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Environmental Constitutionalism in the European Union: A Comparative Analysis of Environmental Legislation in Italy, France and Germany

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INTRODUCTION

Over the past few years, the world has witnessed a rapid increase in the number and rate of environmental disasters. This became even clearer over the last two summers, with dramatic floods, wildfires, earthquakes, and extreme heat that have profoundly affected practically all continents, and therefore the entire world. When reflecting on the dynamics of natural disasters, a reference to the latest United Nations Intergovernmental Panel on Climate Change (IPCC) report becomes necessary, since it is expressly stated therein that the devastating consequences of climate change are attributable to human beings.

The implication of anthropogenic activities with regard to both environmental and human health received widespread attention from the last decades of the twentieth century onwards, when scientists suggested that the world was entering a new era marked by extensive and lasting human influence, subsequently denominated *Anthropocene* by Paul J. Crutzen and Eugene Stoermer. What became clear soon is that the humankind is not only the driver behind what can be considered a substantial – and to a certain extent dramatic – change, but also one of its victims. While serious concerns arise as regards human safety, health and the broad theme of the enjoyment of human rights and freedoms of the present generation, the situation gets worse if considering the consequences of our inaction today with regard to future generations.

This intergenerational aspect has been given due consideration by Richard P. Hiskes according to whom, since the present generation has extensively used natural resources and consequently caused environmental degradation, it is unlikely that the future generation will enjoy environmental rights in a satisfactory manner. As far as environmental rights are concerned, reference shall be made to the Three Generations Theory of Human Rights, developed by Karel Vasak in the late 1970s. In particular, it shall be noted that environmental rights belong to the third generation of human rights, the most recent one, which corresponds to the concepts of humanity or fraternity and covers *collective* rights, for which states and the global community have a particular responsibility.

Remarkably, over the last decades, there has been a substantial change in cross-cultural understanding of the importance of the environment and of environmental protection, issues that are now addressed in the majority of world Constitutions. This appears to be in line with the world trends known as '*environmental rights revolution*' – that, according to David R. Boyd, took place between the end of the XX Century and the beginning of the XXI century – and '*global environmental constitutionalism*', concept that can be attributed to Louis J. Kotzé. This recent phenomenon, further reiterated and investigated by James R. May and Erin Daly, is influenced and shaped by international, constitutional, environmental and human rights law. An interesting aspect lies in the fact that emphasis is not exclusively placed on the right to a safe environment, and indeed many constitutional Charters have been revised in order to include broader rights to participation, information, justice, climate and sustainable development.

When an explicit reference to environmental rights and duties lacks, these latter are however implicitly recognized by means of *ad hoc* interpretation of other constitutional provisions. As such, it can be argued that one hundred and forty-eight of the one hundred and ninety-six modern national Constitutions today provide for a certain kind of environmental constitutionalism. In particular, reference is made not only to environmental rights as such, but also to further types of constitutional rights and related obligations, among which it is possible to mention the right to life, health, dignity, and so on. Tellingly, environmental constitutionalism becomes a powerful tool not only for recognizing rights and establishing obligations with respect to the environment, but also for establishing compliance mechanisms. Hence it follows that, according to the analysis of Hiskes, it represents the best way to address and limit environmental degradation and guarantee the enjoyment of environmental rights to the generations to come.

If it is true that each country has different priorities and addresses environmental protection according to its own urgency, necessity and calculation, then it is not surprising that national Constitutions – that protect the cultural identity and common values of a given Nation and thus of a given community – will express different societal problems and provide for different types of legal safeguards, rights and duties. Therefore, while explicit constitutional environmental rights are becoming the norm, the concepts and terms adopted may differ across legal systems, and the interpretation of the meaning attached to *healthy*, *favourable*, *sustainable* is not always easy and linear and must be in

accordance with the general legal context and national circumstances. In this regard, it is remarkable that, although states face similar environmental problems, damages, and challenges, they have diverging historical backgrounds, founding elements, national and legal cultures that play a role in the shaping of environmental law and policy. At the same time, in spite of the fact that English is the most commonly used language in the world, scholars carry out publications in their mother languages, thereby expressing domestic ideas, standards and goals. As such, it is imperative to understand the major contribution given by the work published in different national languages, which once again confirms the importance of the comparative approach, instrumental in understanding and analyzing not only the distinctive nature of each constitutional and legal system, but also the reciprocal influences and interconnections.

With these premises, the present dissertation is divided into four chapters. It will start by investigating the rise and development of environmental constitutionalism and its affirmation in the European Union. Subsequently, it will analyze a number of aspects of environmental legislation in the European Union and, through a comparative approach, of Italy, France and Germany, three EU Member States which, to some extent, have experienced a similar path in the field. Finally, proper attention will be given to the rapid rate of change that the European Union and the Member States are experiencing since the election of Ursula von der Leyen as President of the European Commission, in the decade that she has referred to as '*The Roaring Twenties of Climate Action*'. This will show that, although it is too early to draw any firm conclusion about the success and effectiveness of recent EU instruments in the long-term – whose implementation is dependent also and above all upon Member States – societies are evolving in the direction of an increased environmental sensibility.

The first chapter will focus on the emergence and evolution of environmental constitutionalism, with reference been made, first of all, to scholars' theories and categorizations. Then, an analysis of the link between modern Environmental Law and Public and Constitutional Law will be made. After that, attention will be paid to the spreading of the idea of Environmental Rights as human rights. Finally, the chapter will end by focusing on the European Union, and in particular on the environmental provisions contained in the EU Treaties and their implications for the accession of new Member States.

The second chapter is devoted to the analysis of the evolution and affirmation of environmental law in the European Union. To this end, after an historical excursus, it will focus on the principles driving the '*Union policy on the environment*', namely precaution, preventive action, rectification at source and polluter pays, and subsequently on some sectoral controls, namely nature protection and conservation, waste, chemicals, water quality, air pollution and climate change. Finally, the last paragraph will deal with the issue of access to justice in environmental matters.

The third chapter will resort to a comparative approach to investigate environmental legislation in Italy, France and Germany. In this respect, the focus will be on its historical evolution, including some major turning points, on the legislative and implementation framework, and finally on the access to environmental information and justice for individuals and NGOs.

To conclude, the fourth and last chapter will demonstrate that the von der Leyen Commission has, to a certain extent, represented a break with the previous European Commissions, inasmuch as – since the electoral campaign – it has showed a sincere commitment to the issue of environmental protection, and especially climate change. In order to do so, reference will be made to the political guidelines '*A Union that strives for more*' and the first *State of the Union Address*. Then, the European Green Deal and its interconnected proposals, policies, and measures, together with the European Climate Law and the Fit for 55 Package will be analyzed. Also, proper attention will be given to the last *State of the Union Address* held on September 15th, 2021. In the final analysis, the chapter will end by analyzing the latest changes that are occurring in Italy, France and Germany.

CHAPTER ONE – EMERGENCE AND EVOLUTION OF ENVIRONMENTAL CONSTITUTIONALISM

1.1. Introduction

From the last decades of the twentieth century onwards, scientists started to embrace the idea of the end of the Holocene era and the beginning of a new one characterized by the predominant and lasting human influence, if not full domination. This proposal took a step nearer in the 2000s, when Paul J. Crutzen and Eugene Stoermer suggested the introduction of a new geological epoch, the so-called Anthropocene[1]. Although it was originally conceived as a geological concept, it has subsequently become a cultural one as well. Contemporary scholars and researchers therefore maintain that the humankind has entered the 'Age of humans' and is facing the unprecedent challenges arising from it[2]. More accurately, there are concerns about the socio-economic and environmental impact of unsustainable and environmentally harmful human activity, which has negative repercussions on the quality of life on Earth. Interestingly enough, the mankind is at once directly accountable for and adversely affected by such a socio-economic change and this, understandably, has repercussions on the environmental quality and ecological balance on one side, and on the enjoyment of human rights and freedoms on the other[3].

As a natural consequence, it is possible to say that the majority of national Constitutions around the world nowadays include provisions for the protection of the environment and the adjoining environmental rights. As such, it comes as no surprise that constitutional environmental rights are of different types, ranging from being either explicit or implicit, substantive or procedural, enforceable or not, of a specific or a general nature. They are very commonly linked to other types of constitutional rights and related

[1] H. Trischler, *The Anthropocene: A Challenge for the History of Science, Technology, and the Environment* in NTM, 2016, 24, 309-335; J. Carruthers, *The Anthropocene* in South African Journal of Science, 2019, 115(7-8), 1

[2] H. Trischler, *The Anthropocene: A Challenge for the History of Science, Technology, and the Environment*, cit. 309-335

[3] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, 1st edn., Oxford, Oxford University Press, 2019, 1044-1045

obligations, among which it is possible to mention the right to life[4], health[5], dignity[6] and so on. It is worth to mention that the Portuguese Constitution of 1976 was the first one to ever include the constitutional protection of environmental rights, as set out in Article 66: '*Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it*'[7]; furthermore, Article 66 additionally establishes that it is up to the state to ensure the right to environment via ad hoc bodies.

The world trend known as '*Global Environmental Constitutionalism*', concept that can be attributed to Louis J. Kotzé, consists in expressing the environmental *care* in constitutional language[8]. This recent phenomenon was further reiterated and investigated by James R. May and Erin Daly[9], and is the combination of international, constitutional, environmental and human rights law[10]. Tellingly, global environmental constitutionalism, which investigates the constitutional inclusion, adjudication and implementation of environmental prerogatives, obligations, policies and accountability, does not exclusively acknowledge the simple right to a safe environment. And indeed, many constitutional Charters have been revised so as to include broader rights to participation, information, justice, climate and sustainable development[11].

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[4] Belgium Constitution, Title II, art. 23(4): '*Everyone has the right to lead a life in keeping with human dignity* [including] *the right to enjoy the protection of a healthy environment*'

[5] The Constitution of the Kingdom of Norway, [Section] E., art. 112: '*Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained*'

[6] Kenya Constitution, Ch. II, artt. 10(2) (b) – (2)(d): '*The National values and principles of governance include*: […] *human dignity*, […] *sustainable development*'

[7] Constitution of the Portuguese Republic of 1976, Ch. II 'Social Rights and Duties', art. 66 'Environment and quality of life'

[8] L.J. Kotzé, *Arguing Global Environmental Constitutionalism* in Transnational Environmental Law, 2012, 1:1, 208

[9] J. R. May, *Making Sense of Environmental Human Rights and Global Environmental Constitutionalism* in E. Techera, J. Lindley, K.N. Scott, A. Telesetsky (eds.), *Routledge Handbook of International Environmental Law*, 2nd edn., Routledge, Abingdon – New York, 2021, Ch.6

[10] J. R. May, E. Daly, *Six Trends in Global Environmental* Constitutionalism, 20 September 2018, in Environmental Constitutionalism: Impact on Legal Systems?, Peter Lang Pub Inc (ed.), forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252636. Interestingly, Global Environmental Constitutionalism encompasses six trends, namely: (i) – (ii) the inclusion of references to climate change and sustainability in the constitutional texts; (iii) the new understanding of nature as having legal personality; (iv) the new linkage between environmental rights and dignity rights; (v) the growing importance of environmental constitutionalism at the sub-national level; (vi) the emergence of new constitutional rights such as information, participation and access in environmental matters.

[11] J. R. May, *Making Sense of Environmental Human Rights and Global Environmental Constitutionalism* in E. Techera, J. Lindley, K.N. Scott, A. Telesetsky (eds.), *Routledge Handbook of International Environmental Law*, cit. Ch.6

The inclusion of different provisions concerning environmental protection in national constitutions becomes a powerful tool for establishing obligations with respect to the environment, as well as compliance mechanisms. At the same time, national courts retain the authority to conduct judicial review in matters related to environmental protection, as enshrined in many Constitutions to the present day[12]. Remarkably, it is estimated that in one hundred and forty-eight of the one hundred and ninety-six modern national Charters there is a certain kind of environmental constitutionalism[13], with reference been made to environmental rights as such or other types of duties and responsibilities[14]. As a result of the trend, in 2020 the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment declared that more than eighty percent of UN Member States, and more precisely one hundred and fifty-six out of one hundred and ninety-three, recognize the human right to a sound environment[15]. Such a rapid and significant spread of ecological rights and constitutional provisions for environmental preservation over the last decades is an important indicator of a major change in cross-cultural understanding of the importance of environmental care[16].

In this chapter, the rise and affirmation of environmental constitutionalism will be investigated, with a particular attention to scholars' theories and findings. At the end, as a confirmation of the affirmation of such a trend especially in the European Union, the national Constitutions of those states having entered the European Union in more recent times will be analyzed.

1.2. Environmental Constitutionalism: theories and categorizations

[12] E. Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process* in International Journal of Peace Studies, 2012, 17:2, 73
[13] R. O'Gorman, *Environmental Constitutionalism: A Comparative Study* in Transnational Environmental Law, Cambridge University Press, 2017, 6:3, 435
[14] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1055
[15] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/43/53, 2020, available at: https://undocs.org/en/A/HRC/43/53, accessed 5 June 2021
[16] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1055

In the context of the analysis of environmental constitutionalism, particularly relevant is what David R. Boyd refers to as a '*environmental rights revolution'* that took place between the end of the XX century and the beginning of the XXI century, according to which countries and governments are now addressing the question of climate change and environmental degradation in various ways, linking the issue to human rights and including it within national constitutions[17]. This increasing trend can be traced back to the Italian Constitution of 1947, in which a reference is made to the protection of natural landscapes[18], and had its momentum in the last few decades. Interestingly, those constitutional changes that were implemented so as to embrace environmental protection and the related rights vary from individual groups of amendments to a fully-fledged substitution of previous constitutional norms with new ones[19].

Unsurprisingly, there are some factors favoring the adoption of constitutional provisions for environmental protection. For instance, May and Daly argue that countries with constitutional Charters acknowledging and protecting economic, social and constitutional rights, are more willing to include the substantive right to a sound environment[20]. At the same time, Joshua C. Gellers proposes a research based on three elements:

(i) the probability of the constitutional recognition of environmental rights is '*directly associated with its domestic political conditions and structures, and indirectly associated with the international normative context in which its constitution is written*';

(ii) there is a better chance of adopting constitutional environmental rights in those countries symptomatic of poor human rights backgrounds;

(iii) the proximity to countries with a constitutional tradition of environmental rights does not represent a determinant factor in this context[21].

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[17] D. R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the* Environment, UBC Press, Vancouver, 2012, 3

[18] Constitution of the Italian Republic, Fundamental Principles, Art. 9: '*The Republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the Nation*'

[19] R. O'Gorman, *Environmental Constitutionalism: A Comparative Study*, cit. 441

[20] J. R. May, *Making Sense of Environmental Human Rights and Global Environmental Constitutionalism* in E. Techera, J. Lindley, K.N. Scott, A. Telesetsky (eds.), *Routledge Handbook of International Environmental Law*, cit. Ch.6

[21] J. C. Gellers, *The Global Emergence of Constitutional Environmental Rights*, London, Routledge, 2017, 1st edn., 19

For the purpose of the analysis of environmental constitutionalism, a reference is made to the categorization mentioned by Roderic O'Gorman, according to which the one hundred and forty-eight modern Constitutions that show environmental constitutionalism are divided into three broad categories: (i) crisis change; (ii) regime consolidation; (iii) non-crisis change[22].

It is commonly recognized that crisis periods highly contribute to constitutional change, or even are the reasons behind it. Indeed, according to Nathan J. Brown, the urge to adopt new constitutions is often felt in tumultuous times and it is precisely in moments of political crisis that '*fundamental political structures*' are modified, refined or superseded[23]. In particular, ninety-seven of the one hundred and forty-eight constitutions that include the environmental provisions belong to this first category.

The second driver of change to be taken into account, namely regime consolidation, consists in the alteration '*to governmental structures by non-democratic rulers*'[24]. Sometimes the adoption of a new constitution at such a clearly sensitive moment may show the intention of a political changeover, which may consist in a real shift towards democratic structures or simply in a phase of consolidation of a constitutional regime. Precisely, twenty-five states fall into this second category of regime consolidation, and for instance it is possible to mention the Gulf Countries, or one-party states such as China and Vietnam, which nevertheless adopted constitutional provisions for environmental protection[25].

