that the development of nuclear facilities in general would contravene the principle of sustainability, upholding nuclear energy as a legitimate source of

[136] See, e.g., *Brundtland Report*, cit.; TEU preamble, Arts 3, 21(2)(d), (f); TFEU Arts 11, 119(3), 140(1); CFR preamble, Art. 37; UNGA Resolution 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development', UN Doc. A/RES/70/1 (2015) (*Sustainable Development Goals*).

[137] Case C-573/12, *Ålands Vindkraft AB v. Energimyndigheten* ECLI:EU:C:2014:2037 (*Vindkraft*).

[138] Joined Cases C-204/12 to C-208/12, *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* ECLI:EU:C:2014:2192 (*Essent Belgium*).

[139] *Vindkraft*, cit., paras 76-80; *Essent Belgium*, cit., paras 89-95.

[140] *Vindkraft*, cit., paras 76-119; *Essent Belgium*, cit., paras 89-116.

[141] *Hinkley*, cit.

energy under EU law.[142] Yet, the Court confirmed that the Euratom Treaty, even without stipulating a principle of sustainability, could not preclude the application of EU law's environmental rules. State aid that contravened rules of EU law on the environment or general principles of EU law was held to be incompatible with the internal market.[143] As such, the principle of sustainability has remained applicable in the nuclear energy sector, and its violation could preclude the grant of state aid.[144]

Furthermore, the Court in *Hinkley* upheld each member state's rights to security of energy supply and sovereignty over their energy mix.[145] It acknowledged the choice of using nuclear power as a matter for individual member states, to find no conflict between EU environmental law's objectives and principles, and the Euratom Treaty's objectives.[146] Thus, while the principle of sustainability and other environmental principles apply to nuclear energy under EU law, the Court has found that they do not necessarily preclude state aid from being granted to nuclear projects, affirming that nuclear power, given its several benefits, may not manifestly be a disproportionate means of securing electricity.[147] These rulings showcase how sustainability can take form in energy law, which can influence sustainability's conception as a legal principle.

4.3 *Evaluating the Court's Doctrinal Role*

From these energy cases, the CJEU can be observed to be reluctant in expressly recognising or defining a legal principle of sustainability. Generally, express references to the concept and principle of sustainability or sustainable development within the CJEU's case-law have been few, passive, and undeveloped. The

[142] *Hinkley*, cit., para. 49.
[143] *Hinkley*, cit., para. 44.
[144] *Hinkley*, cit., paras 44-5.
[145] *Hinkley*, cit., paras 48-9; Opinion of AG Hogan, Case C-594/18 P, *Austria v. Commission* ECLI:EU:C:2020:352, point 42.
[146] *Hinkley*, cit., para. 49.
[147] *Hinkley*, cit., paras 77-80.

CJEU has not been closely involved in the explicit development of sustainability as a principle in EU law, much less a binding and overriding general principle of EU law.[148] Nevertheless, the strands of sustainability observed from the CJEU's energy case-law above illustrate the Court's ability to influence the conceptualisation of such a legal principle.

Less surprising has been the delay between the early usage, establishment, and acceptance of sustainability's terminology in civil society and the legislature, and its subsequent uptake in the CJEU's case-law. This has been epitomised by the CJEU's eventual reference to sustainable development several years after the Brundtland Report's publication in 1987,[149] which has also been the case for the Millennium Development Goals.[150] In addition, no CJEU case-law has to date referred to the Sustainable Development Goals[151] adopted by all members states of the United Nations in 2015. It demonstrates how the CJEU, resembling other conservative judicial bodies trailing behind their parliaments, may not usually be as proactive in responding to social developments as the legislature. That is not to say that legal principles are fixed in stone,[152] analogous to the CJEU's jurisprudence, as demonstrated by the evolutions of the law in the Court's landmark judgments of *PreussenElektra*, *OPAL*,[153] and *Mangold*.[154]

The CJEU, since its inception, has been building a set of norms vital for shaping EU law. However, it can only do so when called upon to undertake legitimate judicial law-making and not at whim, under the principle of institutional balance.[155] The CJEU's hesitancy in expressly elaborating on the principle of sus-

[148] M. Horspool, *European Union Law*, cit., 152-4.

[149] See, e.g., Case T-117/94, *Associazione Agricoltori della Provincia di Rovigo and others v. Commission* ECLI:EU:T:1995:37.

[150] UNGA Resolution 55/2, 'United Nations Millennium Declaration', UN Doc. A/RES/55/2 (2000). See, e.g., Opinion of AG Mengozzi, Case C-91/05, *Commission v Council* ECLI:EU:C:2007:528, point 157, footnote 65.

[151] See, *Essent Belgium*, cit.

[152] See also E. Lees, *Environmental Principles and Legitimacy*, cit., 64-5.

[153] *OPAL*, cit.

[154] *Mangold*, cit. See also P. Craig, *EU Law*, cit., 93.

[155] Case C-70/88, *Parliament v Council*, cit.

tainability, as shown in the energy case-law above, could be deliberate, to avoid proffering an interpretation that is too restrictive and intrusive.[156] This could be associated with the abstractness of an overarching general principle of sustainability, which could be further described as a meta-principle of law, a type of general principle that explains, describes, and guides the operation of other legal principles.[157]

Moreover, the principle of sustainability in the EU and the priority amongst sustainability's elements have appeared to require legal-political discretion over each specific situation, rather than being purely legally motivated, evinced by the CJEU's avoidance of the topic in its case-law.[158] Many aspects of the law, as observed in respect of sustainability and particularly in energy which underpins modern civilisation, are driven directly and indirectly by politics, 'political entrepreneurship', and geopolitics.[159] They rely on innovation and other factors internal and external to the law,[160] and the quantification, mitigation, absorption, management, and allocation of risk within society, policy, and politics. These features could influence the CJEU in its deci-

[156] See also E. Lees, *Environmental Principles and Legitimacy*, cit., 71.

[157] See also D. French, *Global Justice and the (Ir)relevance of Indeterminacy*, in 8 *Chinese Journal of International Law* 3 (2009), 593-619.

[158] M. Horspool, *European Union Law*, cit., 152-3. See also F. Mormann, *Of Markets and Subsidies: Counter-intuitive Trends for Clean Energy Policy in the European Union and the United States*, in 10 *Transnational Environmental Law* 2 (2021), 336. See also D. Kennedy, *A Semiotics of Critique*, in 22 *Cardozo Law Review* 3-4 (2001), 1168-9; T. Khaitan, *Areas of Law: Three Questions in Special Jurisprudence*, cit., 84; R. Dworkin, *Taking Rights Seriously*, cit., 83.

[159] A. Somek, *Is Legality a Principle of EU Law?*, in S. Vogenauer, S. Weatherill (Eds), *General Principles of Law: European and Comparative Perspectives*, Oxford, 2017. See also C. Haines, *General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges*, in 17 *Illinois Law Review* (1922), 106; M. Eliantonio, M. Krajewski, E. Lees, *Legitimacy: What's in a Name?*, in E. Lees, M. Eliantonio (Eds), *The Legitimacy of EU Environmental Governance and the Role of the European Courts*, Oxford, 2025, 5-7.

[160] See, e.g., C. Moser, B. Rittberger, *The CJEU and EU (De-)Constitutionalization: Unpacking Jurisprudential Responses*, in 20 *International Journal of Constitutional Law* (2022); C. Haines, *General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges*, cit.

sion-making as an institutional agent behind social reconfigurations within what it perceives as its legally permissible reach,[161] and to correspondingly set the boundaries of sustainability.[162]

The role of the CJEU has not only been to interpret and apply the law to adjudicate,[163] passively and mechanically. It also cultivates the law by contributing to and refining general doctrines, including principles in EU energy law, even when the law has been silent on a particular matter, to nourish and sustain its governed jurisdiction[164] by strengthening the substance and coherency of the law.[165] The CJEU can contribute to the development of general legal doctrines through its case-law either directly through their explicit articulation, or indirectly by delineating their constituent elements which can subsequently be systematised by scholars. Even if the CJEU has yet to explicitly recognise sustainability as a legal principle,[166] sustainability could be embraced as the meta-principle in law within the hierarchy of principles, with applications in EU energy law and most if not all other legal disciplines. Such acknowledgement by the Court can influence legal culture in the EU.[167] It can also guide and improve decision-making inside and outside of the courtroom on the legitimacy of actions or instruments from a sustainability perspective, including laws, principles, and policies, which could produce downstream rights, obligations, and other consequences.[168]

[161] See also R. Dehousse, *The European Court of Justice*, cit.; C. Moser, *The CJEU and EU (De-)Constitutionalization*, cit.; C. Haines, *General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges*, cit.

[162] B. Preston, *Leadership by the Courts in Achieving Sustainability*, cit.

[163] R. Dehousse, *The European Court of Justice*, cit.

[164] A. Barak, *The Judge in a Democracy*, cit.

[165] See also A. Peczenik, *A Theory of Legal Doctrine*, in 14 *Ratio Juris* 1 (2001), 75-105.

[166] See also *Audiolux*, cit.; E. Dagilytė, *Solidarity: A General Principle of EU Law? Two Variations on the Solidarity Theme*, in A. Biondi, E. Dagilytė, E. Küçük (Eds), *Solidarity in EU Law*, Cheltenham, Northampton, 2018, 78.

[167] K. Tuori, *Ratio and Voluntas*, cit., 7; K. Tuori, *Critical Legal Positivism*, cit., 183.

[168] See also R. Dehousse, *The European Court of Justice*, cit.; A. Barak, *The Judge in a Democracy*, cit., 61-2.

The influence of courts over the formulation of general doctrines, including the principles of energy law, even when the law has been silent on them, enhances the law's substance and coherence.[169] This could contribute to the material that helps solidify autonomous disciplines of the law,[170] which for instance would be useful in distinguishing energy law from climate law and environmental law, especially since energy law may overlap with these interrelated disciplines. It could foster shared universal values across transnational energy sectors which are typically segregated under the competences of individual states as matters of national sovereignty, spurring cross-border cooperation and alignment to resolve common energy-related issues.[171] This will be particularly useful when sustainability is a crucial ideal of cosmopolitanism, standing against an era of growing global fragmentation towards communitarianism and exclusivity in the Anthropocene.[172] The alternative is that courts will be left confined to their minimal role as apathetic and purely reactionary referees, unable to meaningfully mould law to become less influential compared to other branches of government. It would result in little growth in the law, general doctrines, and legal culture, to impede the notions of justice which would normally evolve with the humanity that courts uphold.[173]

Nonetheless, courts alone are unable to carve an explicit principle of sustainability, much less general doctrines and legal cultures.[174] Civil society, political and democratic processes, govern-

[169] See also T. Khaitan, *Areas of Law: Three Questions in Special Jurisprudence*, cit.; K. Tuori, *Ratio and Voluntas*, cit., 164-72.

[170] See also T. Khaitan, *Areas of Law: Three Questions in Special Jurisprudence*, cit.

[171] See, e.g. N.O. Gunningham, *Confronting the Challenge of Energy Governance*, in 1 *Transnational Environmental Law* 1 (2012), 119-135.

[172] See also R. Koopmans, M. Zürn, *Cosmopolitanism and Communitarianism – How Globalization Is Reshaping Politics in the Twenty-First Century*, in P. de Wilde, R. Koopmans, W. Merkel (Eds), *The Struggle Over Borders: Cosmopolitanism and Communitarianism*, Cambridge, 2019. See, e.g., T. Wojczewski, *Trump, Populism, and American Foreign Policy*, in 16 *Foreign Policy Analysis* 3 (2020), 292-311.

[173] See also M. Eliantonio, *Legitimacy: What's in a Name?*, cit.

[174] Tuori, *Critical Legal Positivism*, cit., 179-83.

ments, and the scholars who forge unexplored scenarios of legal imagination, can offer courts with direction,[175] including potentially towards recognising sustainability as a general principle of EU law.[176] Simultaneously, courts play a role in reminding governments and their governed populations of the nature of the law,[177] redistributing power within social structures to sustain these governed jurisdictions by upholding fairness and social order.[178] This is a judicial interest that is safeguarded by the courts' independent authority, as agents seeking to fulfil the meta-principle of sustainability.

5. *Conclusion*

The role of the Court has not only been to adjudicate on cases or to interpret and apply EU law as the Union's most powerful judicial authority. On top of this main role, the CJEU is also a key contributor and refiner of general doctrines due to its ability to influence and inspire the conceptualisation of legal principles, examined in this chapter through sustainability as a principle from an energy law perspective. The strands of sustainability highlighted in the CJEU's energy law cases can contribute towards conceptualising a legal principle of sustainability, even without the Court expressly and unequivocally recognising and delineating such a principle.

While not its central function, the CJEU's prerogative in doctrine generation presents new opportunities for legal development and innovation. The CJEU can play a leading role in refining sustainability as a legal norm, particularly by courting sustainability as a principle and meta-principle of law. It can most clearly do so by expressly sharpening and solidifying the defini-

[175] See also T. Khaitan, *Areas of Law: Three Questions in Special Jurisprudence*, cit.; K. Tuori, *Ratio and Voluntas*, cit., xix; Tuori, *Critical Legal Positivism*, cit., 183.

[176] See also M. Horspool, *European Union Law*, cit., 152-4.

[177] See, e.g., R. Dworkin, *Law's Empire*, Cambridge (MA), 1986, 1-2; A. Barak, *The Judge in a Democracy*, cit., chapters 1-2.

[178] See also M. Eliantonio, *Legitimacy: What's in a Name?*, cit., 6-7.

tion, objective, nature, status and position in the hierarchy of norms, scope and limits, applications, and implications of sustainability as a principle, which could simultaneously be explored in future research. At the same time, there is room for energy law as a discipline to formulate its own goals and principles, including in terms of sustainability. The ball is in the CJEU's court in furthering the principle of sustainability as a norm of Union law. Doing so will provide the presently ambiguous notion of sustainability with greater relevance and applicability as a principle within the EU, typified by EU energy law, which can be emulated beyond the Union under an enlarged agenda for cultivating a more sustainable world.

TRANSFORMATIVE CONSTITUTIONALISM AND JUDICIAL ENFORCEMENT OF GENDER-RESPONSIVE SUSTAINABILITY: THE EXPERIENCE OF TURKEY

Deniz Polat

Abstract: *This article examines how transformative constitutionalism can advance gender-responsive sustainability through judicial practice, focusing on the Turkish Constitutional Court. Tracing three jurisprudential phases, it highlights oscillation between aspiration and ambivalence, with uneven equality rulings despite the post-2012 individual application mechanism and the landmark 2023 annulment of the maiden-name rule (invoking ECHR Arts. 8 and 14). The study argues for a feminist, rights-based approach grounded in collective responsibility and intergenerational justice, urging a shift from family-centered protectionism to equality-enhancing adjudication and integration of international human rights norms, so that courts act as agents of justice, care, and sustainability.*

Keywords: Sustainability, Turkish Constitutional Court, Transformative Constitutionalism, Gender-Responsive Sustainability, Intergenerational Justice.

1. *Introduction*

Discussing sustainability often feels like navigating through conceptual ambiguity. This is largely because sustainability is frequently perceived as less urgent or less valuable than socio-economic welfare or other imperatives of economic development. As such, it is often deployed as a rhetorical veil – an umbrella term lacking precise content or priority.[1] Yet this observation should not diminish its value; on the contrary, it underscores the need to interrogate the term critically, to clarify what exactly is at stake and how fragile the underlying normative commitments may be.

[1] J. J. Mazan, *Sustainability and Justice: A Constitution of Fragility*, in Perez, Márquez, Hernández (Eds), *Rethinking Sustainable Development In Terms of Justice*, Cambridge, 2018, iix.

Sustainability is intimately linked to the concept of cultural heritage and draws on the imperative to preserve the shared memory and collective legacy of all human communities that have inhabited the world to date.[2] We live in the Anthropocene – an era in which socio-economic, cultural, environmental, and gender-related concerns increasingly come into conflict with planetary realities. Preventing the irreversible harms of this era requires the pursuit of distributive justice, grounded in a profound respect for diversity. It is in this context that sustainability emerges as a cross-cutting normative paradigm – an analytical and moral framework that bridges disparate domains such as gender justice, environmental protection, and economic development. Sustainability and justice are therefore twin concepts; both are deeply rooted in notions of social interdependence and collective responsibility.[3] The philosophical foundation of sustainability lies in its intergenerational logic: it aspires to secure a just life not only for those who inhabit the present but also for future generations. This demands the design of a model of responsible freedom – one that transcends atomistic individualism and reorients political imagination toward collective well-being.

In addition to its ecological and economic dimensions, sustainability must also be approached as a matter of political ethics and civic responsibility. Drawing on Hannah Arendt's concept of *collective responsibility*, sustainability requires a shift in perspective from individualistic self-interest to a shared commitment toward others – both those living now and those yet to be born.[4] *Collective responsibility* encompasses all components of society – citizens, state organs, courts, and institutions alike – meaning that constitutional courts also carry a form of collective responsibility toward the future. Indeed, Arendt aptly emphasized the separation of powers as a deliberate design to restrain power and

[2] *Ibid.*, 1.

[3] Ibid., 10, 21.

[4] H. Arendt, *Collective Responsibility*, in J. W. Bernauer (Eds), *Amor Mundi: Explorations in the Faith and Thought of Hannah Arendt*, Dordrecht, 1987, 43-57.

prevent its abuse.[5] Within this framework, constitutional courts are not merely legal arbiters but institutions uniquely tasked with upholding the integrity of the constitutional order. Their role in preventing power concentration and in protecting long-term democratic values renders them especially significant within a constitutional system grounded in collective and intergenerational responsibility.

From this *Arendtian* lens, the core of sustainability lies in acknowledging 'the other' – what Aristotle conceptualized as *philia* – as a co-dweller of the world, and thus as someone to whom we are inevitably accountable. This resonates with Kant's idea of *sensus communis*, the capacity to judge from the standpoint of everyone else, which Hannah Arendt saw as central to civic reasoning.[6] Accordingly, *intergenerational justice* is not merely a policy objective, but a moral imperative: we are responsible not only for the world we inhabit but for the future generations who will inherit it.[7]

Hence, sustainability becomes inseparable from a constitutional and political commitment to justice, care, and responsibil-

[5] H. Arendt, *On Revolution*, London, 2006, 149.

[6] H. Arendt, *Lectures on Kant's Political Philosophy*, R. Beiner (Eds), Chicago, 1992, 43. See also, L. Disch, *Hannah Arendt and the Limits of Philosophy*, Ithaca, 1996.

[7] See H. Arendt, *The Life of the Mind: Thinking*, I, New York, 1978, 40. See also H. Arendt, *Lectures on Kant's Political Philosophy*, 8, 20, 50, 54. According to Arendt, 'it is the hope it contained for future generations that made the French Revolution such an important event'. See H. Arendt, *Lectures on Kant's Political Philosophy*, 56. Therefore, in Arendt's view, true political action is always oriented toward the future – a commitment to shaping a world that remains livable for generations yet to come. See also, R. Beiner, *Preface*, in R. Beiner (Eds), *Lectures on Kant's Political Philosophy*, Chicago, 1992, xii-xxii. It is necessary to conceptualize sustainability in relation to 'the Other', that is, as a form of collective responsibility toward both present social diversities and future generations. Contemporary neoliberal society, however, promotes precisely the opposite orientation. *Byung-Chul Han* addresses this through concepts such as 'the loss of the Other' and 'the terror of the Same', emphasizing that sociality and ethical responsibility collapse in the absence of contact with the Other. Accordingly, the proposition that 'sustainability is an ethics of accountability to the Other' can be regarded as a constructive rearticulation of Han's warning. See B.-C. Han, *The Expulsion of the Other: Society, Perception and Communication Today*, Cambridge, 2018, 1-5, 7-12, 23-28.

ity. It presupposes a republican model of citizenship, in which individuals are not isolated agents but co-authors of a shared world. As Hannah Arendt noted, collective responsibility may be burdensome, yet it is preferable to the far heavier cost of collective irresponsibility.[8] In this context, constitutional design must embed this ethical dimension, ensuring that legal and institutional frameworks are equipped to uphold the rights of both present and future generations. Sustainable constitutionalism, therefore, rests not only on formal guarantees but also on a civic ethos of responsibility, mutual recognition, and shared judgment.

Accordingly, constitutional and political discourse must be nourished by this normative orientation and reflect it in constitutional design. A truly holistic approach necessitates embedding values such as care, responsibility, cooperation, and precaution into a rights-based, pluralistic, and democratic constitutional framework.[9] These strategic principles may serve as sources of inspiration for a more just, inclusive, and resilient model of governance.[10]

In the long term, social, economic, and cultural justice – along with gender justice, which is the focal point of this study – can only be sustained through this integrative and future-oriented lens. Achieving such durability requires the active involvement of all constitutional and societal actors. Among these, constitutional courts hold a particularly significant role, as they possess the authority to conduct rights-based adjudication and to shape both constitutional doctrine and practice through their interpretive functions.

In this framework, the study revolves around the question of whether sustainable political institutions that uphold gender equality can be established through constitutional means. The primary objective is to demonstrate the interrelation between sustainability and gender equality and to argue that the framework of transformative constitutionalism offers a robust and effective tool for fostering this connection.

[8] H. Arendt, *Collective Responsibility*, cit., 46.
[9] J.J. Mazan, cit., 15, 19.
[10] Ibid., 15.

Despite its growing relevance, the intersection of transformative constitutionalism and sustainable development, particularly in the context of gender inequality, remains underexplored. This study seeks to address that gap. While sustainability is not a novel concept, its constitutional dimension – especially in relation to gender – has seldom been framed as a core component of constitutional theory. Existing constitutional scholarship has largely addressed sustainability through environmental protection or intergenerational justice, with gender considerations remaining peripheral.[11] Yet sustainability can and should be viewed as a constitutional principle that reflects and reinforces democratic aims. In this regard, constitutions endowed with transformative potential can function as active agents in the pursuit of sustainable development.

In contemporary constitutionalism, constitutions are increasingly conceived not merely as legal documents safeguarding rights, but as dynamic instruments that shape inclusive and equality-oriented institutional frameworks. Within this transformative vision, the judiciary plays a central role in advancing constitutional goals. Transformative constitutionalism highlights that the true effectiveness of a constitution lies not only in its textual content but also in how those provisions are interpreted and implemented in practice.

In this regard, constitutional courts, as the principal guardians and interpreters of the constitution, are positioned as key actors in building an egalitarian and sustainable constitutional order. Through purposive and progressive interpretations, courts contribute not only to redressing existing inequalities but also to cultivating a deeper constitutional culture and public awareness. This interpretive function of the judiciary is therefore critical to

[11] See, e.g., J. R. May, E. Daly, *Global Environmental Constitutionalism*, Cambridge, 2015; J. M. Balkin, *Living Originalism*, Cambridge, 2011; K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2nd ed.), Oxfordshire, 2008; B. Ackerman, *The Rise of World Constitutionalism*, in 83 *Virginia Law Review* 4 (1997), 771-797; B. Barry, *Sustainability and Intergenerational Justice*, in 89 *Theoria: A Journal of Social and Political* Theory (1997), 43-64; E. Brown Weiss, *In Fairness to Future Generations*, New York, 1989.

achieving intergenerational justice and ensuring the constitutional integration of sustainability in social policy domains.

The study undertakes a socio-legal analysis of the Turkish Constitutional Court's decisions on gender equality. Employing document analysis as the methodological approach, the research examines the Court's jurisprudence through the dual lenses of transformative equality and transformative constitutionalism. The aim is to illustrate how judicial reasoning can serve to resolve constitutional ambiguities, advance substantive equality, and inform constitutional responses to sustainability-related challenges.

Ultimately, the study argues that constitutional adjudication should be understood not only as a mechanism of legal enforcement, but also as a transformative tool that aligns constitutional interpretation with the broader goals of gender equality and sustainable development. As the United Nations declares, 'gender equality is not only a fundamental human right, but a necessary foundation for a peaceful, prosperous and sustainable world'. There has been progress over the last decades, but the world is not on track to achieve gender equality by 2030.[12] In this context, the judiciary's pivotal role becomes evident – as courts are uniquely positioned to embed sustainability principles within the constitutional framework and to guide societal transformation toward justice and equality.

2. *Transformative Constitutionalism and Gender-Responsive Sustainability: Reimagining Justice*

Constitutionalism is founded upon a tension between two imperatives that, while interdependent, appear to stand in opposition. State authority must, at its deepest level, emanate from the consent of the people; yet to ensure that such authority is both enduring and effective, it requires fragmentation, limitation, and operation through predetermined institutional forms. This inherent tension – popular sovereignty as the source of legitimacy

[12] *United Nations, The Sustainable Development Goals Report, New York, 2023, 3-4, https://unstats.un.org/sdgs/report/2023*

versus the juridical and institutional containment of power – constitutes what has aptly been termed the paradox of constitutionalism.[13]

In contemporary democratic constitutional regimes, this paradox is expressed through a hierarchically structured system of legal norms, with the constitution occupying the apex of the normative order. Within this hierarchy, each subordinate norm derives its validity and authority from the superior one, while all legal norms ultimately trace their legitimacy to the constitution itself.[14] The constitution's position at the summit thus entails not only its formal supremacy but also its universal binding force on all state organs and individuals alike. Constitutionalism thereby presupposes the subjection of political power to legal norms – an essential component of the rule of law.[15] Constitutions, in this sense, do not merely organize political authority; they also delineate its permissible boundaries and define its normative limits. The idea of restraining arbitrary power is as old as political thought itself, and emerging from this historical concern, modern constitutionalism seeks not only to structure but also to constrain political power through normative instruments.[16] Within this framework, foundational principles such as the separation of powers and the rule of law have become cornerstones of constitutional democracies, reflecting the centuries-long struggle to institutionalize individual liberties and to curtail state arbitrariness.[17]

However, the twentieth century witnessed a significant transformation in the expectations directed at constitutional regimes.

[13] M. Loughlin, N. Walker, *Introduction*, in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form,* Oxford, 2007, 1; D. Grimm, *Constitutionalism: Past, Present, and Future*, Oxford, 2016, 61.

[14] H. Kelsen (tr. A. Wedberg), *General Theory of Law and State*, Cambridge (MA), 1945, 123; H. Kelsen (tr. M. Knight), *The Pure Theory of Law*, 2nd ed., Berkeley, 1967, 2-9. See also, H. Kelsen (tr. B. L. Paulson, S. L. Paulson), *Introduction to the Problems of Legal Theory*, Clarendon, Oxford, 1997.

[15] M. Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, in 74 *Southern California Law Review*, 1307-1309 (2001).

[16] G. Sartori, *Constitutionalism: A Preliminary Discussion*, in 56 *American Political Science Review* 4 (1962), 856.

[17] M. Shapiro, *The Success of Judicial Review*, in S. J. Kenney *et al.* (Eds),

Expanding rights catalogues, evolving societal demands, and the proliferation of new constitutions across diverse contexts redefined the role of constitutionalism. Today, its function transcends the conventional model of regulating the asymmetrical relationship between the individual and the state. Modern constitutionalism must be reconceptualized to include normative commitments that respond not only to existing power relations but also to structural injustices and future-oriented concerns. Constitutions are no longer confined to operating as legal shields against state overreach; they are also institutional blueprints that enable the realization of rights and direct political power toward legitimate ends.[18]

This evolution reflects a paradigmatic shift from a solely garantisme-based understanding of constitutionalism – where constitutions primarily functioned to restrain the state and protect individual rights – to a more dynamic and aspirational model. In classical garantisme, the constitution served as a safeguard, limiting state power through judicially enforceable rights provisions. While the protective dimension of constitutionalism remains vital, it is no longer adequate to confront the multifaceted challenges of contemporary societies – ranging from globalization and rapid technological transformations to the profound influence of multinational corporations on social structures, as well as pressing environmental, urban, and ethical issues. Constitutions today must therefore transcend a merely defensive posture and actively design the institutional and normative frameworks required for the realization of equality and justice.

This expanded understanding highlights the constitution's directive and transformative function – its ability to shape political space, legitimize demands for justice, and chart the normative course of governance. Accordingly, contemporary constitutional debates increasingly frame the constitution as an instrument of sustainable and egalitarian political reconfiguration rather than merely a static repository of norms.

Constitutional Dialogues in Comparative Perspective, Basingstoke, 1999, 196-200.

[18] Ibid.

Within this reconceptualized framework, the concept of sustainability – once primarily associated with economic development – has evolved into a multidimensional normative paradigm encompassing intergenerational justice. Since the Stockholm Declaration and the Brundtland Report, sustainability has emerged as a constitutional concern, extending obligations beyond the state to all societal actors and incorporating future generations into the constitutional imaginary.[19] It builds upon classical constitutional principles such as limited government and the separation of powers while also expanding them through a rights- and responsibility-based lens.

The institutionalization of sustainability within constitutional structures requires specific mechanisms that render the constitution's supremacy not merely formal, but operational. Embedding sustainability principles into the constitution provides the normative infrastructure necessary to guide political power within a pluralist democratic framework. In this context, sustainability functions not only as a policy objective but as a constitutional value that binds all political authorities across time. This is particularly salient in addressing entrenched forms of inequality, such as those based on gender.

The pursuit of gender-responsive and democratic political structures must therefore begin with constitutional guarantees.

[19] The concept of 'sustainable development' first emerged within the field of law in the context of international law. It was initially articulated in the 1972 Stockholm Declaration (Declaration of the United Nations Conference on the Human Environment, UN, A/CONF48/14/Rev1, 1972) where the relationship between humanity, the environment, and development was addressed, alongside an early recognition of the rights of future generations. However, a fully developed conceptualization appeared in the 1987 report of the World Commission on Environment and Development (UN, A/42/427, 1987) – commonly known as the Brundtland Report. This report famously defined sustainable development as *'development that meets the needs of the present without compromising the ability of future generations to meet their own needs*'. Central to this formulation is the concept of future needs – and, more critically, of future generations. The obligation for political authorities to take into account the rights of future generations in all decision-making processes is encapsulated in the notion of *'intergenerational justice',* which constitutes the normative core of sustainability.

Embedding equality-oriented sustainability tools into the constitutional framework elevates them from policy preferences to binding commitments. Such normative entrenchment fosters a new constitutional imagination – one that redefines the relationship between the individual, state power, and the institutional architecture of development.

By their very nature, constitutions perform an intergenerational function. They establish enduring links between past, present, and future citizens, binding them through shared values and a collective commitment to justice and order.[20] In this light, the constitutional protection of gender equality and related matters not only ensures normative stability but also shapes constitutional culture.[21] One might refer to this as the emergence of a gender-based constitutional conscience, reflecting a deeper collective awareness embedded within the constitutional framework. Through their ideological components, constitutions can also have a transformative effect on political discourse and the way fundamental moral and political controversies are articulated.[22] This transformative potential further reinforces the role of gender equality norms in reshaping both constitutional meaning and the broader democratic imagination across generations.

Realizing intergenerational justice through such a constitutional conscience necessitates institutional structures that are deliberately designed to serve these ends. Sustainable development – particularly in relation to gender inequality – requires normative rules that enable inclusive policies and institutions that make their realization possible. The durability and functionality of these mechanisms, in turn, depend on a constitutional paradigm that is dynamic, forward-looking, and grounded in transformative constitutionalism.

[20] R. Hiskes, *Human Right to A Green Future*, Cambridge, 2009, 128.

[21] M. E. Waterstone, *Disability Constitutional Law*, in 63 *Emory Law Journal* 3 (2014), 548.

[22] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge (MA), 2004, 13; P. A. Lambert, D. L. Scribner, *Gender, Constitutions and Equality: A Global Comparison*, London, 2023, 4.

Transformative constitutionalism refers to a process of constitutional drafting, interpretation, and implementation that seeks to restructure a country's political and social institutions, as well as its power relations, in a democratic, participatory, and egalitarian direction, while remaining attentive to the historical and political context in which those structures have developed.[23] Rather than representing a revolutionary rupture with all preexisting constitutional values, this approach allows for previously contested or exclusionary norms to gradually evolve into shared and internalized values, thereby fostering reconciliation and normative continuity.[24]

At its core, transformative constitutionalism envisions the constitution not merely as a legal document but as a dynamic framework for societal transformation grounded in justice, equality, and human dignity. In this respect, it emphasizes that the constitution's foundational values should serve as instruments for redress, inclusion, and the promotion of human welfare – not only through legislation but via active engagement by all branches of constitutional order. Transforming deeply embedded institutional hierarchies and social inequalities requires a comprehensive and coordinated embrace of constitutional principles by the judiciary, legislature, and executive alike.

The endorsement of broad constitutional commitments – such as equality and substantive justice – thus imposes a proactive responsibility on state institutions to implement transformative values through both legal interpretation and policy design. This integrated approach ensures that constitutionalism remains a living, evolving process, responsive to historical injustices and capable of guiding democratic renewal. In this way, transformative constitutionalism provides both a normative vision and a

[23] S. Liebenberg, *The Future of Transformative Constitutionalism in South Africa*, in *Legalbrief Today*, 12 August 2008.

[24] K. E. Klare, *Legal Culture and Transformative Constitutionalism*, in 14/1 *South African Journal on Human Rights* 146 (1998); L. Gönenç, *Recent Developments in the Field of Freedom of Expression in Turkey*, in 11 *European Public Law* 2 (2005), 258.

practical roadmap for reconfiguring power relations and cultivating a more inclusive constitutional culture.

A core component of this vision is the redress of structural inequalities, particularly those rooted in gender. Gender-based injustice frequently intersects with exclusionary mechanisms related to race, class, and sexuality, thus necessitating an interdependent understanding of justice. In this respect, transformative constitutionalism offers not only legal protection but also a normative and institutional foundation for social emancipation. Its intellectual roots lie in critiques of the classical liberal rights tradition, especially the inadequacy of formal equality. Rather than contenting itself with abstract declarations of liberty, this model focuses on the institutional and material conditions necessary to realize those rights in practice.[25] It also entails moving beyond the tradition of garantisme – where constitutions primarily function as safeguards against state overreach – toward a model that embraces positive obligations and state duties to advance substantive equality and social justice.

Within this normative reorientation, sustainability emerges not as a peripheral development discourse but as a constitutional value of growing importance. Grounded in principles of care, intergenerational justice, and collective responsibility, sustainability challenges the fragmented nature of contemporary legal and political systems. In the Anthropocene era – characterized by ecological degradation, deepening inequalities, and the erosion of democratic norms – it provides a critical ethical foundation for rethinking the responsibilities of constitutional orders. This requires a shift from exploitation to values of life and care, for both people and the planet.[26]

The transformative character of a constitution is revealed in its emphasis on substantive equality, gender justice, cultural diversity, and the protection of vulnerable groups. It also manifests in the positive duties it imposes on state actors to implement

[25] C. Soohoo, *Reproductive Justice and Transformative Constitutionalism*, in 42 *Cardozo Law Review* 33 (2021), 862-863.

[26] R. Rubio-Marín, *Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion*, Cambridge, 2022, 25.

rights in practice.[27] However, textual inclusion alone is not sufficient. Constitutional provisions must be supported by institutional mechanisms that can translate aspirational norms into enforceable standards. Governance structures must be deliberately oriented toward progressive change.

At the center of this project lies the judiciary. While legislative action is essential for constitutional transformation, courts play a pivotal role in sustaining and shaping that transformation over time.[28] Given the breadth of constitutional jurisdiction, constitutional courts possess significant capacity to influence the trajectory of equality and justice. Their proximity to the application of norms makes the judiciary particularly well-suited to interpret constitutional provisions in ways that affirm gender-responsive sustainability and contribute to a rights-based constitutional culture.

Constitutions are characteristically drafted in broad and open-ended language, thereby rendering interpretation both indispensable and inherent to any constitutional order. Through purposive and, where necessary, transformative interpretation, courts can help fulfil the emancipatory promise of constitutionalism. This interpretive function is especially critical in the context of gender equality, where judicial engagement often determines whether constitutional norms evolve beyond symbolic commitments.

Surely, constitutional gender provisions increase the legitimacy of rights claims, facilitate gender policy reforms, and equip courts with legal tools for adjudication.[29] However, these provisions are not self-executing. Without judicial uptake, they remain

[27] K.E. Klare, *Legal Culture and Transformative* Constitutionalism, cit., 153-155.

[28] R. Goldwin, *Why Blacks, Women and Jews Are Not Mentioned in the Constitution and Other Unorthodox Views*, Washington D.C., 1990, 9. See also, A. Ross, *Why Legislate for Sustainable Development?*, in 20 *Journal of Environmental Law* (2008), 35-68; A. Ross, *It's Time to Get Serious – Why Legislation is Needed to Make Sustainable Development a Reality in the UK*, in 2 *Sustainability* (2010), 1101-1127, www.mdpi.com/2071-1050/2/4/1101.

[29] Lambert, Scribner, 2023, 4.

'parchment barriers'.[30] Conversely, the absence of explicit guarantees may compel courts to stretch the boundaries of their authority, often placing them in a legally and politically delicate position. While constitutional guarantees do not ensure transformative change on their own, they enhance the flexibility, legitimacy, and reach of judicial reasoning – especially in value-laden contexts like constitutional review.

Importantly, the judicial role in this transformation is not confined to national borders. Constitutional and apex courts increasingly engage in transnational dialogue, contributing to a shared jurisprudence of equality and sustainability.[31] Through such exchanges, courts clarify constitutional ambiguities, expand the normative reach of rights, and generate precedents that influence both domestic and global constitutional developments.[32] Even decisions of modest scope can serve as crucial steps toward the protection of rights for both present and future generations.[33]

Moreover, courts play a vital role in interpreting constitutional norms not only in the public sphere but also in the private domain. The horizontal effect of constitutional rights requires that states be held accountable for private harms, including gender-based violence, as affirmed in landmark judgments such as *Opuz v. Turkey*. Full participation in public life and the realization of an egalitarian society are only possible if the deep-rooted inequalities within the private sphere are also addressed since the conditions of women's private lives and public options were inextricably linked.[34] This observation highlights the inadequacy of formal equality in addressing the complex and intersecting forms of disadvantage that women face in real life. A purely formalistic approach fails to capture the structural barriers that inhibit women's full participation in political, economic, and social life. In response, the framework of inclusive constitutionalism emerges

[30] Ibid.

[31] Raub et al., *Paid Leave for Personal Illness: A Detailed Look at Approaches across OECD Countries*, Los Angeles, 2018, 211.

[32] *Ibid.*

[33] J. R. May, E. Daly, *Global Environmental Constitutionalism*, Cambridge, 2015, 1-15.

[34] R.R. Marín, *Global Gender Constitutionalism*, 81.

as a necessary corrective, aiming not only to guarantee rights on paper but to transform the conditions under which those rights can be meaningfully exercised. Ensuring gender equality in both the private and public spheres thus requires constitutional frameworks that are structurally inclusive and committed to transformative justice. This imperative should guide constitutional courts in their adjudication of cases that implicate private power.

In order to effectively carry out this transformative mandate – particularly in cases involving gender-based inequalities – judicial institutions must also broaden their interpretive horizons by engaging with international human rights standards. Particularly in the context of constitutional review, courts can draw upon global norms to enrich domestic adjudication and to expand the available forms of legal remedy. This cross-fertilization allows for a more holistic understanding of justice, incorporating not only corrective but also restorative and redistributive dimensions. Such a vision captures the very essence of transformative gender constitutionalism: embedding dignity, equality, and care as operative values within the constitutional order.

Yet it must be emphasized that courts alone cannot bear the full weight of transformation. The legitimacy of all exercises of power – including judicial ones – must be continually justified.[35] Transformation is not guaranteed by judicial activism alone; it requires structural support from the political branches, sustained civic engagement, and attention to social and economic inequalities. The sustainability of democratic constitutionalism itself is threatened by rising socio-economic injustice. Therefore, any constitutional project that seeks to embed gender-responsive sustainability must foreground the principle of economic justice.

In this regard, the accumulated insights of global gender constitutionalism offer both cautionary lessons and normative inspiration. They illuminate what has worked, what has failed, and how constitutional frameworks might be recalibrated to meet the

[35] A. C. Diala, *Courts and Transformative Constitutionalism: Insights From South Africa*, in S.M. Sterett, L. Walker (Eds), *Research Handbook on Law and Courts*, Cheltenham, 2021, 102.

demands of justice in complex, plural societies.[36] Taken together, these experiences help shape a constitutional imagination capable of building resilient and inclusive societies anchored in transformative equality and sustainable justice.

3. *The Constitutional Court of Turkey and Gender Equality: between Normative Commitment and Jurisprudential Ambivalence*

The constitutional trajectory of gender equality in Turkey cannot be fully grasped without situating it within the broader political and normative shifts that have shaped the country's legal order. From the foundation of the Republic, Turkey has pursued a constitutional vision committed to achieving a modern and egalitarian society. Gender equality, while not always explicitly articulated, has nonetheless constituted a foundational aspiration of the republican reform agenda. The 1961 Constitution marked a turning point by explicitly prohibiting sex-based discrimination and by introducing substantive provisions aimed at enhancing women's participation in social life. The 1982 Constitution largely retained this normative framework, preserving equality guarantees and reaffirming the state's role in ensuring women's special protection in both the private and public spheres.

From the late 1980s onward, Turkey's accession to a broad array of international human rights treaties – most notably the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* – added a transnational dimension to the constitutional commitment to gender equality. The constitutional amendments of 2001, 2004, and 2010 must be understood within this broader context as critical moments of normative expansion. These reforms not only reiterated the principle of equality between men and women but also imposed a positive obligation on the state to ensure the effective realization of such equality, thereby moving toward a more transformative constitutional model. However, the constitutional text alone is an insufficient

[36] R.R. Marín, *Global Gender Constitutionalism*, cit., 25.

measure of progress in the field of gender justice. As feminist legal theory reminds us, the transformative potential of constitutional norms depends not only on their textual articulation but also on their judicial interpretation and enforcement. In this regard, the Turkish Constitutional Court has played a pivotal role in the constitutional protection of fundamental rights since its establishment under the 1961 Constitution. By exercising both abstract and concrete norm review, the Court has not only possessed the authority but also the opportunity to shape the constitutional meaning of gender equality – as both a gatekeeper and interpreter of constitutional values. Indeed, landmark decisions in the 1990s and early 2000s, in which the Court invalidated certain discriminatory provisions of civil and criminal law, reflect a growing sensitivity to constitutional and international equality norms. These cases reveal moments of jurisprudential alignment with evolving human rights standards.

Yet, this jurisprudential trajectory has not been linear. While the Court has at times adopted an equality-affirming and gender-sensitive interpretive stance, it has also issued decisions that reflect a more conservative, status quo-oriented approach – particularly when family law or traditional social roles are invoked. This ambivalence has impeded the development of a consistent and transformative body of gender jurisprudence. The legislature's recurring appeal to the protection of 'family values' and family unity has, in several instances, constrained the Court's willingness to advance a fully rights-based understanding of gender equality.

The 2010 constitutional amendment introducing the right of individual application to the Constitutional Court has arguably expanded the potential for gender-based rights claims to be adjudicated directly. This reform has made it possible for women to challenge discriminatory laws and practices with greater immediacy, and has opened up space for the Court to engage with international human rights law in a more systematic manner. Nevertheless, the Court's interpretive practice still exhibits reluctance in consistently operationalizing this potential, particularly when gender justice claims come into tension with entrenched moral or institutional norms.

To better understand this ambivalence, the following section undertakes a doctrinal analysis of key Constitutional Court decisions that have addressed gender-related claims. Particular attention is given to the Court's reasoning strategies, its use (or omission) of international human rights instruments, and the extent to which it has embraced – or resisted – a transformative reading of the equality principle. Through this case-based inquiry, the aim is to assess whether the Court has functioned as a transformative agent within the constitutional framework or whether it has merely reinforced prevailing social norms under the guise of legal neutrality.

The Turkish Constitutional Court's approach to gender-based issues can be analysed in three distinct phases:

1. The first phase, which I refer to as the 'Conservatism over Equality Period (1960-1990)' reflects a limited and traditional perspective on gender equality in the Court's early jurisprudence. During this period, the notions of procedural self-restraint and the concept of the sanctity of the family dominated. In cases involving women's rights, the Court mostly rendered decisions that reinforced prevailing gender roles. Only a single annulment decision concerning gender issues was delivered in this period – decision on the Military Criminal Procedure Law – in which the Court struck down a provision excluding women from public hearings as incompatible with the constitutional principle of publicity of trials. Beyond this exceptional ruling, however, no further annulments were rendered until the 1990s.[37]

A particularly striking example of the Court's conservative stance is its 1989 decision upholding a legal provision that reduced penalties in sexual crimes where the victim was a sex worker, reasoning – controversially – that an 'unchaste' woman would not suffer the same harm as a 'chaste' woman.[38]

2. In the second period, the 'Transitional Period (1990s-early 2000s)', the Court demonstrated limited alignment with international norms, and its transformative potential remained restricted. Although certain annulment decisions concerning gen-

[37] E.1963/143, K. 1963/167, 26.6.1963.
[38] E.1988/4, K.1989/3, 12.1.1989.

der-based regulations stood out, and references to international human rights instruments became more frequent, it is difficult to speak of a consistent or principled jurisprudence.

A landmark decision of this period was rendered in 1990, when the Court annulled a Civil Code provision requiring a woman to obtain her husband's permission to work. The Court held that the rule was incompatible with the constitutional principles of equality (Art. 10) and the right to work (Art. 49).[39] Importantly, the Court interpreted gender equality as a vehicle for transforming discriminatory social values and adopted a transformative approach by integrating both domestic and international standards on gender equality.

The Court's approach was also evident in its jurisprudence on adultery provisions. In 1996, it declared unconstitutional certain provisions of the Criminal Code that imposed unequal treatment on women and men with respect to adultery.[40] While the Court did not consider the criminalization of adultery per se unconstitutional – leaving this question to legislative discretion – it emphasized that differential treatment between women and men violated the constitutional principle of equality. In reaching this conclusion, the Court cited international instruments such as the Universal Declaration of Human Rights, the European Convention on Human Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women.

Finally, in 1998, the Court struck down a provision that criminalized adultery only for women, holding that such selective criminalization was irreconcilable with the constitutional guarantee of equality.[41] In this decision, the Court further reinforced the principle of gender equality by relying on both constitutional equality guarantees and international human rights standards concerning non-discrimination.

These decisions illustrate the Court's awareness of subtle forms of inequality and its capacity to engage in transformative interpretation. Nonetheless, a comprehensive and consistent

[39] E.1990/30, K.1990/31, 29.11.1990.
[40] E.1996/15, K.1996/34, 23.9.1996.
[41] E.1998/3, K.1998/28, 23.6.1998.

transformation cannot be identified for this period as a whole. For example, the Court upheld the constitutionality of a provision preventing married women from using solely their maiden name, thereby reaffirming traditional gender norms.[42] This issue was later brought before the European Court of Human Rights (ECtHR), which in *Ünal Tekeli v. Turkey*[43] held that such provisions violated Article 14 (prohibition of discrimination) of the European Convention on Human Rights. In its judgment, the ECtHR drew on international legal developments and underscored that Turkey could not remain entirely outside the global trend toward eliminating discrimination against women. The Court further observed that, although many discriminatory rules had been revised with the adoption of the new Turkish Civil Code in 2001, the requirement obliging women to take their husband's surname upon marriage was preserved.

Another telling example of the Court's restrictive approach was its refusal to annul a provision stipulating that, if a woman who had been abducted or detained subsequently married her abductor, public prosecution would not be initiated or, if a conviction had already been issued, the sentence would be suspended.[44] This illustrates the persistence of patriarchal assumptions in the Court's jurisprudence.

Throughout the early to mid-2000s, the Court's stance continued to display inconsistency and, at times, even normative regression. While certain rulings based on the constitutional principle of equality were handed down, the jurisprudence lacked coherence and failed to establish a consistent trajectory. An example of a progressive development is the 2007 decision annulling a law that conditioned women's access to compulsory agricultural social security on being recognized as the 'head of household'.[45] Although the Court did not invoke international stand-

[42] E.1997/61, K.1998/59, 29.9.1998.

[43] ECtHR, A no. 29865/96, 16.11.2004.

[44] E.2001/478, K.2004/38, 25.3.2004. This provision provoked significant public backlash, particularly from women's rights advocates, and was eventually repealed in 2005.

[45] E.2003/81, K.2007/50, 17.4.2007.

ards in this ruling, it was nevertheless significant in demonstrating the direct impact of constitutional guarantees of equality.

A significant setback to this trajectory came in 2011, when the Court once again upheld the provision preventing a married woman from using only her maiden name, despite earlier signs of progress such as the 2007 ruling on agricultural women's social security.[46] In doing so, the Court disregarded both constitutional advances in gender equality and the *Ünal Tekeli* judgment of the ECtHR. The Court broadly interpreted the legislature's margin of appreciation and failed to provide objective and reasonable grounds for differential treatment, thereby reinforcing continuity with its conservative stance rather than advancing a transformative approach. Taken together, these developments confirm that the Court's jurisprudence during this period cannot be characterized as reflecting a dynamic interpretation of equality, let alone a full transformation.

3. In the 'Post-2012 Period', following the introduction of the individual application procedure in 2010 (which became effective in 2012), the Constitutional Court began to address violations of women's rights more directly and within a rights-based framework. A normative shift can thus be observed from case-specific redress toward broader structural reform in the Court's jurisprudence on gender equality. This trajectory, however, has not been linear.

The individual application mechanism opened new opportunities for more rights-based adjudication, enabling the Court to revisit recurring complaints, particularly concerning a married woman's right to retain her maiden name. In a series of decisions delivered in 2013 and 2014, the Court more explicitly identified gender-based discrimination and aligned its reasoning with the jurisprudence of the ECtHR as well as with international standards.[47] Nevertheless, these rulings remained largely case-specific and fell short of establishing a stable or comprehensive jurispru-

[46] E.2009/85, K.2011/49, 10.3.2011.

[47] See: *Sevim Akat Ekşi*, No. 2013/2187, 19.12.2013; *Gülsüm Genç*, No. 2013/4439, 6.3.2014; *Neşe Aslanbay Akbıyık*, No. 2014/5836, 16.4.2015.

dence, as the Court continued to defer to the legislature's discretion in certain areas.

The most significant development came in 2023, when the Constitutional Court delivered a landmark judgment annulling the Civil Code provision that prohibited women from retaining only their maiden name after marriage. Marking a departure from earlier partial remedies through individual applications, the Court abrogated the contested rule entirely from the normative legal order. Grounding its reasoning in a rights-based framework, the Court invoked Articles 8 and 14 of the European Convention on Human Rights – respectively protecting private life and prohibiting discrimination – and thereby aligned domestic constitutional jurisprudence with European human rights standards.[48] Although the decision entered into force following a nine-month deferral period, the legislature has yet to enact a replacement rule, resulting in a normative vacuum that is currently interpreted in favour of women.

4. *Conclusion*

Transformative constitutionalism extends beyond the normative content of constitutional texts; it also depends on how constitutional principles are interpreted and implemented in judicial practice. Courts play a pivotal role in translating constitutional commitments into responsive legal standards capable of addressing entrenched structural inequalities. In this process, they ele-

[48] The Court of Cassation has likewise embraced a rights-based perspective, holding that a woman's use of her maiden name after marriage does not require the existence of a 'justified reason'. In its landmark ruling, the General Assembly of Civil Chambers (E.2014/889, K.2015/2011, 30 September 2015) affirmed that the imposition of such a condition constitutes an unwarranted restriction on personal autonomy and gender equality. This decision stands as a salient example of transformative constitutionalism in action, demonstrating how judicial engagement with constitutional and international human rights norms can contribute meaningfully to the advancement of substantive gender justice.

vate equality from an abstract legal norm to an operative instrument of substantive justice.

Law possesses a form-giving power – that is, it structures and shapes social relations and values. From this perspective, gender equality must be redefined not merely as a right to be protected, but as a foundational principle that restructures the constitutional order. At the core of this approach lies the mainstreaming of gender equality as a fundamental constitutional value, grounded in the recognition that it is a structural issue requiring systemic integration across all domains. In this respect, gender-responsive adjudication becomes a vital means for constitutional courts to challenge hierarchical structures and empower disadvantaged groups. When judicial reasoning transcends literalism and engages with the constitution's deeper normative aspirations, equality provisions can become effective tools for social transformation.

Accordingly, gender equality requires an interpretive effort that is explicitly acknowledged and rendered visible. While courts frequently frame their reasoning in terms of neutrality and impartiality, constitutional interpretation is inherently value-laden, involving normative choices that shape both the identification of harm and the scope of constitutional protection. Against this background, the Turkish Constitutional Court bears a responsibility not only to address explicit violations of individual rights but also to uncover implicit and structural forms of gender-based discrimination through dynamic interpretation. Such discrimination cannot be adequately understood as a series of isolated infringements; rather, it reflects systemic patterns of inequality that affect social structures over time and across generations. From this perspective, gender-based discrimination raises concerns not only of equality in the present but also of constitutional sustainability, as entrenched patterns of exclusion undermine democratic legitimacy and the ability of constitutional orders to secure justice for future generations. Addressing these dynamics therefore requires a re-examination of core constitutional concepts, including democracy, the separation of powers, and the public/private divide.

This imperative becomes even more urgent in the face of re-

strictive interpretations centered on family and normative gender roles, which risk deviating from a sustainable constitutional value system. The Turkish Constitutional Court's path has wavered between aspiration and ambivalence – gestures toward transformation are evident, yet they remain inconsistent and often lack gender-sensitive reasoning. Its inconsistent and uneven rulings on equality continue to hinder the development of an inclusive constitutional culture. While some decisions reflect the normative aspirations of transformative constitutionalism, the absence of coherence, depth, and normative clarity constrains the Court's ability to serve as a reliable guarantor of sustainable constitutional values.

True constitutional transformation requires courts to act as agents of justice, care, and responsibility: exposing hidden forms of discrimination, fostering inclusive equality, and promoting sustainability as a core constitutional value. To fulfil this role, the Court should shift from a family-centered, protectionist model to one that delivers equality-enhancing interpretations. International human rights standards must be treated not as peripheral references but as essential components of constitutional interpretation.

A feminist, rights-based approach – grounded in collective responsibility and intergenerational justice – is urgently needed to consolidate gender equality as a constitutive element of constitutional identity. Within such a framework, constitutional courts should not be viewed solely as guardians of legality, but also as agents of normative transformation whose interpretive choices shape constitutional meaning and either reinforce or challenge prevailing social hierarchies. By embracing a gender-conscious and transformative model of adjudication, the Turkish Constitutional Court can contribute to the construction of a democratic constitutional culture anchored in equality, participation, and sustainability.

Ultimately, realizing substantive equality in Turkey will depend not only on doctrinal clarity but also on the Court's readiness to move beyond ambivalence and embrace a dynamic, rights-based, and contextually grounded model of constitutional adjudication.

INTERPRETATION *'IN DUBIO PRO NATURAM'* IN POLISH LEGAL SYSTEM: LIMITATIONS AND OPPORTUNITIES

Karol Popławski

Abstract: *Poland's energy transition implies not only an infrastructural challenge, but also a legal one. Substantial industrial investment in renewable energy sources has the potential to profoundly alter the character of individual municipalities in Poland. Comprehensive evaluation of the environmental ramifications of the investments in question may also persist as a challenge. This text endeavours to analyse the extant legal regulations relating to the rules of interpretation applied within the framework of environmental law – considering their axiology, as well as the imperative to ensure the principle of sustainable development. The author dedicates particular attention to the interpretive principle in dubio pro naturam emphasizing its unique opportunities in this context.*

Keywords: Environmental Protection, Sustainable Development, Precautionary Principle, *In Dubio Pro Naturam* Principle.

1. *Introduction*

According to the research of the Eurobarometer, issue of the environmental protection as the main goal of the European Union and its policy, vary in different countries. It is still mentioned as one of the fundamental challenges, but – especially recently – its importance slightly decreased. In average, 15 per cent of the society of the EU Member States consider the protection of the environment as an important thread.[1] Nevertheless, Poland is currently facing dynamic changes in the scope of the sources used in the energy production. Polish example shows tendency

[1] https://poland.representation.ec.europa.eu/document/download/05c20d3e-381a-4a97-a987-a687ca75d628_en?filename=STANDARDOWY%20EUROBAROMETR%20102%20-%20Opinia%20publiczna%20w%20Unii%20Europejskiej%20-%20Polska.pdf

to reduce the amount of the energy produced by the hard coal and lignite, which however is still dominant (consenquently 38,14% and 19,04%).[2] The proportion of the renewable sources of energy is though still increasing. Production from the offshore wind farms is approximately 13,24%, whereas other renewable sources – mainly photovoltaic systems – is 18,28%.

Despite political polarization, it is rather consistent, that mentioned course shall be maintained. Problem concerns parallel consent among society – especially according to large-scale investments, which changes the character of municipalities and its landscapes.

Consistent development concerning the installation of the renewable sources of energy affects the planning policy, changing the landscape. On that basis we can also determine conflict of values. Installation of the sources of energy – of each kind – is treated as the public policy and therefore can be granted certain enhancements in the process of investing, but still other values need to be properly addressed and balanced (f.e. freedom of economic activity, protection of the environment). The result of mentioned process is the increased meaning of certain interpretative principles, one of which is the *in dubio pro naturam*. In this aspect it remains fundamental and still rather undeveloped in Polish legal system.

Thus, presented paper focuses on the legal basis of the environmental protection in Poland, including the constitutional standard of its protection. Furthermore it emphasizes the concept of the precautionary principle and the *in dubio pro naturam* principle – especially in the Polish context. Then paper aims on presenting limitation and opportunities stemming from the analysed principles, including the fact that *in dubio pro naturam* is used merely in the process of application of law (being the interpretative principle). As it will be presented, *in dubio pro naturam* – as the method of interpreting and applying the law – could create better grounds for preserving the state of the environment, as it is not necessary to imply the scientifical doubts on the risk

[2] Actual data on April, 2025. Available: https://www.rynekelektryczny.pl/produkcja-energii-elektrycznej-w-polsce/ (access on 9th of June 2025)

stemming from potential actions. In some sense it can improve the level of protection of the environment, where precautionary principle seems insufficient. That concerns especially its significance in the process of balancing conflicting values, by creating the grounds for legal interpretation better protecting the environment. However, concerning the Polish example, *in dubio pro naturam* principle is still used in limited catalogue of cases and therefore needs further development. Nevertheless, creating theoretical basis for its 'recent' understanding, as well as analysing opportunities and limitations stemming from its implementation is important – from the theoretical and practical perspective. The methodological background is made upon the dogmatic-legal analysis, including mainly Polish doctrine of law in the scope of the sustainable development and precautionary principle, as well as judiciary referring to *in dubio pro naturam* principle.