Finally, twenty-six of the one hundred and forty-eight Constitutions here considered come under the category of non-crisis situations. To give but one example, according to Article 21 of the Dutch constitution, which was amended in 1983, the State

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[22] R. O'Gorman, *Environmental Constitutionalism: A Comparative Study*, cit. 441

[23] N. J. Brown, *Reason, Interest, Rationality, and Passion in Constitution Drafting* in Perspective in Politics, 2008, 6:4, 681-682

[24] R. O'Gorman, *Environmental Constitutionalism: A Comparative Study*, cit. 443

[25] J. A. Cohen, *China's Changing Constitution* in The China Quarterly, 1978, 76, 794-841, https://www.jstor.org/stable/652647?seq=1#metadata_info_tab_contents [Accessed: 4 June 2021]; Constitution of the Socialist Republic of Vietnam of 1992. It shall be noted that the People's Republic of China's Constitution of March 5th, 1978, included some sort of environmental constitutionalism. Indeed, art. 11 explicitly recognizes that '*the state protects the environment and natural resources and prevents and eliminates pollution and other hazards to the public*'. At the same time, Vietnam apparently adopted environmental constitutionalism in the Constitution of 1992. As a confirmation of this, art. 29 provides that '*State organs, units of the armed forces, economic and social bodies, and all individuals must abide by State regulations on the rational use of natural wealth and on environmental protection. All acts likely to bring about exhaustion of natural wealth and to cause damage to the environment are strictly forbidden*', while art. 112.5 establishes that the government must '*take measures […] to protect the environment*'.

has an obligation '*to keep the country habitable and to protect and improve the environment*'[26].

In the analysis of Professor Richard P. Hiskes, the type of constitutional change known as environmental constitutionalism meets the criteria of constitutionalism to the extent that it shapes and promotes the creation of a political community delimited by geographical boundaries of soil and water, helps characterize a common cultural identity and lasts through generations[27]. The environment is thus of considerable importance for the political community, but it is nonetheless threatened by human activities. Consequently, a major role is played by judges and national courts. Also, it is foreseeable that the importance of environmental claims will be better understood by local judges coming from a given political community that shares a common culture.

Another element of his analysis reflects on the fact that constitutions protect the cultural identity and common values of a community; from this it follows that the environmental debate will be constitutionalized differently among the various nations. In this way, each country will give precedence to different priorities and address environmental protection according to its own urgency, necessity, and calculation.

Finally, concerning the intergenerational aspect, Hiskes acknowledges that the present generation has extensively used natural resources and likewise caused environmental degradation in many ways, therefore it is precisely the future generations which are less likely to benefit from environmental rights. As a consequence, environmental constitutionalism and the limits – in addition to the benefit – arising therefrom represent the best way to tackle environmental damage and guarantee the enjoyment of environmental rights to the generations to come.

1.2.1. External Factors

Tellingly, those factors belonging to and shaping environmental constitutionalism are both of an external and internal nature. Concerning external factors, it goes without saying that, over the last few decades, legal concepts, sets of policies and new principles of legal

[26] Constitution of the Kingdom of the Netherlands of 2008, Chapter 1 'Fundamental Rights', art.21

[27] From now on, reference will be made to: R. P. Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*, 1st edn., Cambridge, Cambridge University Press, 2008, 133

thought have quickly spread between countries in a variety of ways. Roderic O' Gorman additionally recognizes and analyzes four networks of cross-border influence, namely (i) coercion; (ii) competition; (iii) learning or persuasion; (iv) acculturation or emulation[28]. He eventually affirms that the last two networks of cross-border influence have definitely been more influential with regard to the rise and establishment of environmental constitutionalism that the first two.

As regards coercion, in international relations the most powerful and influential states can exercise a strong influence over less powerful or developing states by means of a broad range of expedients, such as foreign aid and foreign assistance. This may lead the less powerful states to adopt some precise constitutional amendments and arrangements. International organizations can similarly exercise coercion over Member States in the context of constitution building. For instance, the European Union and the obligations under EU Treaties may result in the necessity for Member States to pass precise constitutional amendments in order to align their constitutions to EU standards and fulfil their Community obligations. Currently, according to Gellers there is no certainty that coercion has been the main and only driver of environmental constitutionalism, or at least it is no more relevant than subsidiary environmental legislation[29]. It remains however true that such a channel of cross-national influence has highly contributed to the passing of environmental legislation at the international level. As a confirmation of this, David J. Frank, Ann Hironaka and Evan Schofer have emphasized the major significance of the World Bank in influencing and boosting the adoption of legislation concerning environmental impact analysis[30]. But nonetheless, in order to observe the principle of national sovereignty enshrined and expressed by domestic constitutional charters, the World Bank cannot and is unwilling to lay down any sort of conditions that could breach or be inconsistent with national constitutions.

Competition between states and the effort to appeal to foreign investors may result in implementing policies or extending and adapting constitutional provisions that might

[28] R. O'Gorman, *Environmental Constitutionalism: A Comparative Study*, cit. 444
[29] J. C. Gellers, *Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis* in Journal of Human Rights and the Environment, 2015, 6:1, 93
[30] D. J. Frank, A. Hironaka, E. Schofer, *The Nation-State and the Natural Environment over the Twentieth Century* in American Sociological Review, 2000, 65, 99

encourage beneficial business relationships[31]. There is evidence – although little – that competition has favored the adoption of stricter environmental standards and norms[32].

Similarly, learning and persuasion, which in intra-state relations imply a comparison between constitutional strategies, can lead to constitutional change. Predictably, international non-governmental organizations (NGOs) play a role in promoting environmental constitutionalism. Interestingly, their contribution can be envisaged in the adoption of the new Ecuadorian Constitution. In fact, the Community Environmental League Defense Fund (CELDF) made a significant contribution to the process of adopting four important provisions related to the environment, the most important of which is Article 71(1) that clarifies the definition of a right of environment[33].

Finally, in the framework of constitutional change acculturation and emulation imply a dynamic of change that is not the result of coercion and pressure, but rather consists in trying to be in line with donor countries and international organizations' desires and expectations in the hope of gaining social rewards and 'democratic credentials' arising from international recognition[34]. According to Frank, Hironaka and Schofer, states today can promote *'world cultural institutions'* such as global institutions dealing with environmental issues[35], and therefore acculturation occurs regardless of the fact that those countries introducing environmental legislation are necessarily facing particular environmental troubles or not. The Constitution of Romania is a clear example of this acculturation of constitutional articles; in particular, according to Gheorghe I. Ionita, Article 35 of the 2003 Charter was the result of a compelling need to align the Romanian domestic legislation to EU standards before entering the European Union[36], as it will be shown later in the text. Regarding emulation, it is a consequence of constitutional globalization and happens when countries and national courts follow the

[31] D. Law, M. Versteeg, *The Evolution and Ideology of Global Constitutionalism* in California Law Review, 2011, 99:5, 1175

[32] D. Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy*, 1995, Harvard, Harvard University Press, cited in R. O'Gorman, *Environmental Constitutionalism: A Comparative Study*, cit. 446

[33] Constitution of the Republic of Ecuador, art. 71(1): '*Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution*'

[34] V. Hart, *Democratic Constitution Making*, United States Institute of Peace, 2003, Special Report n.107

[35] J. Frank, A. Hironaka, E. Schofer, *The Nation-State and the Natural Environment over the Twentieth Century*, cit. 99

[36] G.I. Ionita, *The Fundamental Right to a Healthy and Ecologically Balanced Environment: Romanian Particularities of Recognition and Guarantee* in Law Review, 2012, 2, 12

example of and imitate the manner in which other countries deal with analogous constitutional matters[37].

1.2.2. Internal Factors

Although highly influential, it is no surprise that the rise and development of environmental constitutionalism cannot be explained by external factors alone. And indeed, another major contribution is given by domestic factors. For instance, the existence or absence of political leadership greatly influences a country's path towards environmental constitutionalism. This can be seen in the *Charte de l'environnement* appended to the French Constitution on February 28th, 2005. Already in 2002, President Jacques Chirac manifested his will to set up a French environmental charter of constitutional rank by virtue of which environmental protection would have prevailed over ordinary legislation, so that the principles of a '*humanist ecology*' became one of the core values of the French Republic[38].

Another relevant role is played by national NGOs which, in the event of constitutional review or constitution building process, manage to mobilize support for – or resistance to – precise amendments[39]. Furthermore, NGOs can broaden the public debate on environmental constitutionalism and testify to the great value placed on environment and its legal protection by individuals and communities. Thomas Bernauer and Ladina Caduff show that in those situations where there is strong mobilization and general interest for a specific subject – in this case, environmental protection – NGOs have a concrete possibility to influence and shape policy in relation to that very same subject[40]. To cite an example, at the moment of the constitutional review of the Basic Law following the Reunification of Germany, social movements, public opinion and political parties – in particular the German Green Party, Bündnis 90/Die Grünen –

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[37] G. J. Jacobsohn, *Constitutional Values and Principles* in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 1st edn., Oxford University Press, Oxford 2012, 789

[38] J. Chirac, *Discours de Jacques Chirac, candidat à la présidence de la République, le 18 mars 2002 à Avranches* in *Revue Juridique de l'Environnement*, *numéro spécial*, 2003, 'La charte constitutionnelle en débat', 89 – 97, www.persee.fr/doc/rjenv_0397-0299_2003_hos_28_1_4104 [Accessed: 3 May 2021]

[39] R. O'Gorman, *Environmental Constitutionalism: A Comparative Study*, cit. 450-451

[40] T. Bernauer, L. Caduff, *In Whose Interest? Pressure Group Politics, Economic Competition and Environmental Regulation* in Journal of Public Policy, 2004, 24:1, 105

attracted major attention to the environmental issue. Having the Joint Constitutional Commission proposed the adoption of an article dealing with environmental protection, this has moved over one hundred and seventy thousand citizens in support of such a proposal who urged to embrace *'animal protection and the preservation of fellow creatures'* in the constitutional text[41].

David Law and Mila Versteeg individuate another factor that can explain the trend for environmental constitutionalism, namely the distinctiveness of each Constitutional Charter. In particular, they discriminate between the constitutions of a '*traditional and libertarian*' nature and those of a '*contemporary and statist'* one[42]. Tellingly, they note that seven among the then existing constitutions with the stronger libertarian ideology – mostly of anglo-american origin – did not contemplate the constitutional protection of the environment. Curiously, thirty-five of the forty-eight Nations devoid of environmental constitutionalism include the United Kingdom and some countries once belonging to its colonial empire. This analysis leads O' Gorman to the conclusion that those countries with a common law legal system are less likely to embrace the principle of environmental constitutionalism, or even are hostile to it.

Finally, the last internal factor here considered is the possible presence of domestic environmental damage. According to Detlef Sprinz and Tapani Vaahtoranta there is a connection between environmental damage and the safeguard of the environment, inasmuch as without such a damage there would be no need for the legal framework for environmental protection[43]. Other scholars, on the contrary, find it highly uncertain whether such a connection is genuinely relevant. In any event, it is not surprising that factors such as rampant pollution have been instrumental in the emergence of environmental constitutionalism.

For instance, right before and immediately after the end of the communist rule in Eastern Europe, the environmental issue became a matter of public interest. This becomes particularly evident at the moment of the drafting of the new Polish Constitution in 1997, when the environmental damage provoked and eventually worsened by the PCUS became

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[41] C.E. Haupt, *The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause* in Animal Law Reviews, 2009-2010, 16:2, 219

[42] D. S. Law, M. Versteeg, *The Evolution and Ideology of Global Constitutionalism* in California Law Review, 2011, 99:5, 1223

[43] D. Sprinz, T. Vaahtoranta, *The Interest-Based Explanation of International Environmental Policy* in International Organization, MIT Press, 1994, 48:1, 79

of such a concern that individuals and NGOs urged for the adoption and enactment of specific constitutional provisions for environmental protection[44]. This influenced the drafting of:

(i) Article 5 of Chapter I, which stipulates that the Republic of Poland '*shall ensure the protection of the natural environment pursuant to the principles of sustainable development*';

(ii) Article 31 (3) of Chapter II, which foresees that the exercise of constitutional freedoms may be limited only if necessary and in specific cases, here included the protection of natural environment;

(iii) Article 74 of Chapter II, providing that: '*Public authorities shall pursue policies ensuring the ecological security of current and future generations. Protection of the environment shall be the duty of public authorities. Everyone shall have the right to be informed of the quality of the environment and its protection. Public authorities shall support the activities of citizens to protect and improve the quality of the environment*';

(iv) Article 86 of Chapter II, which specifies that every individual shall respect the quality of the environment and is accountable for potential environmental harm.

1.2.3. Further remarks and contemporary concerns

From the above it follows that, when discussing about environmental constitutionalism, the diversified nature, the purpose and the several different definitions attributed to environmental rights should be taken into proper consideration[45]. In certain cases, environmental rights are considered as belonging to the nature and as serving as protection against external aggressions. One example of this is the Ecuador Constitution of 2008, whose Article 71 affirms that *Pacha Mama*, the place within which the endless cycle of nature and life occurs, '*has the right to integral respect for its existence*'[46].

[44] R. Cholewinski, *The Protection of Human Rights in the New Polish Constitution* in Fordham International Law Journal, 1998, 22:2, 276

[45] J. C. Gellers, *The Global Emergence of Constitutional Environmental Rights*, New York, Routledge, 2017, 4

[46] It shall be noted that the Ecuadorian Constitution is the only one to the present day to acknowledge enforceable rights of nature. L. Kotzé, P. Villavicencio Calzadilla, *Somewhere between Rhetoric and*

Alternatively, in other instances environmental rights reflect '*the reformulation and expansion of existing human rights and duties in the context of environmental protection*'[47].

A further element to be considered concerns the role and responsibilities belonging to governmental authorities and non-state actors. There is no doubt that the state is traditionally deemed as acting as guarantor for citizens' rights and freedoms. As such, when it comes to the field of environmental protection, it has either a negative duty to refrain from performing acts dangerous for or representing a threat to human life and well-being, or a positive duty to protect citizens against ecological damage and hazards resulting from and associated with private and government companies, such as argued by James W. Nickel[48]. Analogously, he claims that citizens and organizations must not only avoid actions and behaviors that could produce environmental hazard, but also act for the environmental clean-up of discharge sources and eventually compensate for losses and damages suffered by victims.

Unsurprisingly, each obligation corresponds to just as many rights. Indeed, individuals and groups are entitled to protection against environmental damage and, at the same time, anyone suffering from environmental degradation has the right to seek redress before the courts and obtain justice. This complexity in terms of rights and obligations leads to the conclusion that environmental rights require and provide for effective legal instruments of protection and guarantees for individuals and groups[49]. This is even more important in the case of vulnerable and marginalized communities, especially in developing countries. Indeed, these legal mechanisms have the power to reduce the significant gap in judicial protection between rich and poor nations, at least with respect to environmental protection, and be more akin to principles of global justice[50]. One last aim pursued by environmental rights, and which will subsequently be analyzed in the chapter, attempts to the simultaneous combination of human rights protection with environmental protection from a legal point of view, based on the

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Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador in Transnational Environmental Law, 2017, 6:3, 401-33

[47] D. Shelton, *Human Rights, Environmental rights and the Right to Environment* in Standford Journal of International Law, 1991, 28, 117

[48] J. W. Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification* in Yale Journal of International Law, 1993, 18, 286

[49] J. C. Gellers, *The Global Emergence of Constitutional Environmental Rights*, cit. 5

[50] Ibid.

assumption that a degraded, polluted and unhealthy environment hinders the full enjoyment of basic fundamental human rights and freedoms.

As previously mentioned, it goes without saying that rights and duties are inherently linked. And indeed, there are several obligations arising from environmental law, as well as many are the issues that environmental constitutionalism seeks to address. Approximately half of world constitutions seek to preserve and safeguard the environment, the natural landscape or the ecological heritage by imposing different sorts of right[51]. In particular, there are cases in which the state and state actors are under explicit constitutional obligations to ensure and protect. This first option occurs in the *Grundgesetz*, the German Constitution, which provides that the State, responsible *vis-à-vis* future generations, must defend and guarantee the realm of nature and animal beings '*by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*'[52]. In other instances, the government might be entitled to give priority to environmental rights, or to place significant limitations on the enjoyments of other rights and freedoms.

As new concerns arise, today great attention is paid to the issue of sustainability, concept that suggests the need to make the best use of available natural resources in a rational way, so to enable future generations to benefit from similar conditions. As a confirmation of this, even greater emphasis is put on the 17 UN Sustainable Development Goals, and over thirty Constitutions devote proper attention to concepts such as '*future generations'*[53], '*sustainable development'*[54], '*environment favorable to the development*'[55]. This may be attributed to an ever-changing global environmental governance, according to which the international agenda is increasingly shaped by non-binding goals or environmental targets[56]. Another relevant environmental issue is that of

[51] J. R. May, E. Daly, *Judicial Handbook of Environmental Constitutionalism*, United Nations Environment Programme, Nairobi, 2017, 79-86

[52] Basic Law for the Federal Republic of Germany, Part II, art. 20a 'Protection of the natural foundations of life and animals'

[53] The Constitution of Sweden, Chapter I, art.2: '*The public institutions shall promote sustainable development leading to a good environment for present and future generations*'

[54] Belgian Constitution, Title I bis, art.7 bis: '*In the exercise of their respective competences, the Federal State, the Communities and the Regions pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations*'

[55] African Charter on the Rights of Man and Peoples, Art.24: '*All peoples shall have the right to a general satisfactory environment favorable to their development*'

[56] E. Techera, J. Lindley, K.N. Scott, A. Telesetsky (eds.), *An introduction to International Environmental Law* in Routledge Handbook of International Environmental Law, cit. Ch.1

climate change, which represents a major threat and challenge yet is not adequately addressed in the vast majority of national constitutions across the globe, but just in a few[57].