2. *Protection of the Environment in the Scope of the Polish Constitution*[3]

Environmental protection is mentioned in several provisions in the Polish Constitution. One of the most important is art. 5, which emphasizes the main obligations of the State. One of them is the ensurement of the protection of the environment, pursuant to the principle of the sustainable development. Article 68 p. 4 of the Polish Constitution states: 'Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment'. Furthermore, passing over art. 74 of the Polish Constitution would be erroneous. Paragraph 1 of mentioned article states, that 'Public authorities shall pursue policies ensuring the ecological security of current and future generations'. Protection of the environment is the obligation of public authorities (art. 74 p. 2). Public authorities are also obliged

[3] The Constitution of the Republic of Poland of 2nd of April, 1997, published in *Dziennik Ustaw,* no 78, item 483; further: Polish Constitution or Constitution. Available on: https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm (access on: 5th of January 2026).

to strengthen the citizens in their actions on protecting and improving the state of the environment (art. 74 p. 4) Subjective rights of the individuals concerning the environmental protection are stated in art. 74 p. 3 of the Polish Constitution, but guarantees only the right to information on the condition and the protection of the environment. Pursuant to its art. 86: 'Everyone shall care for the quality of the environment and shall be held responsible for causing its degradation. The principles of such responsibility shall be specified by statute'.

That leads to the conclusion that non-compliment of above obligations shall result with certain responsibility (civil, criminal or administrative), which are not interdependent, but still co-exist and are complementary. According to the above mentioned art. 86, it is the obligation of the State to create adequate legal regulations – including restrictions and its execution. Unregulated use of the environment shall be read as: 1) harm to the ecological justice; 2) increasing the threads to the human and the environment.[4]

Thus, protection of the environment is one of the main obligations of the State. However, this does not mean that the Polish Constitution creates catalogue of subjective rights concerning environmental law. In this aspect, only the State bodies are entitled to undertake certain actions, whereas the individuals can initiate those actions, f.e. by indicating the necessity of its exercise. Nevertheless, individuals are subject of obligations on protection of the environment, which are defined by ordinary law.

Protection of the environment shall be inscribed in the context of fundamental values of Polish constitutional system. It need to be emphasized, that art. 1 of the Polish Constitution states, that 'Republic of Poland shall be the common good of the citizens'. Following that, pursuant to the art. 82 of the Constitution: 'Loyalty to the Republic of Poland, as well as concern for the common good, shall be the duty of every Polish citizen'.

[4] See: M. Łyszkowski, *Obligation to Protect the Environment Versus the Prinicple of freedom and of economic activity in the Polish Constitution – comments in the Light of the Case Law of the Constitutional Tribunal*, in *Przegląd Ustawodawstwa Gospodarczego* (Economic Legislation Review) 11 (2024), 44.

Thus, one can conclude, that 'the subject of protection by public authorities and citizens' is to be, inter alia, 'common good'.[5] Furthermore, above mentioned 'common good' – pursuant to the judgments of the Polish Constitutional Tribunal (Polish CT) – is the sum of 'conditions of social life enabling the integral development of the members of the political community', whereas one of the conditions is the 'appropriate state of the environment'. As it was defined by the Polish CT 'Constitution treats the environment as a 'common good' – subject to special protection'.[6] In this aspect it is connected with the concept of solidarity, which is derived from the art. 1 and 2 of the Constitution. The latter states, that: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice'. Solidarity is though the constitutional value, that must be respected by both public authorities and citizens. The very concept of solidarity means concerted and joint striving and action as well as supporting each other. When we consider it in the light of the text of the Preamble of the Polish Constitution, where the obligation to 'bequeath to future generations all that is valuable from over one thousand years' heritage' is being mentioned, it need to be emphasized that the obligation to protect the environment is considered in the context of whole society – solidarity between existing generations, but also between present generations and the unborn (future) one's (intergenerational solidarity).[7]

However, protection of the environment is not considered to

[5] B. Majchrzak, *Poland: One of the Most Protected Values of the Constitution and its Limited Conceptualization in the practice of the Constitutional Court,* in J.E. Szilagyi (Ed.), *Constitutional Protection of the Environment and Future Generations. Legislation and Practise in Certain Central European Countries,* Miskolc-Budapest 2022, 282.

[6] Compare: Judgment of the Constitutional Court of 16th of March, 2017, case ref. Kp 1/17 (OTK ZU no. A/2017, item 28); Judgment of the Constitutional Court of 21st of September, 2015, case ref. K 28/13 (OTK ZU no. 8/A/2015, item 120; Judgment of the Constitutional Court of 28th of September 2015, case ref. K 20/14 (OTK ZU no. A/2015). See also: Judgment of the Constitutional Court of 15th of May, 2016, case ref. P 32/05 (OTK ZU no A/2006).

[7] B. Majchrzak, *Poland: One of the Most Protected Values of the Constitution,* cit., 283.

be absolute, and the legislature is deemed to retain the power to modify it. Essential principle mentioned in this concept, by the Polish Constitution is the principle of the sustainable development. Having its basis in the Constitution, is defined in art. 3 p. 50 Act of April 27th, 2001 *of environment protection law*, [8] where sustainable development is: "social and economic development, which integrates political, economic and social activities, with preservation of natural balance and sustainability of basic natural processes, in order to ensure the ability to meet the basic needs of individual communities or citizens of both the contemporary generation and future generations". As it is mentioned in the judiciary, one of the main purposes of the mentioned principles is the improvements of citizen's rights[9] (analysed further). Sustainable development does not exclude the possibility to take actions potentially harming the environment, but – in parallel – provides its security even if it concerns only certain compensating actions, e.g. obligation to provide planting new trees.[10]

Thus it is emphasized, that both art. 5 of the Polish Constitution and art. 3 p. 50 Act of April 27th, 2001 *of environment protection law* while mentioning the principles of sustainable development 'refers to the preservation of natural balance and sustainability of basic natural processes'. It is applicable "in case of doubts concerning the scope of duties, the type of duties and how they are to be realised; in case of conflicting values, one of which is the protection of the environment. Thus, this principle serves to protect non-renewable natural resources, which must be preserved for present and future generations".[11]

This does not exclude the fact that the legal system is – in fact – 'anthropocentric' and therefore it creates certain hierarchy of

[8] Official Journal 2025, pos. 647.

[9] Judgement of the Highest Court of Administration of 20th of December 2022, (II OSK 2150/21) – in the context of interpretations of zoning ordinances.

[10] Judgment of the Court of Administration in Gliwice of 17th of April 2024, (II SA/Gl 1597/24).

[11] Judgement of the Court of Administration in Białystok of 27th of March 2018, (II SA/Bk 760/17); Judgement of the Highest Court of Administration of 2nd of April 2015, (II OSK 2123/13).

priorities in its execution. As it is mentioned, obligation to protect the 'common good' is not synonymic to the concept of 'reduction of individual's right and freedoms' – contrary to the public interest. That means the restrictiveness of defining the protection of the environment could result with far-reaching socio-economic consequences, in which evident example is the conflict of interests considered in the light of the freedom of the economic (business) activity.[12] In the concept of social market economy, an important premise considers the acceptance to create restrictions on the entities using the environment and to burden them with cost of its use and potential degradation. Objective of the legal system – from its definition – is to facilitate the optimal arrangement of the costs and benefits of environmental use. Consequently, pursuant to the Polish Constitution, following discourse aims to provide a comprehensive justification for the utilisation of mechanisms that impose constraints on entities. The undertaking of economic activity is to be conducted in a manner that respects the requirements of environmental protection, whilst simultaneously taking into account regulations derived from the overarching principle of sustainable development.

Consequently, the principle of sustainable development is primarily understood to function as an interpretive directive. The principle of sustainability is to be employed in circumstances where there is doubt concerning the scope of obligations, the nature of obligations, and the manner of their implementation. It is evident that the subject under discussion plays a role that is analogous to that of the principles of 'social intercourse' or 'socio-economic purpose' in civil law. Firstly, it is incumbent upon the legislator to take the principle of sustainable development into consideration during the process of lawmaking. Conversely, this principle should be borne in mind by the bodies responsible for the implementation of the law. This is due to the fact that, in certain instances, the factual situation necessitates the considera-

[12] M. Łyszkowski, *Obligation to Protect the Environment Versus the Principle of Freedom and of Economic Activity…,* cit., 45.

tion and balancing of more favourable solutions by applying the principle of sustainable development.[13]

In conclusion, the permissibility of introducing restrictions on the exercise of the analysed constitutional freedoms (freedom of economic activity) may be justified by the properly prepared decision of the State passing the law, which *rationale* would be unambiguous and objectively verified already at the stage of preparation of the law. Constitutional responsibility for protection of the environment creates grounded legal and axiological basis, which obliges public authorities to restrict freedom of economic activity, which could be harmful to the environment. Those restrictions need to be proportionate, justified and cannot interfere the essence of the protected rights.[14] Assumingly, in this aspect, the importance of the principle *in dubio pro naturam* is being disclosed.

3. *Precautionary Principle and the* in Dubio Pro Naturam – *Setting the Framework*

Considering the two of above mentioned principles one has to remember its main goal is to protect the natural environment. Precaution need to be applied if there are activities or technologies, which – if used – 'could cause harm to the environment (i.e. according to probability, magnitude, and long term effects of any possible harm').[15] Mentioned risk is not only potential, but known to exist, however – in parallel – it is hard to determine its concrete implications. In some sense, precautionary principle is about finding proper balance between 'acting' and 'non acting', considering threads especially connected with climate issues.[16] The simple list of pre-emptive actions rather does not exist. We

[13] Judgment of the Court of Administration in Gorzów Wielkopolski of 25th of March 2009, (II SA/Go 825/08).

[14] M. Łyszkowski, *Obligation to Protect the Environment Versus the Principle of Freedom and of Economic Activity,* cit., 48.

[15] OECD (2023), Understanding and Applying the Precautionary Principle in the Energy Transition (in corsivo), OECD Publishing, Paris 9

[16] Ibid., 13.

shall rather understand it as a set of tools used in order to find the best solution in protecting natural environment and maintaining the will of development.

It can be accomplished by different methods, especially by reviews and certain reassessment over time. The result of those activities could be 'adaptive learning', which include also horizontal comparisons between jurisdiction and policies, even if they are made in the EU Member States. In parallel, precautionary principle creates also the necessity of public engagement and participation, the result of which is 'deliberation about the possible hazards and risk governance'.[17] This conclusion – at least – partially determines future assumptions on the presented subject.

In dubio pro naturam principle is an example of further development of the precautionary principle and 'requires' – in case of lack of clarity or ambiguity in the interpretation of applicable laws – to solve the issue in the most favourable manner for the preservation of the environment.[18] As it follows, it provides 'higher degree of protection than the precautionary principle'. Precaution shall be applicable, when there is no certainty on the risk, that potential action – or its shortage – could set to the environment, whereas the immanent aspect of the *in dubio pro naturam* principle is the selection between two legal interpretations, one of which offers higher environmental protection. Important factor in this context is the sole responsibility of the state actors. Thus it implies not only preventive measures, but mainly is concerned on concrete actions to control problematic and dangerous situations and 'offer the highest possible degree of environmental protection'.[19] What need to be emphasized is the fact, that mentioned principle gives the state actors (but also the judiciary) the preference in deciding on the highest protection or less impact to biodiversity, habitat, ecosystem processes, air and water quality among other interests. It does not require uncertainty

[17] Ibid., 15.

[18] A.A. Sanabria-Rangel, *The* in dubio pro naturam *in the light of scientific evidence: state responsibility*, in 17 *Revista Mision Juridica* 27 (2024), 211.

[19] Ibid., 217.

or proportionality of undertaken actions, which are immanent part of the assessment of the precautionary principle. Hence, it is mentioned that *in dubio pro naturam* principle could be used in the context in which 'societies have developed a new vision regarding to the their relation to the environment'. In some sense, it puts environmental interests in favour of economic rights and conflicting visions of development, even if they are not strictly subject of mandatory precaution.

4. *Precautionary Principle in Polish Legal System*

In Poland, precautionary principle is stated in article 6 paragraph 2 Act of April 27th, 2001 *of environment protection law*, which read as follows: 'Who undertakes an activity, the negative impact of which on the environment is not yet fully recognized, is obliged, guided by prudence, to take all possible preventive measures'. Paragraph 1 of mentioned article includes the principle of caution, which states: 'Who undertakes an activity that may have a negative impact on the environment is obliged to prevent this impact'. As it is mentioned those prinicples are considered jointly, which is not correct.[20] Precaution principle shall be considered initially – before the principle of caution. However, obligation resulting from the precaution principle is imposed not only for entities who maintains business activity. Nevertheless, one maintaining such activity is responsible for recognize the results of its activities. The principle of precaution is not harmed when the results occur, even by fulfilling the highest standards of precaution, but when the precaution was not considered in order to predict its negative implications. Accordingly one shall predict the results of its actions from the beginning in order to take effective measures and methods of protecting the environment. Precautionary principle emphasize an obligation to protect the environment as a whole, but also separately. Thus, its purpose is the protection from irreversible and unknown effects of environ-

[20] E. Iwanek-Chachaj, *Prinicples of Prevention and Caution in Environment Protection Law,* in *Studia Iuridica Lublinensia* 11 (2008), 144.

mental degradation on a global, regional and local scale. All activities related to the exercisement of the environment, and thus undertaking activities, should take into account the principle of precaution, even when assuming hypothetical threats to the environment. The precautionary principle is implemented, among other things, through the obligation to take into account the risks resulting from the obligation to take risks into account, resulting from the planning principle. Outline of the risks at the planning stage of the project, and then guided by the prudence, allows possible preventive measures to be taken.[21] Important backward of this principle is the fact, that it does not possess independent legal character, and it shall be included in particular legal regulations – pursuant to the above mentioned principle.

Hence, in presented aspects, precautionary principle in Poland is – in principle. – compliant with the presented methods of its interpretation in European law. In some sense, it results from the fact, that European law still presents 'warranty dimension', which is not only connected with the EU law and its agenda in this subject. Still numerous regulations enforced in the international law over the years (including laws and regulations of the UN or resulting from Convention for the Protection of Human Rights and Fundamental Freedoms[22] and rulings of the Court on Human Rights) were implemented to the Polish legal system; including formulation of the basic principles of the Polish Constitution – during the transitional period – even before formal accession to the EU.[23]

However, Polish literature presents interesting tendencies. It results from the analysis of the CJEU judgments concerning the precautionary principle. From that perspective, at least assumingly, mentioned rulings equated obligation to act pursuant to the precautionary principle with the obligation to prove, that

[21] Ibid., 146.

[22] Entered into force in Poland in 3th of September 1993, Official Journal 1993, nr 61, pos. 284.

[23] K. Popławski, *Constitutional Identity of the Republic of Poland in the Light of the Constitution on 2nd of April 1997 and Its Relation to the EU Law,* Warsaw, 2023*,* 244.

there is a 'scientific certainty', that certain investment will not harm the environment.[24] That creates certain difficulties, as attaining a level of scientific certainty is, in fact, exceedingly difficult, if not wholly impossible. This discrepancy can be attributed to the inherent nature of scientific research, which predominantly utilizes probability assessments, despite the fact that the outcomes are frequently regarded as relatively substantiated.[25] Upon closer examination of the conditionality of the precautionary principle, as outlined in art. 191 of the Treaty on the Functioning of the European Union (TFUE), it becomes evident that CJEU case law establishes requirements that extend beyond those derived from EU primary law. In art 191 p. 3 it is mentioned that "In preparing its policy on the environment, the Union shall take account of: available scientific and technical data; environmental conditions in the various regions of the Union; the potential benefits and costs of action or lack of action; the economic and social development of the Union as a whole and the balanced development of its regions (in some sense – 'sustainable development'). Although this provision refers to EU policies, it can – and occasionally does – be applied directly to national legislation in this regard. The text makes reference to the Communication from the EU Commission on the Precautionary Principle, which states that the invocation of the precautionary principle should be reserved for cases where there is particularly compelling evidence.[26] In this manner, in Poland, despite concrete basis stemming from the Act of April 27th, 2001 *of environment protection law*, it has been demonstrated through empirical observation that administrative authorities (and administrative courts) invoke the precau-

[24] Judgement of the Court of Justice of the European Union on 7th of September 2004, C-127/02, European Commission versus Republic of Portugal, pt 20.

[25] P. Debmicki, *Two Faces of the Precautionary Principle in Investing and Building Process,* in *Studia Prawnicze KUL* (Legal Papers of the Lublin's Catholic University) 3 (2018), 125-6.

[26] Communication from the EU Commision on the Precautionary Principle of 2nd of February 2000, Brussels, COM 2000/1, Europe Environment, 8 February 2000, nr 561. See also: P. Dembicki, *Two Faces of the Precautionary Principle*, cit., 126-127.

tionary principle in accordance with the views of the CJEU, particularly in regard to Natura 2000 areas. One may encounter views to: 'assume the inevitability of negative outcomes, regardless of the probability of their occurrence'.[27] Consequently, it can be posited that the precautionary principle as embedded in Polish law may wield a more expansive reach than that derived directly from the provisions of EU law, suggesting an inclination of heightened restrictions.

5. In Dubio Pro Naturam *Principle in Polish Legal System*

In dubio pro naturam as the principle of law is not expressed in legal text. It is an interpretative principle, applicable in the process of exercising – not passing the law (creating subject rights). It is implemented 'in case of doubts' in the application of administrative law norms as well as when there are doubts about the facts of the case (*in dubio*).[28] In this context it can be compared to other principles fundamental in interpreting the law – *in dubio pro reo* or *in dubio pro tributario*. This relation is emphasized in doctrine of Polish law. First of above mentioned is typical in criminal law, second in tax law. Both are implemented in order to guarantee fundamental human rights – applicable towards relation between State and individuals. The latter does not have equivalent competences in the process of enacting the law. Thus, enforcing the law competent bodies need to be abided by the necessity of certain methods of interpretation of law. In Poland it is secured by the art. 2nd of the Constitution. The legislator cannot use ambiguities of legal regulations against an individual by interpreting them to the contrary to the interests individuals.[29]

[27] Judgment of the Court of Administration in Warsaw of 10th of May 2017, IV SA/Wa 2593/16. After: P. Dembicki, *Two Faces of the Precautionary Principle,* cit., 128.

[28] A. Żywicka, *Principle in Dubio Pro Libertate as the Interpretative Norm in Public Law (Administrative) Economic Rights,* in M. Kruś, L. Staniszewska, M. Szewczyk (Eds), *Directions of Development of the Administrative Jurisdiction*, Warsaw, 2022.

[29] B. Rakoczy, *Interpretation in Dubio Pro Naturam in Polish Law,* in *KUL Legal Papers* 1 (2018), 92.

It is difficult though to interpret the *in dubio pro naturam* principle in contrast to individualist approach (e.g. *in dubio pro reo*). Essentially, protection of the environment aims on balancing conflicting interests, boiling down the need to protect the environment, on the one hand, and the permissibility of using it and its resources, on the other. Thus, it cannot be considered in a general and abstractive manner, but only in certain situations. Here occurs the comparison between analysed principle and the sustainable development, which serves primarily to resolve conflicts between values in conflict, one of which is the environmental protection. Assumingly, that constitutes hypothesis present in polish doctrine, that

> (…) environmental protection is conferred in the interest of the individual. The state of this environment affects the state and quality of life and health of the individual. The more favourable the state of the environment is, the better is the quality of life and health of the individual, and conversely the worse is the state of the environment, the quality of individual's life is decreasing. The State, while discharging its duties in the field of environmental protection, at the same time – at least – indirectly protects human life and health".[30]

From that perspective, environmental protection is interpreted conditionally to the individual rights – including protection of human health. According that, environmental protection and principle stemming from it (*in dubio pro naturam*) are the moulding elements of the protection of individual rights. It results from the hypothesis, that 'from the prevention on the impact on the environment in connection with the exercise of protected rights and freedoms of the individual, one still remains beneficial, as the quality of the environment affects the quality of his life and health'.[31] That leads to conclusion of the pretence of the 'axiological conflict', since in any case, the benefit of the individual is expected. From one perspective it can be assumed as the individual interest "at a given time, in a given manner and in a given

[30] B. Rakoczy, *Interpretation in Dubio Pro Naturam,* cit., 93.
[31] Ibid., 95.

place", or – from the other – it will be a benefit in the form of the quality of the environment and, consequently, the quality of the individual's (human) health and life. Thus, one chooses a benefit that obtains 'here and now' and concerns some particular interest of that person, or chooses a benefit related to the quality of the environment, which one perceives as related to above mentioned quality".[32]

In some sense, it can be compared with the dualistic concept of property in the context of the environment protection. It is recognizable in polish doctrine – complementary to the international law – that possession of the property is both dimensional: economical (as the individual *dominum*) and heredital (*patrimony*) concerning common environmental values. The latter 'implies viewing the environment as a certain inherent good in joint ownership. It was not created by anyone and should belong to future generations'.[33] This in unequivocally the result of the – presented above – concept of the intergenerational solidarity. Nevertheless, each interference in individual rights need to be balanced by the principle of proportionality (art. 31 p. 3 of the Polish Constitution). Following that principle, situations in which the interests of the individual are sacrificed in the name of undefined, general collective interests shall be considered as an abuse of power.

In polish judiciary, principle *in dubio pro naturam* is mainly used in the context of planning policy. It is usually mentioned in relation towards art. 6 p. 9c Act on 21th of August, 1997 *of real estate management*,[34] in which one of the main public purposes recognized by the Polish law is 'allocation of land for publicly accessible local government: pedestrian routes, squares, parks, promenades or boulevards, as well as their arrangement, including construction or reconstruction'. Above mentioned relation results from different interpretations of zoning ordinances, enabling competent bodies to broaden spheres of the "arranged

[32] Ibid.

[33] O. Sachańska-Dobrzyńska, *Between Protection of Environment and Private Property in a Regional Planning Policy,* in *Legal Papers* 3 (2024), 171.

[34] Official Journal 2024, pos. 1145 – with further changes.

green zones", even if it is not mentioned explicitly in zoning ordinances. As it was stated, it is compliant with the principles recognized by the Polish Constitution in art. 5 (principle of sustainable development) and art 74 p. 2 – duty of State actions to protect the environment. Thus, it is compliant (or in other words) protected by the Polish Constitution to interpreted zoning ordinances extensively, when one of the considered values is the protection of the environment – by proper interpretation of the municipal regulations according to 'arranged green zones'. In case of interpretative doubts it shall be settled in favour of the environment (*in dubio pro naturam*).[35]

Principle *in dubio pro naturam* is also recalled in the process of balancing conflicting values – protected by the Polish Constitution – emphasizing the right to private property (art. 64 p. 2) and its derivative, which is the right to its development in contrast to the protection of the environment and landscapes. Within the framework of the aforementioned value-weighting process, the competent bodies should act, e.g. compliant with basic environmental principles as the principle of a high level of environmental protection and the precaution principle. It is worth mentioning, that in this aspect *in dubio pro naturam* is the result of the precautionary principle and shall be implemented – at least partially – in contrast to the projects (invests) potentially harmful to the environment.[36]

Standards of the environment protection are the relevant criterion in planning policies, whereas the subject of protection are 'migration corridors' of wildlife. Hence, *in dubio pro naturam* as the interpretative principle is mentioned in accordance with municipal planning – in contrast to the right of the private property – even when considered harm to the environment is not the result of industrial investments, but also simple development of the

[35] Judgement of the Highest Court of Administration of 13th of April 2023 (case no. I OSK 640/22). See also: Judgement of the Highest Court of Administration of 19th of December 2023 (case no.II OSK 1900/23).

[36] Judgement of the Highest Court of Administration of 4th of December 2024 (case no II OSK 269/24).

individual's property.[37] Regardless, the correctness of this assumptions – as *in dubio pro naturam* principle shall be applicable while exercising, not passing the law – considered problem is even more complex. The inherited concept of the property rights, in the scope of the principle of the sustainable development is not – in parallel – favourable for future generations. It is though emphasized, that concept of 'sustainability' enforces proper balance of values – nor protecting particularities. Especially, when 'environment' or 'nature' as a partially open notions creates ambiguity and interpretative doubts. Hence, there is no preference between any interpretative principles, e.g. *in dubio pro naturam* contrasting *in dubio pro libertate*, as its correct application shall be done individually – separately for each case.

In the same context, above mentioned principle is exercised accordingly to the photovoltaic plants. In this aspect it is also related to the principle of complexity – from art. 5 of the Act of April 27th, 2001 *of environment protection law*. It states 'The protection of one or more natural elements should be implemented taking into account the protection of other elements'. As it was mentioned, "In consideration of this fundamental principle, the pursuit of renewable energy development does not supersede the imperative to safeguard a pivotal component of the environment: agricultural land. The imperative to preserve this land in a pristine state is further substantiated by a paramount public interest: ensuring food security. Therefore, also in light of the principle of sustainable development (Article 5 of the Constitution), for the construction of photovoltaic farms, wasteland and land of the lowest production suitability should be allocated primarily, and exceptionally agricultural land of higher classes (…) On the other hand, with regard to the planned industrial development, the finding that the agricultural land under the photovoltaic panels will not be cultivated at all is valid, and, moreover, the access of water and sunlight to a significant part of such land will be restricted. This conclusion corresponds with principles of environmental protection as the principle of a high level of environmen-

[37] Compare Judgement of the Highest Court of Administration of 15th of June 2023, (case no. II OSK 2140/20).

tal protection and the principles of prevention and precaution". Thus, *in dubio pro naturam* is also used in prevention of the agricultural lands (of high quality).[38]

6. *Limitations and Opportunities of* the in Dubio Pro Naturam *Principle in Poland*

In order to establish the limits of the *in dubio pro naturam* principle in Poland, it is first necessary to demonstrate its application in legal proceedings. Consequently, it appears erroneous to establish a direct correlation with planning policy within municipalities. This, in turn, gives rise to further complications of a more extensive nature, given that the fundamental problem, in the context of the challenges posed by dynamic economic changes involving the creation of industrial installations in renewable energy sources, is transferred to the level of designing the investments. In the context of Polish legislation, this frequently assumes a declarative dimension, signifying that the pertinent public authorities exercise their authority mainly on the basis of information furnished by the investor. It is possible that potential defects in the conducted environmental impact assessment may result in the approval of investments, the scope of which – even if they are potentially beneficial in terms of enhancing environmental quality (for example, investments in renewable energy sources) – may in fact result in a negative environmental impact, whether intentionally or not. The principle *in dubio pro naturam* has been invoked in a limited capacity in the cases previously outlined, and this can be considered as a limitation on the scope of its application. Despite the existence of examples in which this interpretive principle has been exercised to protect agricultural land, it is challenging to identify well-established jurisprudential views in this regard.

It is evident that the opportunity for the described principle to be interpreted in a more creative manner is a significant bene-

[38] Judgement of the Highest Court of Administration of 18th of March 2025, (case no. II OSK 485/24).

fit. It has been posited that, in principle, interpretation *in dubio pro naturam* has the potential to establish a novel paradigm for the relationship between the anthropocentric framework for safeguarding human rights (and their subjective rights) and environmental protection – even if a particular project does not show *ab initio* unambiguously negative consequences, and to some extent may even serve to improve the environment. In other word, it can be exercised, where precautionary principles seems not sufficient or impossible to implement – in certain cases.

However, given that the precautionary principle and the related principle of *in dubio pro naturam* have also been formulated in discursive and evolutionary terms, it is all the more important to emphasise their significance. The analysis demonstrated that, despite the evident legal and axiological foundations related to environmental protection, this does not imply their absolute priority over other values in conflict (the principle of freedom of economic activity). This underscores the necessity for the pursuit of compromise solutions, including the implementation of suitable educational initiatives.

The dynamic development of industrial renewable energy installations, which is undoubtedly desirable from the point of view of Poland's energy security, may also, in certain configurations, lead to a change in planning policy and even to a change in their nature. It is evident that an additional aspect of the aforementioned conflict of constitutionally protected values is revealed, namely the protection of private property. This is due to the fact that individuals who procured land in non-urban areas did so with the assurance that the representatives of local authorities would make a specific decision regarding their place of residence and the subsequent development thereof. The issue can be resolved through the implementation of a well-conceived planning policy (i.e. the introduction of local development plans). Nevertheless, until the conclusion of 2025 and the potential for undertaking the aforementioned investments within the framework of development conditions, it is reasonable to assert the presence of provisional solutions in this particular context.

The Polish Commissioner on Human Rights is the body that is taking active steps to satisfy the conflicting interests. The Pol-

ish Commissioner was granted extensive powers, albeit without the right of direct legislative initiative. The Ombudsman advocated for changes that would lead to the enactment of the so-called *Land Planning Law*, a set of demands and documents whose primary objective was to enhance public participation in relation to the potential for individuals to express their opinions on planned investments that could potentially interfere with environmental security, as well as spatial planning and development. Polish Commissioner has also expressed active support for initiatives aimed at curbing the unregulated proliferation of industrial poultry farms. In support of this stance, he has invoked the precautionary principle, emphasising the necessity for the establishment of odour emission standards within the Polish legal framework. However, it should be noted that such standards have not yet been formally implemented. In considering the role of the Ombudsman in this context, it is important to recognise the value of their ability to weigh conflicting values and the general authority of the cited body. This capacity may potentially contribute to a shift in the jurisprudential paradigms in Poland, which could include the development of the principle of *in dubio pro naturam*.