1.3. Modern Environmental Law and Public and Constitutional Law

Modern environmental law does not relate to the traditional distinction between the concepts of public or private interpretation of the law. Tellingly, in the context of environmental disputes, both private and government authorities may be held accountable for environmental damage and either required to guarantee and provide environmental public goods[58]. While it is widely acknowledged that individuals who report a breach of their constitutional rights file against public authorities, in the domain of environmental law the controversies are characterized by members of the public bringing claims against private entities, often claiming the infringement of public rights[59]. Also, several are the parties involved in the shaping of environmental law, inclusive of international institutions (e.g. United Nations Environment Programme), NGOs (e.g. Word Widlife Fund), corporate organizations, scholars, individuals and so on[60].

It is unquestionable that modern environmental law is becoming more and more regulatory, meaning that environmental norms result in '*explicit control, directing and guiding mechanisms*'[61]. These regulatory mechanisms, which were put in place since the inception of the administrative state and subsequently widened and spread over the last century, are designed to safeguard human health and the environment by means of public and administrative laws. This is motivated by a commitment to control business practices and all the other individual and collective activities which could represent possible

[57] Constitution of Tunisia, Title II, art.45: '*The state guarantees […]the right to participate in the protection of the climate*'; Constitution of the Dominican Republic, Title IX, Chapter I, art.194: '*The formulation and execution, through law, of a plan of territorial ordering that ensures the efficient and sustainable use of the natural resources of the Nation, in accordance with the necessity of adaptation to climate change, is a priority of the State*'

[58] E. Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process* in International Journal of Peace Studies, 2012, 17:2, 75

[59] Ibid.

[60] J. R. May, E. Daly, *Global Environmental Constitutionalism*, Cambridge, Cambridge University Press, 2014, 17-49

[61] O. W. Pedersen, *Environmental Law and Constitutional and Public Law* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1074

damages or menaces for public health and the natural habitat through the application of *ad hoc* laws[62]. In this context, the state is constitutionally entitled and required to afford adequate protection to nationals through different constitutional provisions, which for instance may put the state itself under an express obligation to preserve and protect the environment, such as in the Constitution of Poland[63], or which may include only a vague description of its responsibilities, for instance in the Constitution of the Netherlands[64], or which eventually constitute the legal basis for the enactment of environmental legislation, as it is the case in the Italian Constitution[65]. From this derives that the constitutional environmental rights have an impact on environmental management at the state level and somehow constrain governments to act in line with voters' preferences and desires, which in turn reflect their degree of trust in the state's ability to protect the environment[66].

In many important respects, the objectives and obligations laid down in constitutional environmental provisions show and emphasize the importance given to a particular subject and as regards the environment, constitutional texts clarify the need for addressing and reducing environmental hazard. When a national Constitution is considered the mirror of attitudes and core values of the surrounding society, those same values and priorities are reflected and embodied in its text[67]. However, constitutions are not merely the expression of a community's values: as pointed out by Richard McAdams in *The Expressive Powers of Law*, constitutional arrangements also translate into normative pressures and drivers of change in a society, and constitutionally protected environmental rights can advance, popularize and promote public involvement in environmental concerns[68]. It can be deduced that this entails the creation and adoption of environmental-related regulation, enables the establishment of environmental law mechanisms, and provides individuals with the right to judicial remedy before a court or

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[62] Ibid.

[63] Constitution of the Republic of Poland, art.68: '*Public authorities shall combat epidemic illnesses and prevent the negative health consequences of the degradation of the environment'*

[64] The Constitution of the Kingdom of the Netherlands, Ch. I, art.21: '*It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment*'

[65] Constitution of the Italian Republic, Title V, art.117: '*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations. The State has exclusive legislative powers in the following matters: […] (s) protection of the environment, the ecosystem and cultural heritage*'

[66] J. C. Gellers, *The Global Emergence of Constitutional Environmental Rights*, cit. 3

[67] C. Sunstein, *On the Expressive Function of Law*, 1996, 144, in University of Pennsylvania Law Review, 2021

[68] O. W. Pedersen, *Environmental Law and Constitutional and Public Law* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1077

a tribunal. In this regard, the constitution is not simply considered a key element for taking enforcement actions but rather can be interpreted in such a way as to lay down appropriate secondary rules and administrative measures[69].

Explicit constitutional environmental rights are becoming the norm in several modern constitutions around the world, although in reality concepts and terms may vary and the interpretation of the meaning attached to *healthy*, *favourable*, *sustainable* is not always easy and linear[70]. This stems from the recognition of the challenging nature of constitutionally protected environmental rights and from fundamental doubts as to what '*environment'* effectively implies[71]. Particularly relevant is the case of *Minors Oposa v Factoran*, which marked a milestone for environmental protection inasmuch as it recognized an intergenerational responsibility to protect and maintain a healthy environment. As underlined by Justice Feliciano:

> It is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to 'a balanced and healthful ecology.' The list of particular claims which can be subsumed under this rubric appears to be entirely open-ended[72].

It follows that knowledge and comprehension of environmental issues and thus remedies to address environmental damage are never clear or unequivocal, and therefore it is important to be *eco-pragmatic* and retain regulatory and administrative flexibility[73].

Another aspect that deserves due consideration is that the meaning attributed to principles of constitutional rank does not have universal significance across legal systems and therefore must be interpreted in accordance with the general legal context and national circumstances[74]. It is thus complex for courts to determine whether and to what extent the environment can actually be considered *healthy* or *clean* according to

[69] Ibid., 1077-1078
[70] Ibid.
[71] E. Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process* in International Journal of Peace Studies, 2012, 17:2, 75
[72] Minors Oposa v Secretary of the Department of Environmental and Natural Resources, Supreme Court of the Philippines, July 30th, 1994. Separate Opinion of Justice Feliciano
[73] O. W. Pedersen, *Environmental Law and Constitutional and Public Law* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1079
[74] C. Warnock, O.W. Pedersen, *Environmental Adjudication: Mapping the Spectrum Identifying the Fulcrum* in Public Law, 2017, 643

constitutional requirements[75]. This clarification becomes necessary if we consider that, such as previously pointed out, constitutions reflect the historical, cultural and political background of a given polity[76], and thus environmental provisions enshrined in a particular constitutional text depend on and are the result of the importance attributed to the environment and to the need of tackling environmental damage according to public perception.

When considering a polity with no written constitution, as it is the case of the United Kingdom and New Zealand, the rule is the resort to traditional primary legislation[77]. For instance, in 1995 the United Kingdom passed the Environment Act, a parliamentary act which gave recognition and legitimacy to environmental law measures put forward by public authorities. Part I of the Environment Act significantly provides for the establishment of the Environment Agency whose institutional aim is to safeguard and improve the environment; Part II lays down the criteria for classification of contaminated land and the actions needed to control the hazards posed by such contamination; Part III deals with national parks; Part IV is concerned with the cut of emissions and specifies that the Secretary of State must establish a frame of reference in terms of air quality standards; Part V eventually contains general and supplemental Provisions[78]. An interesting consideration is that, in the absence of a written constitution, the recognition of the Environment Agency by a statutory act has the purpose and the effect of legitimizing its mandate and powers. Anyway, primary legislation adopted in Common Law jurisdictions does not clearly identify the precise purpose and extension of the obligations of the agencies and of their tasks and duties, and consequently a wide margin of discretionary power is conferred to the latter[79]. And furthermore, similarly to what happens in civil law legal systems, the meaning of the adjectives that refer to and clarify the concepts of environmental *well-being* or protection is not always clear and

[75] E. Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, cit. 74

[76] D. Feldman, *The Nature and Significance of 'Constitutional' Legislation* in Law Quarterly Review, 2013, 343, 351-352

[77] O. W. Pedersen, *Environmental Law and Constitutional and Public Law* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1082

[78] For the sake of clarity, reference is made to the original version of the Environment Act of 1995, subsequently amended until October 1st, 2020. Available at: https://www.legislation.gov.uk/ukpga/1995/25/2020-10-01

[79] From now on, reference is made to O. W. Pedersen, *Environmental Law and Constitutional and Public Law* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1082-1084

obvious. Actually, a notable characteristic of environmental law is that the scope of the related legislation evolves quickly and steadily and thus such laws are the result of scientific analysis and calculation of costs and benefits. Hence the need for delegation to the agency and administrative discretion.

A further essential element of the link between environmental law and constitutional law lies in the fact that local governmental structures, instituted by means of constitutional legislation, possess the authority and discretion to determine the form and substance of environmental law. This is well-outlined in the case of the European Union, with its supranational structure of states and its body of environmental law which encompasses more than five hundred Directives, Regulations and Decisions; in the case of federal countries, like the United States or Australia, where environmental legislation drastically diverge across and is at the discretion of the states; and eventually in the case of the United Kingdom, wherein the main internal differences in terms of environmental legislation arise from the devolution settlements.

As it is widely known, the European Union enjoys solely the explicit attribution of powers and responsibilities conferred by the Member States in accordance with Treaties. The latter thus constituted the constitutional foundation for whatever initiative and legislation in the environmental field. Although the competences of which the Union benefited were already broad, they were further enhanced by means of the Single European Act of 1986, which granted the Union extensive prerogatives in the field of environmental law, and the Treaty of Lisbon of 2007, according to which 'climate change' became a specific objective of EU environmental policy[80]. From then onwards, the European Union has committed itself to put in place specific regulatory initiatives to tackle climate change, such as Directive 2003/87/EC aimed at cutting greenhouse gas emissions[81] and Directive 2012/27/EU, whose purpose was to set a common EU framework of measures for the advancement of energy efficiency[82]. However, it is significative to note that the constitutional basis of the competences enjoyed and the

[80] Treaty on the Functioning of the European Union, Title XX 'Environment', art.191 TFEU (ex-art. 174 TEC)
[81] 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 and amending Council Directive 96/61/EC (Text with EEA Relevance)
[82] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (Text with EEA relevance)

decision-making initiatives in the same way set the conditions and limits within which the Union is entitled to take regulatory measures[83].

Within the context of federal states, due attention should be paid to subnational sources, namely '*states, provinces and municipalities*'[84], and therefore to the interaction between laws passed at the national level and the existing constitutional provisions at the federal level. Tellingly, such interaction can influence and have repercussions on environmental norms and models. For instance, federal laws might obstruct or impose restrictions on state ones, or otherwise they might establish a general standard for vehicle emissions or water quality whose implementation and deployment are the responsibility of national regulatory agencies, or eventually they might impose common general parameters and objectives that will subsequently be clarified and given effect by means of specific benchmarks adopted through local laws[85].

Particularly relevant is the case of Brazil, where environmental protection is addressed in the constitutional texts of each of the twenty-six states, likewise in the general Constitution of the Federative Republic of Brazil[86]. Interestingly, the Constitution of the state of Mato Grosso identifies and promotes both substantive and procedural environmental rights and recognizes a special obligation and responsibility to safeguard the environment for the sake of present and future generations[87].

The case of the United States is equally important, inasmuch as it shows the very subtle borderline between success and failure of environmental constitutionalism in federal systems. Indeed, while it remains true that the fundamental law of the federal system, the Constitution of the United States of America, still does not cover environmental rights, it is worth recognizing that forty-six states address environmental protection and environmental concerns in their national constitutions in widely differing ways and with different purposes, and in five of them environmental protection is further considered one of the overriding objectives and policy priorities[88]. Tellingly, the

[83] O. W. Pedersen, *Environmental Law and Constitutional and Public Law* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1085-1086
[84] J. R. May, E. Daly, *Judicial Handbook of Environmental Constitutionalism*, cit. 87
[85] O. W. Pedersen, *Environmental Law and Constitutional and Public Law* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1086
[86] Constitution of Brazil of 1988 with amendments through 2015: art.5(LXXIII); art.23(VI); art.24(VI)(VIII); art. 170(VI); art.174(§3°); art.186(II); art.200(VIII); art.220(§3°)(II); art.225; art.231(§1°)
[87] J. R. May, E. Daly, *Judicial Handbook of Environmental Constitutionalism*, cit. 87
[88] J. R. May, E. Daly, *Judicial Handbook of Environmental Constitutionalism*, cit. 88-89

Constitution of the Commonwealth of Pennsylvania incorporates one of the most exhaustive environmental right provisions of the world, which even predates the Stockholm Conference of 1972[89]. Article 1, Section 27 foresees that:

> The people have a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people[90].

Finally, shifting focus to common law systems and especially to the United Kingdom, we have yet further evidence of the way governmental structures influence public and environmental law. Particularly significant here is the fact that devolution settlements have caused several discrepancies between states in a number of ways, for instance with regard to unequivocal standards, organizational arrangements, facilitation of cohesiveness, homogenization of regulation and implementation of environmental law. It follows that the specificity of environmental law and regulation essentially mirrors the will or inclination of the different UK jurisdictions[91].

After having analyzed in what manner and under what circumstances environmental law is influenced and molded by constitutional and public law, due attention should be given to the ways in which the substance of constitutional and public law is, in turn, influenced and defined by environmental law itself. In this context, it is recalled that concepts of public engagement, public information and public involvement, which are key to environmental law, have been and still are put into practice by a wide set of legislative tools, juridical instruments and jurisdictional authorities and have been consolidated in the public administration[92]. For instance, it is appropriate to mention the 1998 Aarhus Convention, the 1992 Rio Declaration and, less recent but equally important, the 85/337/EEC *Directive on the assessment of the effects of certain public and private*

[89] L. J. Kotzé, E. Daly, *A Cartography od Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1058
[90] For the sake of completeness, reference is made to the so-called 'Environmental Rights Amendment' of May 18th, 1971
[91] O. W. Pedersen, *Environmental Law and Constitutional and Public* Law in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1086
[92] Ibid., 1087

projects on the environment, which entitled individuals to participate and intervene in debates and decisions regarding the environment.

According to Richard Macrocry[93], it is undisputable that environmental law and regulation have succeeded in establishing '*principles and precedents that are central to a contemporary constitutional settlement*', although there is not an unequivocal connection between rules on access to information in environmental matters and an overall regime concerning freedom of speech and expression. It is also worth noting that the considerable influence of environmental law and regulation on a number of areas extends to the modalities of access to justice in different national jurisdictions as well[94]. Indeed, the opportunity to initiate proceedings is no more restricted to individuals claiming infringement of private rights and, notably, the possibility of appealing against administrative rulings concerning the environment is extended to individuals, groups, associations and organizations, also in absence of a mere private interest.

As a confirmation of this, it is important to mention the Decisions *R v HM Inspectorate of Pollution ex parte Greenpeace Ltd (No 2)* of 1994 and *R v (Edwards) v The Environment Agency* of 2004 in which an NGO on behalf of the public and an individual without a permanent address were recognized as having legal standing to challenge, respectively, an administrative authorization and a decision by the Environment Agency in judicial review. Such enlargement of the number of claimants who can challenge public decisions can be partially explained by the courts' acknowledgement of the unique character of environmental complaints and by their attempt to affirm their supervisory jurisdiction and control in light of the expansion of the state apparatus.

From the foregoing it becomes clear that the diffusion of environmental constitutionalism influenced the need for institutions responsible for ensuring compliance with environmental laws and standards and charged with upholding the rights of individuals and groups arising therefrom[95]. At the same time, institutions took important

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[93] R. Macrory, *Regulation, Enforcement and Governance in Environmental Law*, Oxford, Hart Publishing, 2nd edn., 2014, 228

[94] From now on, reference is made to O. W. Pedersen, *Environmental Law and Constitutional and Public* Law in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1087-1089

[95] P. Roch, F. X. Perrez, *International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient International Environmental Regime* in Colorado Journal of International Environmental Law and Policy, 2005, 16:1, 6

steps towards greater public participation in environmental decision-making and courts embraced the idea that a wider base of claimants in environmental disputes was needed.

Ultimately, the conclusion of this analysis is based upon the consideration that the impact and leverage of environmental law with regard to public and constitutional law have been remarkable.

1.4. The spreading of the idea of Environmental Rights as human rights

It is indisputable that there is a close connection between the enjoyment of several human rights and freedoms and the current degree of environmental quality. Certainly, environmental rights are to be considered human rights to all intents and purposes, since they are of benefit for present and future generations and any eventual damage constitutes a violation of basic human rights. And as such, many scholars maintain that linking the protection of environmental rights within broader human rights law is both necessary and beneficial, since it allows individuals to invoke and enforce their environmental rights before courts though the tools and implementation instruments of international human rights law[96].