7. *Conclusions*

Presented paper shows the importance of further analysis of the *in dubio pro naturam* principle. As it occurs, it could potentially become an important factor whilst balancing conflicting values, one of which is the protection of the environment. This should be concerned especially on its axiological dimension, which accordingly enables State bodies to use *in dubio pro naturam* principle as not merely the interpretative principle, but also as the broader tool used in order to develop a new vision regarding to the relation of the society to the environment – even when there is no uncertainty according to the influence of certain investments on the state of the environment. According that it seems more applicable than the precautionary principle, at least in particular cases. Also it can be exercised directly while weight-

ing values in conflict, creating the opportunity to maintain more dynamic interpretation. It does not change the fact, that fundamental for above mentioned relation is maintaining discourse – based upon proper education. That role could be, at least partially, fulfilled by State bodies, such as Polish Commissioner on Human Rights.

THE ROLE OF CONSTITUTIONAL JUDGES IN PROTECTION OF FRENCH AND BRAZILIAN AMAZONIA

Victor Bertolotto

Abstract: *This paper examines the relationship between constitutional law and traditional peoples in the Amazonian territories of French Guiana and Brazil, regions marked by rich cultural diversity with hundreds of cosmogonies, peoples, and languages, yet officially recognizing only French and Brazilian Portuguese. Utilizing a decolonial and socio-environmental framework, the study explores the protective roles of French and Brazilian constitutional judges, comparing their juridical actions within these geographically contiguous but nationally distinct Amazonian regions. It highlights the interplay between historical colonial legacies, contemporary ecological challenges, and law's dual capacity as an emancipatory promise and an instrument constrained by colonial heritage and neoliberal economic interests.*

Keywords: Decolonial, Perspectivism, Jurisprudence, Biocultural, Law

1. *Introduction*

In the French and Brazilian Amazonian territories, there are hundreds of cosmogonies among hundreds of peoples and languages, besides the officially recognition of only two national languages: Brazilian Portuguese and French.[1] This paper seeks to

[1] According to the Brazilian Institute of Geography and Statistics (IBGE), there are 7.666 quilombola communities in Brazil across 25 federal states with many African and Creole languages, such as Kimbundu, Yoruba, and others. Concerning indigenous peoples, there are 305 indigenous peoples and 272 indigenous languages spoken in Brazil. In French Guyana, there is at least 6 indigenous people and each with their respective languages: Kali'na (Galibi), Wayana, Palikur, Arawak, Emerillon, and Wayampi. Concerning bushinengués peoples, there is 6 as well: Les Boni (or Aluku), Saamaka (or Saramaka), Pamaka (or Paramaka), Okanisi (or Djuka / Ndjuka), Kwinti et Matawai.

IWGIA, The Indigenous World 2023: French Guiana, International Work Group for Indigenous Affairs, 2023; B. de Freitas Moura, Brazil has 7.6 thousand quilombola communities: descendants of enslaved people from colonial times total 1.3 mi, Agência Brasil, Rio de Janeiro, 2024; A. Traldi Simoni, B.

understand the relation between law and local Amazonians populations: firstly, by the purpose to bring the perspective of Amazonians peoples, history and contexts; secondly, by reflecting about the protective role of French and Brazilian constitutional judges in Amazonia: French Guiana and Brazilian Amazonia.

Following a decolonial and socio-environmental approach, the interest of the comparative analysis between French and Brazilian Amazonia may make it possible to identify common national legal solutions to protect a single territory with a similar colonial history. The fact that these two jurisdictions operate within two distinct nation states will enrich the comparative research.

Far from becoming secondary, ecological concerns are even more pressing in the current context of war economy, particularly if one considers that the military industries, if they were a country, would occupy the 4th place of the most polluting countries in the world.[2]

Between resignation and revolution, the law can find its place beyond its own limitations. These limitations are very present by a simple contrast between the functional promise of an emancipatory law, and the law of violence, of colonial heritage, today hyper-marketed and monopolized by the neoliberal and techno-feudal order, which is blind or ineffective towards many ecocides and genocides.

At a time when there is still little ecological ambition on the part of the executive and legislative powers of both countries, this conscience about law can be a starting point for reversing the current state of things. This is especially true regarding the cross-border interdependence of rights during health, security, environmental, and food crises, among others fundamental questions. As a potential to be both a source of normative production and a tool for real transformation.

Nogueira Guimarães, R. Ventura Santos, *Brazil Shall Never Go Without Us Again: Indigenous Peoples in the 2022 Population Census, Cadernos de Saúde Pública*, *Scielo Brasil*, 2024. Available at: https://agenciabrasil.ebc.com.br/en/geral/noticia/2024-07/brazil-has-76-thousand-quilombola-communities; https://www. scielo.br/j/csp/a/Wr8wdt4BRn3j47mhgfTpVhD/?lang=en

[2] Conflict and Environment Observatory (CEOBS). *Mission and Activities*, 2018. Available at: https://ceobs.org/.

Mining, oil, or the use of pesticides in the Amazonia, raises the same questions for French and Brazilian judges; yet the jurisprudential responses may be different. For example, hydraulic fracturing (fracking) is still permitted in Brazil, while it is banned in France. Similarly, many dangerous pesticides are still permitted in Brazil while prohibited in European Union. The project therefore proposes to compare the different legal treatment of these common issues.

Apart from the fact that there is an evident global interest in protection of the Amazonia, the people the most affected are traditional and local communities[3] that remain victims from old and new forms of colonialism. Thus, in one hand, a new perspective of environmental ethic could be developed through a legal study about 'biocultural rights' and, in another hand, an analysis of some judicial decisions will show us how far or how close we really are to emerge biocultural rights.

2. *Biocultural Rights and Historical Reflections*

For many non-western cultures, as indigenous or traditional communities, nature and culture are not separated. Instead, they understand themselves as an integral and inseparable part of the environments in which they live. However, in an opposite and authoritarian direction, Western law has historically been uninterested in cultural diversity. The care for nature is a recent phenomenon and evidently not very successful. This contrast gives rise to an intergenerational and intercultural conflict which urges the need for an ontological review of the premises that guide normative production.

Biocultural rights are often reduced as the rights of nature, based on recognition of the personhood of a river, forest or mountain, as in some Amazonian neighbours, as in Ecuador, Bolivia and Colombia, where judges or legislators recognized some

[3] The term 'local communities' has an expressly generic meaning that can refer, in both countries, in urban or rural areas, to indigenous, bushinengués, quilombolas, riverains, fishermen, peasant farmers, etc.

new juridical entities. Indeed, biocultural rights could have initially this symbolic and pedagogical dimension of demarketing law, of a holistic de-anthropocentric protection of the nature or, even with intentions of human empathy towards non-humans. However, to honor an emancipatory project, this dimension must ensure full respect for local and traditional communities, who are in fact qualified to guide democratic and effective governance of eco-social rights.

The recognition of nature's legal personality is particularly interesting when we consider the protection of private companies. In this sense, we could reflect on how long the legal concept of legal personality has existed and how it has been improved over time by Western law. Before that, the average lifetime of a company was about 20 years because shareholder liability was illimited. When a company got broken, the shareholders had to pay its debts and, if they couldn't succeed, the company disappeared. To manage this, around 1600, the legal personality of corporate recognition officially appeared with the founding of the English and Dutch India Companies.

After that, limited liability companies (where the liability of the partners is limited to their contributions) gradually emerged in the 19th century, but the first modern and clearly defined form appeared in Germany with the GmbH (*Gesellschaft mit beschränkter Haftung*) law in 1892. In France, the *Société à Responsabilité Limitée* (SARL) was officially introduced by the law of March 7, 1925, directly inspired by the German model.

This invention marked the birth of the concept of a company as a legal entity separate from its owners, with its own rights and obligations, capable of owning property, incurring debts, and being sued. This legal innovation marked a major turning point by allowing shareholders to benefit from limited liability for their initial investment, thus laying the foundations for modern capitalism and the development of corporations.

With the creation of limited liability for companies, the sustainability of a business has increased from 20 years to unpredictable intergenerational periods. In this case, it's interesting to perceive that the State is a fully partner in this mechanism by ensuring the main condition for the private property: the emission of

liquidable titles. The State acts as an official partner through a coercive protection of property rights.

To ensure the sustainability of companies, human and environmental sustainability has taken a back seat. We could even think that corporate sustainability is basically becoming fully protected, even against lawsuits involving social and environmental crimes,[4] as mentioned by the jurist Katharina Pistor, and what lead us to think about the disrespect for the victims and the impunity of those truly (but still not legally) responsible in the cases of ecocide in Brumadinho and Mariana, in Brazilian context of Minas Gerais state.

2.1 *How to React Against Scientific and Excessive Mediatic Collapsology?*

The collapsology narratives should not paralyze or undermine socio-ecological actions. It is crucial to first recognize the most accurate historical context and identify some key facts for the amazonian context. It's necessary to put an end to the ongoing neocolonial subjugation of the Global South resources and workers to the dictates of the North. Beyond the clear global narrative that the capitalist system must end worldwide, we seek to find solutions based on radically transformative comparative constitutional law, with a view to satisfying a larger number of people.

2.2 *Prudent Gradation of Scientific Concepts: Anthropocene, Capitalocene and Plantationocene*

The origins of the current massive climate change have been addressed in many ways, each highlighting different historical moments and liabilities for this turning point in the crisis. In the whole American continent, since 1492, invaders actions were founded on intense extractivism of natural resources. As we

[4] K. Pistor, *Code of Capital: How the Law Creates Wealth and Inequality*, Princeton, 2019.

know, these actions generated genocide of indigenous peoples and ecocides of their lands. Even if, at first sight, the names of institutions or companies have changed, the consequences and the similar operational logic of extractivism remains present nowadays.

While clearly this phenomenon results from specific human decisions throughout history, understanding its roots requires examining key scientifical/historical approaches that frame the debate from distinct perspectives. Among the most important scientific keys are the collapsological concepts of Anthropocene, Capitalocene and Plantationocene.[5]

The concept of the Anthropocene, popularized in the early 2000s by Nobel Prize-winning chemist and atmospheric scientist Paul Crutzen, refers to new geological age in which human activities have become the dominant force shaping the Earth's geology and ecosystems. The term underscores the unprecedented scale and permanence of human impact on the planet, including climate change, biodiversity loss, pollution, and the transformation of landscapes.

According to the Brazilian anthropologist Eduardo Viveiros de Castro, the concept Anthropocene is fairest term in the point of view from bees and polar bears for example. From their concerns and consciousness, inside a particular perspective probably borrowed from indigenous cultures,[6] human's actions are undeniable seen as the principal guilty.[7] Indeed, the concept Anthro-

[5] As previous other eras of geological transformation: Holocene, Pleistocene, etc.

[6] Which is provocative to rethink some received ideas in many kinds of western human sciences epistemologies. In a similar way, we can see the scientific model of Gaïa. Firstly, used by James Lovelock in a scientific vision considering the Earth as an interconnected living organism, Bruno Latour introduces a biocentric cosmopolitics vision based on the required reinvention of a popular myth toward a path to equally promotes all kind of life on Earth. However, this model is weak because it tends to apply a certain balance in the human sciences that disregards colonial history and social injustices. In this sense: B. Latour, *Face à Gaïa. Huit conférences sur le nouveau régime climatique*, Paris, 2015.

[7] E. V. de Castro, *Devenir angélique ou humanité perspective : l'anthropologie chrétienne à l'épreuve des cosmologies animistes, Les Temps qui restent* 1

pocene is a persuasive statement and the solutions against the phenomenon of climate change still need to be deliberated between us, humankind. Nevertheless, by introducing the Northern impacts[8] in a decolonial perspective,[9] a closer look to the root cause of the current socio-ecological crisis can be taken more precisely.

Gradually investigating, this next concept shines an interesting perspective. The term Capitalocene was introduced by Andreas Malm in 2009, during his doctoral studies at Lund University, as a critical alternative to the Anthropocene framework.[10] While the Anthropocene attributes current environmental crises to all humanity, as a whole, the Capitalocene specifically identifies the modern capitalist system – particularly industrial capitalism, which is driven by the pursuit of profit and the intensive use of fossil fuels – as the principal cause of this new geological epoch or ecological crisis.

According to Malm, the decisive turning point was not simply the existence of humans or even the invention of the steam engine, but the point at which fossil fuels became essential for self-sustaining industrial growth, notably after the English Industrial Revolution. His purpose is to show that alternative forms of social organization could have resulted in different ecological outcomes.[11]

(2024), available at: https://lestempsquirestent.org/fr/numeros/numero-1/devenir-angelique-ou-humanite-perspective-l-anthropologie-chretienne-a-l-epreuve-des-cosmologies-animistes.

[8] P. Dann, *Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies,* in 1 *Comparative Constitutional Studies* 2 (2023), 174-96.

[9] Specially taking a very seriously consideration about traditional people's special relation with the land, that this research strives to better understand. According the quilombola leader Antonio Bispo dos Santos and many other indigenous cultures in Burkina Faso or even in Amazonia, the land did not belong to them, they belong to the land. In: A. B. dos Santos. *We Belong to the Land*, in *PISEAGRAMA* 17 (2023).

[10] D. J. Haraway. *Anthropocene, Capitalocene, Plantationocene, Chthulucene: Making kin*, in 6 *Environmental Humanities* 6 (2015), 159-65. Available at: https://read.dukeupress.edu/environmental-humanities/article/6/1/159/8110/Anthropocene-Capitalocene-Plantationocene.

[11] K. Pistor, *Code of Capital: (…)*, cit.

Although this is unquestionable true, a most recent concept called Plantationocene created at Aarhus University in Denmark in a dialogue between the philosopher Donna Haraway and the anthropologist Anna Tsing, in 2014, looks like the most accurate way to understand the origins of the currently massive climate changes,[12] especially for decolonial and biocultural studies.

In contrast with Anthropocene, the Plantationocene concept emphasizes that the roots of global ecological and social transformation lie specifically in the colonial era, particularly started by the massive new way of colonization, as the Iberian one. Which, not by coincidence, converges with many indigenous statements. As we can observe in the literature of the shaman David Kopenawa and the philosopher Ailton Krenak, this period saw the rise of extractive economies, such as large-scale gold mining, and the establishment of monoculture plantations dependent on enslaved labour and racialized hierarchies, justified and perpetuated by religious racism[13] and legal frameworks.[14]

Even though we no longer see the same official colonial *modus operandi* nowadays (with the exception of the recent attack publicly declared on colonial lines by the United States in Venezuela), in practice, several forms of colonialism persist disguised, affecting many peoples and countries. Despite the continued invisibility on many agendas of academic elites, due essentially, among other reasons, to the absence of transitional justice and a minimally dignified memorial policies for the peoples who were persecuted and exploited, the root cause needs to be confronted,

[12] A. L. Tsing, D. Haraway, *The era of standardization: conversation on the Plantation*, Terrestres review, 23 February 2024. Available at: https://www.terrestres.org/2024/02/23/lere-de-la-monoculture-et-de-la-standardisation-conversation-sur-la-plantation/.

[13] The Pope Nicholas V authorized racial slavery through the papal bulls Dum Diversas (1452) and Romanus Pontifex (1455). These documents specifically granted King Afonso V of Portugal the right to 'invade, search out, capture, vanquish, and subdue all Saracens and pagans' and to reduce them to perpetual slavery.

[14] However, even so, the term Plantationocene could be further explored through an ecofeminist approach such as that of Silvia Federici, considering the origins of capitalism in the persecution of female knowledge during the Inquisition in the Middle Ages.

otherwise every emancipation project will continually be derailed.

2.3 *How to React Against Mediatic Collapsology?*

With this Southern turn[15] inclusion, important to understand Global South and Amazonian reality, comparative constitutional environmental law studies based in a Plantationocene decolonial approach can be deeply accurate to find new solutions and responses face the superficiality of mainstream mediatic alarms.[16]

Nonetheless, between the scientific and mediatic collapsology, it's important to separate the wheat from the chaff, the relevant prognostics from the lucrative culture of panic. On one hand, scientific prognostics play a crucial role by raising awareness and prompting necessary social and ecological responses. On the other hand, we must remain vigilant against the dangers of media-driven collapsology, which can often exaggerate negative outcomes without discussing real solutions. This tendency can undermine collective psychological resilience and push people toward ideological pessimism and resignation.

When we consider cultural production, this dynamic becomes clear: there is a striking abundance of apocalyptic movies production compared to the relative scarcity of movies that envision hopeful or positive futures. This imbalance reflects and reinforces a broader pattern. Historically, colonial enterprises or imperialism[17] have sought to control collective consciousness, suppress critical thinking, and of course discourage ecological actions that might threaten their profits.

Before pointing out colonial acts that threaten lives, lands,

[15] P. Dann, *Southern turn, Northern implications: (…)*, cit.

[16] About the meaning of the term 'mediatic', we can consider: Religious messages, press, social networks and cinema culture.

[17] Beyond the nation state concepts, the employment of colonial enterprises and imperialism are not restricted to past North-South global relations, but this is also relevant to national issues between capitals, metropolitans and other cities relationship. In: P. Dann, *Southern turn, Northern implications: (…)*, cit.

and biodiversity of Amazonian peoples in Part II, it's important to understand the issues contexts about a particular exercise of the fundamental right of religious freedom intensely imbued inside a mercantilist ideology nowadays.[18]

The enduring mechanisms of reproduction, reminiscent of colonial-era forced catechism, reveal how the principle of the coloniality of power[19] persists today. This is evident in the violent proselytizing practiced by neo-Pentecostal pastors, or even in the new policies of the Catholic Church, which continue to target vulnerable groups, including indigenous and quilombola peoples, and demonstrate that such coercive practices remain a present reality.

In the French Guyana, no reparations have been made to the indigenous and bushinengué children who were taken from their families and sent back to Catholic internment schools, a process that lasted between 1983 and 2023, and all of that, with the support of the French state. In the form of a report made by the Francophone Institute for Justice and Democracy (IFJD), a Truth Commission proposal was submitted to the National Assembly on February 1st, 2024.

This reality can show us a relevant analysis about the role of neo-Pentecostal church by applying the coloniality of power in all Amazonian territory. Accordingly to the anthropologist Ron-

[18] R. de Almeida, *Bolsonaro, the Evangelicals, and the Brazilian Crisis*, in *Fieldsights – Hot Spots*, Society for Cultural Anthropology, 28 January 2020, available at: https://www.culanth.org/fieldsights/bolsonaro-the-evangelicals-and-the-brazilian-crisis.

[19] The coloniality of power is an essential principal in decolonial studies. This concept was developed by the Peruvian sociologist Aníbal Quijano to describe the enduring patterns of power, social hierarchies, and knowledge systems that originated with European colonialism and continue to shape the modern world. It refers to the structures of domination, control, and hegemony that emerged with the conquest of the Americas in 1492 and persist today, deeply embedded in global capitalism, social relations, and cultural norms. The coloniality of power is not just a historical phenomenon but a continuing process that shapes contemporary global structures, including labour markets, authority, gender relations, and knowledge production. In: A. Quijano, W.D. Mignolo, R. Segato e C.E. Walsh, *Foundational Essays on the Coloniality of Power*, Durham (NC), 2024.

aldo de Almeida, recently, many evangelical churches have broken with traditional asceticism, advocating the 'conquest of heaven on earth'.

Beyond the campaigns of anti-vaccination promoted by the federal government and pastors during Covid 19 in Brazilian Amazonia deployed against vulnerable populations by threatening they relation with God if someone opts to take the 'impure' vaccines,[20] some religious doctrines based specially on the Theology of Prosperity, distinctive inside neo-Pentecostal doctrine, has been studied by anthropologists of religion as an instrument for stimulating massive non ecological consumerism culture.[21]

While it should be noted that not all evangelicals are engaged in this type of violent proselytism, it is necessary to highlight a backlash in catholic church policies. By a recent telegram sent by Cardinal Pietro Parolin, on behalf of Pope Leo XIV, to the Amazonians bishops, the Vatican addressed 'the need to proclaim Jesus Christ to indigenous peoples'.[22]

Even with this telegram pointed that the 'evangelization must go hand in hand with respect for cultures and care for the *common home*', an expression he used to refer to the planet, the Association of Indigenous Peoples of Brazil (APIB) quickly reacted:

We cannot be tricked into thinking that turning our traditions and spiritualities into targets for conversion is protection or love. It is an attempt to erase centuries of ancestral knowledge, beliefs,

[20] N. Pontes, *Pastors Distance Indigenous People from Vaccination, Leaders Report*, 29 January 2021. Available at: https://www.dw.com/pt-br/pastores-afastam-ind%C3%ADgenas-da-vacina%C3%A7%C3%A3o-relatam-lideran%C3%A7as/a-56380498.

[21] According to the anthropologist Ronaldo de Almeida, pastors dangerously promise wealth related by the faith, proactivity actions and donations to his church: 'the notion that material prosperity results from monetary ritual sacrifices and entrepreneurial attitudes is valued by neo-Pentecostalism and adopted as an economic ethic'. In: R. de Almeida, *Bolsonaro, the Evangelicals, and the Brazilian Crisis (…)*, cit.

[22] M. A. Campos, *Peoples of the Amazonia Must Be Evangelized, Says Pope Leo XIV to Bishops*, Gazeta do Povo, August 19, 2025. Available at: https://www.gazetadopovo.com.br/vozes/marcio-antonio-campos/papa-leao-xiv-mensagem-bispos-amazonia/.

and rituals that have existed for millennia. The real defence of the Amazonia and its peoples does not come through religious imposition, but through the recognition of indigenous autonomy, culture, and spirituality. Indigenous peoples do not need to be evangelized, they need to be respected. Our cultures, our beliefs, and our lives in the territory are our strength and our resistance!

In the same sense, it's important to remind that the American Declaration (in Article XVI) guarantees protection for indigenous spirituality, the right of these peoples not to suffer pressure, impositions, or coercive measures that limit their religious beliefs and symbols, and state measures to ensure that their religious life is respected and preserved.

Media, religion, politics, all those old and new forms of colonialism seem to be frozen in an old culture of predation which origins can be found since the Scientific Revolution, Catholic Church dogmas, Descartes discourse of method, etc. This is the reflects of what some anthropologists and philosophers consider to be the rise of a naturalistic ontology imbued in Western modernity.[23]

Combined with this ascension, we cannot forget to notice a massive process of epistemicides of other non-European and non-institutionalized cultures, as happened when Immanuel Kant brought by an Eurocentric perspective, in his lessons about Geography and Anthropology, underlining that Native Americans (indigenous peoples) were 'savages', 'thoughtless', and 'lazy', incapable of complete autonomy and considered inferior on a civilizational scale that he proposed, where Europeans would be at the top and indigenous peoples in an inferior position. Without meaning to detract from the historical importance of this author, it is difficult to believe that this type of statement has not contaminated several of his academic productions.

Despite these kinds of analyses has still been marginalized from most university programmes, we can perceive that, to face

[23] According to the anthropologist Philippe Descola, other ontologies exist inside non-naturalist societies as the: animism, totemism and analogism.

those old or new forms of epistemicides, traditional knowledge's is honourably being restored by the increased presence of indigenous leaders and voices during international climate conferences, decolonial academic works and other forms of struggles.

Differently from what is observed in capitalist regimes, many traditional and indigenous peoples have not adopted a rigid distinction between nature and culture. Instead, they understand themselves as an integral and inseparable part of the environments in which they live. This relational ontology helps explain why such peoples have generally not embraced predatory and self-destructive practices that are disconnected from the material world that surrounds them. In brief, the purpose of this analysis is also to provoke the urge for new perspectives and build new imaginaries towards new ecosocial ontologies.

2.4 *Biocultural Glasses as a Tool to Find Social and Ecological Solutions*

After these analyses of cultural conflicts related to social and ecological crises, which is essential for the quality of any jurisprudential response, different perspectives could be introduced to rule currently socio environmental litigations between many fundamental rights as those frequently in dispute between nature, collective interests and private company's rights, for example.

During the operation of a proportional test tool control, some concrete legal cases could be optionally interpreted and ruled under: Anthropocentric, Biocentric, Ecocentric, Biocultural or many other perspectives. According to each of them – which we can understand as epistemological tools or 'glasses' – the satisfaction of rights in the same specific legal dispute may result in considerably different outcomes.

Inside the anthropocentric glasses, we can fall into several sub-categories beyond the first sight perception of speciesism which defends that humans are superior and the most special comparing to all non-human beings. However, inside this category, there are many sub-categories that are responsible for the cre-

ation of ontological conflicts and oppressions between human beings as: ethnocentrism, colonialism, imperialism, fascism or religious proselytism.

In another sense, there are other forms of anthropocentrism that, into an intersectional perspective, mainly serve to repair or avoid subjugation and protect human dignity, such as: counter-colonialism (from many quilombola peoples), anti-racism, feminism, LGBTQIA+ movement, among others.

By combining these anthropocentric glasses with environmental requirements, we can focus on other glasses as the ecocentric and biocentric ones, which have interesting outcomes but often ambiguous functionalities. Nevertheless, biocultural glasses demonstrate more consistent ecosocial effects giving more dignity for local populations and, still helping in a central fight against environmental racism structural phenomenon.

Firstly, ecocentric glasses will give even more focus to protect nature, especially with the maxim that all human life is totally dependent of nature's life. This current supports fundamentally a holistic meaning which places the value of entire ecosystems above the value of individual species or human interests. However, the controversy and weakness of this perspective lie in the fact that it can easily be perceived as a disregard for colonial history and social injustices.[24]

Slightly different, biocentric glasses supporters will focus to protect all forms of life as a priority way to solve environmental litigations in the sense to overcome an anthropocentric or speciesism vision. Partisans of this perspective argues that the care of all kinds of life, not only human's ones, without hierarchy among living beings, will not minimize the care of human and social rights. Especially considering the interdependency proposed by scientists and philosophers in the Gaïa project, for example, which understand the world as one unique living organism.[25]

In turn, the interest of biocultural glasses could be resumed as a democratic environmental tool for judges, lawyers, jurists and

[24] Or even be perceived as an ecofascist dimension.

[25] B. Latour, *Face à Gaïa, Huit conférences (…)*, cit.

even any other public actors. As the Plantationocene concept, this perspective looks the fairest way when the priority is given to respect local demands of traditional and local populations which tend to play a naturally prominent social and ecological role.[26] In this case, all forms of authoritarianism inside decision disappear without the need to resort to sophisticated technological investments that are often related to greenwashing and useless in combating climate change.

In short, while biocentric glasses goes beyond both Kantian anthropocentrism and Aldo Leopold's ecocentrism in its conception of the *sine qua non* prevalence of all forms of life inseparable from their surrounding environment (what philosopher Baptiste Morizot calls relational humanism), biocultural glasses reveals the major importance of the role of peasant farmers and traditional communities in their sociocultural dimension of interaction and harmonical preservation of biodiversity and nature.[27]

Nevertheless, even if they can still avoid dramatic backlashes, constitutional judges still seem disconnected from the reality on the ground and, thus, from biocultural rights. Despite some progress, we can observe several decisions that demonstrate insufficient overcoming of developmentalist doctrine and connivance with internal colonialism.

[26] As Antonio Bispo dos Santos said, even before the concept of ecology appears in academia, traditional populations were already ecological. However, given the seriousness of the harmful projects underway and the ineffectiveness of greenwashing environmentalism governance, this reflection invites the lectors to be radically shifted towards local populations and their ecological expertise. Learning with who have lived in harmony with nature for thousands of years and with the purpose of giving voice and space to those who were not heard or welcomed. Of course, if they want it. Neither, we cannot give them the burden or responsibility of saving the planet, but we must at least open the doors for them, which means to ally ourselves to their causes, respecting their homes, cultures and lives.

[27] I. Kant, *Groundwork of the Metaphysics of Morals*, Cambridge, 1998; A. Leopold, *A Sand County Almanac*, Oxford, 1949; A. Naess, Écologie, Communauté et Style de vie, Paris, 2008; M. Prieur, *Droit de l'environnement*, 9th edition, Précis, Paris, 2023, 70; B. Morizot, *L'écologie contre l'humanisme: sur l'instance d'un faux problème*, in Id., *L'Europe réensauvagée*, Arles, 2020.

3. *Jurisprudence in French and Brazilian Amazonia*

The circular socio-environmental issues in the Amazon region subject to French[28] and Brazilian[29] constitutional jurisdiction result mainly from activities authorized by the executive branch without the consent of local communities,[30] such as the use of pesticides[31] and the exploitation of natural and energy resources with a significant harmful impact. They also result from the state's failure or complicity to control or allow activities such as gold mining and others pharaonic constructions. In a wider perspective, they result from how law and constitution can be useful or not at all for protecting local populations lands and lives, without violating their self-determination.

Regarding to the constitutional legal framework of both countries, in France, we have no serious mention about the protection of local communities in the Constitution of 1958, neither in the most recent Environment Charter of 2005 (hereinafter the Charter of 2005), which has entered the constitutional French block.[32]

[28] Four French examples of socio-environmental constitutional case law concerning the Amazonia: Decision No. 2013-346 QPC of October 11, 2013, Société Schuepbach Energy LLC [Prohibition of hydraulic fracturing for hydrocarbon exploration and exploitation – Revocation of exploration permits]; Decision No. 2017-750 DC of March 23, 2017 – Law on the duty of care of parent companies and contracting companies; Decision No. 2019-823 QPC of January 31, 2020 (Union des industries de la protection des plantes [Prohibition on the production, storage and circulation of certain plant protection products]); Decision No. 2021-971 QPC of February 18, 2022 France Nature Environnement (Automatic extension of certain mining concessions).

[29] For Brazilian examples of socio-environmental constitutional jurisprudence concerning the Amazonia: Tema 1031 Extraordinary Appeal No. 1017365 (RE), of September 21, 2023; SL 933 AgR-segundo / PA – PARÁ, of May 31, 2017; ADPF No. 709 of January 30, 2023, ADPF 760, 743, 746 and 857 and ADO 54 (*Pauta verde*) of March 14, 2024.