However, whereas human rights law can be traced back to the end of the Second World War and the inception of a new legal order, the roots of environmental protection are to be found many decades later, and precisely ascribable to the Stockholm Declaration of 1972. The legal recognition of environmental protection was further strengthened with the enactment of the World Charter for Nature of 1982 by the UN General Assembly, whose purpose was to charge governments and their individuals with the responsibility to protect nature 'in its essential processes' and 'against degradation'[97]. Interestingly, the Charter is the only nature-centered legal remedy at the international level to be adopted by most world governments. For this reason, it has been highly influential in persuading the same governments to incorporate environmental human rights at the domestic level.

[96] J. R. May, E. Daly, *Global Environmental Constitutionalism*, Cambridge, Cambridge University Press, 2014, 17-49

[97] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1051

The human right to a healthy environment is widely regarded as the principle behind other environmental rights broadly speaking[98]. More specifically, the expression '*environmental human rights*' encompasses all different types of rights related to '*human-environment interests*'[99]. Over the last five decades international conferences, treaties, human rights courts and organizations of various kinds have put great emphasis on the connection between human rights and the environment, thereby attracting the public attention and keeping the focus on the issue[100].

According to May and Daly, the constitutionally protected right to a sound environment, as well as substantive and procedural environmental rights, are invoked ever more frequently by both domestic or international courts and tribunals, which have adopted the habit of acknowledging human rights to healthy and clean land, air, and water[101]. In particular, a significant aspect that is common to international, regional and domestic legal regimes concerns the great emphasis placed on the right to a *healthy* environment for living and future generations[102].

According to Boyd, human rights treaties have been adopted by around one hundred and thirty countries around the world[103]. With particular regard to Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union of 2000 maintain considerable significance. Whilst the first one does not expressly acknowledge environmental rights and interests – which instead are recognized by the European Court of Human Rights by

[98] J. R. May, E. Daly, *Judicial Handbook of Environmental Constitutionalism*, cit. 81
[99] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1045
[100] M. Orellana, *Human Rights and International Environmental Law* in E. Techera, J. Lindley, K.N. Scott, A. Telesetsky (eds.), *Routledge Handbook of International Environmental Law*, cit. Ch. 24
[101] J. R. May, E. Daly, *Global Constitutional Environmental Rights* in S. Halam, J. H. Bhuiyan, T. MR. Chowdhury et al. (eds), *Routledge Handbook of International Environmental Law*, 1st edn., Routledge, 2012, 603; J. R. May, E. Daly, *Global Environmental Constitutionalism*, 1st edn., Cambridge, Cambridge University Press, 2014, 17-49. For instance, at the cross-national regional level some bodies like the ECHR, the ECJ, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights have passed decisive judgments on cases concerning the environment
[102] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1045
[103] Ibid., 1055

means of adequate interpretation of certain provisions, such as the right to family and privacy[104] – the latter expressly foresees a legally binding environmental provision[105].

In addition to this, particularly relevant is the acknowledgment that there is an extra-territorial application of environmental rights, as generally applies to human rights more broadly[106]. Indeed, in spite of the fact that international human rights treaties, such as the European Convention on Human Rights or the ICCPR, generally foresee that it is within their own borders and jurisdictions that states parties must guarantee human rights and freedoms, it has been clarified by the European Court of Human Rights that states can be held accountable for acts or omissions that have an impact also beyond national border[107]. Hence, the conclusion that the European Convention on Human Rights can have a trans-boundary application as far as a contracting state is unable or unwilling to monitor and prevent those activities resulting in environmental damage and affecting basic fundamental rights and freedoms in surrounding nations[108].

This concept is further reinforced by the principle of non-discrimination, enshrined in Article 32 of the 1997 UN Watercourses Convention[109] and Article 15 of the 2001 Articles on Prevention of Trans-boundary Harm[110], which establishes that under

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[104] European Convention on Human Rights as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, 16, art. 8 'Right to respect for private and family life'

[105] Charter of Fundamental Rights of the European Union (2000/C 364/01), Ch. IV, art.37: '*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*'

[106] A. Boyle, *Human Rights or Environmental Rights? A Reassessment* in Fordham Environmental Law Review, 2007, 18:3, 500

[107] For instance, in the case *Loizidou v Turkey* the European Court of Human Rights stipulated that the concept of 'jurisdiction' as provided for in art. 1 of the European Convention on Human Rights is not limited to national borders. Indeed, a state can be held responsible also in the cases in which a given action results in effective control beyond national borders. Moreover, in the case of *Cyprus v Turkey* the European Court of Human Rights reiterated that international law foresees the obligation of a State to act in order to uphold the law and not to cause disproportionate damage to another party. In that particular case, the Court stated that Turkey was responsible not only for the acts of its own army corps, but also for the assistance provided to the local administration in Cyprus.
Sources: Case of *Loizidou v Turkey* [1995] ECtHR, (Application no. 15318/89); Case of *Cyprus v Turkey* [2001] ECtHR (Application no. 25781/94); European Court of Human Rights, factsheet: Extra-territorial jurisdiction of States Parties, July 2018, available at: https://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_eng.pdf [Accessed: 9 May 2021]; Draft articles on Responsibility of States for internationally wrongful acts, International Law Commission, 2001

[108] A. Boyle, *Human Rights or Environmental Rights? A Reassessment*, cit. 500

[109] Convention on the Law of the Non-Navigational Uses of International Watercourses, art. 32, G.A. Res. 51/229, Annex, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/5 1/229

[110] LC Draft Articles on Prevention of Transboundary Harm, art.15 'Non-discrimination' reads as follows: '*Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or*

international law the benefits of domestic remedies to environmental damage can possibly be enjoyed also by complainants located outside the territory in question. With reference to the Organisation for Economic Co-operation and Development (OECD), this principle entails that individuals, NGOs and even public authorities facing actual or potential risk deriving from environmental decay should be treated on an equal footing with inhabitants of the country where such damage originates[111]. Finally, relying to Article 31(3) of the 1969 Vienna Convention on the Law of the Treaties[112], it may be inferred that also the Aarhus Convention, which refers to '*the public*' or '*the public concerned'* in the broader sense, must be understood and applied in compliance with the principle of non-discrimination[113].

1.4.1. The Three Generations Theory of Human Rights

Being environmental rights perceived as human rights, reference shall be made to the Three Generations Theory of Human Rights, developed by Karel Vasak in the late 1970s; as a result of their outstanding importance, the first two generations of human rights were further contemplated in the Declaration of Human Rights of 1948[114]. According to Vasak himself, the first generation answers to the principle of liberty, the second is in accordance with the principle of equality and the third is in line with humanity or fraternity[115].

The first generation concerns *negative rights* – insofar as they are considered 'freedoms from'[116] – and thus civil and political freedoms, among which it is possible to mention the right to life, equality before the law, freedom of speech, opinion, press,

residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress'

[111] A. Boyle, *Human Rights or Environmental Rights? A Reassessment*, cit. 502

[112] Vienna Convention on the Law of the Treaties, Part III, art.31(3): '*There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties*'

[113] A. Boyle, *Human Rights or Environmental Rights? A Reassessment*, cit. 502

[114] S. Domaradzki, M. Khvostova, D. Pupovac, *Karel Vasak's Generations of Rights and the Contemporary Human Rights Dicourse* in Human Rights Review, 2019, 20, 423-443

[115] D. M. Davis, *Socio-Economic Rights* in M. Rosenfeld, A. Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, 2012, 1022

[116] D. M. Davis, *Socio-Economic Rights* in M. Rosenfeld, A. Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, 2012, 1020-1021

religion and so on. These rights have ancient roots – dating back to Magna Carta of 1297 and being incorporated also in the Bill of Rights of 1791 and the Declaration of Rights of Man and of the Citizen of 1789 – and have subsequently been codified in the International Covenant on Civil and Political Rights of 16 December 1966[117]. Interestingly enough, civil and political freedoms including the right to life, dignity, non-discrimination, freedom of expression or access to information are directly connected with environmental quality and thus can be used to assert environmental claims[118]. Also, they can be more easily brought before the courts.

The second-generation human rights, which are referred to as *positive rights*, encompass social, economic, and cultural rights. They were the result of both the progressive industrialization that took place in the nineteenth century, the twentieth century fights and the socio-economic disparities arising therefrom, and were lately codified in the International Covenant on Economic, Social and Cultural Right of 16 December 1966[119]. These rights expressly require the state to interfere and to comply with its obligations[120]. Their interest with regard to environmental protection relates to the fact that the positive rights protect basic well-being and sanitary requirements, such as the right to healthcare, food and water. According to an estimate by May and Daly, around three dozen of national constitutions link the simpler and mainstream right to water, which is traditionally constitutionally recognized, and the broader and more recent environmental rights[121].

The third generation is the most recent one and covers *collective rights* such as the right to self-determination, socio-economic development, healthy environment, and many more, for which states and the global community as a whole have a responsibility. Interestingly, reference is found in the Constitution of the Republic of South Africa of 1996, where a connection exists between individual and collective rights and a healthy, preserved and safeguarded environment. This is enshrined in Section 24, which states:

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[117] Ibid.
[118] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1064-1065
[119] C. Wellman, *Solidarity, the Individual, and Human Rights* in Human Rights Quarterly, 2000, 22, 640; D. M. Davis, *Socio-Economic Rights* in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, cit. 1020-1021
[120] D. M. Davis, *Socio-Economic Rights* in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, cit. 1020-1021
[121] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1066

> Everyone has the right to an environment that is not harmful […]; to have the environment protected, for the benefit of present and future generation, through measures that […] secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development[122].

It is argued that the third generation comprehends solidarity environmental rights as well, mentioned for instance in the Portuguese Constitution, which envisages that the right to a '*healthy and ecologically balanced human living environment*' belongs to every individual, who is also given the duty to defend it[123]. More precisely, this category recognizes a particular feature of environmental rights that, unlike others, require joint effort at the global level for effective and satisfactory implementation[124]. Unfortunately, not only the third-generation human rights are unclear and general in nature, but also it is definitely not easy to properly identify who is legally responsible for compliance with these rights and for fulfilling the related obligations[125].

According to Professor Alan Boyle, environmental rights do not pertain to just one of the abovementioned generations of human rights, but rather to all three of them[126]. From his point of view, the public and NGOs should take civil and political rights and freedoms as the basis for requiring an easier access to environmental-related information or recourse to legal remedy in the event of the breach of environmental rights, which in turn would enhance government accountability and transparency. Besides, he suggests putting the right to a healthy environment on a par with other economic or social rights set forth in the ICESCR, thus conferring equal legal status, which would therefore give environmental rights precedence over other secondary issues. Finally, the last option, which envisages a collective right to environment, would empower communities to safeguard and responsibly handle their natural resources[127]. Reference to collective rights has been made in several texts, among which it is particularly important to mention the

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[122] N. Goolam, *Recent Environmental Legislation in South Africa* in Journal of African Law, 2000, 44:1, 124-128
[123] Constitution of the Portuguese Republic, Ch. II, art. 66 'Environment and quality of life'
[124] J. C. Gellers, *The Global Emergence of Constitutional Environmental Rights*, New York, Routledge, 2017, 6-7
[125] S. Domaradzki, M. Khvostova, D. Pupovac, *Karel Vasak's Generations of Rights and the Contemporary Human Rights Dicourse*, cit. 425
[126] A. Boyle, *Human Rights or Environmental Rights? A Reassessment* in Fordham Environmental Law Review, 2007, 18:3, 471
[127] Ibid.

Stockholm Declaration of June 1972 and the Rio Declaration of 1992 that were the outcome of the first two environmental conferences, that is to say the United Nations Conference on the Human Environment of 1972 and the United Nations Conference on Environment and Development of 1992, both of which however do not come without criticism.

Although the Stockholm Declaration was not as incisive as it was initially foreseen, it is blatantly obvious that since its enactment the impact of environmental constitutionalism has been unexpected yet astounding. Gellers[128] suggests that the importance of a sound environment was firstly given constitutional recognition by Yugoslavia, soon followed by an ever-increasing number of other Countries, that started to adopt and implement legislation on environmental protection and environmental rights. This trend is remarkable because it suggests that, criticism aside, the Stockholm Declaration truly helped cultivate the idea of the environment as an essential condition for the enjoyment of human rights[129]. Indeed, it proclaims that:

> Man is both creature and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. […] Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself. [..] The protection and improvement of the human environment is a major issue which affects the wellbeing of peoples and economic development throughout the world[130].

Moreover, Principle 1 states:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Unfortunately, there is some ground for scholars to question the true effectiveness and legacy of the Stockholm Declaration and indeed, for instance, reference to this grand

[128] J. Gellers, *Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis*, cit. 75-97
[129] M. Orellana, *Human Rights and International Environmental Law* in E. Techera, J. Lindley, K.N. Scott, A. Telesetsky (eds.), *Routledge Handbook of International Environmental Law*, cit. Ch.24
[130] Declaration of the United Nations Conference on the Human Environment

statement was not made in the subsequent Rio Declaration, according to which the humankind is solely '*entitled to a healthy and productive life in harmony with nature*'[131]. But nonetheless, under the Rio Earth Summit important principles such as prevention, precaution and environmental impact assessment were drawn up[132] and eventually ended up impacting further discussions on the linkage between human rights and the environment[133]. The Rio Conference is especially interesting when considering that it led to the adoption of crucial treaties such as the Convention on Biological Diversity and the UN Framework Convention on Climate Change[134]. Also, it influenced the adoption of many different regional agreements dealing with clearly expressed or implied environmental rights, including the Arab Charter on Human Rights[135] or the ASEAN Human Rights Declaration[136].

In the opinion of Kotzé and Daly, many are the explanations that can be given when investigating why and how can human rights as such be considered relevant with regards to environmental protection[137]. First, since it is true that the aim of human rights is historically to protect and improve human beings' quality of life, it goes without saying that environmental rights are just a natural progression in terms of the extension of the types of rights invoked by individuals and guaranteed by the law. Secondly, it is increasingly evident that the quality of human life is unavoidably influenced by environmental quality and thus environmental human rights seek to guarantee, secure and improve life standards of individuals, in favour of achieving more equal living conditions. Third, environmental law, albeit become popular and increasingly taken into

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[131] Rio Declaration on Environment and Development, Principle 1
[132] Rio Declaration on Environment and Development, Principles 14 – 15 – 17
[133] M. Orellana, *Human Rights and International Environmental Law* in E. Techera, J. Lindley, K.N. Scott, A. Telesetsky, *Routledge Handbook of International Environmental Law*, cit. Ch.24
[134] E. Techera, J. Lindley, K.N. Scott, A. Telesetsky (eds.), *An introduction to International Environmental Law* in Routledge Handbook of International Environmental Law, cit. Ch.1
[135] 2004 Arab Charter on Human Rights, art. 38: '*Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights*'; art. 39: '*The States parties recognize the right of every member of society to the enjoyment of the highest attainable standard of physical and mental health and the right of the citizen to free basic health-care services and to have access to medical facilities without discrimination of any kind. The measures taken by States parties shall include the following: […] (f) Combating environmental pollution and providing proper sanitation systems*'
136 2002 ASEN Human Rights Declaration, art. 28: '*Every person has the right to an adequate standard of living for himself or herself and his or her family including: […] (f) the right to a safe, clean and sustainable environment*'
[137] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1049

consideration at the domestic and international level, is so far devoid of efficient enforcement mechanisms especially concerning multilateral agreements, as noted by Ben Cramer. He also maintains that it is more likely, as noticed so far, to observe some kind of militancy for environmental human rights at the local level through national legislation[138].

In addition to this, it is not very often that the environmental agreements heretofore signed contemplate associated courts or prosecuting authorities, or however, when these latter are covered, they are woefully underused. Curiously enough, the very same Aarhus Convention, the most widely employed and appreciated agreement, provides for a related compliance committee which has ruled on less than four-dozen cases since 1998[139]. This might depend on the fact that the Aarhus Convention does not undertake environmental preservation at first instance, but rather aims at safeguarding procedural environmental rights which, for their part, safeguard civil and political ones.

It is remarkable that the Anthropocene and '*the growing sense of human and environmental crisis underpinning the global realities of the late twentieth and early twenty-firs centuries*' are increasingly believed to have a major role in this regard[140]. Due to the ever-growing and massive human impact on the planet and major global crisis such as climate change, displacement of people for environmental reasons and all the related problems, it is no longer possible to ensure, protect and satisfy the enjoyment of human rights and freedoms. As a consequence, given their fundamental role of 'a*pex juridical instruments*'[141], environmental human rights translate into extensive and vigorous attempts to introduce more severe regulations in a bid to tackle the negative human impact and the associated crisis in the Anthropocene era.

1.4.2. Substantive and procedural environmental rights

[138] B. W. Cramer, *The Human Right to Information, The Environment and Information About The Environment: From the Universal Declaration to the Aarhus Convention* in Communication Law and Policy, 2009, 14:1, 73-86

[139] The Aarhus Convention is applicable to both EU Member States and to non-EU Member States as far as they ratify it. It follows that the Convention could have had a wider impact. For the sake of consistency, see A. Grear, L. J. Kotzé, *Research Handbook on Human Rights and the Environment*, 353-76

[140] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, cit. 1050

[141] Ibid.