[30] Violating the International Labor Organization Convention n° 169 (Which is still not signed by the French State).

[31] The global pesticide market has clearly unequal human and environmental consequences between the Global North and South. L. M. Bombardi, *Pesticides – A Chemical Colonialism*, Paris, 2024.

[32] Despite the applicability of almost all the constitutional clauses of the French Environnement Charter of 2005, their operational effectiveness remains weak and provides little incentive for environmental activists to bring

However, even if we have Chapters VI and VIII of the 1988 Constitution of Brazil, which are devoted exclusively to the environment and indigenous peoples, in reality, the protection of local communities is equally weak.

In both cases, the texts are very ambiguous and lack precision regarding the environmental protection requirements currently demanded. Of course, a strong industrial lobby in both cases has undoubtedly played a role in creating more ambiguity during the constituent process. However, considering that the survival of nature and its guardians depend more than ever on the guardians of the constitution, as the last bastions of constitutional decision authority, we could hope that the subjectivity of constitutional legal framework also allows judges to develop their power of assessment and interpretation and thus be able about bringing more protective rights.

3.1 *French Guyana Jurisprudence*

Hydraulic fracturing (fracking) is one of the greatest threats to the environment, local communities and traditional populations worldwide. This practice, which involves extracting liquid or gaseous hydrocarbons from underground, risks contaminating groundwater and even causing earthquakes. While it is still permitted in much of Brazil, the French Constitutional Council issued one of his most important decisions in 2013 confirming the constitutionality of a legislative interdiction.

Following the ban on fracking by Articles 1 and 3 of Law No. 2011-835 of July 13, 2011, a Priority constitutionality question (QPC) was referred to the Constitutional Council. His members ruled that the provisions of the contested law were consistent with the Constitution, concluding that the restriction on freedom of enterprise was proportionate in view of the "state of

cases before the courts. *Access to Justice in Environmental Matters*, European e-Justice Portal, European Commission, 2022, available at: https://e-justice.europa.eu/topics/your-rights/access-justice-environmental-matters_en.

knowledge and technology"[33] on fracking and the general interest objective of protecting the environment pursued by the legislature.

Legal mining in Amazonia, as the illegal one, is also one of the greatest threats to the environment, local communities, and traditional peoples. After years of neglect by the French government, the gold company Montagne d'Or had finally a refusal to renew his mining concession granted in 2019. However, after that, the administrative courts of French Guiana and Bordeaux ruled that this refusal was illegal.

As a result, another QPC,[34] brought by the associations *France Nature Environnement* and *Guyane Nature Environnement*, made the Constitutional Council declare several articles of the French Mining Code to be contrary to the Charter of 2005. Nevertheless, even if this decision is an unprecedented and very mediatic ecological gain, in which Articles 1 and 3 of the Environmental Charter of 2005 may acquire real normative value and influence future climate cases involving mining, this precedent can also be seen, in reality, as a smoke screen.[35] Besides this victory, many other small scale mining authorizations were granted. What has been barely noticed by scholars and the public.[36]

[33] A recurring formula that allows the Constitutional Council to reverse its position if new scientific data emerges.

[34] Decision No. 2021-971 QPC of February 18, 2022 (France Nature Environnement [Automatic extension of certain mining concessions]).

[35] M.C. Thébia, *Mining Commission: 14 gold mining permits issued or renewed since January 2023*, France Info Newspaper, 30 April 2023, available at: https://la1ere.franceinfo.fr/guyane/commission-des-mines-14-autorisations-d-exploitation-aurifere-delivrees-ou-renouvelees-depuis-janvier-2023-1390862.html.

[36] According to *Reporterre* website's notice, the highly publicized ban on Montagne d'Or served to mask the continuation of a broader extractive policy, allowing other mining projects to move forward without attracting the same level of opposition or attention from environmentalists and the general public. H. Ferrarini, Reportage – Mines et métaux: 'En Guyane, les groupes miniers préparent 'la grande braderie', 30 avril 2019, available at: https://reporterre.net/En-Guyane-les-groupes-miniers-preparent-la-grande-braderie-du-territoire.

3.2 *Brazilian Amazonia Jurisprudence*

In Brazilian side, the right to indigenous and quilombola Lands is one of the pillars in a country where there has been equally directed to huge extractive policies. In 2023, the Supreme Federal Tribunal (STF) ruled the 'case of the century' concerning the unconstitutionality of the 'marco temporal' (time frame theory).[37]

This theory claimed that indigenous peoples, lacking sufficient means to prove that they occupied their Lands before the promulgation of the 1988 Constitution, should not have the right to proceed the administrative demarcation of their Lands, a procedure that guarantees an essential juridical base for the minimal protection of their dignity and survival. Nevertheless, the Brazilian Constitution of 1988 does not establish any time frame for the demarcation of Indigenous Lands. Contrarily, it emphasizes their immemorial and ancestral fundamental right.[38]

Since the declaration of Brazilian independency in 1822, the unconstitutionality of the 'time frame theory' pronounced by the STF was the most important opportunity to make a just transition towards the recognition of Amazonian socio-environmental land rights. However, this decision still carries an important heritage from colonial times.

Concerning the expulsion or expropriation of farmers who were, in any case, illegally occupying Indigenous Lands, the judge Alexandre de Moraes defended a state monetary compensation illegal occupying farmers.[39]

[37] C. B. C. Nogueira, D. S. Massulo, A Teoria do Indigenato vs. Teoria do Fato Indígena (Marco temporal): Breve análise desde a perspectiva do colonialismo interno, Empório do Direito website, 2019, available at: https://emporiododireito.com.br.

[38] Furthermore, in Article 67 of the Transitional Constitutional Provisions Act (ADCT), the constituent assembly made the following fallacious promise: 'The Union shall complete the demarcation of Indigenous Lands within five years of the promulgation of the Constitution'.

[39] This compensation must be paid by the Federal Government and covers both the value of the improvements and the value of the bare land. It means the full value of the property and not just the buildings or improvements made.

However, the compensation method applied until then was calculated based on improvements made in good faith, it means, buildings erected on the territory without the intention of committing illegal acts.[40] Nonetheless, in practice, the good faith is frequently falsified by the very well-known in Brazilian society by the so-called method of *grilagem*.[41] When this happens, beyond the frauds, we have often indigenous and quilombolas peoples murdered. Even if we could overcome this question, the Constitution explicitly states that titles in Indigenous Lands are null and void and therefore should not be recognized by the Brazilian State.

Compensating aggressors rather than victims reminds us of the same logic adopted in the era of the French and Brazilian empires after the abolition of slavery. While the owners of enslaved people received compensation, the people who were newly liberated were excluded from any 'national project'.

Somehow, this judiciary reproduction of colonial mechanism is a statement of weakness front of aggressors. As result, the rise of rural conflicts testifies that this kind of conciliation encourage further invasions, and worse, it sets a precedent towards a 'real estate investment' inside Indigenous Lands.

After the judgment of the case of the century, a majority of federal parliaments members partisans to Bolsonaro's anti-indigenous policies and monoculture agrobusiness interests approved the Time Frame Theory Law (Law 14.701/2023). Even if any law shall never overcome an unconstitutional decision, and in this case, indigenous rights lands is a fundamental right protected by

[40] M. Pajola, *Timeframe: Supreme Federal Tribunal Approves Compensation for Farmers and Rejects Mining on Indigenous Lands*, Brasil de Fato, 27 September 2023, available at: https://www.brasildefato.com.br/2023/09/27/marco-temporal-stf-aprova-indenizacoes-a-fazendeiros-e-descarta-mineracao-em-terras-indigenas/.

[41] Grilagem in Brazil refers to the illegal appropriation or land grabbing of public lands, often involving the forgery of documents to create false property titles that give the appearance of legal ownership. The term originates from an old practice where forged documents were placed in boxes with crickets ('*grilos*' in Portuguese), whose excrement aged the paper artificially to make the documents look authentic.

clause of non-reversibility with the institution of the 'basic structure doctrine', this backlash intensified legal uncertainty and increased even more violence, evictions, and threats against indigenous communities.

After that newborn unconstitutional law, several indigenous people's rights organisations have referred the matter back to the STF to have this law subsequently declared unconstitutional. Many unconstitutional actions were brought but the judge Gilmar Mendes, rapporteur for some of these cases, granted a preliminary injunction ordering the immediate suspension of all legal proceedings challenging the constitutionality of Law 14.701/2023 in other courts until the STF issues a final ruling on the matter.

At the same time, while indigenous lives keep in danger, the same judge, Gilmar Mendes, created a Special Conciliation Commission to seek a consensual solution, but there has not yet been a judgment on the merits of the law's constitutionality. One more time, given such a disproportionate balance of power between aggressors and victims, in a situation that is clearly unconstitutional, the invasion of indigenous lands cannot be subject to conciliation. Invaders that often is related to agrobusiness must be expelled and punished about their crimes while indigenous families must be urgently fully protected. According to indigenous right's lawyers, the STF should immediately declare the Time Frame Theory Law (Law 14.701/2023) unconstitutional by a technique appeal window about the first unconstitutional declaration.

4. *Conclusion*

Biocultural rights require a major interdisciplinary and intersectional effort to avoid falling into preconceived ideas that reproduce and give strength to many forms of racism, colonialism, fascism, and other prejudices that law seems to be supposedly trying to globally eradicate from many societies.

According to a seminar at Sciences Po Paris about the recognition of the Atrato River's legal personhood in Colombia by the Constitutional Court, with the honourable speech of two of his

elected Guardians, it was explained that the constitutional judges adopted a strategic approach aimed at achieving tangible democratic results. An approach that can qualify this decision as a biocultural one.

The recognition of the legal personality of nature was made beyond the animist and symbolic solution. Instead of biocentralizing the importance of the Atrato's river, only giving him human perspectives and qualities as the same did to private compagnies since 1600, it was exposed that the judges from the Colombian Constitutional court had a complementary requirement about a special democratic decision making.

Between the national institution's interests, located in the capital in Bogotá, the private companies interests, which were used to easily explore and contaminate the river, and the local population interests of protection of their environment, 14 Guardians of the Atrato's rivers, among indigenous and Afro-Colombians riverain populations, were elected to legally represent the interests of the river and inevitably protect the real interests of the riverain populations. Through this decision grounded on a biocultural approach, they have acquired an important horizontal relationship face public and private actors and thus, after 10 years, the health of the river and riverain populations increased.

Even if the International Labor Organization Convention n° 169 has not a great influence in our national legal systems, neither a statement about the importance of power of veto for consulted people (and even if it is even not signed by the French State), amazonian judges in France and in Brazil could be inspired by the Colombian case and think about policies to rule environmental and social litigations.

Alternatively, could a form of collective property status be insured by State power of coercivity and bring protection for local and traditional people fundamental lands rights? This option is still far to be approved by quilombola peoples in Brazil who are more invisible then indigenous struggles and waits for decades their administrative land process of demarcation.[42] The same

[42] Differently, in the case of Brazilian indigenous peoples, the official property of the Indigenous Land remains to the Federal State.

goes to the complexity of problems faced in Belize capitalism challenges, despite the decision of their Supreme Court.[43]

Inside an intersectional ontology perspective about women rights, the anthropologist Rebecca Lemos Igreja gives us a beautiful example of struggles inside an indigenous community autonomously inspired by Western rights:

"A notable example is the struggle of Indigenous women against their own authorities and the state to redefine gender norms and so-called customs, while taking into account the intersection of other forms of oppression, such as class and race, which also affect them. By making patriarchal structures and their intertwining with the colonial structures imposed on them visible, Indian women have succeeded in opening up avenues for finding liberating alternatives, where human rights are fundamental to destabilizing various forms of exclusion and violence that must be combated both within and outside their communities. Ana Cecilia Arteaga's contribution to this volume offers a new perspective on the definition of Indian autonomies and justice based on the experience of Aymara women in Totora Marka, Bolivia. In order to adapt gender discourse and depatriarchalizing to their norms, they decided to redefine the terms of gender relations from a perspective of equity within their communities. Thus, the Andean principle of chacha-warmi in male-female relations was transformed into chacha-warmi/warmi-chacha to promote true complementarity between the sexes. In this way, women have appropriated human rights and women's rights and made them part of the community's logic".[44]

In this example of gender emancipation through self-determination, we can see that the emergence of a right often proclaimed as universal can occur without the subterfuge of colonialism and

[43] As it was the case of the Mayas in Belize inspired by the ILO Convention 169 of 1989 and United Nations Declaration on the Rights of Indigenous Peoples of 2007. In: Supreme Court of Belize, Aurelio Cal, Maya village of Santa Cruz and others v. Attorney General of Belize and others, October 18, 2007, No. 171 and 172/2007.

[44] M. T. Sierra and R.L. Igreja, *Néocolonialisme et justiciabilité des droits des peuples indiens. Introduction*, Cahiers des Amériques latines, 2020. Available at: http://journals.openedition.org/cal/11193.

wars that has frequently accompanied universalism. Without an imposition based on institutional violence on traditional peoples, human rights, or whatever other cultures may or may not call them, prove to be able to arise organically through a genuine interculturality. By achieving a fair and inspiring coexistence of knowledge, cultures and cosmovisions.

ENERGY JUSTICE IN COURT: LESSONS FROM LATIN AMERICA FOR A JUST TRANSITION LITIGATION

Emanuela Rassu

Abstract: *The paper aims to analyse the judicial reasoning underlying judgments related to energy in the so called 'energy transition'. As energy justice increasingly consolidates as an indicator to assess the development of sustainability principles, the related adjudication must be based on the fundamental energy trilemma: security, environmental sustainability, and social fairness. However, comparative perspectives reveal different approaches to understanding this trilemma, especially in the judgments of European and Latin American courts; while the former often adopt a more market-oriented approach, the latter integrate the dimensions of energy justice to a greater extent.*

Keywords: Energy Justice, Just Transition Litigation, Human rights-based Approach, Vulnerable Communities, Europe and Latin America

1. *Introduction: the Scope of a Just Transition Litigation*

As the reaching of the temperature limit of the Paris Agreement is approaching, shifting towards a net-zero carbon economy must accelerate, and investing in renewable energy and critical minerals extraction is expanding rapidly.[1] Nevertheless, it is recognised that the climate crisis is going to increase social inequality.[2] Measures that are aimed at achieving climate neutrality

[1] IRENA (2023), *Global Landscape of Renewable Energy Finance 2023*: https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2023/Feb/IRENA_CPI_Global_RE_finance_2023.pdf; IRENA (2021*), Critical Materials For The Energy Transition:* https://www.irena.org/Technical-Papers/Critical-Materials-For-The-Energy-Transition; F. Denton, K. Halsnæs, K. Akimoto *et al., Accelerating the transition in the context of sustainable development*, in IPCC, 2022, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change; P.R. Shukla, J. Skea, R. Slade *et al.* (Eds), Cambridge and New York.

[2] S. Nazrul Islam, J. Winkel*, Climate Change and Social Inequality*, UN/

do not affect everyone equally: different regions and social groups have different capacities to adapt and enjoy the gains of the net-zero transition, and this has been shown to delegitimise climate efforts and lower climate ambitions, posing a clear threat to sustainable development.[3]

In this context of crisis, the emergence of new instances that require responses as rapid and fair as they are complex, the energy transition is the essential key.[4] To moderate concerns about the socio-economic and environmental impacts of laws, policies and projects that aim to promote the transition to low-carbon economies and climate-resilient societies, the concept of just transition is being invoked. Commonly used to recognize impacts on the rights of workers and labour conditions in transformations towards sustainability,[5] this concept permeates nowadays the political, social,[6] economic and even legal

DESA Working Paper No. 152, ST/ESA/2017/DWP/152; M. Marchegiani, *L'incidenza della nozione di vulnerabilità sullo sviluppo del diritto internazionale in tema di cambiamenti climatici*, Torino, 2023. R. Zanhow, A. R. Yousefnia, M. Hassankhani *et al.*, *Climate Change Inequalities: A Systematic Review of Disparities in Access to Mitigation and Adaptation Measures*, in 165 *Environmental Science and Policy* (2025), 1-10.

[3] *Brundtland Report, Our Common Future*, Oxford, 1987, prepared by the World Commission on Environment and Development, composed of representatives of 21 States, and established in 1983 by mandate of the United Nations General Assembly.

[4] O. Hailes, J. E. Viñuales, *The energy transition at a critical juncture,* in *Journal of International Economic Law* 26 (2023), 627-648; V. Johansson, *Just Transition as an Evolving Concept in International Climate Law*, in *Journal of Environmental Law* 35 (2023), 229-249; J. S. Maloy, *Climate Change, Energy Transition, and Constitutional Identity*, in *International Studies Review* 25 (2023), 1-19; M. Mascarenhas-Swan, *The Case for a Just Transition,* in D. Fairchild, A. Weinrub (Eds), *Energy Democracy: Advancing Equity in Clean Energy Solutions*, Washington, 2017.

[5] *Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All*, International Labour Organization, 2015 https://www.ilo.org/publications/guidelines-just-transition-towards-environmentally-sustainable-economies.

[6] I. Velicu, S. Barca, *The Just Transition and its work of inequality*, in 16 *Sustainability: Science, Practice and Policy* 1 (2020), 263-73; E. Morena, D. Krause, D. Stevis (Eds), *Just transitions. Social Justice in a Low-carbon World*, London, 2020; B. Galgóczi, *Just Transition on the Ground: Challenges and*

debate,[7] constituting one of the elements that orbits around the discourse of the most remote origins, but always current, about sustainable development.[8]

This becomes more evident if we consider that the energy transition has been defined not just as a shift from one set of fuels to another; instead, it involves a much deeper transformation of the world's energy systems, which will have major social, economic, and political implications that go well beyond.[9] Thus, the idea of a just transition has become broader, drawing on theories of climate, social and environmental justice, laying the foundations for the adoption of tools aimed at mitigating the social impacts of climate action, such as the European Union Just Transition Fund[10] and the Paris Agreement's Just Transition Work Programme.[11]

However, the climate debate is becoming increasingly heated, and the different and multiple actors are becoming spokesper-

Opportunities for Social Dialogue, in 26 *European Journal of Industrial Relations* 4 (2020), 367-82.

[7] M. Gbomagba, *Role of Law Driving Energy Transitions: A Critical View from China and Selected African Countries*, in *Beijing Law Review* 16 (2025), 76-106. E. Domorenok, P. Graziano, K. Zimmerman (Eds), *The Eco-Social Polity? Theoretical, Conceptual and Empirical Issues*, Bristol, 2025. P. Kimani, *Leveraging Carbon Trading for a Just Energy Transition in Kenya*, in 21 *Law, environment and development journal* 1 (2025), 42-61; D. Iglesias Márquez, C. Esteve-Jordà, B. F. Pérez, *Legal Challenges at the End of the Fossil Fuel Era: Shaping a Just and Clean Energy Transition*, Cham, 2024.

[8] M. Montini, *SDGs e sviluppo sostenibile nel diritto internazionale dell'ambiente*, in *Federalismi.it* 9 (2019) 1-21; M. Montini, *I fondamenti giuridici della sostenibilità,* in *Agenda 2030: un viaggio attraverso gli Obiettivi di sviluppo sostenibile*. ASviS; Santa Chiara Lab, 2022. T. Groppi, *Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro*, in *Diritto pubblico comparato ed europeo* 18 (2016), 43-78.

[9] IRENA (2019), *A New World: The Geopolitics of the Energy Transformation. Abu Dhabi: International Renewable Energy Agency.* Available at: https://www.irena.org/publications/2019/Jan/A-New-World-The-Geopolitics-of-the-Energy-Transformation. Concerning the general discourse about the definition of transition, see L. Mezzetti, Teoria e prassi delle transizioni costituzionali e del consolidamento democratico agli inizi del nuovo millennio, in *Derecho PUCP* 56 (2003), 29-156.

[10] The European Green Deal (European Commission, 2019).

[11] Work Programme on Just Transition Pathways Referred to in the Relevant Paragraphs of Decision 1/CMA.4 (UNFCCC, 2022).

sons for protection requests that do not find an adequate response in institutional forums; among these, the growing demand for a human-rights-based approach in climate discourses emerges with increasing strength.[12]

As these tensions arise and calls for a just transition increase, little attention is given to what 'just' could concretely mean.[13] This is because, beyond the reconstructive and analytical efforts of the scientific community to define energy justice,[14] the principles related to it are seldom addressed in policies. Indeed, energy justice scholarship has traditionally examined the distributive, procedural, and recognition dimensions of the transition, highlighting how energy systems generate unequal burdens and benefits, and how marginalised communities are often excluded from decision-making processes. These principles are useful to understand the social implications of decarbonisation, but they remain within the realm of normative theory or policy guidance. Their limited incorporation into binding legal instruments or enforceable standards has created a disjunction between the theoretical recognition of inequalities in the energy transition and the mechanisms available to remedy them. It is precisely in this gap that litigation emerges as a tool: when energy justice principles are not operationalised through laws or policies, courts become the forum where affected actors can contest uneven outcomes and demand accountability.[15]

[12] Resolution adopted by the Human Rights Council on 10 July 2024 A/HRC/RES/56/8; E. Morgera, *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, A human rights-based approach to the energy transition*, 17 July 2025, A/80/188: https://docs.un.org/en/A/80/188; S. H. Baker*, Anti-Resilience: A Roadmap for Transformational Justice within the Energy System*, in 54 *Harvard Civil Rights-Civil Liberties Law Review* (2019), 1-48.

[13] G. Chiara, I. Terrana, M. Sarrica *et al.*, *What Does "Just" Mean in Just Energy Transitions? Different Perspectives between EU Institutional Debates and Scientific Literature*, in 7 *Frontiers in Political Science* (2025), 1-14; R. J. Heffron, *What is the 'Just Transition'?* in 88 *Geoforum* (2018), 74-7.

[14] See paragraph 2.

[15] G. N. Rosenberg, *Courts as Agents of Change*, in L. Epstein, U. Šadl, G. Grendstad *et. al.* (Eds), *The Oxford Handbook of Comparative Judicial Behaviour*, Oxford, 2024.

In this sense, moving the debate on energy justice from the academic and policy spheres into the judicial arena responds to the structural problem of under-enforcement. The analysis of global judicial activities related to energy falls under the broad umbrella of climate change litigation, which encompasses an infinite number of issues, sectors, and subjects that are extremely challenging to analyse and categorise given their various peculiarities. The common denominator of climate litigation appears to stem from the call for general mitigation and adaptation actions as outlined by the United Nations Framework Convention on Climate Change (UNFCCC),[16] which undoubtedly form the cornerstones of climate action and the decarbonisation processes. However, these actions are not sufficient to complete the framework of protection requests for the various stakeholders involved. Moreover, within this umbrella of litigation, the energy sector is acknowledged only marginally, primarily concerning the contribution of the demand for increasingly ambitious targets for the decommissioning of fossil fuel production plants to facilitate a greater installation of renewable energy plants, or to contest the failures to achieve these targets.

Instead, the just transition litigation[17] is intended to enhance

[16] The provision most referred to within the climate dispute is certainly the objective deriving from the Paris Agreement to keep the global temperature below 1.5 °C, with all the mechanisms deriving from this objective, especially concerning the Nationally Determined Contributions of States. See *ex multis*: *Duarte Agostinho et al. v. Austria et al*, ECtHR, Grand Chamber, 39371/20, *Armando Ferrão Carvalho and Others v. The European Parliament and the Council (Carvalho Case)*, General Court (Second Chamber), Order of 8 May 2019, T-330/18, *Urgenda Foundation v. The State of the Netherlands,* Supreme Court of the Netherlands, Judgment of 20 December 2019, No. 19/00135, *Neubauer et al. v. Germany,* Federal Constitutional Court, Order of 24 March 2021, 1 BvR 2656/18, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, European Court of Human Rights, Judgment of 9 April 2024, *Thalita Silva e Silva and Others v. Minister of Environment and Others,* Federal Civil Court of Sao Paulo, Judgment of 28 May 2021, Ação Popular nº 5008035-37.2021.4.03.6100. R. Zanhow, A. R. Yousefnia, M. Hassankhani *et al.*, *Climate change inequalities: A systematic review of disparities in access to mitigation and adaptation measures*, cit.

[17] A. Savaresi, J. Setzer, S. Bookman *et al.*, *Conceptualizing just transition litigation*, in 7 *Nature Sustainability* 11 (2024), 1379-84.

climate action because success in addressing the climate crisis depends on people's public support for the paradigm shift, which is only possible if the process does not create communities that are more vulnerable than maintaining the *status quo*. Without focusing attention on adaptation and mitigation measures, much less affecting the objectives for achieving the share of renewable energy, the just transition litigation[18] argues that laws, policies and projects must better balance the distribution of benefits and burdens of the desired paradigm shift,[19] so that no one is left behind.[20] Therefore, this type of lawsuit highlights the inequalities associated with the transition, in terms of the distribution of socio-economic and environmental benefits and burdens, and participation in decision-making processes. It gives parties – whose circumstances, opinions and knowledge are often less reflected in legislation and decision-making – the opportunity to voice their grievances and pursue the protection of their rights and interests.

Having made this premise, the object of this contribution is the analysis of energy justice in action, i.e. verifying whether the courts, especially constitutional or supreme judges, play a role in this process and, if so, understanding whether they can intercept the underlying needs with the legal instruments available from the international framework and the domestic legal systems.

In particular, the intention is to turn the perspective of analysis towards the legal systems of the European region and that of Latin America, by virtue of the different approaches that already emerge with a panoramic analysis of the cases that may fall within the definition of just transition litigation or in one of the dimensions of this type of litigation adopted by the literature; if, in fact, on the one hand, European courts seem to be more predisposed to adopt a market-based approach, i.e. aimed at mainly considering the balancing of economic interests orbiting the en-

[18] Ibid.

[19] E. Aba, *A Fast and Fair Energy Transition, How Community Legal Action and New Legislation are Shaping the Global Shift to Renewable Energy*, in 8 *Business and Human Rights Journal* 2 (2023), 252-8.

[20] A/RES/70/1 (2015).

ergy transition process, the Inter-American courts tend to adopt a more applied approach to the principles of energy justice, integrating the dimensions of the trilemma to a greater extent. The latter, certainly influenced by the strong proactivism of the Inter-American Court of Human Rights,[21] show a greater propensity to consider other elements that impact and at the same time are impacted, such as the participatory involvement of local communities that could suffer from an unconditional development of new energy production plants.

Therefore, the purpose of this contribution is to analyse whether a greater focus on the theorized principles of energy justice in courtrooms can actually lead to strategic innovations in terms of energy litigation and whether it can result in a set of useful mechanisms for the development of a just transition in the European territory through judicial activity.

To do this, it is necessary to verify whether the key elements of redistributive, procedural, and recognition justice are present in the process of delivering energy justice, which are essential parameters for assessing sustainability throughout the energy life cycle.[22]

2. *The Principles of Energy Justice*

Energy justice is a recent concept but is becoming essential for understanding and evaluating the social, environmental, and legal implications of the energy transition.[23] Although still lacking a uniform codification in positive law, the energy justice is configured as an analytical key to explore emerging conflicts in

[21] C. Rodríguez-Garavito, *Climate Change on Trial: Mobilizing Human Rights Litigation to Accelerate Climate Action*. Cambridge, 2025, 109; A. Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, in 44 *Cornell International Law Journal* 3 (2011), 497-504.

[22] R. J. Heffron, *Applying Energy Justice into the Energy Transition,* in *Renewable and Sustainable Energy Reviews* 156 (2022), 1-9. R.J. Heffron, K. Talus, *The evolution of energy law and energy jurisprudence: Insights for energy analysts and researchers*, in *Energy Research & Social Science* 19 (2016) 1-10.

[23] K. Jenkins, D. McCauley, R. J. Heffron *et al.*, *Energy Justice: A Conceptual Review*, in *Energy Research & Social Science* 11 (2016), 174-82.

the field of energy transition, placing vulnerable subjects and power relations implicit in decision-making processes at the centre of attention.

In the contemporary academic and legal debate, energy justice is understood both as an evolutionary phase of energy law, oriented towards the protection of collective interests,[24] and as an axiological principle that guides the transformation of the energy sector in the light of the objectives of equity, sustainability and human rights. In this sense, energy justice is not limited to the field of legal litigation but also embraces participatory governance tools,[25] mechanisms for accessing environmental information, and cooperative models of energy production and management. It therefore represents a transversal paradigm, which challenges the traditional supremacy of technical-economic analyses dominated by States and large energy companies, proposing instead a politically aware and socially inclusive vision of the transition.

The core of energy justice lies in its articulation in three fundamental dimensions:[26] redistributive justice, procedural justice, and recognition justice.

Distributive justice is concerned with the fair distribution of the benefits and burdens associated with the energy transition. In a context where the abandonment of fossil fuels leads to significant industrial, environmental, and employment transforma-

[24] R. J. Heffron, *L'energia attraverso il diritto,* Italian edition by L.M. Pepe, Napoli, 2021; K. Jenkins, D. McCauley, R. J. Heffron *et al.*, *Energy Justice: A conceptual review*, cit., K. Jenkins, D. McCauley, A. Forman*, Energy Justice: A Policy Approach*, in *Energy Policy* 105 (2017), 631-4; M. C. Labelle, *In puruit of energy justice*, in *Energy Policy* 107 (2017), 615-20; S. Williams, A. Doyon, *Justice in Energy Transitions*, in *Environmental Innovation and Societal Transitions* 31 (2019), 144-53.