In the context of the analysis of environmental rights, a main division is made between substantive environmental rights and procedural environmental rights. According to Mark Halsey and Rob White, substantive and procedural environmental rights recall an anthropocentric perspective by which nature is '*something to be disposed of in a manner which best suits the immediate interests of human beings*'[142]. They also make reference to ecological rights, a concept that echoes a biocentric perspective according to which '*non-human species have intrinsic value, that is, they possess a moral worth*'. In Boyd's opinion, procedural and substantive environmental rights are mutually complementary and integrate each other[143], meaning that they have comparable objectives and purposes and use similar tools to achieve common aims, namely the safeguard of local natural heritage[144].

With regard to substantive rights, a reference can be made to the right to live in a healthy environment, which presupposes the fundamental access to natural resources; conversely, procedural rights ensure the access to environmental information, the involvement in decisions concerning the environment and the possibility to bring proceedings before a court or to gain access to remedial actions[145]. Tellingly, it is generally recognized that substantive rights are self-executing and therefore directly applicable, but also unlikely to be subject to political shift or constitutional amendments[146]; thus, it follows that they are the most reliable way of ensuring appropriate legal protection of the environment.

In the opinion of May and Daly, these characteristics satisfactorily explain why substantive rights are the most commune and appreciated branch of environmental constitutionalism[147]. Following the Stockholm Declaration, the substantive right to a healthy environment has been embodied in several constitutional Charters, ninety-nine

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[142] M. Halsey, R. White, *Crime, ecophilosophy and environmental harm* in Theoretical Criminology, 1998, 2, 345–371, cited in A. Brisman, *Environmental and Human Rights* in Encyclopedia of Criminology and Criminal Justice, 2014, 1345-1346

[143] D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, Vancouver, U.B.C. Press, 2012, 66-67

[144] E. Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process* in International Journal of Peace Studies, 2012, 17:2, 73

[145] A. Brisman, *Environmental and Human Rights*, cit. 1344

[146] J. R. May, E. Daly, *Judicial Handbook of Environmental Constitutionalism*, cit. 81

[147] J. R. May, E. Daly, *Global Environmental Constitutionalism*, 1st edn., Cambridge, Cambridge University Press, 2014, 64

for the accuracy according to an estimate by Boyd[148], while others are still devoid of such an explicit and unequivocal right. Where an express reference lacks, constitutional and apex courts have succeeded in relating environmental rights to other substantive rights and constitutional protections, first among many the right to life[149]. Examples of substantive rights can be found, for instance, in the Norwegian Constitution, which establishes the right to 'an environment that is conducive to health'[150], or in the Spanish Constitution, which states the right to '*enjoy an environment suitable for the development of the person*'[151].

Turning to procedural environmental rights, it is interesting to note that over the last three decades such rights have been embodied in the constitutional charters of three dozen countries with the purpose to integrate and complete other norms[152]. In particular, the relevance of procedural rights as legal instruments is shown by the fact that they facilitate and contribute to uphold complaints with regard to substantive rights so to ensure compliance with them[153]. Particularly noteworthy here is Principle 10 of the Rio Declaration, which reads as follows:

> Environmental issues are best handled with participation of all concerned citizens […] At the national level, each individual shall have appropriate access to [environmental] information […] that is held by public authorities […] and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 10 has been influential for the adoption of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters – or Aarhus Convention – of 1998, which grants many important environmental rights to the public and establishes that the Parties shall take the necessary

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[148] D. R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*, cit.
[149] J. R. May, E. Daly, *Judicial Handbook of Environmental Constitutionalism*, cit. 81
[150] Constitution of the Kingdom of Norway, art. 112
[151] Spanish Constitution, Ch. III, art. 45
[152] J. R. May, E. Daly, *Judicial Handbook of Environmental Constitutionalism*, cit. 83
[153] L. J. Kotzé, E. Daly, *A Cartography of Environmental Human Rights* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 1062

measures as to effectively guarantee such rights[154]. The Aarhus Convention interestingly provides for three pillars that deal with access to environmental information, public participation in environmental decision-making and access to justice in environmental matters.

With regard to the pillars of the Convention, the first one foresees that environmental information must be freely distributed by public authorities. Moreover, when a member of the public decides to exercise his or her right to information, which does not require any justification, accurate information shall be provided no later than a month following the request[155]. Public participation in environmental decision-making, the second pillar, allows those concerned by environmental matters or decisions, whether it is the public or NGOs, to give opinions and judgments which shall be taken into careful consideration by public authorities and included when making a final decision[156]. A well-known example is provided by the 2004 French Charter of the Environment that, as we have seen earlier in the chapter, has subsequently been embedded into the constitutional bloc, which establishes that everyone has the right to access environmental-related information and to participate in the decision-making process[157]. Finally, the third pillar allows interested parties to oppose any action and decision taken without strictly adhering to the first two rights or found to be inconsistent with environmental law as such, by means of resort to civil mediation or appeal to courts[158].

It follows that these procedural environmental rights are crucial as a way of increasing awareness, guaranteeing and promoting public participation and democracy through the exchange of ideas, ascertaining state liability and enhancing the lawfulness and loyalty of governmental action. As an example, it is possible to mention the Constitution of the Czech Republic, which at Article 35(2) entitles to '*timely and complete information about the state of the environment'*, or the Constitution of Finland, whose Section 20 of Chapter 2, titled '*Responsibility for the environment'*, establishes the

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[154] Website of the European Commission, The Aarhus Convention. Available at: https://ec.europa.eu/environment/aarhus/ [Accessed: 5 May 2021]
[155] Ibid.
[156] Ibid.
[157] 2005 Charte de l'environnement, art.7: '*Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decisions-taking process likely to affect the environment*'
[158] Website of the European Commission, The Aarhus Convention. Available at: https://ec.europa.eu/environment/aarhus/ [Accessed: 5 May 2021]

right to a healthy environment in respect of which anyone is responsible and that must be guaranteed by public authorities.

Procedural environmental rights are further included in another classification of environmental rights, namely the one made by Luis E. Rodriguez-Rivera, who recognizes three elements, each with a different purpose: environmental procedural rights, the right of environment and the right to environment[159]. In the context of his analysis, the right of environment is said to be the most radical one, inasmuch as it attributes a value to the environment as such and recommends that it should be legally protected. This is at odds with the right to environment which does not ascribes value and protection to the environment, but rather recognizes a right which belongs to every human being and stems from the recognition that the environment is crucial for the humankind and its well-being. This last right was eventually acknowledged in the Stockholm Declaration, as mentioned earlier in the paragraph.

1.5. Environmental provisions in the EU Treaties

The European Union has attached outstanding importance to the protection of the environment, which has been given increasing attention and has contributed to the expansion and progression of the Union's legal body. It is therefore important to highlight the contribution given by EEC/EU Treaties at early stages during the 1960s and 1970s. Indeed, although according to Laurens J. Brinkhorst the first measures in the field of environmental protection in the EU were *'incidental'*, '*responsive*' and '*unarticulated*', an interest in environmental issues was emerging[160].

Given the lack of *ad hoc* treaty provisions, the legal basis which could enable the Council to act in the environmental sphere was Article 100 of the Treaty Establishing the European Economic Community (EEC Treaty), on the basis of which the Council could issue directives for the harmonisaation of statutory and administrative provisions undertaken by Member States which affect or impair the well-functioning of the common

[159] L. E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized under International Law? It Depends on the Source*, in Colorado Journal of International Environmental Law & Policy, 2001, 12:1, 9–16

[160] E. Orlando, *The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges* in Transworld, 2013, 21, 3

market[161]. Also, the Council could take full advantage of provisions regarding the fostering of '*harmonious development of economic activities*', '*raising the standard of living*' or '*improvement of the living and working conditions*'[162].

For the sake of consistency, the process that effectively led to the acknowledgment of the need of a satisfactory common environmental policy dates back to 1972, in the period immediately following the first UN Conference on the Environment held in Stockholm, when the European Council solicited the first Environmental Action Programme[163]. However, it was not until the Single European Act of 1987 that EU environment policy was placed on a legal footing[164]; its 'Title VII Environment' is indeed devoted to actions to be undertaken in the context of environmental protection. According to Article 130r-t, the Council was entitled to dispose of particular competences and powers in the field of environmental policy, while actions by the Community became based on the following threefold objectives:

> to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; to ensure prudent and rational utilization of natural resources[165].

In addition, key principles underpinning environment action such as '*preventive action'*, '*environmental damage rectified at source*' and '*polluter pays'* were introduced for the first time. It may be concluded that the adoption of such an unequivocal environmental legal basis was a great breakthrough in the field of EU environmental policy. Subsequently, with the 1992 Treaty of Maastricht and the 1997 Treaty of Amsterdam, the Single European Act, and particularly the Environment Title, did not undergo any major change[166].

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[161] Treaty Establishing the European Economic Community (EEC), art. 100: '*The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or functioning of the Common Market*'

[162] E. Orlando, *The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges*, cit. 3

[163] Christian Kurrer, Environment policy: general principles and basic framework, 05/2021, https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework [Accessed: 19 May 2021]

[164] Ibid.

[165] Reference is made to art.130 r-t of the Single European Act, today replaced by artt. 192-193 TFEU

[166] E. Orlando, *The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges*, cit. 6

More accurately, the signatory states of the Treaty of Maastricht committed themselves to reinforcing cohesion and environmental protection and the environment finally became a policy area of the European Union. In accordance with Article 3 of the Treaty[167], it was the first time that '*a policy in the sphere of the environment'* was included amongst the activities of the Community. Also, pursuant to Article 2, it was the first time as well that the '*sustainable […] growth respecting the environment*' became a goal to promote throughout the Community[168]. Although it was argued that the meaning given to '*sustainable growth*' in this last provision could have been controversial and susceptible to varying interpretations, the fact remained that such an effort to broaden the scope and enhance the effectiveness of environmental provisions was a major change in European Union's general attitude towards environmental protection[169]. In addition to this, the new Article 130r of '*Title XVI – Environment*' of the Treaty of Maastricht reiterated the threefold objectives of Community's action laid down in the Single European Act, plus introduced another one, namely '*promoting measures at international level to deal with regional or worldwide environmental problems*'[170]. Furthermore, co-decision procedure and qualified majority voting, instead of unanimity, in the Council were further incorporated, thereby removing the veto power and consolidating and reinforcing the effectiveness of European Parliament's action in the context of environmental policy[171]. It is ultimately important to emphasize here the symbolic significance of the '*Declaration by the Member States on Assessment of the Environmental Impact of Community Measure*s' eventually annexed to the Treaty, which was intended to reiterate and underline the outstanding value attached to the environmental commitments[172].

Very importantly, with the Treaty of Amsterdam greater weight was placed on the principle of environmental integration, which eventually came under Article 6, namely in

[167] Treaty on European Union, art. 3: '*For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set aut therein: […] (k) a policy in the sphere of the environment*'
[168] Treaty on European Union, art. 2: '*The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities refened to in Articles 3 and 3a, to promote throughout the Community a […] sustainable and non-inflationary growth respecting the environment*'
[169] A. M. Farmer (ed), *Manual of European Environmental Policy*, 2012, London, Routledge, 3
[170] Treaty on European Union, art. 130r(1)
[171] A. M. Farmer (ed), *Manual of European Environmental Policy*, cit. 3
[172] Ibid.

the very section which delineates the main principles of the Union's policy[173]. Additionally, Article 2 of the Treaty established that, among its many purposes, tasks and objectives, the Community had '*to promote […] a high level of protection and improvement of the quality of the environment*'[174]. Meanwhile, Article 3c foresaw the integration of environmental protection into all of the sectoral policies of the European Union and eventually focused on the promotion of sustainable development among EU objectives[175]. Also, the new codicil 2 of Article 130r established that:

> harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure[176].

Moreover, as referred to in Article 174, the Community could use legal powers afforded to it under the Treaty to take concrete action in the field of environmental policy[177]. Finally, it is highly significant that the Commission was requested to '*prepare environmental impact assessment studies when making proposals which may have significant environmental implications'* in accordance with the Declaration attached[178].

Reference should ultimately be made to the Treaty of Lisbon as well. Come into force in 2009, it consists of a range of amendments to the Treaty on European Union and the Treaty establishing the European Community, the latter of which was renamed and is today known as the Treaty on the Functioning of the European Union. The novelty

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[173] E. Orlando, *The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges*, cit. 6

[174] Treaty of Amsterdam, art. 2 reads as follows: '*The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community […] a high level of protection and improvement of the quality of the environment*'

[175] Treaty of Amsterdam, art. 3c: '*Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development*'

[176] For the sake of completeness, Treaty of Amsterdam, art. 130r(2) reads: '*Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure*'

[177] Treaty of Amsterdam, art. 174, now art.191 TFEU

[178] A. M. Farmer (ed), *Manual of European Environmental Policy*, cit. 4

introduced by the Treaty of Lisbon mainly concerns the fact that first, the Union was given a certain competence in the field of energy policy and investments and second, the co-decision procedure was applied to other key areas such as agricultural policy, energy, transport[179]. It is eventually important to note that Article 46A afforded the Union legal personality on the basis of which it is now entitled to conclude international agreements[180]. Besides, it was stipulated in Article 2 that the European Union had to achieve a sustainable development of Europe based, among many, on '*a high level of protection and improvement of the quality of the environment*'[181]. This provision was further reiterated in and strengthened by the General Provisions on the Union's External Action laid down in Article 10(a), which required the Union to define common policies and actions devoted to the achievement of specific goals, amongst which:

> (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; […] (f) 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[182].

With regard to the specific amendments, the Treaty of Lisbon provided for a new Title 1 concerning '*Categories and Areas of Union Competence'* and a new related Article 2C which introduced the shared competence between the Union and the Member States on a number of areas, environment included[183]. It also amended Article 174, by making reference to the promotion of '*measures at international level to deal with regional or*

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[179] E. Orlando, *The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges*, cit. 13

[180] Christian Kurrer, Environment policy: general principles and basic framework, 05/2021, https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework [Accessed: 19 May 2021]

[181] Treaty of Lisbon, art.2(3): '*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*'

[182] Treaty of Lisbon, art.10A(2): '*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: […] (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; […] (f) 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*'

[183] Treaty of Lisbon, art. 2C(2): '*Shared competence between the Union and the Member States applies in the following principal areas: […] (e) environment*'

worldwide environmental problems, and […] climate change'[184], and introduced a new Article 176A on the basis of which the Union policy on energy shall pay particular attention to the preservation and improvement of the environment[185].

Today, the functioning and structuring of EU environmental policy relies on the provisions laid down in Articles 11 and 191 – 193 of the Treaty on the Functioning of the European Union. Article 11 TFEU (ex art. 6 TEC), included among 'Provisions Having General Application' under Title II, reads:

> Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

At the same time, Articles 191, 192 and 193 TFEU (respectively ex. artt. 174, 175 and 176 TEC), belong to Title XX titled 'Environment'[186]. Read together, the first two Articles focus on the objectives that must be pursued by the EU in the context of its environmental policy and on the action and measures that must be taken to achieve such objectives. More in detail, the objectives laid down in Article 191 are:

> preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

It is also envisioned that EU environmental policy shall be based on the precautionary principle as well as on those of preventive action and polluter pays. This was subsequently supplemented by Article 192, which establishes that, with reference to the objectives abovementioned, the Council was required to adopt:

> provisions primarily of a fiscal nature; measures affecting: town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, land use, with the exception of waste management; measures

[184] Treaty of Lisbon, art.174(1)
[185] Treaty of Lisbon, art.176A(1)
[186] Treaty on the Functioning of the European Union, Title XX 'Environment', artt. 191 – 192 – 193

significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

Finally, Article 193 focuses on the reiteration that the measures in question shall be consistent with the Treaties and shall not '*prevent any Member State from maintaining or introducing more stringent protective measures*'.

Table 1. A summary of the significant changes affecting European Union (EU) environmental policy in successive treaties

Year signed	Year in force	Treaty	Changes affecting environmental policy
1957	1958	Rome	- No mention of environment.
1986	1987	Single European Act	- Environmental Title added. - Article on Integration added. - Qualified Majority Voting (QMV) for the internal market.
1992	1993	Maastricht	- 'Sustainable growth respecting the Environment' becomes one of the tasks of the Community (Article 2). - Environment Title strengthened to include mention of 'precautionary principle'. - Integration Article (Article 130r) was reinforced. - The number of policy areas where the Council could adopt environmental legislation using QMV was extended. - Co-decision strengthened the role of the European Parliament in developing environment policy.
1997	1999	Amsterdam	- Article 2 strengthened so that 'Sustainable development of economic activities' made an explicit objective of the EU. - Integration Article given more prominence (Article 6). - Co-decision became the normal process for agreeing environment policy.
2001	2003	Nice	- QMV changed to establish a double majority of Member States and votes cast.
2007	2009	Lisbon	- Environment Title (174–176 of the TEC) substantively unchanged but numbering changed (now Articles 191–193 of TFEU). - Integration Article now Article 11. - Article 2 strengthened so that the EU shall work for the 'sustainable development of Europe' and the 'sustainable development of the Earth' (now Article 3 of the TEU).