[25] L. Castro-Diaz, *Participatory Research in Energy Justice: Guiding Principles and Practice*, in 6 *Progress in Energy* 3 (2024), 1-24. M. Finley-Brook, E. L. Holloman. *Empowering Energy Justice*, in 13 *International Journal of Environmental Research and Public Health* 9 (2016), 926; B. Van Veelen, *Negotiating Energy Democracy in Practice: Governance Processes in Community Energy Projects*, in 27 *Environmental politics* 4 (2018); A. Capaccioli, *Exploring Participatory Energy Budgeting as a Policy Instrument to Foster Energy Justice*, in *Energy Policy* 107 (2017), 621-30.

[26] A. Stark, F. Gale, H. Murphy-Gregory, *Just transitions' meanings: a systematic review*, in 36 *Society & Natural Resources* (2023), 1277-1297.

tions, it is essential to ensure that the costs of the transition do not disproportionately fall on workers, rural communities, ethnic minorities, or populations already exposed to forms of socio-economic marginalisation. Similarly, access to renewable energy technologies and energy services must be promoted by criteria of territorial and social equity, thereby avoiding new forms of exclusion or inequality.

Procedural justice refers to the effective possibility for individuals and communities to participate meaningfully in decision-making processes related to energy policies and projects. This principle implies access to information, transparency of administrative procedures, public consultation, and the availability of adequate judicial means to enforce one's rights. Procedural justice plays a leading role in assessing the legitimacy of authorisations for the construction of energy plants, the assignment of public incentives or territorial planning, especially when these choices have a profound impact on the environment and the local socio-cultural fabric.

Finally, recognition justice focuses on respect for cultural identities, traditional knowledge and the collective rights of the communities involved. It aims to counter the marginalisation of actors such as Indigenous peoples, workers, women, or rural communities, who are often excluded from dominant narratives on the green transition. In this perspective, recognition is not only symbolic but has a concrete value in shaping political and legal choices, for example by imposing limits on invasive energy projects or imposing compensation and protection obligations.

These dimensions of energy justice are closely intertwined with human rights, which provide both impetus and legitimacy, constituting a stable normative reference for the evaluation of energy policies.[27] The role of human rights is crucial because access to energy is considered fundamental for meeting basic human needs and effectively exercising other guaranteed rights, including civil, political, and socio-economic rights.[28]

[27] L. Mokrá, D. Wertlen, *May Energy Justice Enhance Human Rights Protection in the European Union?*, in 9 *Bratislava Law Review* 1 (2025), 151-66.

[28] Ibid.

While the European Court of Human Rights has interpreted rights like the right to life and the right to private life to establish positive environmental obligations for States, this 'greening' of human rights law is a phenomenon extending beyond Europe.[29] There is evidence of convergence in environmental jurisprudence and a cross-fertilization of ideas across different human rights systems.

The growing environmental caseload focuses on interpreting existing rights – such as the rights to life, health, water, and property – in the context of climate and environmental issues. A relevant aspect of linking human rights and energy justice involves protecting the rights of Indigenous Peoples and local communities, especially concerning large-scale renewable energy projects that risk land dispossession and loss of cultural integrity.[30]

Furthermore, procedural justice is reinforced by the human right to public participation, recognized under instruments like Article 25 of the ICCPR.[31] International mechanisms for participation in environmental decision-making, such as the Aarhus Convention, exemplify the formal recognition of these procedural rights.[32] This development ensures the explicit recognition of vulnerable communities, countering their marginalization within the transition processes.[33]

Then, the extension of these dispositions to the energy sector is presented as a coherent evolution: the ecological transition im-

[29] A. Boyle, *Human Rights and the Environment: Where Next?*, in 23 *European Journal of International Law* 3 (2012), 613-42.

[30] H. Agrawal, L. El-Katiri, K. Muiruri *et al.*, *Enabling a Just Transition: Protecting Human Rights in Renewable Energy Projects: A Briefing for* Policymakers, Columbia Centre on Sustainable Investment (CCSI) / ALIGN, New York, April 2023, 1-24.

[31] O. C. Ruppel, L. J. H. Houston, *The Human Right to Public Participation in Environmental Decision-making: Some Legal Reflection*, in 53 *Environmental Policy and Law* 2-3 (2023), 125-38.

[32] Ibid.; M. Eliantonio, J. Richelle*, Access to Justice in Environmental Matters in the Eu legal Order: the "Sectoral" Turn in Legislation and Its Pitfalls*, in 9 *European Papers* 1 (2024), 261-74.

[33] M. Atola, E. Laes, *Community Heroes and Sleeping Members: Interdependency of the Tenets of Energy Justice*, in 28 *Science and Engineering Ethics* 45 (2022), 45.

plies a radical transformation of the industrial and economic model, which directly involves the production, distribution, and consumption of energy. In this sense, guaranteeing human rights in the energy transition does not only mean protecting individuals from environmental or health damage, but also ensuring their active participation in decision-making processes, the recognition of their cultures and the fair distribution of resources and burdens.

Considering these premises, the principles of energy justice are also fundamental interpretative criteria for the analysis of just transition litigation cases. Unlike classic climate litigation, which is aimed at enforcing State obligations to reduce emissions (mitigation) or protect against extreme weather events (adaptation), just transition litigation focuses on social justice in the economic conversion to renewable energy. Here, human rights-based arguments are used to question the legitimacy of public energy decisions, assess the distribution of benefits and costs of the transition, and protect the collective rights of affected communities.

Such cases thus become not only tools for resolving specific disputes but also catalysts for regulatory and cultural change. Judgments can set precedents, clarify legal principles, and influence public policies, contributing to the construction of a fairer and more sustainable legal framework. They also make the demands of marginalised communities visible and strengthen their capacity for participation, strengthening energy democracy.

Therefore, the principles of energy justice – distributive, procedural and recognition – constitute an essential reference for assessing the legitimacy and fairness of energy transition policies. Integrated with the protection of human rights and underpinned by international law, they offer powerful analytical and legal tools to interpret and guide emerging litigation in the field of just transition litigation.

3. *Are the Principles of Energy Justice Applied in Trials? A Methodological Premise*

Before analysing the case-law in the following paragraphs, it is necessary to start with a brief methodological reflection. It is im-

portant to clarify that the identification of disputes attributable to the principles of energy justice, as defined in the academic field, faces several difficulties. Currently, only a limited number of legal databases adopt a categorisation that allows cases to be selected based on the criteria of energy justice or just transition litigation. This information deficit directly affects the breadth and depth of research, making the systematic retrieval and analysis of cases a complex challenge, especially in European contexts where the topic still seems marginal in legal litigation.

Despite these limitations, the available data show a clear picture: most of the cases attributable to energy justice and just transition litigation are recorded in Latin America, which alone accounts for 58% of the total monitored.[34] Not only is this region the scene of the most intense forms of community resistance against the abuses associated with mining linked to the energy transition, but it is also characterised by a higher incidence of litigation focused on human and environmental rights violations.

On the other hand, in Europe, the number of cases is significantly lower (only 8% of the total)[35] and is fragmented both in the energy sectors involved and in the applicants. European cases concern projects that negatively impact local communities and are often promoted by NGOs or citizens, while the direct involvement of Indigenous peoples is rare. The most frequent violations relate to the right to health, water, and a healthy environment, but only in a few cases do court decisions explicitly mention the principles of energy justice.

3.1 *European Cases*

The litigation relating to justice in the energy transition in Europe develops within a regulatory and institutional framework

[34] *Unjust Transition on Trial: Communities and Workers Litigate to Shape Corporate Practice*, Business and Human Rights Resource Centre, Briefing (2024): https://www.business-humanrights.org/en/from-us/briefings/unjust-transition-on-trial-communities-and-workers-litigate-to-shape-corporate-practice/

[35] Ibid.

deeply influenced by the economic nature of the European Union and its historical genesis as an industrial cooperation and common market project.

Within the European Union framework, Article 194 of the Treaty on the Functioning of the European Union (TFEU),[36] make it clear from the outset that the main objective of European integration in the energy sector is not social or environmental justice, but the creation of a functioning, competitive and integrated internal energy market,[37] to be carried out 'in a spirit of solidarity'. Even though the European Green Deal[38] will undoubtedly remain central to the debate, as the ambition of the EU to stay a frontrunner in climate and transition policies, the crucial weakness of the measures adopted is the fragmentation and redundancy, and difficulty in harmonisation with climate goals and the social dimension.[39] Whereas a holistic approach is needed to integrate social and human rights to address injustice derived from both climate change and the energy transition, the measures adopted, for instance, all the social funds provided by the EU, rest on a compensatory logic, classifying the social and climate risks as economic costs resulting from the green transition. However, the most recent policies addressing the social di-

[36] L. Kaschny, *Energy Justice and the Principles of Article 194(1) TFEU Governing Energy Policy*, in 12 *Transnational Environmental Law* 2 (2023), 270-94.

[37] L. Ammannati, *La Transizione energetica,* Torino, 4-6; F. Donati*, Il Green Deal e la governance europea dell'energia e del clima*, in *Rivista della Regolazione dei Mercati* 1 (2022), 13-24; R. Miccú, *Premesse ad uno studio sulle Energy communities: tra governance dell'efficienza energetica e sussidiarietà orizzontale*, in *Federalismi.it* 4 (2022), 603-46; E. Chiti, *Oltre la disciplina dei mercati: la sostenibilità degli ecosistemi e la sua rilevanza nel Green Deal europeo*, in *Rivista della Regolazione dei mercati* 2 (2022)*,* 468-77; E. Bruti Liberati, *La strategia europea di decarbonizzazione e il nuovo modello di disciplina dei mercati alla prova dell'emergenza ucraina*, in E. Bruti Liberati, M. De Focatiis, A. Travi (Eds), *L'attuazione dell'European Green Deal: Mercati dell'energia e il ruolo delle istituzioni e delle imprese, Proceedings of the Annual Conference of AIDEN - Associazione Italiana di Diritto dell'Energia*, Milano, 10 february 2022, 1-10; G. De Maio, *Fiscalità energetica e cambiamento climatico: il ruolo del diritto tributario nella società moderna*, Napoli, 2020, 165 ff.

[38] COM/2019/640 final.

[39] L. Ammannati, *La Transizione energetica*, cit.

mension of energy focus only on energy poverty, i.e. on the increase in energy costs for citizens and the economic inability to cope with them.[40]

Indeed, the same notion of 'energy solidarity', which could offer space for a social justice dimension in the energy transition,[41] remains undefined in legal practice. This principle takes on empowering or emergency characteristics, but rarely translates into an effective balance between economic, environmental, and social rights. EU Regulation 2017/1938, for example, expressly refers to solidarity in the event of energy crises, but limits its application to interstate emergency measures, excluding any structural content in terms of citizens' rights or fairness in the transition. Article 13 of the Regulation regulates only cooperation between Member States, without attributing significant roles to the institutions of the Union or recognising rights that may be demanded by vulnerable citizens or communities.

The interpretation of this principle was the subject of an important ruling by the Court of Justice of the European Union in the OPAL case (C-848/19),[42] where Poland challenged the decision of the Commission and Germany to increase the transport capacity of the pipeline without taking into account the potentially negative effects on the energy security of Eastern Europe. The Court ruled that energy solidarity is a binding legal principle and not a mere political declaration but avoided defining its pre-

[40] EU Directive - 2023/1791; R.J. Heffron & D. Mccauley, *The Concept of Energy Justice across the Disciplines*, in *Energy Policy* 105 (2017), 658-67.

[41] E. Buono, *Costituzionalismo ambientale europeo e doveri di solidarietà. Italia e Germania nell'Antropocene*, in *DPCEonline*, SP. 2(2023), 465-87, Proceedings of the Caserta Conference 2022: The Author explains that solidarity is now one of the six fundamental values of the Union, enshrined in art. 2 TEU. The solidarity dimension acts as a transversal axis between the constitutional heritage of the Member States and the primary sources of the Union. The articles mentioned above, the art. 3 of the TEU and 37 of the Charter of Nice – read in conjunction with art. 191 TFEU – constitutes the legal basis for the introduction of the intergenerational perspective in the interpretation and judicial review of the European Union law.

[42] Court of Justice of the European Union, Case C-848/19 P, Federal Republic of Germany v Republic of Poland (OPAL), ECLI:EU:C:2021:598, Judgment of 15 July 2021.

cise contours. It follows that even in the leading European jurisprudence, energy solidarity remains a generic clause, evoked above all in cases where national interests in terms of supply conflict, rather than as a tool for the protection of the rights of citizens most exposed to the impacts of the energy transition.

In this context, the jurisprudential space for a just transition litigation genuinely oriented towards social and ecological justice remains narrow. The Court of Justice of the EU, which is called upon to decide on issues related to market regulation, economic incentives for renewable energy and permitting regimes, tends to treat conflicts as administrative or economic disputes.[43] The protection of vulnerable groups, when present, is mediated through consumer law and national social protection policies, rather than through explicit jurisprudence of environmental or intergenerational justice.

It is in the jurisprudence of a few national courts that more concrete attempts at just transition litigation can be traced, although in a fragmented and non-systematic way. Particularly relevant are the cases from Sweden (more outdated) and Norway (latest), which, although concerning the rights of the Indigenous Sámi population, demonstrate different approaches.

In Sweden, diverse Land and Environmental Court rulings[44] have addressed the issue of the impact of wind projects on traditional reindeer husbandry practices, which are central to the Sámi culture. However, in the few cases that were decided in favour of the indigenous community, the dominant approach remains that of economic assessment of the damage and the solu-

[43] L. Hancher, *Strategic Autonomy, REPowerEU and The Internal Energy Market: Untying The Gordian Knot,* in 61 *Common Market Law Review* 1 (2024), 55-92; L. Hancher, K. Talus, *Retrospective Application of Legal Rules in the European Union: Recent Practice in the Energy Sector*, in 39 *Journal of Energy & Natural Resources Law* 1 (2021), 65-81. L. Hancher, *Delimitation of Energy Law Jurisdiction: the EU and its Member States: From Organisational to Regulatory Conflicts*, in *Journal of Energy & Natural Resources Law* 16 (1998), 16, 42-67.

[44] L. M. Pepe, *La transizione ecologica e le corti speciali: riflessioni comparate tra Svezia e India*, in *DPCEonline*, SP. 2(2023), 705-22, Proceedings of the Caserta Conference 2022.

tions adopted are based on compensatory measures,[45] which tend to monetise the loss of traditional activities rather than recognise them as violations of cultural or collective rights, showing a general predisposition to welcome instances of rejection for authorization of wind energy plants only if it ensures quite evidently that the traditional activity might completely cease, complicating the burden of proof on the communities that in some way should be able to prove the extinction of their activity.

The Norwegian case *Statnett SF et al. v. Sør-Fosen sijte et al.*[46] marked a turning point in this context. In this decision, the courts recognised that the construction of energy infrastructure (such as wind farms) could result in the permanent extinction of the cultural use of the territory by the Sámi community, ruling that this constitutes an unacceptable violation of human rights. It is one of the few European cases where the energy transition has been blocked in the name of protecting the rights of Indigenous peoples, marking a rare example of justice of recognition.

Then, despite having defined ambitious targets for decarbonisation and the tripling of renewable energy plants, Europe continues to treat the issue of a just transition as an afterthought. European law is described as geared towards energy market stability, reliability of supply and competitiveness, but not sufficiently equipped to deal with distributional tensions, territorial inequalities and cultural claims emerging from the transition. Attempting to answer the question of the existence of such a thing as European energy law, Kim Talus[47] argued that the answer that could be given to this question depends on the specific-

[45] D. Cambou, *Uncovering Injustices in the Green Transition*, in *Arctic Review on Law and Politics* 11 (2020), 322-33, mentions some cases highlighting the wording used in the court decisions referring to reindeer herding as a business right: Case M1475-15 (Östersund Mark- och miljödomstolen 2 March 2017); Case M 6860-17 (Svea Hovrätt Mark- och miljööverdomstolen 2019)

[46] Supreme Court of Norway, *Statnett SF et al. v. Sør-Fosen sijte*, HR-2021-1975-S, Judgment of 11 October 2021. A. Savaresi, J. Setzer, S. Bookman *et al.*, *Conceptualising Just Transition Litigation*, cit.

[47] K. Talus, *EU Energy Law and Policy: A Critical Account*, Oxford, 2013; R.J. Heffron, A. Rønne, J. P. Tomain *et al.*, *A Treatise for Energy Law*, in 11 *The Journal of World Energy Law & Business* 1 (2018), 34-38.

ity of the problems experienced by the energy industries concerning EU law, which reflects precisely the approach strongly influenced by sectoral and economic logics.

From this brief analysis, the European jurisprudence on just transition litigation is still in its embryonic phase and reflects the structure of an energy law oriented towards market integration, systemic stability, and technological promotion, rather than social justice or protection of vulnerable groups. Despite some promising signs, such as the Sámi case in Norway, access to energy justice for disadvantaged communities or instances for the implementations of procedural rights remains difficult, fragmented, and dependent on the national jurisdictional context. A true just transition litigation in Europe will require an evolution of energy law that knows how to integrate distributive and participatory dimensions, as well as a bolder jurisprudence in the protection of fundamental rights in decarbonization processes.

3.2 *Latin America Cases*

The development of just transition litigation in Latin America takes place within a legal and political context that significantly diverges from the European model. Unlike European courts, which focus on economic and regulatory aspects tied to energy security or the functioning of the internal market, Latin American national courts act as active guarantors of the substantive application of energy justice principles. Equitable distribution of the burdens and benefits of the energy transition, effective participation of local communities in decision-making processes, and legal recognition of collective and territorial identities – especially those of Indigenous peoples – constitute the core elements of this paradigm. These are anchored not only in international human rights law but, crucially, in the constitutional frameworks of several Latin American countries.[48]

[48] P.G. Ferreira, M. Mancilla, *Indigenous Environmental Rights and Sustainable Development: Lessons from Totonicapán in Guatemala*, in S.A. Atapattu, C.G. Gonzales, S.L. Seck (Eds), *The Cambridge Handbook of Environmental*

In contrast to Europe, where individual human rights barely serve as a ground for climate litigation, just transition litigation in Latin America unfolds as a form of constitutional and collective justice. High courts consistently rely on environmental clauses, ecological principles,[49] and international Treaties[50] to assess the legality of energy policies and projects.[51] The first significant difference that can be found with respect to the European region is found precisely in the pioneering ability of the Inter-American Court of Human Rights to frame issues related to environmental and climate protection in different provisions related to human rights, especially those redistributive, procedural and recognition dimensions of energy justice discussed in the previous paragraphs; in particular, the recent rulings of the Inter-American Court represent a significant advance in the consolidation of human rights as jurisdictionally relevant and directly protectable in disputes related to the promotion of a low-carbon energy – and economic – system, recognizing the direct justiciability of economic and social rights contained in the Charter of the Organization of American States.[52] The Court has reiterated on numerous occasions rights such as the right to a healthy environment and the related rights to water, health and participation, which States

Justice and Sustainable Development, Cambridge, 2021, 164-82; J. Auz, *Human Rights-Based Climate Litigation: A Latin American Cartography*, in 13 *Journal of Human Rights and the Environment* 1 (2022), 114-41.

[49] L. Dalla Riva, I diritti della natura in Brasile ed Ecuador: un'analisi comparatistica tra costituzionalismo ambientale e buen vivir, in *DPCE Online,* SP. Ed. 2(2023), 841-56, Proceedings of the Caserta Conference 2022;

[50] ILO Convention No. 169/1989 and the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted in March 2018.

[51] M.A. Tigre, D. Marquez, C. Esteve-Jordà *et al.*, *Just Transition Litigation in Latin America: an initial categorization of climate litigation cases amid the energy transition*, Columbia Centre for Climate Change Law https://scholarship.law.columbia.edu/sabin_climate_change/197/.

[52] See IACtHR, Caso Comunidades indígenas miembros de la Asociación Lhaka Honhat Nuestra Tierra vs. Argentina, judgment of 6th February 2020, parr. 202, 210, 222, and 231; IACtHR, Caso Pueblo indígena U'wa y sus miembros vs. Colombia, judgment of the 4th of July 2024, parr. 174, 231, 234; IACtHR, Caso Habitantes de La Oroya vs. Perù, judgment of the 27th november 2023, parr. 46-62, 73-132.

must guarantee according to criteria of non-discrimination and precaution. For the purposes of the present discussion, however, it is effective participation that proves decisive, as it imposes obligations of consultation and supervision with respect to energy activities and the extraction of natural resources.[53] In this sense, the Court recalls both the principle of intergenerational equity, enshrined in the main international conventions and subject to progressive recognition in customary terms, and the procedural nature of the rights of access to information and prior consultation of the communities concerned.[54] Specifically, the Court's affirmation of the direct and autonomous scope of art. 26 of the Convention marks the overcoming of the traditional perspective that limited the justiciability of economic and social rights to cases in which there was a necessary connection with civil and political rights, introducing the possibility of activating not only in a reflexive way the rights to the environment, health, water and the rights of democratic participation connected thereto.

On the other hand, the Court had already recognized, with Advisory Opinion OC-23/2017, the right to a healthy environment as an autonomous and fundamental right[55] underlining the duty of States to take effective measures in order to prevent irreversible damage from occurring that would cause serious consequences to the exercise of fundamental human rights. The most recent advisory opinion, OC-32/2025, strengthened by a context of increasing international attention and an equally growing proactivity of the States most affected by climate change, places further emphasis precisely on the imperative need to implement a just energy transition, enshrining the principle of environmental

[53] IACtHR 2023, La Oroya, cit., parr. 125-127; IACtHR, 2020, Lhaka Honhat, cit., parr. 59-61, 109.

[54] American Convention on Human Rights, art. 13; Advisory Opinion OC-23/17; ILO Convention 169; see also the consultation and consent obligations emphatically reiterated in paragraphs 58 to 76 of *Pueblo U'wa* case, cit.

[55] IACtHR, OC-23/2017, par. 59: 'protege los componentes del medio ambiente, tales como bosques, ríos, mares y otros, como intereses jurídicos en sí mismos, aun en ausencia de certeza o evidencia sobre el riesgo a las personas individuales'.

democracy[56] as a principle of protection of access to information, participation and access to courts, emphasizing the relevance and enhancement of the knowledge of indigenous peoples.

The remedies put in place to protect collective rights, and vulnerable groups show explicit attention to the paradigm of energy justice, enhancing the participation of local communities and emphasizing the necessary sustainability and non-reversibility of the measures adopted by States. The central element remains the principle of prevention, referred to as an obligation of behaviour and not of result, while the obligation of intergenerational equity is specifically linked to the energy transition and respect for the rights of future generations.

The Court, therefore, not only translates the paradigms of energy justice into standards of judicial operation, but actively participates in their evolutionary construction, establishing precise obligations of transparency, precaution, participation and non-discrimination for States, and strengthening the justiciability of rights related to the energy transition in the inter-American context. In this context, the Court's jurisdictional role proves decisive in affirming the binding nature of energy justice paradigms and in promoting a systematic interpretation of international human rights law that takes into account the new challenges posed by the climate crisis, access to natural resources and the energy needs of the most vulnerable communities.

As far as the national perspective is concerned, the constitutions of Ecuador, Bolivia, Colombia, Mexico, and Chile provide an especially robust legal foundation for the emergence of substantive just transition litigation, where social and ecological claims are translated into enforceable rights.

Ecuador's 2008 Constitution was the first in the world to grant legal personhood to nature with art. 71, recognising its right to regeneration and to maintain its vital cycles. This provi-

[56] IACtHR, OC-32/2025, III-B, p. 11: 'las estrategias y planes desarrollados deben respetar los derechos de procedimiento y, con ellos, el princípio de democracia ambiental; así como asegurar la adecuada protección de los derechos de los pueblos indígenas y tribales, y de las comunidades que guardan una relación estrecha con esos ecosistemas. De igual forma, estas decisiones deben estar basadas en la mejor ciencia disponible'.

sion was successfully invoked in the Constitutional Court's ruling halting mining projects in the *Los Cedros* ecological reserve,[57] and formed the legal and argumentative framework in *Tagaeri and Taromenane v. Ecuador*,[58] a case decided by the Inter-American Court of Human Rights in 2024, in which Ecuador was found responsible for violating the rights of Indigenous peoples in voluntary isolation, including the rights to life, self-determination, collective property, health, and a healthy environment.

Similarly, Bolivia's 2009 Constitution embraces the concept of *Pachamama*, recognizing the plurinational character of the state and affirming the coexistence of multiple legal systems – an architecture that has strengthened the justiciability of Free, Prior, and Informed Consent and other territorial rights of Indigenous peoples facing fossil fuel or green energy development.[59]

In Colombia, the Constitutional Court has played a pioneering role in environmental jurisprudence. Article 79 of the Constitution, which guarantees the right to a healthy environment, has been expansively interpreted in landmark rulings such as STC 4360/2018, which suspended a hydroelectric project due to the absence of FPIC.

In Mexico, Article 4 of the Constitution provided the legal basis for the landmark decision in *Idheas Litigio Estratégico v. CENACE and SENER*,[60] in which a federal court annulled a decree that limited renewable energy integration during the COVID-19 pandemic. The court held that the decree violated the constitutional right to a healthy environment as well as international environmental law principles such as precaution and non-regression. The ruling emphasised that administrative measures could not obstruct the legally mandated shift away from fossil fuels toward clean energy.

[57] Corte Constitucional del Ecuador. (2021). *Sentencia 1149-19-JP/21, Caso Los Cedros*. Retrieved from https://www.corteconstitucional.gob.ec.

[58] IACtHR. (2024). *Pueblos indígenas Tagaeri y Taromenane v. Ecuador*. https://www.corteidh.or.cr.

[59] E. Gudynas, *Extractivisms: Politics, Economy and Ecology*. Halifax, 2019.

[60] I*dheas Litigio Estratégico v. CENACE and SENER*, Amparo 186/2021, Primer Tribunal Colegiado de Circuito (2021)

In Chile,[61] Article 19.8 of the existing Constitution, which guarantees the right to live in an environment free from pollution, has nonetheless been invoked by courts to suspend wind and hydroelectric projects affecting *Mapuche* territories, citing a lack of proper consultation and reinforcing links between participation, cultural recognition, and environmental safeguards.[62]

These cases collectively demonstrate that just transition litigation in Latin America is not limited to contesting isolated development projects but serves a broader systemic function, reaffirming that the energy transition must proceed within a framework of rights, ecological sustainability, and social equity.

In this context, courts do not act as neutral adjudicators between state and citizen interests, but rather as institutional actors actively shaping a normative framework for energy transition that upholds collective rights, environmental duties, and intergenerational justice. Just transition litigation in Latin America is, therefore not merely a regional variant of global environmental litigation trends but constitutes a paradigmatic expression of law's transformative capacity where judicial intervention, constitutional design, and grassroots mobilization converge to reorient decarbonization processes and prevent the reproduction of extractives and exclusionary dynamics in the guise of green development.

4. *Conclusions and Future Perspectives*

To meaningfully engage in discussions of energy justice, it is essential to integrate a human right-based approach more firmly, with the judiciary playing a crucial role in this process. The courts are crucial for tailoring legal solutions that allow a greater reconciliation of all the interests that make up the prism of sustainabil-

[61] R. Iannacone, *Le decisioni della Convenzione Costituzionale cilena in materia ambientale: tra un futuro modello di costituzionalismo e una nuova forma di Stato*, in *DPCEonline,* SP. Ed. 2 (2023), Proceedings of the Caserta Conference 2022.

[62] C. Ituarte-Lima, R. Mares, *Environmental Democracy: Examining the Interplay between Escazú Agreement's Innovations and EU Economic Law*, in 21 *Earth System Governance* 19 (2024), 1-13.

ity. The analysis of recent jurisprudence and courts in Europe and Latin America unequivocally demonstrates the imperative that the courts interpret the interests at stake and that they contribute to defining not abstract climate obligations of States and companies, but to protect fundamental rights and balance conflicting interests in an era of profound energy and climate transformations. While in Europe we are witnessing the progressive affirmation of State responsibility for the inadequacy of climate policies, an affirmation often anchored in the human rights enshrined in the ECHR, the litigation proves still very immature as soon as it is confined to the cases that genuinely correspond to the parameters of energy justice, with energy issues relegated to an approach narrowly focused on market regulation, State aid, and consumer protection.

In Latin America, the jurisprudence on the energy transition is deeply intertwined with the protection of constitutional rights to a healthy environment and with the collective rights of Indigenous peoples. The cases before the Inter-American Court of Human Rights and numerous national decisions on prior, free and informed consultation highlight how courts are called upon to mediate conflicts arising from the impact of energy projects – both traditional extractive and related to new green technologies – on territories and the ways of life of communities, and the Escazú Agreement is emerging as a significant tool to strengthen environmental democracy and access to justice.

Comparison between the two regions reveals convergences in the use of arguments based on human rights and international climate law, but also significant divergences in the focus of litigation and the key rights invoked. The impact of judicial intervention is considerable: courts can accelerate climate action, strengthen rights protections, increase the accountability of States and corporations, and give a voice to marginalised groups.

The path to a just and sustainable energy future requires an integrated approach in which case law plays a complementary, but indispensable, role. Court decisions can help ensure that the energy transition is not only ecologically sustainable but also socially fair and respectful of human rights. The integration of just transition principles into legal frameworks and judicial reason-

ing, as observed in recent developments in Latin America, will be crucial. Future research perspectives could focus on the long-term impact of these judgments, the development of specific legal doctrines, and how cross-judicial dialogue and mutual learning between jurisdictions can be further enhanced to address the global challenges of the energy transition.

A TYPOLOGY OF CLIMATE VICTIMS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Riccardo Luporini

Abstract: *In Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, the Grand Chamber of the European Court of Human Rights articulated a novel and tailored approach to climate change cases. Among the most debated aspects of the judgment is the Court's reasoning on victim status and locus standi. This contribution seeks to advance the discussion by proposing a typology of 'climate victims' before the Court. It distinguishes three categories: the private individual as a direct victim, future generations as potential victims, and groups particularly vulnerable to climate impacts as victims. The typology serves as a tentative framework for exploring how different forms of climate-related victimhood may be situated within the Convention system.*

Keywords: European Court of Human Rights; Climate Change Litigation; Standing; Victim Status; *KlimaSeniorinnen*.

1. *Introduction*

On 9 April 2024, the Grand Chamber of the European Court of Human Rights (ECtHR or Court) delivered its long-awaited judgment in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[1] For the first time, the Court found that insufficient climate action amounted to violations of rights protected by the European Convention on Human Rights (ECHR or the Convention), specifically Article 8 (right to respect for private and family life) and Article 6 (right to a fair trial).

In its reasoning, the ECtHR emphasised that climate cases differ from more conventional environmental disputes, such as those concerning localised pollution. The global, long-term and diffuse nature of climate harm, together with the complex causal

[1] *Verein KlimaSeniorinnen Schweiz and others v. Switzerland* [GC] 53600/20 (ECtHR 9 April 2024) (KlimaSeniorinnen).

links between State conduct and individual rights, requires a more tailored approach.[2]

The novelty of *KlimaSeniorinnen* lies not only in the recognition of substantive Convention violations in the context of climate change, but also in the Court's effort to recalibrate the requirements of legal standing in response to this new challenge.

Article 34 ECHR governs individual applications before the Court, providing that it may receive applications from 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation' of the rights guaranteed by the Convention or its Protocols. Access to the Court is therefore conditional upon compliance with the so-called 'victim requirement'. In its established case law, the ECtHR has elaborated different forms of victim status. The primary category is that of the 'direct victim', which requires applicants to demonstrate a sufficiently close and personal connection between themselves and the alleged Convention violation.[3] Beyond this core category, the Court has recognised the standing of 'indirect victims', namely individuals who, although the violation was primarily committed against another person, are able to show a legitimate interest in bringing a complaint.[4] A third category concerns 'potential victims'. In such cases, standing is granted only where the applicant can provide reasonable and convincing evidence that a violation affecting them personally is likely to materialise in the future.[5] The rationale of this category is preventive: it enables the Court to avert human rights breaches before they materialise. At the same time, the Court has stressed that such claims cannot be brought in the abstract or in defence of the general interest. In particular, they cannot take the form of an actio popularis, which the Convention system does not permit.

[2] *KlimaSeniorinnen*, para 422.

[3] See, for example, *Burden v. United Kingdom* [GC] 13378/05 (ECtHR, 29 April 2008), para 33.

[4] See *Vallianatos and others v. Greece* [GC] 29381/09 and 32684/09 (ECtHR, 7 November 2013), para 47.

[5] See *Senator Lines GmbH v Austria and Others* [GC] 56672/00 (ECtHR, 10 March 2004) and Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, [GC] 47848/08 (ECtHR, 17 July 2014), para 101.

Over the last decade, the Court has also opened to the *locus standi* of associations and other non-profit organisations (NGOs) representing direct victims before the Court, even in the absence of a formal power of attorney. This development, however, has remained tightly circumscribed. The Court has stressed that such representative standing is admissible only in exceptional situations, notably where the direct victim is unable to bring an application personally and lacks relatives or legal guardians capable of acting on their behalf.[6]

In *KlimaSeniorinnen*, in assessing whether the applicant individuals and association fulfilled the requirements of standing, the Court adopted an approach that marked a clear departure from its prior case law and has been widely regarded as innovative and controversial.[7] The Grand Chamber's ruling, therefore, leaves open important questions as to how the victim requirement test under Article 34 ECHR should operate in future cases.

This contribution seeks to advance the debate by proposing a

[6] See Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania. See also Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania 2959/11 (ECtHR, 24 March 2015). On the role of NGOs in international human rights law, see: A.K. *Lindblom, Non-Governmental Organizations in International Law*, Cambridge, 2005; T. Treves, M. Frigessi di Rattalma, A. Tanzi (Eds), *Civil Society, International Courts and Compliance Bodies* The Hague, 2005; L. Hodson, *NGOs and the Struggle for Human Rights in Europe,* Oxford, 2011; P.-M. Dupuy, L. Vierrucci (Eds), *NGO*s in *International Law: Efficiency in Flexibility?*, Cheltenham, 2008. More specifically on the role of NGOs before the ECtHR, see: R. Pavoni, Interesse pubblico e diritti individuali nella giurisprudenza ambientale della Corte europea dei diritti umani, Naples, 2013; R. Pavoni, *Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight*, in F. Lenzerini, A.F. Vrdoljak, *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Oxford, 2014; E. Erken, *Scholarly and Empirical Considerations on Expanding Access for Non-Governmental Organisations Before the European Court of Human Rights*, in *European Convention on Human Rights Law Review* 6 (2024), 165; H. Keller, V. Gurash, *Expanding NGOs' Standing: Climate Justice through Access to the European Court of Human Rights*, in *Journal of Human Rights and the* Environment 14 (2024), 194.

[7] See, among others, K. Dzehtsiarou, *"KlimaSeniorinnen Revolution": The New Approach to Standing*, in *European Convention on Human Rights Law Review* 4 (2024), 423.

typology of climate change cases based on the identity of the 'climate victim', intended as a tentative framework for examining how different forms of climate-related victimhood may be accommodated within the Convention system. The typology distinguishes three possible configurations: (i) the individual as a direct victim; (ii) future generations as potential victims; and (iii) groups particularly vulnerable to specific climate impacts as victims.

Before turning to this classification, the next section introduces the Court's reasoning on legal standing in *KlimaSeniorinnen* and how it departs from its earlier case law.

2. *The New Approach to Legal Standing in* KlimaSeniorinnen

KlimaSeniorinnen was brought by an association of elderly Swiss women, together with four individual members. They contended that Switzerland's insufficient climate change mitigation policies exposed them to heightened risks from increasingly frequent and severe heatwaves, thereby breaching their rights under Articles 2 and 8 of the Convention. They emphasised that older women face a particular susceptibility to heat-related mortality and morbidity, making them disproportionately affected by inadequate State action. At the domestic level, however, their claims were dismissed without a substantive assessment of the merits, which led them to allege before the ECtHR not only violations of Articles 2 and 8, but also a breach of Article 6 concerning their right of access to a court.[8]

With regard to the four individual applicants, the Court rejected reliance on the category of potential victim, reasoning that

[8] On the case, among others, see: C. Heri, *KlimaSeniorinnen and Its Discontents: Climate Change at the European Court of Human Rights*, in *European human rights law review* 4 (2024), 317; A. Hösli and M Rehmann, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: the European Court of Human Rights Answer to Climate Change*, in *Climate Law* 14 (2024), 263; R. Pisillo Mazzeschi, *Diritti umani e cambiamento climatico: brevi note sulla sentenza KlimaSeniorinnen della Corte di Strasburgo*, in *Diritti umani e diritto internazionale* 2 (2024), 383.

recognising such status in climate cases would allow virtually anyone to claim standing. Instead, it established a particularly demanding threshold for individual victimhood: applicants must show both a 'high intensity of exposure' to adverse climate impacts and a 'pressing need' for 'individual protection' not otherwise addressed by reasonable measures.[9] Applying this test, the Court found that the applicants' circumstances did not meet the required severity, and their claims were declared inadmissible *ratione personae*.[10]

The Court then turned to the association's standing. The Court stressed that in modern societies, collective recourse through associations often constitutes the only effective means for individuals to defend their rights against complex and large-scale threats.[11] While traditionally associations cannot invoke rights of a personal nature under Articles 2 or 8, and even though the individual members in this case did not qualify as direct victims, the Court granted *locus standi* to the association, recognising it as a 'vehicle of collective recourse'.[12] The Court set out three conditions for associations to be admitted: they must (i) be lawfully established in the relevant jurisdiction, (ii) pursue statutory objectives dedicated to the protection of the rights at issue, and (iii) demonstrate their capacity to represent individuals subject to concrete climate-related risks.[13] Meeting these require-

[9] KlimaSeniorinnen, para 487.

[10] Ibid., para 533.

[11] Ibid., para 489.

[12] Under Article 34 ECHR, legal persons may qualify as victims where the rights invoked apply to them (e.g. property under Art. 1 Prot. 1, freedom of association under Art. 11), but not for rights of a strictly personal nature (Arts. 2 and 8). The Court has nonetheless recognised associations' standing under Art. 6, notably in Gorraiz Lizarraga and Others v Spain, 62543/00 (ECtHR, 27 April 2004), para 36. As described above, in exceptional cases, the Court has allowed NGOs to act on behalf of direct victims unable to bring a claim themselves, see, in particular, Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania. See also Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania 2959/11 (ECtHR, 24 March 2015).

[13] Ibid., para 502. The Court specified that '[i]n this connection, the Court will have regard to such factors as the purpose for which the association was established, that it is of non-profit character, the nature and extent of its acti-

ments, the *KlimaSeniorinnen* association was able to bring the case forward, ultimately leading the Court to examine the merits and find a violation of Article 8.[14]

3. *Three Types of 'Climate Victims' Before the ECtHR*

3.1 *A Private Individual as a Direct Victim*

The first category in our typology refers to a private individual who satisfies the high threshold set by the Court in *KlimaSeniorinnen* and thus qualifies as a direct victim. Under the Court's case-law, a direct victim must demonstrate a sufficiently proximate link between the contested measure or omission and the harm alleged, that is, the applicant must be 'directly affected'.[15]

For this case-type to succeed, the claim must be highly individualised and personalised: the applicant must show a high intensity of exposure to the adverse effects of climate change and a pressing need for individual protection, for example, a specific climate-related risk to which the individual is exposed, or a health condition rendering them unusually vulnerable. The Court stressed, indeed, that such criteria must be assessed in light of the 'prevailing local conditions' and the 'individual specificities and vulnerabilities' of the applicant.[16]

In the *KlimaSeniorinnen* case, the claims of the individual applicants were declared inadmissible *ratione personae* because their exposure to heatwaves did not reach the exceptionally high threshold, and their health conditions could be addressed through available adaptation measures.[17]

vities within the relevant jurisdiction, its membership and representativeness, its principles and transparency of governance and whether on the whole, in the particular circumstances of a case, the grant of such standing is in the interests of the proper administration of justice'.

[14] Ibid., para 537.

[15] See, for example, *Burden v. United Kingdom* [GC] 13378/05 (ECtHR, 29 April 2008), para 33.

[16] *KlimaSeniorinnen*, para 488.

[17] Ibid., para 533.

Of the cases currently pending before the Court, the one that most closely exemplifies this case-type is the *Müllner v. Austria* case.[18] The applicant suffers from a temperature-sensitive form of multiple sclerosis (Uhthoff's syndrome), which causes significant mobility loss when ambient temperatures rise. He alleges that Austria's inadequate mitigation policies violate his rights under Articles 2 and 8 ECHR.

This type of case would be the most conventional for the Court to accept in terms of recognising victim status. At the merits stage, however, it may encounter an underestimated difficulty. Climate change mitigation is inherently long-term: emission reductions undertaken today will only translate into stabilisation or decline in global temperatures decades from now.[19] For individuals in a 'pressing need' of protection, such as those already suffering acute health risks, mitigation cannot deliver immediate relief. In practice, their situation is more directly alleviated through adaptation measures or other personalised forms of protection, rather than through the delayed benefits of mitigation policies.

3.2 *Future Generations as Potential Victims*

Judge Eicke appended a partly concurring and partly dissenting opinion to the *KlimaSeniorinnen* judgment. His principal disagreement concerned the interpretation of victim status and *locus standi*, which in his view had been 'unnecessarily expanded'.[20] The Judge specifically opposed the recognition of standing for the association despite its inability to qualify itself or its individual members as victims of rights violations. Judge Eicke ar-

[18] Müllner v. Austria, 18859/21 lodged on 8 April 2021 and communicated on 18 June 2024.

[19] See, for instance, *If Emissions of Greenhouse Gases Were Stopped, Would the Climate Return to the Conditions of 200 Years Ago?*, The Royal Society <https://royalsociety.org/news-resources/projects/climate-change-evidence-causes/question-20/>.

[20] KlimaSeniorinnen, Partly Concurring Partly Dissenting Opinion of Judge Eicke, para 4.

gued that, since the individual applicants were denied recognition as direct victims and the association itself cannot be acknowledged as a victim under Article 8 ECHR, the case risked degenerating into an *actio popularis*. The Court itself has repeatedly affirmed, including in *KlimaSeniorinnen*, that *actio popularis* is not compatible with the Convention system. Yet, as Judge Eicke noted, the majority's reasoning paradoxically created 'exactly what the judgment repeatedly asserts it wishes to avoid, namely a basis for actio popularis-type complaints'.[21]

The partly concurring and partly dissenting opinion of Judge Eicke sparked an intense debate on the meaning of victim status in climate cases. In this context, it has been argued that one possible way out of this 'paradox of a case without victims' lies in recognising future generations as the victims. On the one hand, the principle of intergenerational equity – or, in the Court's own terms, 'intergenerational burden-sharing' – was a central thread in *KlimaSeniorinnen*.[22] The Court highlighted the disproportionate vulnerability of future generations to climate impacts and their representational disadvantage, as they cannot participate in present decision-making. On the other hand, the Court ultimately refrained from granting them victim status. It stressed that the ECHR protects the rights of individuals currently alive and that extending protection to unborn generations would risk opening the door to unlimited standing and thereby undermine the integrity of the Convention system.[23]

Scholarly commentary has challenged this stance. George Letsas, in particular, argues that the Court mischaracterises the

[21] Ibid., para 45.

[22] Ibid., paras 410-413.

[23] Ibid., para 420: 'While the legal obligations arising for States under the Convention extend to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party, it is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change (see paragraph 119 above) and that, at the same time, they have no possibility of participating in the relevant current decision-making processes'. On this point, see also L. Acconciamessa, *Il contenzioso climatico davanti alla Corte europea dei diritti umani, tra aspettative, rischi e realtà*, in *Diritti umani e diritto internazionale* 2 (2024), 369.

notion of *actio popularis*.[24] According to Letsas, the fact that many people are equally affected by climate change does not prevent each of them from being considered a victim under the Convention. Large groups of applicants can simultaneously qualify as victims without eroding the logic of the 'victim requirement'. On this view, the 'potential victim' category could extend to future generations, with associations legitimately representing their interests before the Court. According to him, this interpretation would address their representational disadvantage while staying faithful to the object and purpose of the Convention.

From a systemic perspective, this approach comes closest to capturing the truly global and intertemporal character of climate change, but it also represents the most significant departure from the traditional notion of 'victim status' under the Convention. It is therefore also the most difficult for the ECtHR to accept.

Future cases might nonetheless attempt to follow this line more coherently. To do so, they would need to frame their claims not around highly individualised harms, but around the general and long-term risks inherent in climate change. The challenge in such complaints is not to collapse into an inadmissible *actio popularis*, while still recognising the structural and intergenerational nature of climate harm. In hypothetical terms, associations and NGOs appear to be the most suitable applicants to advance such claims. Their role can be seen as bridging the representational gap faced by future generations and ensuring that long-term climate risks are not left unaddressed within the Convention framework.

Thus far, the *Urgenda* or *Neubauer* cases demonstrated that similar claims can be successful at the domestic level.[25] Before the ECtHR, the closest example might be *Greenpeace Nordic and Others v. Norway*, concerning the authorisation of oil and gas

[24] G. Letsas *The European Court's Legitimacy After Klimaseniorinnen* in 5 *European Convention on Human Rights Law Review* 4 (2024) 444.

[25] The State of the Netherlands v Stichting Urgenda ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, December 2019) (Urgenda); Neubauer et al. v. Germany (Federal Constitutional Court of Germany, April 2021). Judgments and other case documents are available in English at <https://climatecasechart.com/non-us-climate-change-litigation/>.

exploration in the Arctic. The complaint was indeed explicitly framed in terms of intergenerational rights and the need to safeguard the future climate system.[26] However, the final judgment followed a pattern similar to that adopted in *KlimaSeniorinnen*: the individual applicants were unable to meet the particularly high threshold of the victim requirement, while *locus standi* was recognised only in respect of the two applicant NGOs, and not on behalf of future generations.[27]

3.3 *A Vulnerable Group as the Victim*

A third, and still relatively underexplored, approach would be to recognise as victims those groups that are particularly vulnerable to specific adverse effects of climate change.[28]

In *KlimaSeniorinnen*, the Court held that the risks posed by heatwaves did not yet attain the level of severity necessary for the individual applicants to qualify as direct victims under the stricter test developed for climate cases. Yet scientific evidence strongly indicates that such risks will intensify significantly in the near future.[29] This suggests that the present inability of individual members to satisfy the admissibility threshold should not preclude acknowledging the group as a whole as a victim, given that

[26] Greenpeace Nordic and Others v. Norway, Application no. 34068/21, lodged on 15 June 2021, communicated on 16 December 2021.

[27] Greenpeace Nordic and Others v. Norway 34068/21 (ECtHR, 28 October 2025).

[28] See L. Peroni and A Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, in 11 *International Journal of Constitutional Law* (2013), 1056.

[29] See, on the risk of heatwaves in general, B. Bednar-Friedl *et al.*, *Chapter 13*, in H-O Pörtner *et al.* (Eds), *Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,* Cambridge, 2022, 1817-1927, for a focus on Europe, European Environment Agency, European Climate Risk Assessment Report, EEA Report 01/2024 (11 March 2024) available at <https://www.eea.europa.eu/en/analysis/publications/european-climate-risk-assessment>, and on the specific case of Switzerland, A.M. Vicedo-Cabrera *et al.*, *The footprint of human-induced climate change on heat-related deaths in the summer of 2022 in Switzerland*, in 18 *Environmental Research Letters* (2023).

its interests are by nature more collective, long-term, and distinct from those of isolated individuals.

Associations and civil society organisations are especially well placed to safeguard group interests over time. This was well illustrated by the applicants in *KlimaSeniorinnen*, who stressed that the association made it possible for a vulnerable group to assert its rights collectively and continuously.[30]

Future climate change litigation before the ECtHR could build on this logic. To resolve the paradox of admitting a claim without identifiable victims, the Court might explicitly recognise particularly vulnerable groups as victims, with associations acting on their behalf. Vulnerability here should not be understood as an inherent trait, but rather as a heightened susceptibility to specific climate impacts. Comparative human rights practice points in the same direction. In 2022, for instance, the UN Human Rights Committee upheld a complaint brought by Indigenous inhabitants of the Torres Strait Islands, who relied on Article 27 ICCPR (right to culture) to frame the collective and intertemporal dimension of their claim.[31] Comparable scenarios could arise before the ECtHR, involving groups such as the Sámi or other local communities that are disproportionately exposed to climate risks.

This type of case corresponds to an understanding of group rights as collective rights. This collective conception is particularly pertinent where public goods are at stake, since the shared interests of a group can justify the imposition of duties on States even if no single individual's interest would suffice on its own.[32] Within the Convention system, such claims could draw on an evolutive reading of Article 34, which expressly lists 'a group of

[30] 'Applicant 1 [the association] enables a particularly vulnerable group to exercise its rights in the long term, regardless of the natural age-related retirement of some of its members', *KlimaSeniorinnen*, Application to the ECtHR, para 35.

[31] See Daniel Billy et al. v Australia 3624/2019 (Human Rights Committee, 22 September 2022), UN Doc. CCPR/C/135/D/3624/2019.

[32] See P. Jones, *'Group Rights'* (Stanford Encyclopedia of Philosophy, 22 September 2008) <https://plato.stanford.edu/entries/rights-group/>. See also J. Raz, *The Morality of Freedom*, Oxford, 1986.

individuals' alongside 'any person' and 'non-governmental organisation' as categories of applicants before the Court. While the Court has previously accepted applications lodged by large numbers of individuals,[33] it has never explicitly defined a 'group of individuals' as a distinct victim category, though it has not ruled out this possibility either.[34] Crucially, such cases would not amount to *actiones populares*: they would be grounded in the specific interests of a defined group, supported by evidence of how climate change affects them in a given context and of how those risks are likely to intensify.

4. *Conclusions*

Climate change represents one of the greatest challenges of our time, and its impacts on human rights are now firmly acknowledged. As these impacts intensify, international human rights law must adapt to remain fit for purpose, ensuring that it can provide effective protection to those affected by climate-related harms. In this context, rights-based climate litigation has emerged as a crucial tool for holding States accountable for inadequate mitigation and adaptation policies. At the same time, this development exposes structural tensions between the traditional features of human rights law – such as individualised protection, reactive adjudication, and territorial limitations – and the global, collective, and preventive dimensions of climate change.

Domestic courts have taken the lead in recognising violations

[33] See for instance Cordella and Others v. Italy, 54414/13 and 54264/15, ECtHR, 24 January 2019.

[34] The ECtHR has addressed the concept of 'group' in a case concerning discrimination against the Roma ethnic group. The Court recognised that even if the individual applicant was not personally targeted, he could, however, have felt offended by the remarks concerning the ethnic group to which he belonged. In particular, 'any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group'. Aksu v. Turkey, [GC] 4149/04 and 41029/04 (ECtHR, 15 March 2012).

linked to insufficient climate action, with landmark rulings such as *Urgenda* paving the way. More recently, international human rights bodies, and in particular the ECtHR, have been called to address these claims. The Grand Chamber's judgment in *KlimaSeniorinnen* marked a turning point, not only in finding human rights violations arising from inadequate climate action, but also in reshaping key standing requirements under Article 34 ECHR.

This contribution has sought to contribute to the debate by proposing a typology of three distinct categories of 'climate victims'. At one end of the spectrum lie cases brought by individuals as direct victims, conventional in form but difficult to succeed given the Court's stringent test. The pending case of *Müllner v. Austria*, involving an individual with a rare disease exacerbated by rising temperatures, may test whether such a threshold can ever be satisfied in practice. At the opposite end are claims invoking the broader and more general risks of climate change, where the recognition of future generations as potential victims would most faithfully reflect the intertemporal and collective nature of the problem, but also challenge the prohibition of *actio popularis* and the Court's more consolidated notion of 'victim requirement'. Positioned between these two extremes are cases brought by or on behalf of vulnerable groups. This middle category arguably offers a promising path forward: it avoids the pitfalls of generalised claims, while acknowledging the preventive and collective dimensions of climate change litigation and providing a more realistic vehicle for the effective protection of rights.

While *KlimaSeniorinnen* broke new ground, its reasoning on legal standing has been criticised as less persuasive than other aspects of the judgment. Further clarification and refinement are therefore needed. Recognising the diversity of possible applicants through a structured typology may assist the Court in striking a balance between preserving the integrity of the Convention system and ensuring that human rights law evolves to meet the unprecedented challenges of the climate crisis.

THE FRENCH CHARTER FOR THE ENVIRONMENT IN THE EUROPEAN CONTEXT: FROM HIGH AMBITION TO PROFOUND DISILLUSIONMENT?

Anna Maria Lecis Cocco Ortu

Abstract: *Although France entered the process of environmental constitutionalization relatively late, the French Charter nonetheless represents a virtuous example of constitutional environmental protection in the European context. Its innovative value, however, deserves a more nuanced assessment, balancing its high ambition against certain elements of disillusionment. The chapter will first focus on its high ambition, presenting the content of the Charter and its innovative scope in the European context. It will then point out the deficiencies of this text, in contrast with its strong promises. Finally, it will briefly assess its actual effectiveness, in the light of its judicial application especially in the constitutional review.*

Keywords: French Charter for the Environment; Environmental Constitutionalism; Judicial Review; Environmental Justice

1. *Introduction. Environmental Constitutionalism in Europe*

Over 80% of the world's constitutions contain at least one reference to environmental protection,[1] either in their original

[1] In 2010, David R. Boyd found that environmental provisions were incorporated in not less than 140 national constitutions: see D. R. Boyd, *The environmental rights revolution : constitutions, human rights, and the environment*, Ph.D. thesis, University of British Columbia, 2010 available on line at https://open.library.ubc.ca/collections/ubctheses/24/items/1.0058239 (see also the updated published version: *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment*, Vancouver-Toronto, 2012). Three years later, the same author identified 9 more constitutions which joined the environmental constitutionalization process (see D.R. Boyd, *The Status of Constitutional Protection for the Environment in Other Nations*, in Id. *The Importance of Constitutional Recognition of the Right to a Healthy Environment*, David Suzuki Foundation, 2013, on line at https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf). According to a research of the word

text or as a result of subsequent amendments.[2] The French Constitution falls within the latter category, as explicit protection of the environment was introduced at the constitutional level in 2005, when the Charter for the Environment was annexed to the Constitution. Although France entered the process of environmental constitutionalization relatively late, the French Charter nonetheless represents a virtuous example of constitutional environmental protection in the European context. Its innovative value, however, deserves a more nuanced assessment, balancing its high ambition against certain elements of disillusionment.

Without retracing the successive waves of environmental constitutionalism, some aspects are particularly relevant for the purposes of the comparative analysis undertaken in this book. In the most recent phase of environmental constitutionalism, we can observe a shift in perspective, characterized by provisions less narrowly anthropocentric and addressing a broader perspective of human-environment relations.[3] While some Latin-American States are pioneers of this paradigm shift, the European framework is usually contrasted with the Latin American model – or more generally with the 'Global South' model –, as it tends to remain rooted in an essentially anthropocentric conception characterizing the European environmental constitutionalism. Even if this opposition is somewhat simplistic, since it is based on a comparison taking into account the most advanced constitutional protection systems[4] – such as Bolivia, Ecuador or Colombia

'environment' in the *Constitute project database*, 159 constitutions or drafts contain at least one environmental provision.

[2] See the classifications proposed by David R. Boyd, *The Constitutional Right to a Healthy Environment*, in 54 *Science and Policy for Sustainable Development* 4 (2012), 3 and by D. Amirante, *Environmental Constitutionalism Through the Lens of Comparative Law. New Perspectives for the Anthropocene*, in D. Amirante, S. Bagni (Eds), *Environmental Constitutionalism in the Anthropocene*, New York, 2022, 148; R. O'Gorman, *Environmental Constitutionalism: A Comparative Study*, in 6 *Transnational Environmental Law* 3 (2017), 435.

[3] D. Amirante, *Environmental Constitutionalism Through the Lens of Comparative Law*, cit., 148.

[4] C. Cerda-Guzman, *La dimension anthropocentrée de la Charte: un modèle*

and, at the regional level, the Interamerican system[5] – it is undeniable that in Europe environmental protection has been predominantly translated into rights of human beings with an anthropocentric view. However, many differences exist, then, in contents and scope.

Just like in the rest of the world, European environmental constitutionalism has also developed in waves. Constitutions adopted in the immediate post-war period, generally made no reference to environmental protection as a constitutional exigency. At most, we could find references to the protection of environment as 'landscape', like in the Italian Constitution.

The first wave of constitutionalization began in the 1970s, led by a mix of factors, like the growing ecological concern and major institutional changes. In the aftermath of the Stockholm declaration,[6] the protection of the environment entered the Swedish constitution of 1974, the communist constitutions of the 1970s[7] and, with the favor of the context of democratic transitions in Southern Europe, environmental provisions were included in the constitutions of Greece (1975), Portugal (1976), and Spain (1978). This first generation of constitutional provisions was marked not only by an anthropocentric vision but also and especially by a state-centered approach according to which the protection of the environment is a duty of the State. A striking example is article 24 of the Greek constitution, which, in its original version of 1975, established that "[t]he protection of the natural and cultural environment is an obligation of the State. In order to

dépassé?, in C. Cerda-Guzman, F. Savonitto, H. Alcaraz *et al.* (Eds), *Les 20 ans de la Charte de l'environnement*, Paris, 2025, 143.

[5] The reference goes particularly to IACtHR, Advisory Opinion on *The Environment and Human Rights* no. 23/18, February 7, 2018, and the IACtHR Advisory Opinion on *the Climate Emergency and Human Rights* no. 32/25 of May 29, 2025. In this book, see the chapter by Flavia Piovesan.

[6] Declaration of the United Nations Conference on the Human Environment, 1972.

[7] The first states to introduce the environment into their constitutions were communist states, which were directly inspired at the time by the 1972 Stockholm Declaration: constitutions of Bulgaria (1971), Hungary (1972), Yugoslavia (1974), then followed by Poland (1976), Soviet Union (1977) and China (1978). However, these first codifications proved to be pretty ineffective.

safeguard it, the State is obliged to take special preventive or repressive measures". In the same vein, the Swedish Constitution established that '[t]he public institutions shall promote sustainable development leading to a good environment for present and future generations'.[8] Another example lays in article 21 of the Dutch Constitution as amended in 1984, according to which '[i]t shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'.[9] This connection with state intervention explains a certain hesitancy, in Europe, to fully recognize environmental protection as a right, and its long-standing classification among rights conditional on legislative intervention. This perspective will gradually, albeit still partially, be overcome thanks to the recognition of the horizontal effectiveness of environmental provisions and their direct application regardless of state intervention.