Source: A. M. Farmer (ed), Manual of European Environmental Policy, cit. 5

1.5.1. Implications for the accession of new Member States

The environmental provisions enshrined in the Treaties, and especially those referred to in Articles 11 and 191 – 193 TFEU, have influenced the path to EU Membership of post-communist states in the 1990s. Indeed, in order to comply with the entry requirements imposed by the Union, national politics was reliant on and devoted to meeting the imposed conditions for membership[187]. From 1990s onwards the European Union therefore started to negotiate bilateral agreements with Central and East European Countries, even though they were not directly related to the acquisition of the membership. Instead, such agreements dealt with key issues such as free trade, financial and technical assistance and, above all, environment[188]. More precisely, when the European Council held a meeting in Copenhagen in 1993, it was acknowledged that Central and Eastern European Countries possessed the right to access to the Union.

It was additionally decided that applicant countries had to satisfy the three specific requirements provided for in the so-called 'Copenhagen criteria', or 'Accession criteria'[189]. The first one is political and concerns the stability of institutions committed to the full observance of democracy, human rights, rule of law and respect for minorities. The second criterion, economic, requires a well-functioning market economy. Finally, the last condition foresees the implementation of the *acquis communautaire* and the compliance with the obligations arising from EU membership. Notably, it is precisely Chapter 27 of this *acquis communautaire* which focuses on environment, reiterates the principles laid down in the Treaties and foresees that '*a strong and well-equipped administration at national and local level is imperative for the application and enforcement of the environment acquis*'[190]. It is interesting to highlight that the *acquis* encompasses more than two hundred legal instruments regarding, for instance, water and air quality, forestry, nature protection, industrial pollution control and risk management, and many more.

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[187] D. Lane, *Post-Communist States and the European Union* in Journal of Communist Studies and Transition Politics, 2007, 23:4, 461-466

[188] Ibid, see 465

[189] Website of the European Commission, Accession Criteria. Available at: https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en [Accessed: 7 May 2021]

[190] Website of the European Commission, Chapters of the acquis. Available at https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/conditions-membership/chapters-acquis_en [Accessed: 12 May 2021]

Of the twelve countries which started the European Union's preaccession assessment procedure, only ten obtained membership in 2004, namely Czechia, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, while Bulgaria and Romania were admitted in 2007 and Croatia eventually in 2013[191]. From this, it follows that these countries committed themselves to implement *ad hoc* policies aimed at reaching the standards required by the European Union in various fields, and that naturally includes environmental protection.

1.5.2. Environmental Constitutionalism in the most recent EU Member States

Going through the concerned provisions, it shall be noticed that the 2002 Constitution of the Czech Republic makes reference to the environment in various Articles. For instance, Article 7 of Chapter I dealing with fundamental provisions foresees that the state shall be committed to protect natural wealth and make careful use of natural resources. Pursuant to Article 11, found in Division 1 'Fundamental Human Rights and Freedoms' of Chapter II, property rights may be limited insofar as they risk '*to harm human health, nature, or the environment beyond the limits laid down by law*'. Finally, in Article 35 falling within Chapter IV concerned with economic, social and cultural rights, it is established that everyone is entitled to a '*favorable environment*' and to receive early and comprehensive information about natural resources and environmental conditions. Additionally, always in accordance with Article 35, the exercise of personal rights and freedoms may not under any circumstances pose a threat to '*environment, natural resources, the wealth of natural species […] beyond the extent designated by law*'.

Similarly, Article 20 of Section 2 of the Constitution of the Slovak Republic, titled 'Fundamental Rights and Freedoms', laid down that property rights cannot be harmful to health, nature, cultural sites and the environment and cannot exceed the limits imposed by national law. Article 23 adds that the freedom of movement can be restricted for the purposes of environmental protection and in accordance with law. Even more compelling is the fact that Section Six is entirely devoted to the '*right to protection of the environment and of cultural heritage*' and its two Articles 44 and 45 acknowledge the right of citizens

[191] Website of the European Union, Further Expansion. Available at: https://europa.eu/european-union/about-eu/history/2000-2009_en [Accessed: 12 May 2021]

to a '*favourable environment*', the duty to preserve and enhance it, the prohibition to damage both the environment and natural resources, the responsibility of the state for the implementation of environmental policy and the protection of the natural and wildlife heritage and finally the right to prompt and comprehensive environmental information.

Estonia has moved in this direction as well. Indeed, the Constitution of 1992, subsequently amended in 2015, recognizes that every individual is responsible for protecting the '*human and natural environment'* and liable for environmental damage caused by his or her conduct, as provided for in Article 53 of Chapter IV dealing with fundamental rights, freedoms and duties. Also, as set out in Article 34, the protection of the natural environment may be one of the reasons on the basis of which the right to freedom of movement may be limited in accordance with the law.

In the Constitution of the Republic of Slovenia, the right to a '*healthy living environment*', recognized to every individual and promoted by the state, falls exclusively under Article 72. Such Article also stipulates that whoever is in breach of compliance with this provision must provide adequate compensation according to that which is stipulated by law.

With regard to the Constitution of the Republic of Latvia, which dates back to 1922 but was reinstated in 1991 and further amended in 2016 and 2018, it is extremely interesting to note that in the Preamble a special mention is made either to environment, nature and sustainable development. Indeed, it establishes that:

> Each individual takes care of oneself, one's relatives and the common good of society by acting responsibly toward other people, future generations, the environment and nature.

In addition to the Preamble and in accordance with Article 115 included in Chapter VIII devoted to fundamental human rights, the state is charged with the protection of the right to live in a healthy environment, and as such must provide its citizens with environmental information and protect and enhance environmental conditions.

A reference to environmental protection in the Preamble is likewise made in Hungary's Constitution of 2011. Indeed, Hungarian people shall endeavor to ensure the protection of the natural assets of the region and to '*protect the living conditions of future generations by making prudent use of (our) material, intellectual and natural resources*'. Besides, as referred to in Article P laid down in 'Foundation', the state and the individuals

must '*protect, sustain and preserve*' natural resources for the sake of future generations. Finally, Articles XX and XXI included among 'Freedom and responsibility' stipulate respectively that the state must preserve agriculture from GMOs, provide access to food and water and ensure environmental protection as well as secure the individual right to a healthy environment and sanction environmental damage under national law.

By contrast, the Preamble of the 1997 Constitution of the Republic of Poland does not refer to environmental protection but recognizes that future generations have the right to inheritance of a well-preserved natural heritage. However, the environment is mentioned several times in the course of the text and precisely in Articles 5, 31, 68 and 86. As foreseen in Article 5, the Republic must protect the natural environment in accordance with the principles of sustainable development and this necessity to safeguard the environment is precisely one of the reasons on the basis of which, according to Article 31, the exercise of constitutionally guaranteed rights and freedoms may be limited under national law. Moreover, Article 68 further states that public authorities must act in time to prevent the implications that environmental degradation might have in relation to human health. Finally, Article 86 recalls that every citizen has the duty to preserve the environment and will be held accountable in case of harmful activities.

Unlike many aforementioned constitutions, environmental provisions in the constitution of the Republic of Lithuania, adopted with the referendum on October 25th, 1992, are not included amongst fundamental human rights and freedoms, but instead under the heading 'National Economy and Labour' of Chapter IV. Two Articles are relevant in this regard, precisely 53 and 54. As referred to in the first one, both the State and individuals have the duty to protect the environment from any danger and threat. The second one, more detailed, envisages that:

> the State shall take care of the protection of the natural environment, wildlife and plants, individual objects of nature and areas of particular value and shall supervise a sustainable use of natural resources, their restoration and increase.

Also, any behavior that could jeopardize the quality of the natural environment is forbidden by law.

Curiously, until when it was amended by Act No. XXII of 2018, the Constitution of Malta did not envisage environmental protection, but only an obligation for the state

to protect the landscape and the historical and artistic heritage of the Country. The new sub-article 2 finally acknowledged that it is the duty of the state to manage and preserve the environment and natural resources for future generations, to tackle the risk of environmental deterioration and to promote '*the right of action in favour of the environment*'[192].

Conversely, the Constitution of the Republic of Cyprus still does not provide for environmental rights and duties, but at least makes mention of natural resources under Article 23 committed to property rights. In particular, the Article reads:

> Every person, alone or jointly with others, has the right to acquire own, possess, enjoy or dispose of any movable or immovable property and has the right to respect for such right.

Turning to the last three states that joined the Union, namely Bulgaria, Romania and Croatia, similar constitutional provisions for environmental protection can be observed. In particular, Article 15 of the Constitution of the Republic of Bulgaria, comprehended in Chapter I among the fundamental principles of the Republic, foresees that the state must guarantee environmental protection as well as '*conservation of living Nature*' and the '*sensible utilization'* of natural resources. Reference is made also in Chapter II dealing with fundamental rights and duties of citizens, whose Article 55 reads as following:

> Everyone shall have the right to a healthy and favorable environment corresponding to established standards and norms. They shall protect the environment.

In a similar manner, amongst the fundamental rights and freedoms enlisted in Chapter II, pursuant to Article 35 of the Constitution of Romania the state must recognize the right for individuals to a '*healthy, well-preserved and balanced environment'* and provide the legislative framework for its exercise. Moreover, as required by article 44, property rights entail the respect of the obligations arising from environmental protection. Also, in accordance with Article 135 the state is responsible for ensuring, among many,

[192]E. Brincat, *The Right to a Healthy Environment in the Constitution of Malta* in GhSL Online Law Journal, 29 June 2020, 2 – 4. Available at: http://lawjournal.ghsl.org/en/articles/articles/189/the-right-to-a-healthy-environment-in-the-constitution-of-malta---abstract-of-andlsquothe-second-republic-a-green-oneandrsquo-.htm [Accessed: 7 May 2021]

'*environmental protection and recovery, as well as preservation of the ecological balance*'.

Ultimately, the Constitution of the Republic of Croatia offers a comprehensive list of environmental provisions. Indeed, among the basic provisions we find Article 2, according to which both the Parliament and the citizens are entitled to decide on the protection, management and use of natural and cultural wealth, in full compliance with the Constitution and national laws, and Article 3, on the basis of which it is stated that the environment and the preservation of nature figure among the highest values of the Republic. In addition to this, reference to environmental issues is found in Articles 50, 52 and 69 falling within Chapter III dedicated to economic, social and cultural rights. Article 50 therefore establishes that matters linked to the protection of nature and the environment can entail the limitation of entrepreneurial freedom and property rights. Article 52 recognizes that natural assets and '*other parts of nature*' considered to be of particular interest in accordance with national law shall benefit from special protection. Also, pursuant to Article 69, the right to a healthy life and thus to a healthy environment shall be enjoyed by every individual and secured by the state; moreover, everyone must give adequate attention to the safeguard of '*public health, nature and environment*'. And finally, Article 134 reads as follows:

> units of local self-government shall carry out the affairs of local jurisdiction by which the needs of citizens are directly fulfilled, and in particular the affairs related to the […] protection and improvement of the environment.

In conclusion, it has been shown that the question of environmental protection has become a cross-border issue and has gained valuable recognition across the European Union. Unsurprisingly, the environmental question has called for a substantial change in Member States' policies and Constitutions, hitherto unable to address this problem and recognize the need for and the importance of a healthy environment. EU Treaties have been influential in shaping the constitutions of Central and East European Countries, for which compliance with the Copenhagen criteria, and thus with environmental provisions, represented necessary conditions to be met in order to achieve membership. However, it is not surprising that EU Treaties have repercussions on other Member States as well. Indeed, it shall be noted that although many states already provided for some sort of

environmental constitutionalism and included different types of constitutional provisions for environmental protection, they nonetheless became strongly committed to the observance of Community laws in the sphere of environmental protection, as will be clarified later.

1.6. Conclusions

The aim of the present chapter was to investigate the origins and development of the global trend known as Environmental Constitutionalism. In the new geological epoch we are living in, referred to as 'Anthropocene', the negative human impact with regard to the natural environment and its dramatic consequences cannot be denied. It is blatantly obvious that great efforts are needed to preserve and promote environmental well-being for the sake of both present and future generations, and as such Constitutions all over the world have been amended so as to include some sort of environmental rights and duties.

This trend has established itself in the European Union to such an extent that the *acquis communautaire* today requires the attainment of strict environmental standards in order to achieve membership. Hence, the need to analyze the relevant provisions in the Constitutions of the last thirteen Countries having entered the Union from 2004 until 2013.

CHAPTER TWO – ENVIRONMENTAL LAW IN THE EUROPEAN UNION

1.7. Introduction

With regards to international environmental law and policy, the European Union is one of the leading actors in the scene, being actively involved in environmental action and cooperation, and thus committed to the implementation and promotion of the concepts of healthy environment and sustainable development.

For what concerns the sources of European environmental law, it is important to recall the importance retained by:

(i) the Founding Treaties, which constitute EU primary law;

(ii) the international treaties to which the Union has acceded;

(iii) secondary law, which includes the issuing of regulations, directives and decisions;

(iv) the rulings of the European courts[193].

As far as environmental law is concerned, directives represent the most frequently adopted instrument, since they are at the same time legally binding and flexible, inasmuch as they have to be incorporated into national legal systems and thus leave member some sort of discretion on how to achieve the target set[194].

Concerning the actors, the European Commission, the Council of Ministers, the European Parliament and, needless to say, the Court of Justice are amongst the most closely engaged institutions[195]. In particular, the Commission retains a leading role in the process of drafting, administration and enforcement of environmental law and policy in the European Union, drawing up legislative proposals and policies which influence the evolution of the field[196]. In case of legislative proposals for which technical or scientific

[193] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, Edinburg School of Law Working Paper Series, 2010, 37, 17
[194] Ibid.
[195] Ibid.
[196] 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*, Edward Elgar Publishing, Chelthenham – Northampton, 2020, 54

knowledge is necessary, the Commission relies on expert committees, groups or agencies, the latter of which today are growingly crucial and essential as far as environmental governance is concerned[197].

Overall, the EU has acceded to over forty international environmental agreements[198], at the global (negotiated within the framework of the United Nations, e.g. UNFCC), regional (negotiated, for instance, under the UNECE or Council of Europe) and sub-national level as well (addressing, among many, maritime and transboundary water issues). Such international agreements cover, for instance, climate change mitigation, biodiversity protection, waste management plans, ozone layer protection, transboundary water and air pollution, and also environmental governance and liability more broadly[199]. Within the context of multilateral environmental agreements (MEAs), the European Union emerges as a block with a strong negotiating position[200], since it acts on behalf and represents the different views of its twenty-seven Member States, each of which has different environmental interests, challenges, and priorities. From this it follows that the environmental issues advanced in the EU reflect precise communitarian geographical, topographical and climatological specificities.

Nevertheless, EU environmental law, from a comparative perspective, considerably affects the structure and framework for the development and expansion of environmental legislation in the Member States and in the candidate countries as well[201], also in those instances not necessarily related to transboundary issues. This therefore maintains that these countries live in and share a unique and indivisible environment[202], and thus collective efforts and actions are needed for its protection and enhancement.

Not surprisingly, the rights and obligations applicable to Member States across the Union also apply to their nationals, thereby promoting and ensuring homogeneous implementation of environmental law at the European and national level. This has been defined by Jan Wouters, André Nollkaemper and Erika de Wet as the *Europeanisation* of

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[197] Ibid., 54 – 55
[198] For the sake of completeness, a comprehensive list of agreements can be found on the website of the European Commission, section International issues – Multilateral relations – Multilateral Environmental Agreements, available here: https://ec.europa.eu/environment/international_issues/agreements_en.htm
[199] Ibid.
[200] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, cit. 3
[201] Ibid, 4 – 5
[202] P. Sands, *Principles of International Environmental Law,* Cambridge University Press, Cambridge, 2003, 2nd edn., 794 – 795

international law, a category that investigates the consequences of European integration by maintaining that, inasmuch as international norms are directly binding upon EU institutions and Member States and require a uniform understanding and application, international law is now part of the EU legal system and becomes thus *Europeanised*[203].

As a consequence, domestic legislation and policy are becoming increasingly influenced and shaped by European law and, due to the prevalence of EU environmental law over national provisions allegedly in conflict, national courts are necessarily required to interpret domestic environmental norms in conformity with EU law[204]. Moreover, the compliance between national laws and European requirements and standards is guaranteed also by means of enforcement procedures against any state unwilling or unable to enforce international treaties concluded by the Union, or by means of individuals bringing action for damages[205]. Finally, the EU, from a comparative perspective, is in turn bound to the compliance with broader international environmental instruments binding on the EU itself.

2.2. The Phases of the Evolution of EU law and policy in the Environmental Field

From an historical perspective, five phases marked by and corresponding to the adoption of EU Treaties can clearly show the evolution – also from a constitutional point of view – of environmental law in the European Union[206], whose action, as it is broadly known, is limited and bound to the principle of conferral[207].

The First Phase is assumed to have started in 1957, year of the founding Treaty of the EEC, or Treaty of Rome. Although it did not cover environmental issues as such – which indeed were not yet a concern by the time –, the EEC nevertheless undertook some sort of environmental protection over the years, mostly by means of incidental

[203] J. Wouters, A. Nollkaemper, E. de Wet (eds.), *The Europeanisation of International Law*, TMC Asser Press, The Hague, 2008, 1 – 8
[204] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, cit. 4
[205] Ibid.
[206] Reference is made to the analysis made by Elisa Morgera in E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, Edinburg School of Law Working Paper Series, 2010/37
[207] Art. 5 TEU

decisions[208], specifically for the purpose of achieving the common market[209]. In this regard, it is possible to mention the Council Directive 67/548/EEC of June 27th, 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances[210], and the Council Directive 70/157 of February 6th, 1970 on the approximation of the laws of the Member States relating to permissible sound level and exhaust systems of motor vehicles.

The beginning of the Second Phase was undoubtedly influenced by the 1972 Stockholm Conference, as a result of which urgent intervention was deemed necessary in the field and for the purpose of environmental protection[211]. In the month of October of that very year, the Paris European Summit was held, where the Heads of State or Government of EEC Member States focused on the objectives and policies that had to be undertaken in order for the EU to be created. By agreeing that economic expansion was not an end in itself, the leaders emphasized the need for an improvement in general living conditions, thereby paying careful attention to 'intangible values' and, what is perhaps the most noteworthy, to environmental protection[212]. This also led to the valuable recognition of the importance a Community environmental policy, for the sake of which an action programme had to be set up before July 31st, 1973[213]. During this phase, the adoption of environmental policy and legislation was made possible by means of a broad interpretation of:

(i) the Treaty of Rome[214];

(ii) Article 100 EEC, according to which appropriate action could be taken for the approximation of national '*laws, regulations or administrative*

[208] J. H. Jans, H. H. B. Vedder, *European Environmental Law*, 3rd edn., Europa Law Publishing, Groningen, The Netherlands, 2008, 3

[209] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, cit. 7

[210] Known also as Directive DSD, it was subsequently revised by Regulation (EC) 1272/2008 on classification, labelling and packaging of substances and mixtures (CLP Regulation) and finally replaced permanently from June 1st, 2015.

[211] D. McGillivray, J. Holder, *Locating EC Environmental Law* in Yearbook of European Law, 2001, 20, 140 – 142

[212] Bulletin of the European Communities, October 1972, 10. Luxembourg: Office for official publications of the European Communities. "Statement from the Paris Summit", 14 – 26, available at: https://www.cvce.eu/content/publication/1999/1/1/b1dd3d57-5f31-4796-85c3-cfd2210d6901/publishable_en.pdf

[213] Ibid.

[214] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, cit. 7

provisions' having a direct – and mostly negative – impact on the '*establishment or functioning of the common market*';

(iii) Article 235 EEC, on the basis of which the Council, '*in the course of the operation of the common market'* and '*acting unanimously on a proposal from the Commission and after consulting the European Parliamen*t', could take appropriate measures when needed. This leads to the acknowledgment that economic considerations were the main drivers behind the enactment of environmental legislation at the time[215] and, at the same time, economic expansion was no more considered exclusively in quantitative terms, but either in qualitative ones[216].

In this context, remarkable were, for instance: Directive 85/210 concerning the lead content of petrol[217]; Directive 73/404 relating to detergents[218]; or Directive 78/1015 on the permissible sound level and exhaust system of motorcycles[219], all based solely on Article 100 EEC. Concerning environmental legislation based on both Article 100 and 235 EEC, due reference shall be made to: Directive 76/464 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community[220]; Directive 84/360 on the combating of air pollution from industrial plants[221]; Directive 82/501 on the major-accident hazards of certain industrial plants[222]; Directive 78/319 on toxic and dangerous waste[223]. It is also noteworthy to emphasize that in 1985 the Court of Justice was called upon to assess the compliance of Directive 75/439 on the Disposal of Waste Oils – which imposed '*a system of permits on undertakings which disposed of waste oils and a system of zones within which such undertakings had to operate*' – with the free movement of goods. In a landmark judgment, the Court inscribed environmental protection amongst the essential objectives of the Community and, by reiterating that it also fell within the general interest, it maintained that it could serve as a basis for some

[215] Ibid.
[216] J. H. Jans, H. H. B. Vedder, *European Environmental Law*, cit.4
[217] OJ 1985 L 96/25
[218] OJ 1973 L 347/51
[219] OJ 1978 L 349/21
[220] OJ 1976 L 129/23
[221] OJ 1984 L 188/20
[222] OJ 1982 L 230/1
[223] OJ 1978 L 84/43

sort of limitation to the free movement of goods[224]. From then onwards, Article 235 EEC was *de facto* deemed sufficient to shape environmental policy. However, the application of exclusively Article 235 EEC led to the enactment of just a couple of measures, such as Directive 79/409 on the conservation of wild birds[225]; Directive 82/884 on a limit value for lead in the air[226]; Recommendation 81/972 concerning the re-use of paper and the use of recycled paper[227].

Equally important in this second phase was the First Environment Action Programme (EAP), dating back to November 1973, which focused on the mutual dependence between economic development – which was the main task of the EEC –, fight against pollution, improvement of living conditions and environmental protection, and as such maintained that this latter was one of the essential tasks of the Community[228]. It was stated that the environmental policy had to achieve challenging objectives, amongst which it is possible to mention:

(i) prevention and reduction of pollution and contamination;
(ii) preservation of ecological balance and protection of the biosphere;
(iii) refrain from environmental exploitation and activities potentially harmful to the environment;
(iv) search for common solutions to prevent and counteract environmental damage in agreement with non-member states and international organizations[229].

Besides, this EAP suggested the need to conduct an exhaustive analysis of the impacts of a wide range of policies in order to prevent the conduct of harmful and environmental polluting activities, highlighted the need for conduct studies and research for emissions control, and put forward the idea of a step-by-step approach for the implementation and achievement of environmental quality goals[230].

[224] Case 240/83 *Procureur de la République v Association de Défense des Bruleurs d'huiles usagées,* (ADBHU), ECR 531, ECLI:EU:C:1985:59
[225] OJ 1979 L 103/1
[226] OJ 1982 L 378/15
[227] OJ 1981 L 355/56
[228] Official Journal of the European Communities, C 112, 20 December 1973
[229] Ibid.
[230] C. Hey, *EU Environmental Policies: A short history of the policies strategies* in EU Environmental Policy Handbook, 2007, 18 – 19

Generally speaking, the primary focus of the First EAP was on water protection, air pollution and waste, but eventually attention was also paid to agriculture. The Second EAP ended up primarily being a continuation of the previous one, but provided for a broader categories of problems to be addressed, with a particular concern for nature protection[231]. The Third one, instead, was strictly correlated to the purpose of the implementation and completion of the Internal Market, for the benefit of which due attention to environmental policies and their effects should be paid[232]. For instance, amongst the different economic gains, environmental policies were believed to have positive effects particularly with regard to the levels of employment. Moreover, the third EAP was based on an emission-oriented approach, focused, among many, on waste reduction and avoidance, resources efficiency and environmental technologies. Very interestingly, it also mentioned the first World Conservation Strategy of 1980, prepared by the IUCN with the help and advice of UNEP and WWF and in collaboration with FAO and UNESCO, and its objective of Sustainable Development[233].

At the same time, another peculiarity of environmental policies during the eighties consisted in the emergence of clean air policies, but also noise and risk management measures, as a consequence of German insistence and lobbying[234]. This falls within the context of the 'Waldsterben' debate which highlighted the detrimental impact of polluted air on forests and woodland in the country, with the related pressures exerted by the Die Grünen[235]. This debate in the first place led the German Government to embark on a program dealing with clean air policies and emission reductions, and eventually to push for a harmonized emissions control policy within the whole EEC[236].

The beginning of the Third Phase of the evolution of EU Environmental legislation was characterized by and arose as a consequence of the Single European Act of 1987, which granted the EEC prerogatives in the field of environmental policy and

[231] Ibid.
[232] Ibid.
[233] Ibid; World Conservation Strategy, IUCN – UNEP – WWF, 1980, available at: http://www.a21italy.it/medias/31C2D26FD81B0D40.pdf
[234] C. Hey, *EU Environmental Policies: A short history of the policies strategies*, cit. 20
[235] German Green Party founded in West Germany in 1980 and known as *Bündnis 90/Die Grünen* since 1993
[236] C. Hey, *EU Environmental Policies: A short history of the policies strategies*, cit. 20; F. Ueötter, *Giants without a Heart? Electric Utilities and Environmental Issues in Germany* in Annales historiques de l'électricité, 2005, 3:1, 19 – 33

established its goals, guiding principles and criterion[237]. Therefore, it follows that for the very first time a Treaty expressly included environmental protection among its provisions and objectives[238], such as laid down – for instance – in Articles 130r, 130s, 130t, 100a(3) and 100a(4) EEC[239].

In that period, there was also a gradual shift from internal market completion to internal market governance, and indeed the harmonization of environmental legislation and standards was required in order to meet the necessary requirements of common market and competition issues. Once again, top-down approaches and economic and financial concerns took precedence over bottom-up and scientific ones. This phase was additionally marked by the Fourth EAP, which suggested that '*environment considerations [had to] be integrated into the other economic, industrial, agricultural, regional and social policies implemented by the Community and by its Member States*'[240] and focused on sensitive issues such as multi-media pollution preventions and controls, both substance-oriented and source-oriented, or the management of environmental resources. Also, it introduced the recourse to economic instruments such as taxes, charges, state aids and tradeable discharge permits, reiterated the 'polluter pays' and 'preventive approach' principles and recalled the importance of sustainable development, for the sake of which the Community was required to 'assist developing countries'[241].

Several external factors also contributed to the progress made in the field of environmental policy at the end of the Eighties, namely:

(i) the presence and growth of new threats at the global level, with particular regard to climate change, that led the Commission to enact a strategy aimed at stabilizing emissions;

(ii) the arrangements for the UNCED Conference of 1992, in the context of which there was the general belief that the Commission could at the same time consolidate EU integration and its own role in world affairs;

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[237] According to art.130 r-t of the Single European Act, today replaced by artt. 192-193 TFEU, the action of the Community had amongst many: '*to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; to ensure prudent and rational utilization of natural resources'*

[238] J. H. Jans, H. H. B. Vedder, *European Environmental Law*, cit.6

[239] Now artt.174, 175, 176, 95(3) and 95(4) EC

[240] EEC Fourth Environmental Action Programme (1987 – 1992), available at: https://op.europa.eu/it/publication-detail/-/publication/a1877046-1533-415d-abe2-f6f4584eb0e9/language-en

[241] Ibid.

(iii) a broader support given to economic tools, with the Task Force Report on the Internal Market and the Environment ending up being the most explicit document to encourage the use of environmental taxes, and with the Dublin Declaration of June 1990 requiring the Commission to issue a communication on economic instruments;

(iv) the emergence and consolidation of environmental movements and green parties, which were the mouthpieces for public involvement in environmental concerns[242].

In 1990, *inter alia*, there was the establishment of the European Environment Agency (EEA), whose aim was to guarantee the delivery of free and effective environmental information for the interested parties as well for the public, and to create and coordinate the European Environment Information and Observation Network[243]. Shortly thereafter, the year 1992 witnessed the development of the United Nations Conference on Environment and Development of Rio de Janeiro. Right after this Conference took place, the entry into force of the Treaty of Maastricht on November 1st, 1993 signaled the beginning of the Fourth Phase of the evolution of EU policy, the so-called post-Maastricht phase[244]. This latter was characterized by:

> promotion through the Community of a harmonious and balanced development of economic activities, sustainable and non- inflationary growth respecting the environment[245].

This could be reached by means of a '*policy in the sphere of the environment*'[246], and concurrently by the acknowledgment of the juridical value attributed to the EAPs, that had to be enacted by means of a joint decision-making procedure between the Council and the European Parliament. Interestingly, the reference to '*sustainable growth*' was not immune to its own share of criticism and skepticism, since it was considered being less incisive than the expression '*sustainable development*'[247]. Nonetheless, criticism aside,

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[242] C. Hey, *EU Environmental Policies: A short history of the policies strategies*, cit. 22

[243] *European Environment Agency (EEA)*, Website of the European Union, available at: https://europa.eu/european-union/about-eu/agencies/eea_en

[244] J. H. Jans, H. H. B. Vedder, *European Environmental Law*, cit.7

[245] Article 2 – EC Treaty (Maastricht consolidated version); https://www.cvce.eu/en/education/unit-content/-/unit/d5906df5-4f83-4603-85f7-0cabc24b9fe1/e038b310-f139-407f-9bfb-a1b2e901fb56

[246] Article 3(k) – EC Treaty

[247] J. H. Jans, H. H. B. Vedder, *European Environmental Law*, cit.7

what should be emphasized is the important political dimension that the explicit reference to the environmental issue in the Maastricht Treaty had at that time.

Throughout the fourth phase, there was a shift towards 'integration' governance, where attention was paid to the good performance of the measures undertaken in the environmental field and their effective and successful implementation[248]. As a consequence, attempts were made to ensure greater flexibility and to create limited conditions for devolution to the Member States, where differences in domestic conditions, capacities and traditions prevailed[249]. At the same time, when countries with traditional high standards of environmental protection, such as Sweden, Finland and Austria, joined the EU in 1995, hope that EU standards, in turn, would have been qualitatively improved suddenly emerged, but nonetheless a major improvement was not noticed[250]. However, that period witnessed an open participatory process involving talks and discussions with interested parties and expert committees and leading to the promulgation of horizontal and procedural legislation[251].

The year 1993 also marked the beginning of the Fifth EAP, which introduced a number of cutting-edge elements. First among many, the endorsement '*Towards Sustainability*' was chosen as the headline, with a clear reference to, and engagement towards, sustainable development. The meaning attributed to '*Sustainability*' led to the acknowledgment of the need to preserve a good quality of life, to guarantee access to natural resources, to tackle environmental degradation and to focus on a development which favored both present and future generations[252].

Very interestingly, two key principles behind this EAP concerned: the fundamental importance of the incorporation of the environmental aspect in key policy areas; and the need to introduce a common and harmonized approach of shared responsibility between the actors concerned, thereby recognizing a major role played by non-governmental actors. With regard to this last point, the Fifth EAP resorted to a set of

[248] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, cit. 9
[249] Ibid.
[250] K. Inglis, *Enlargement and the Environment Acquis* in RECIEL, 13:2, 2004, 148 – 149
[251] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, cit. 9
[252] *Towards Sustainability. A European Community Programme of policy and action in relation to the environment and sustainable development*, Official Journal of the European Communities, C 138/5, 1993, available at: https://ec.europa.eu/environment/archives/action-programme/5th.htm

instruments, designed for the long term, that comprised both legislative or horizontal measures – i.e. dealing with basic levels of protection, precise rules and standards, or public information –, or market-based and financial instruments – i.e. providing incentives for both consumers and producers, structural and cohesion funds, or EIB loans[253]. Finally, it acknowledged five target sectors, namely industry, energy, transport, agriculture and tourism, and seven '*themes and targets*', corresponding to seven priorities in the environmental field, that is climate change, acidification and air quality, urban environment, coastal zones, waste management, water management and protection of nature and biodiversity[254].

The beginning of the Fifth Phase of the evolution of EU policy in the environmental field dates back to 1997, year when the Treaty of Amsterdam was enacted. Since then, the general consensus has been that the Treaty of Amsterdam had favored the passage from a purely economic organization to a genuine political one which guaranteed more liberties and safeguards to EU citizens[255]. With due regard to the constitutionalisation of the environmental dimension, the Treaty inscribed both environmental protection and sustainable development in the general provisions and, in Article 2 EC, it expressly mentioned a '*harmonious, balanced and sustainable development of economic activities'*, as well as '*a high level of protection and improvement of the quality of the environment*' among the Community's responsibilities.