The second wave began at the end of the 1980s, driven by a combination of conjunctural ecological and institutional factors, such as the Chernobyl disaster in 1986 and the collapse of the Soviet Union from 1989 onward. This second wave introduced greater attention to procedural dimensions – such as access to information and participation in decision-making – and to new substantial principles, including the precautionary principle and the polluter-payer principle. These developments were also fostered by major advances at the international and regional level, notably the Rio Conference of 1992, and, within the European Union, the Maastricht Treaty (1992) and the Amsterdam Treaty (1997), which recognizes environmental protection as a central objective of the Union. This phase encompassed both amendments to existing constitutions (like the 1994 amendment to the German Basic Law) and newly adopted constitutions in Central and Eastern Europe (including Hungary, Croatia, Czech Republic, Slovakia, Poland), where environmental provisions were embedded from the outset.

A third phase emerged in the 2000s, in parallel with similar

[8] Art. 2, Chapter 1 of the Swedish Constitution, 1974.

[9] J. Verschuuren, *The Constitutional Right to the Protection of the Environment in the Netherlands*, in *Revue Juridique de l'Environnement* 4 (1994). 339.

developments beyond Europe and in the international dimension, among which the adoption of the Aarhus Convention. This instrument further developed and systematized the procedural environmental rights – the so-called 'rights of environmental democracy': access to information, public participation, and access to justice. As previously noted, this phase in Europe is less oriented toward the ecocentric dimension than in some legal systems of the Global South. Nevertheless, it entrenched the recognition of the human impact on environment, ecosystems and biodiversity as well as the necessity of regulating this influence and redefining the relationships between human activity and natural resources, in order to avoid reaching a point of no return, also in the interest of future generations.

It is at this stage that the adoption of the French Charter for the Environment takes place. Whilst France joined the movement of environmental constitutionalism later than other countries, the Charter still stands out as one of the most ambitious attempts to grant constitutional protection to nature in Europe. Next paragraph will focus on its high ambition, presenting the content of the Charter and its innovative scope in the European context. Paragraph 3, then, will point out what is missing in this text, in contrast with its strong promises, and will highlight its limits. Finally, paragraph 4 will briefly assess its actual effectiveness, in the light of its judicial application especially in the constitutional review.

2. *High Ambition: What's New*

The French solution to constitutionalizing environmental protection is innovative first and foremost in its form: rather than introducing one or more provisions within the constitutional text, it was decided to adopt a whole charter, composed of a preamble and 10 articles, annexed to the Constitution.[10] This text

[10] Whilst the Charter was adopted in 2004, the French Constitution was amended in 2005 in order to include a reference to it within the Preamble. The inclusion in a Preamble, giving environmental protection a special sym-

thus became part of the French constitutional framework – *bloc de constitutionnalité* – in the same way as two other fundamental documents of French constitutionalism: the other great charter of rights of the French constitutional system, namely the 1789 Declaration of the Rights of Man and of the Citizen, and the catalogue of social rights included in the preamble to the previous Constitution, to which the current Constitution refers. From a symbolic point of view, therefore, the charter containing first-generation freedom rights and the catalogue containing second-generation social rights are complemented by a charter proclaiming third-generation environmental rights.

Turning to the content, the French system has sought – if not to be at the forefront, as no completely innovative forms of protection are identified – at least to be among the most advanced protection systems in Europe, gathering together substantive rights, with the explicit recognition of a right to a healthy environment, State duties to protect or preserve the environment, directive principles[11] as well as duties of other actors and procedural rights. The French Charter is thus emblematic of the evolution of European environmental constitutionalism, as it incorporates the progress and the different types of content of the various successive waves.

Overcoming the approach that regarded environment protection as an obligation incumbent exclusively upon the State, which was predominant in the first wave, the French Charter explicitly recognizes the horizontal effectiveness of environmental provisions and their direct application regardless of state intervention,

bolic prestige, remains pretty exceptional in a comparative perspective. Only a few constitutions, such as those of Andorra and Burkina Faso, make brief references to the environment in the Preamble, while a more consistent and solemn reference can be found in the constitution of Cameroon: see J. Morand-Deviller, *L'environnement dans les constitutions étrangères*, in *Nouveaux Cahiers du Conseil constitutionnel* 43 (2014).

[11] Which represent the three main categories of constitutional environmental provisions in Europe according to D.R. Boyd, *The Environmental Rights Revolution*, cit., 2012. For another classification, distinguishing between 'thick' and 'thin' environmental constitutionalism, see L.J. Kotze, *The conceptual contours of environmental constitutionalism*, in 21 *Widener L. Rev.* (2015), 187.

by establishing the duty of everyone – public or private actor – to preserve the environment and prevent any damage to it (Articles 2 and 3). The French Charter also explicitly elevates to constitutional status other principles developed during the second phase, such as the polluter pays principle (the obligation to repair any damage caused to the environment, article 4) and the precautionary principle (article 5). It also embeds procedural principles and rights that emerged during this second wave, starting with the right to information and participation, enshrined in Article 7. This represents a progress in terms of environmental constitutionalization, since in most countries (with the exception of the Spanish constitutional provision that already implicitly enshrined the polluter pays principle through the obligation to repair) these principles had been integrated at the legislative or supra-legislative level through European law.

The French Charter, then, could be placed in the third wave not only for temporal reasons, but also because it explicitly includes the perspective of the human activity's impact on the environment as a fundamental reason for environmental protection, thus placing it among the constitutions of the Anthropocene, according to the classification proposed by Amirante.[12] This awareness is strongly and explicitly stated in the preamble, according to which 'Mankind exerts ever-increasing influence over the conditions for life and its own evolution' and 'Biological diversity, the fulfilment of the person and the progress of human societies are affected by certain types of consumption or production and by excessive exploitation of natural resources'. The concern regarding the consequences of this impact though, is always seen through anthropocentric lens, as '[t]he future and very existence of mankind are inextricably linked with its natural environment' and therefore '[c]are must be taken to safeguard the environment along with the other fundamental interests of the Nation'. For these reasons, the preamble states the principle of sustainable development according to which "choices designed to meet the needs of the present generation should not jeopard-

[12] D. Amirante, *Environmental Constitutionalism Through the Lens of Comparative Law*, cit., 150 f.

ise the ability of future generations and other peoples to meet their own needs". This principle is further developed in article 6, establishing the principle – somewhat problematic though, as we will see – of conciliation and balancing between environmental protection, economic interests and social progress.[13]

Finally, we find some more original provisions in articles 8 and 9, according to which education and research should participate to the application of the Charter and the preservation of environment, and in article 10, stating that the Charter 'shall inspire France's actions at both European and international levels'. Even if we cannot really talk about an ecological constitution,[14] because environmental protection is always seen as functional to human beings and society, the Charter is an innovative and advanced document. It nevertheless exhibits certain deficiencies, particularly in the light of the context in which it was adopted and the commitments that accompanied it. The following section examines these shortcomings.

3. *Much ado about nothing? What's missing*

First, since the Charter follows the anthropocentric model, which conceives environmental rights as human rights, it does not recognize nature, or certain natural elements or environments, as subjects of law[15] entitled to the recognition of subjective rights, or at least some of the rights enshrined in the text.

[13] Article 6: 'Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress'.

[14] The Charter fails to meet some of the requirements identified by L. Collins, *The Ecological Constitution, Reframing Environmental Law*, Abingdon-New York, 2021. Also, it does not wear the 'ecological lens' identified by C. Sbert, *The Lens of Ecological Law. A Look at Mining*, Cheltenham, 2020, which consists of three principles: ecocentrism, ecological primacy and ecological justice.

[15] While the issue has become topical again in the context of questioning the anthropocentric conception of environmental protection, the essential reference is C. Stoner*, Should Trees Have Standing?*, Oxford, 1972, republished in 2010.

This contrasts with many legal systems in Latin America, Asia, Australia, and even within the United States, which now recognize subjective rights for certain natural elements or for the environment as a whole.[16] This is a subject of much debate among environmental experts, with some of them advocating for[17] and others strongly opposing this kind of provision considered at best symbolic and useless or at worst counterproductive.[18] A proposition of constitutional amendment in this sense was presented in September 2025, but it has still not been added to the agenda.[19]

Secondly, and more surprisingly, there is not a single word about climate change, in a text adopted in 2004 when this was already a major issue.[20] This partially explains why climate change litigation is currently very underdeveloped before the Constitutional Council[21] whilst it has been developed before other judges

[16] V. David, *La nouvelle vague des droits de la nature, La personnalité juridique reconnue aux fleuves Whanganui, Gange et Yamuna*, in 42 *RJE* 3 (2017), 409; voir aussi S. Dupouy, *La défense de la nature, sujet de droit ou intérêt à protéger?* in M. Hautereau-Boutonnet, È. Truilhé (Eds), *Procès et environnement: quelles actions en justice pour l'environnement?*, Aix-en-Provence, 2020, 17.

[17] V. Cabanes, *Il faut sortir de cette fiction que l'Homme peut dominer le vivant in Actu Environnement*, https://www.actu-environnement.com/ae/news/valerie-cabanes-droits-nature-ecocide-interview-36007.php4, 29/08/2020; A. Zabalza, *Les droits de la nature à la boussole des communs. Premiers jalons pour une théorie du sujet de droit sans personnalité juridique*, in 49 *Revue juridique de l'environnement* 2 (2024), 363.

[18] J. Bétaille, *Reconnaître des «droits» à la nature: des enjeux politiques et démocratiques, davantage qu'une question juridique*, in *Le Club des juristes*, 9 September 2022. A debate among scholars with different positions on the subject can be found here: *Rights of Nature: Opening the Academic Debate in the European Legal Context, on line at* https://www.dailymotion.com/video/x7s5rhb.

[19] See Proposition de loi constitutionnelle n° 891, presented on September 12th 2025, providing that 'Nature and its constituent elements have the right to exist and evolve as an ecosystem. As such, they are entitled to protection, conservation, maintenance, and, where necessary, restoration'.

[20] For a comparative overview of constitutions including climate change provisions, see L. Fonbaustier, J. Charreire*, Analysis of Constitutional Provisions Concerning Climate Change*, in *French Yearbook of Public Law* 1 (2023) 89.

[21] Despite certain attempts by members of parliament and associations as

on other legal basis.[22] Constitutional amendment presented by president Macron in 2021, in the aftermath of the Citizen's Convention on Climate[23] provided for introduction of environmental protection and fight against climate change in art. 1st of the Constitution, but it was abandoned.[24]

The Charter, then, does not explicitly provide for a non-regression principle imposed to legislature, as it exists at the legislative level.[25] While an implicit recognition of this principle has been invoked on multiple occasions before the Constitutional Council, the latter has repeatedly taken an ambiguous position on this point, applying its usual case law on rights protection, according to which the legislator is free to repeal certain protective provisions, on condition that it provides for other 'legal guarantees'.[26]

Also, even if this is something that we barely find in constitutions, with the exception of Austria,[27] there is no reference to

amici curiae in ex ante review: see Const. Council dec. Nos. 2019-791 DC and 2021-825 DC. On this point, see also F. Savonitto, *Le Conseil constitutionnel et le contentieux climatique*, in *AJDA* 3 (2022), 152.

[22] See J. Bétaille, *Climate Litigation in France, a Reflection of Trends in Environmental Litigation*, in 22 *Environmental Law Network International* (2022), p. 63.

[23] See E. Buono, *Climate Democracy Redux. Citizens' Assemblies and Sustainability Governance*, in this book.

[24] The amendment, stating that '[The Republic] guarantees the preservation of the environment and biodiversity and fights against climate change.', was initially adopted by the National Assembly but it was later abandoned since the two chambers could not agree on a common wording. A first amendment in this sense was adopted by the National Assembly in 2018 and rejected by the Senate.

[25] See M. Prieur, *Promesses et réalisations de la Charte de l'environnement*, in *Nouveaux Cahiers du Conseil constitutionnel* 43 (2014) and, on the development of the concept, M. Prieur, *Une vraie fausse création juridique: le principe de non-régression*, in *RJE*, SP. (2016), 319.

[26] See for instance CC n° 2016-737 DC and n° 2020-209 QPC. The obligation imposed to the legislature seems to be strengthened in decision n° 2022-843 DC, in which the Council imposes the burden of a reinforced justification in order to weaken environmental guarantees: see M. Fleury, M.-A. Cohendet, *"Work still in progress": chronique de droit constitutionnel sur la Charte de l'environnement*, in 47 *Revue juridique de l'environnement* 4 (2022), 825.

[27] Five articles of the Austrian federal constitutional law on nuclear power

nuclear radioactive waste and their storage. The famous decision in which the Constitutional Council dealt with the constitutionality of nuclear waste treatment[28] could represent an important innovation, allowing to invoke the obligation to preserve the ability of future generations to meet their own needs as a basis for genuine climate litigation.

Less anecdotal and more relevant, the Charter does not recognize a specific right to access to justice in environmental matters. During the preparatory work, the question was raised and deliberately excluded, since the recognition of a general and broader right to an effective judicial remedy[29] was considered as already sufficient to give effect to international obligations, in particular the Aarhus Convention.[30] In addition to this theoretical argument, there was also a pragmatic one, since the drafters thought that such wording would reinforce the mistrust of those who 'wrongly fear – that [the adoption of the Charter] will lead to an unreasonable increase in litigation'.[31] Several commentators spoke of a missed opportunity, if not a real paradox between the desire to implement the Aarhus Convention and its inadequate transposition.[32] Anticipating the conclusions, we can indeed re-

were adopted in 1999.

[28] Const. Council dec. no. 2023-1066 QPC.

[29] On the basis of Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen.

[30] Report on behalf of the Committee on Constitutional Laws, Legislation, and General Administration of the Republic on the draft constitutional law (No. 992) relating to the Environmental Charter, by Ms. Nathalie Kosciusko-Morizet https://www.assemblee-nationale.fr/12/rapports/r1595.asp

[31] Ibid. It has been rightly observed that 'the rapporteur herself devalued the content of the text in order to reassure the right-wing majorities and obtain their support for it': F. Savonitto, *La Charte de l'environnement: un contentieux toujours en chantier*, in *Italian Papers on Federalism – IPOF* 2 (2024), 30.

[32] J. Bétaille, Propos introductifs. *Le paradoxe du droit d'accès à la justice en matière d'environnement*, in J. Bétaille (Ed.), *Le droit d'accès à la justice en matière d'environnement*, Toulouse, 2016, 7; M. Fatin-Rouge Stefanini, *L'exigence constitutionnelle du droit à un juge environnemental en droit comparé*, in C. Severino, L. Gay, *Du «droit constitutionnel au juge» vers un «droit au juge constitutionnel»? Perspectives de droit comparé*, Paris, 103; H. Dezangles, *La Charte de l'environnement et les sources externes*, in C. Cerda-Guzman, F. Sa-

gret the absence of this specific wording, which could have strengthened the constitutional protection of access to justice against certain restrictions imposed by the legislator in recent years.[33]

The adoption of the Charter also did not provide for any procedure of direct access to constitutional justice or referral mechanism[34] at a time when – it should be remembered – an *incidenter* judicial review of legislation had not been introduced yet. This issue was raised during the work of the Coppens Commission, some of whose members considered that 'broader access to the constitutional court would be in line with the general economy of the Charter' and that, therefore, 'without going as far as a direct referral procedure open to all citizens, a mechanism could be provided for enabling the courts, in the event of a dispute, to refer a preliminary question to the Constitutional Council for it to assess the constitutionality of a promulgated law'. However, this proposal was ultimately rejected on the grounds that 'the significance of such a constitutional reform went far beyond environmental law'.[35] Still with reference to access to justice, the Charter does not even reinforce it by providing for one or more special courts or specialized chambers,[36] as they exist in many

vonitto (Eds), *Les 10 ans de la Charte de l'environnement,* 2005-2015, Paris, 2016, 153.

[33] See A.M. Lecis Cocco Ortu, *Des voies d'accès à élargir?*, in C. Cerda-Guzman, F. Savonitto, H. Alcaraz *et al.* (Eds), *Les 20 ans de la Charte de l'environnement*, cit., 223.

[34] See M. Fatin-Rouge Stefanini, L. Gay. *L'accès au juge constitutionnel en matière environnementale. Un panorama comparatif*, in V. Chiu, A. Le Quinio, *La protection de l'environnement par les juges constitutionnels*, Paris, 45. The authors show that, in the comparative overview, this is rather the exception. Among these exceptions, we find the environmental *amparo* in Argentina and the consultative procedure provided for in the Bolivian Constitution at the request of the specialised environmental court – the Agro-Food Court – which may refer a question to the Constitutional Court for a preliminary ruling on the constitutionality of a law: Art. 202 of the Bolivian Constitution.

[35] Coppens Commission Report, p. 52.

[36] For proposals along these lines from some legal scholars, see, among others, M. Clement, La jurisprudence administrative entre technique et acteurs, in *RJE* HS 19 (2019), 57; S. Mabile, *Il faut créer un parquet national envi-*

countries today (a study conducted in 2017 under the auspices of the UN Environment Programme identified 1,200 such courts in 44 countries[37]), following a trend developed in certain countries in the Global South, such as India and the Philippines.[38]

With respect to the right to stand, then, article 2, which imposes an obligation on every person 'to take part in the preservation and improvement of the environment', could have been interpreted as giving every person the right, or even the duty, to bring a case before a court in case of environmental damage. This could have provided the basis for the introduction of an *actio popularis* similar to those existing in other countries, from Argentina to India, Bolivia to the Philippines, Costa Rica to Pakistan.[39] However, this interpretation of Article 2 was very quickly reject-

ronnement (A national environmental prosecutor's office must be created), opinion piece published in *Le Monde,* 12 September 2017.

[37] G. Pring, C. Pring, *Environmental Courts and Tribunals. Guide for decision-makers,* United Nations Environment Programme (UN Environment), 2017, freely available online at https://www.ifdd.francophonie.org/publications/cours-et-tribunaux-de-l%c2%92environnement/, 80.

[38] D. Amirante, Giustizia ambientale e green judges nel diritto comparato: il caso del National Green Tribunal of India, in *DPCEonline* 4 (2019); M. Stefanini, *Constitution et environnement aux Philippines*, in *AIJC* (2020), XXXV-2019, 427.

[39] Without claiming to be exhaustive, Ecuador – the first country to enshrine the rights of nature in its Constitution – has established a mechanism of recourse open to any person, community, people or nation to call on public authorities to implement the rights of nature. The Bolivian Constitution also provides that any citizen may act in defense of the rights of Mother Earth, while in Costa Rica, it is judicial interpretation that has opened up access to justice for anyone defending a collective interest. The same is true in the Philippines, where case law has recognized the right of all citizens to act in defense of the environmental rights of minors or future generations. An environmental *amparo* exists in Argentina, while in India, the long-standing public interest action has also found application in environmental matters. It is through this type of recourse that, in India, the High Court of Nainital granted legal personality to the Ganges and its tributary the Yamuna and that, in Pakistan, the Lahore High Court Green Bench ordered the country's authorities to strengthen measures to combat climate change. For more on these experiences, see: D. Amirante, Giustizia ambientale e green judges nel diritto comparato*,* cit.; S. Dupouy, La défense de la nature, sujet de droit ou intérêt à protéger?, op.cit., 17; M. Stefanini, Constitution et environnement aux Philippines, cit., 427.

ed by the Council of State.[40] The constitutional environmental provisions nevertheless laid the foundation for a broadening of access to justice that would be provided for much later by the legislature, with the introduction of legal action for compensation for ecological damage by the Act of August 8, 2016, based on Article 4 of the Charter.[41] Apart from this example, which is not a direct consequence of the Charter, there has been no will to strengthen the effectiveness of environmental protection by establishing specific appeal procedures or by extending existing access to justice.

Even if it was observed that the constitutionalization of the Charter had a dual objective – strengthening the legitimacy of environmental policies and embedding environmental protection rules at the highest level – the lack of concern for practical means of enforcement of the Charter in case of violation by the law shows that priority was given to the first objective: since the beginning, the Charter was conceived as a basis for environmental policies possibly adopted by the legislature rather than as a limit on its action, which partly explains the limitations of its use in constitutional review of legislation.

4. *A Mixed Assessment of the Case Law, between Disillusionment and Hope*

In 20 years since its constitutionalization, the Charter was referred to in nearly 70 decisions (at November 30th 2025), which is less than 5% of the total amount of decisions issued since the constitutionalization of the Charter. A little more than half were issued in the *incidenter* proceeding (39 decisions),[42] whilst 29 in response to *ex ante* review.

[40] CE, 3 August 2011, *Buguet,* No. 330566.

[41] On the origin of this recognition, between praetorian action and legislative intervention, see J. Malet-Vigneaux, *De la loi de 1976 à la loi de 2016: le préjudice écologique: après les hésitations, la consécration*, in *RJE* 4 (2016), 617; L. Neyret, *La consécration du préjudice écologique dans le code civil*, in *Recueil Dalloz* 17 (2017), 928.

[42] We should consider that the Constitutional Council limited the access

Among these, we find only 15 declarations of unconstitutionality based on the Charter. Obviously, this number is not indicative in itself of the effectiveness of the constitutional review system, since the low rate of rulings striking down legislation may be due to the fact that the legislature has been particularly diligent in applying the constitutional guarantees contained in the Charter… However, the assessment of the application of the Charter and its ability to ensure concrete protection to the environment is not really positive if we analyse it from a qualitative perspective. In fact, 12 out of these 15 declarations of unconstitutionality were made on the basis of article 7, protecting the rights to information and participation. However, these two rights are procedural rights, whose guarantee does not necessarily result in an effective protection of the environment. Only three times has the Constitutional Council issued a declaration of unconstitutionality outside of Article 7 – on the basis of Articles 1 and 3 of the Charter. This is the consequence of a restrictive approach in the interpretation made by the Council, according to which it repeatedly refused to give application to some provisions through a systematic interpretation, thus nullifying their potential. For example, the Council considers inadmissible questions of constitutionality based on the provisions contained in the preamble, in article 6 and article 8 and has also long refused to use them in the context of a systematic interpretation.[43] Moreover, most of the decisions were accompanied by a deferral of their effects, which largely mitigates the consequences in term of concrete protection of the environment. For instance, the decision declaring uncon-

through *incidenter* proceeding by considering that not all the provisions of the Charter represent 'right or freedom' within the meaning of Article 61-1 of the Constitution. In fact, the Constitutional Council rejected the invocabilty of the whole preamble, of the conciliation rule in Article 6 and of the provision about education in article 8. These interpretations, highly questionable and criticized by scholars, neutralize 'the vast argumentative potential of the Preamble' (V. Champeil-Desplats, *Charte de l'environnement: La QPC bute sur l'incipit* in *La Revue des droits de l'homme*, 2014), even if some space for its application has been made through systematic interpretation.

[43] M.-A. Cohendet, M. Fleury, *La Charte a 20 ans: un grand potentiel à valoriser,* in *Titre VII* 13 (2024).

stitutional the automatic extension of certain mining concessions[44] was issued when the contested provision had already been repealed by the legislature.

The Council's action against legislative provisions that harm the environment is therefore limited, although it should not be forgotten that the constitutional judge also issued some useful interpretative reservations. Furthermore, the effectiveness of the Charter is not limited to reviewing laws that may violate the environment, since its judicial application also made it possible to defend certain laws protecting the environment – such as those prohibiting hydraulic fracturing for shale gas extraction[45] or the export of plant protection products banned in the European territory[46] – against attacks seeking to have them declared unconstitutional.

Ultimately, two recent decisions – dealing respectively with the storage of radioactive waste[47] and the derogation allowing the use of forbidden pesticide[48] – opened a new perspectives, since the Constitutional Council accepted to adopt a systematic interpretation, which paves the way for better application of some underexploited provisions of the Charter. One of the most successful applications of the charter in limiting legislative action contrary to environmental requirements is undoubtedly represented by one of these most recent rulings, that on the *Loi Duplomb* of July 2025.[49] Adopted in response to protests by the farmers' movement led by the majority union in the sector, the law provided for exemptions to the ban on the use of a pesticide that had been banned in France. In this decision, taken in an exceptional context of civil society mobilization (with a petition addressed to the National Assembly that had exceeded two million signatures in a few days), the Council declared this exemption unconstitutional. This decision also shows that the effectiveness of any legal text is often a team effort, the outcome of which

[44] Const. council dec. no. 2021-971 QPC.
[45] Const. Council dec. no. 2013-346 QPC.
[46] Const. Council dec. no. 2019-823 QPC.
[47] Const. Council dec. no. 2023-1066 QPC
[48] Const. Council dec. no. 2025-891 DC.
[49] Const. Council dec. no. 2025-891 DC.

depends on synergies between different institutional and non-institutional actors.

5. *Concluding Remarks*

The French Charter is maybe not the most advanced form of environmental constitutional protection, but is a good document, perfectible, but that could also be better exploited. It cannot be ignored that the application and enforcement of any legal text depend, of course, on the context influenced by the functioning of institutional and legal mechanisms, juridical traditions, etc. The obstacles to the efficiency and judicial application of the Charter, therefore, inevitably bring us back to the limits of French constitutional review itself, characterized by the Council's very deferential approach towards the legislature. The implementation of the Charter thus reflects this approach: it supports the actions of the legislature rather than restricting them, without the vast potential of this document being used to compel it to protect the environment in a manner commensurate with current challenges.

After the disillusionment, however, there is maybe room for some hope and constructive perspectives.

The belated openness to systematic interpretation may give new life to provisions that are currently underutilized, such as the preamble, article 6 or article 10. Even if a hierarchy among constitutional rights and objectives, which would place environmental protection above economic interests, seems to be excluded by the conciliation rule contained in article 6 (the real Achilles heel of the constitutional guarantee of the environment), a systematic interpretation of this article read in the light of the Preamble and the constitutional objective of environmental protection could represent the basis for a renewed reading of this article, more protective of the environment. Undefined concept, 'sustainable development' allows for varying interpretations that are dependent on the economic model: without questioning the paradigm of an unavoidable race for economic growth, the principle of sustainable development therefore conceives environmental protection as a variable rather than an imperative that

must guide the design of economic and social policies taking seriously the availability of environmental resources.[50] A recently presented proposal for constitutional revision envisages repealing the second sentence of Article 6, in order to erase the 'conciliation rule'.

A better interpretative use of the Charter could also lead to a non-ambiguous recognition of a non-regression principle, derived from a teleological interpretation of the duty imposed to legislator by Article 2, or from a systematic interpretation of this provision in the light of article 1, 3 and the Preamble. Furthermore, an effective interpretation of Article 10, according to which the Charter 'inspires France's European and international action', could make it possible to mobilize international sources as interpretative elements, establishing a systemic interpretation of both domestic law in the light of external sources and secondary law in the light of the Charter, according to an axiological-substantive approach inspired by constitutional pluralism theories.

Furthermore, since access to justice is fundamental for the effectiveness of any normative protection, it would be useful to strengthen the constitutional guarantees of the right of access.[51] If a specific right of access in environmental matters is not included in the Charter, its enshrinement in case law would make it possible to strengthen control over the restrictions imposed by the legislator, taking due account of the structurally collective nature of environmental issues and the cumulative effect of the various mechanisms governing litigation. This would lead in particular to a stronger guarantee of the right of access for associa-

[50] About this shift of paradigm, see S. Bagni, *The enforcement of new environmental rights through the courts: problems and possible solutions*, London-New York, 2022 and L. Kotzé, L., R.E. Kim, C. Blanchard (Eds), *Earth System Law: Towards a New Legal Paradigm for the Anthropocene* in *Earth System Governance*, 2021, *7.* About an ecological planification of public policies based on the availability of natural ressources, see C. Durand, R. Keucheyan, Comment bifurquer. Les principes de la planification écologique, La Découverte, 2024.

[51] The solution suggested here were previously presented in A.M. Lecis Cocco Ortu, Des voies d'accès à élargir?, cit., 236 ff.

tions, as has been done by the European Court of Human Rights (hereinafter ECtHR) which, with regard to the restrictive approach taken by the French Court of Cassation, recognized the need to interpret the conditions of the right of appeal flexibly in view of the fact that 'associations play an important role in defending certain causes (…) particularly in the field of environmental protection'.[52] In its famous judgment of 9 April 2024, which is mainly known as the first in which a State has been condemned for its inadequate climate policy, the ECtHR went even further, invoking the recognition of the specific nature of the right of associations to bring legal proceedings due to their representative function in environmental matters. It thus observed that '[t]he specific considerations relating to climate change weigh in favour of recognising the possibility for associations, subject to certain conditions, to have standing before the Court as representatives of the individuals whose rights are or will allegedly be affected' and that 'the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context (…) speak in favour of recognising the standing of associations before the Court in climate-change cases'.[53]

In the end, the role of actors, who stand and bring cases and arguments before the Constitutional Council, is crucial in exerting sustained pressure to go further in strengthening constitutional protection of the environment in the shaping of public policies.[54] It is to be hoped that this gradual yet contested evolution will not be too slow in the light of the urgency of the environmental emergency.

[52] ECHR, *Association Burestop 55 and others v. France,* 5th sect., nos. 56176/18 56189/18 56232/18, 1/10/2021, para. 54 (original in French, our translation); see already ECtHR, *Collectif national d'information et d'opposition à l'usine Melox - Collectif stop Melox et Mox v. France*, No. 75218/01, 12/6/2007, declaring, however, the appeal of a local authority inadmissible.

[53] ECHR, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland [GC],* no. 53600/20 of 9 April 2024, para. 498-499.

[54] On this point, see A.M. Lecis Cocco Ortu*, La contribution des associations au contentieux constitutionnel de la Charte: Avancées et limites du lobbying judiciaire environnemental*, in *Italian Papers on Federalism* 2 (2024), 41.

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