Extremely interesting with regard to this phase were:

(i) the Kyoto Protocol of 1997, which dealt with the issue of the limitation and reduction of greenhouse gases emissions, by imposing a burden exclusively on developed countries, according to the principle of '*common but differentiated responsibility'*[256];

[253] The evolution of the EU environment and climate policy framework: from the 6th to the 7th EAP, Trinomics, Service contract to support the Evaluation of the 7th Environment Action Programme, Issue Specific Paper n.2, 2019, 5, available at: https://ec.europa.eu/environment/action-programme/pdf/7EAP_Issue_paper_2_evolution_6_to_7_EAP_final.pdf

[254] *Towards Sustainability. A European Community Programme of policy and action in relation to the environment and sustainable development*, cit., available at: https://ec.europa.eu/environment/archives/action-programme/5th.htm

[255] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, cit. 10

[256] Kyoto Protocol to the UNFCCC, FCCC/CP/1997/L.7/Add.1, 1997, available at: https://unfccc.int/sites/default/files/resource/docs/cop3/l07a01.pdf

(ii) the summit of the United States of America and the European Union in Göteborg on June 14th, 2001, where both parties acknowledged that climate change was a '*pressing issue*' that required a global solution and a joint commitment, with the UNFCCC engaging in stabilizing greenhouse gas concentrations in the atmosphere[257];

(iii) the summit of the European Council in Göteborg on June 15th and 16th, 2001 where a general agreement was found on the need to launch a strategy for sustainable development, to add an environmental dimension to the Lisbon process and to fulfill the objectives set out in the Kyoto Protocol[258].

In particular, the EU Council also recognized that the Kyoto Protocol represented just a first step and reiterated its own commitment to the objectives of the Sixth Environmental Action Programme, adopted in 2002. This latter achieved a real international scope, by focusing on the enhancement of global governance in the environmental field, and focused on tackling global issues corresponding to four priority areas, namely climate change, nature and biodiversity, environment and health, natural resources and waste management[259]. Also, it promoted the effective and complete integration of environmental protection into both internal and external policies. The final assessment of the Sith EAP in August 2011 has revealed a number of important achievements, such as the development of Natura 2000, the network of nature protection areas in the EU, which came to encompass over eighteen percent of the territorial coverage or the setting up of an exhaustive chemicals policy[260]. However, even more progresses had to be made, so as to register a change from policies of remediation to environmental degradation to policies of prevention.

One last phase of the policy and constitutional evolution of EU environmental legislation has to be traced back to the Lisbon Treaty of 2009, which amended the TEU

[257] Göteborg Statement: Summit of the United States of America and the European Union, Göteborg, Sweden, available at: https://2001-2009.state.gov/p/eur/rls/rm/2001/3661.htm

[258] Presidency Conclusions, SN 200/1/01 REV 1, available at: https://www.consilium.europa.eu/media/20983/00200-r1en1.pdf

[259] E. Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective*, cit. 10; European Commission – Environment – 6th Environment Action Programme, available at: https://ec.europa.eu/environment/archives/action-programme/intro.htm

[260] European Commission – Environment – 6th Environment Action Programme, available at: https://ec.europa.eu/environment/archives/action-programme/index.htm

and the EC Treaty – now TFEU – and is still ongoing. This time, there was an explicit reference to the need for an enhanced role of the European Union in domestic and international environmental problems, especially for what concerned the fight against climate change, in addition to the repeated emphasis on '*the sustainable development of the Earth*'[261], with a clear linkage with the global dimension and the worldwide relations in the field. Moreover, these concepts had already been addressed in the 2000 Charter of Fundamental Rights of the EU – which was afforded the same legal recognition retained by EU Treaties –, whose Article 37 reads as follows:

> 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.

This shows once again the genuine priority given by the Union to the environmental and sustainable development issues and the wholehearted support to the fight against climate change and environmental degradation in all respects.

An interesting fact about this phase is that on November 20th, 2013 the European Parliament and the Council agreed on the seventh Environment Action Programme, which ended very recently in 2020, titled '*Living well, within the limits of our planet*'. Its general aim was to overcome the shortcomings and critical aspects of the previous EAP and address the new 'global systemic trends and challenges' which complicated an already complex scenario[262]. These included the new priorities arising from contemporary, serious issues such as a dramatic increasing of demographic density in the Union's urban zones. However, what is perhaps even more remarkable, is that this EAP not only consisted in a programme for action to 2020, but also it set a roadmap to 2050, thereby showing a clear long-term vision. There was a commitment on several fronts in addition to the mainstream ones, among which: (i) the respect for Earth's ecological limits; (ii) the circular economy; (iii) the low-carbon growth; (iv) the urban air pollution; (v) the sustainability of EU cities; (vi) the cut in global greenhouse gases emissions by a

[261] Art. 3(5) TEU
[262] Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union

percentage between eighty and ninety-five compared to 1990 levels; (vii) the objective of '*no net land take*'[263].

In this context, three were the main goals: to defend and enhance the natural capital; to make progress towards a resource-efficient, green, and competitive low-carbon economy; and to protect individuals, including health and well-being conditions, from environmental pressures[264]. At the same time, this would have been possible by means of the recourse to four '*enablers*', namely: (i) better implementation of legislation; (ii) better information; (ii) more efficient investment in environment and climate policy; (iv) effective integration of environmental observation into EU policies[265]. The report on the evaluation of the seventh EAP of 2019 concluded that a slight progress towards reaching the targets was made, with a rating of three up to five: the better outcome concerned the goal of a low-carbon economy, while the worse result concerned nature protection, environment and health[266].

The willingness towards the fulfilment of EU goals in the environmental field and the high priority attached to the related issues were further reiterated in the 2015 Paris Agreement, in the framework of the COP21 held in Paris, which was the first global, legally binding treaty concluded in the field of climate change, to which the European Union and its Member State are parties, and in the Marrakesh Partnership for Global Climate Action of 2016. The Paris Agreements, whose rules, procedures and guidelines were lately clarified by the Katowice package of 2018, had the ultimate goal of reducing global warming below 2 – and ideally 1.5 – degrees Celsius and of establishing a long-term strategy focused on the reduction of greenhouse gas emissions [267]. In particular, the initial commitment of the EU consisted in reducing its greenhouse gases emissions by 2030 by at least forty percent compared to 1990 levels; however, when delivering the NDC in December 2020, a decision was made so as to engage towards the reduction of greenhouse gases emissions – always by 2030 – by at least fifty percent.

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[263] Ibid.

[264] *Environment Action Programme to 2020*, Website of the European Commission, available at: https://ec.europa.eu/environment/action-programme/

[265] Ibid.

[266] The report from the Commission to the European Parliament, the Council, the ECSCR and the Committee of the Regions on the evaluation of the 7th Environment Action Programme, 2019, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:233:FIN

[267] *The Paris Agreement*, UNFCCC Website, available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement; *Paris Agreement*, Website of the European Commission, available at: https://ec.europa.eu/clima/policies/international/negotiations/paris_en

On March 18th, 2021 EU Member States authorized the Council to start negotiations with the European Parliament on the Eighth Environmental Action Programme, whose proposal is centered on the imperative need to foster and boost the green transition, with six thematic priority objectives that concern: (i) the cut in greenhouse gas emissions; (iii) the adaptation to climate change; (iii) the delivering of a growth model that has to prove sustainable for the planet; (iv) the commitment towards zero-pollution; (v) the defense of biodiversity; (vi) the reduction of environmental and climate constraints on production and consumption[268].

Finally, the ongoing and constant engagement of the EU in the environmental field is eventually recalled and reaffirmed by means of the promotion of fundamentally important initiatives such as the European Green Deal, the Next Generation EU, the New European Bauhaus and the Fit for 55 climate package, which will be examined later in the dissertation.

2.3. Environmental Protection in EU Primary Legislation

First and foremost, it should be noted that, on the basis of Article 5 TEU, EU competences must be well-justified by and strictly linked with two main principles: subsidiarity, on the basis of which, in those areas not pertaining to its exclusive competence, the EU is entitled to take action only if the target set cannot be satisfactorily pursued by Member States and can be more properly accomplished at the Union level; and proportionality, which dictates that the content and form of the action must be limited to the requirement of necessity. At the same time, action in the environmental field is justified by means of the principle of integration as stipulated in Article 11 TFEU, reading as follows:

> Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

[268] *Environment action programme* to 2030, Website of the European Commission, available at: https://ec.europa.eu/environment/strategy/environment-action-programme-2030_it

Over the years and across the different phases discussed above, the policy objectives of EU law in the environmental field have been elaborated and clarified, with due attention given to environmental quality, sustainable development, climate change and human health. With regard to sustainable development, its clarification is not yet provided by primary EU law, but nonetheless can be attributable to Regulation (EC) No 2493/2000, which foresees:

> 'sustainable development' means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations[269].

The general aim of a 'high level of protection' and the related goals that must be achieved are accurately embodied in Article 191 TFEU, which read as follows:

> The Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change[270].

The Article also lays down the general driving principles behind the aforementioned objectives, namely: precaution; preventive action; rectification at source; polluter pays[271].

2.3.1. The precautionary principle

According to the precautionary principle, proper and prompt intervention is required to avoid the risk of potential environmental hazards, even in the absence of scientific

[269] Regulation (EC) No 2493/2000 of the European Parliament and of the Council on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288

[270] Art. 191 TFEU(1)

[271] Artl 191 TFEU(2) reads as follows: '*Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay'*

evidence that may justify that action to occur. Overall, with the Communication from the Commission on the precautionary principle of the year 2000[272], an overview of the most significant elements of the precautionary principle were given. First of all, it was stipulated that the principle was inscribed within a threefold structured approach to risk analysis, that is risk assessment, risk management and risk communication. Then, clear identification of an eventual, serious threat was required, with scientific assessments being in any case inadequate to determine the risk with certainty. Finally, the Communication foresaw that the measures undertaken under the precautionary principle had to be, among others*:*

> *proportional* to the chosen level of protection, *non-discriminatory* in their application, *consistent* with similar measures already taken, *based on an examination of the potential benefits and costs* of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis), *subject to review,* in the light of new scientific data, and *capable of assigning responsibility for producing the scientific evidence* necessary for a more comprehensive risk assessment.

The origins of the precautionary principle are to be identified with the German *Vorsorgeprinzip* of the 1970s, linked to the 'Waldsterben' debate discussed above. In that very period, the notion of *Vorsorge* – namely foresight – became commonly used in public policy to designate the potential risk that environmental damage might arise, which constituted a proper justification for tempestive, earlier action[273]. With the German Clean Air Act of 1974, the *Vorsorgeprinzip* was eventually transposed into domestic law. Concerning EU law, it was with the *Sandoz* case of 1982 that precaution was used as a benchmark criterion with reference to the consequences of the use of vitamins for human health[274]. In that case, the Dutch Government stated the necessity of precaution given the '*risk of undesirable side-effects'*, whereas the Court of Justice affirmed that, because of the insufficiency of the scientific data, domestic rules forbidding '*the marketing of foodstuffs to which vitamins have been added are justified on principle within the*

[272] Communication from the Commission on the precautionary principle, COM/2000/0001 final
[273] J. H. Heckman, *The Precautionary Principle: Amorphous Concept Proves Difficult to Define* in PackagingLaw.com, 2002, available at: https://www.packaginglaw.com/special-focus/precautionary-principle-amorphous-concept-proves-difficult-define
[274] G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. 45

meaning of Article 36[275] *of the Treaty on grounds of the protection of human health*' were recommended[276].

One decade later, Article 130r of the Maastricht Treaty eventually stated that '*Community policy on the environment […] shall be based on the precautionary principle*'. While the latter's proper definition was not given at that time, it was precisely the European Court of Justice which, in 1998, clarified it in Case C-180/96 concerning the so-called mad cow disease, by adjudicating that:

> where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.

Finally, with the *Artegodan* case of 2002[277], precaution became a general principle of EU law, with the Court stipulating that:

> as regards environmental matters, the precautionary principle is expressly enshrined in Article 174(2) EC, which establishes the binding nature of that principle. Furthermore, Article 174(1) includes protecting human health among the objectives of Community policy on the environment.

According to the Court, this was sufficient to define it as an '*autonomous principle*'. What the Court also accurately clarified, by recalling that institutions are entitled to take precautionary measures even without evidence of a given risk, is that the precautionary principle has a comprehensive scope and, *verbatim*:

> is intended to be applied in order to ensure a high level of protection of health, consumer safety and the environment in all the Community's spheres of activity.

[275] Reference is made to Art. 36 of the EEC Treaty, according to which: '*The provisions of Articles 30 to 34 inclusive shall not be an obstacle to prohibitions or restrictions in respect of importation, exportation or transit which are justified on grounds of […] the protection of human or animal life or health*'
[276] Case C-174/82, *Sandoz BV*, ECLI:EU:C:1983:213
[277] Joined cases T-74, 76, 83 – 85, 132, 137, 141/00, *Artegodan Gmb H and others v Commission*, ECLI:EU:T:2002:283

Very importantly, when EU action is undertaken on the basis of the precautionary principle, EU institutions are required to give evidence of a causal nexus between such an action and the risk of environmental hazard, although not necessarily a close one[278]. Indeed, in the *Commission v French Republic*[279] case of 2004, the Court stated the following:

> Community policy on the environment is to be based on the precautionary principle. In the present case, given the available scientific and technical knowledge, the degree of probability of a causal link between nutrient inputs into the Seine bay and the accelerated growth of phytoplankton in that area is sufficient to require the adoption of the environmental protection measures provided for in Directive 91/271 if the other criteria for eutrophication are fulfilled.

This therefore leads to the conclusion that some sort of flexibility can be accepted when asserting the required existence of a causal link[280].

Concerning a few, interesting examples of the application of the precautionary principle which can be found in secondary law, reference should be made to some Directives. It is possible to mention, *inter alia*: (i) Directive 98/81 on the use of GMMs, whose Article 5(4) clarifies that, in case of doubts regarding and adequate classification of GMMs, stricter protection measures have to be implemented[281]; (ii) Annex IV of Directive 96/61 – or IPPC Directive – according to which the concept of waste has to be understood on the basis of the precautionary principle[282]; (iii) the Directive 92/43 – or Habitats Directive – which, at Article 6(3), stipulates the following:

> any plan or project not directly connected with or necessary to the management of [a] site but likely to have a significant effect thereon […] shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after

[278] G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. 46
[279] Case C-280/02, *Commission of the European Communities v French Republic*, ECLI:EU:C:2004:548
[280] G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. 46
[281] J. H. Jans, H. H. B. Vedder, *European Environmental Law*, cit. 56
[282] Ibid.

> having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public[283].

2.3.2. The prevention principle

With regard to the principle of preventive action, it has been adopted in the field of environmental policy and legislation already at the time of the First Action Programme, and it was precisely the Third EAP which placed emphasis on it, whose central aim was indeed '*prevention, rather than cure*'[284]. It was subsequently enshrined in Article 130r(2) of the Single European Act, but its proper definition, not satisfactorily given, was brilliantly clarified by Philippe Sands, who postulated that:

> the preventive principle requires action to be taken at an early stage and, if possible, before damage has actually occurred. […] Broadly stated, it prohibits activity which causes or may cause damage to the environment in violation of the standards established under the rules of international law[285].

According to Gyula Bándi[286], this enunciation is similar to the one provided by the Environmental Liability Directive, on the basis of which prevention implies:

> any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimizing that damage[287].

With regard to its purpose, prevention is valuable for three main reasons:

(i) preventing pollution is the more beneficial way of seeking environmental protection, also given that once pollution spreads – even if in a controlled manner – it is less likely for any remedial measure to lead to satisfactory improvements in environmental standards;

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[283] Council Directive 92/43/EEC, 1992
[284] J. H. Jans, H. H. B. Vedder, *European Environmental Law*, cit. 41
[285] P. Sands, *Principles of International Environmental Law,* cit. 247
[286] G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. 43
[287] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 2004, 56, art. 2

(ii) prevention serves the purpose of both environmental protection and economic development, thanks to technological and creative solutions;

(iii) treating damages and degradation in due course proves to be efficient also in the sense that it avoids pollution to contaminate any further media[288].

In the framework of international environmental treaties, the principle has been adopted with the broad purpose of preventing, among many: (i) the loss of biodiversity[289]; (ii) air[290], seas[291] and river[292] pollution; (iii) hostile environmental modification[293]; (iv) modification of the ozone layer[294]; (v) anthropogenic climate threat[295]; (vi) damages to human health from chemicals and organic pollutants[296]; (vii) transboundary impacts[297].

Concerning case law, the prevention principle is also mentioned in association with the principle of precaution and a high level of protection. In particular, in many instances the Court of Justice of the European Union has reiterated that the purpose of environmental policy consists in:

> a high level of protection and is to be based, in particular, on the precautionary principle and on the principle that preventive action should be taken[298].

At the same time, particularly relevant is that, in its judgment of September 25th, 1977 in the case regarding the Gabcíkovo-Nagymaros Project, the International Court of Justice recalled that:

> in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage[299].

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[288] K. A. Strasser, *Cleaner Technology, Pollution Prevention and Environmental Regulation* in Fordham Environmental Law Review, 2017, 9:1, 2 – 3
[289] 1992 Biodiversity Convention, Preamble and art.1
[290] 1979 LRTAP Convention, art. 2.
[291] 1982 UNCLOS, art. 194(1)
[292] 1958 Danube Fishing Convention, art. 7
[293] 1977 ENMOD Convention, art. 1(1)
[294] 1985 Vienna Convention, art. 2(2)(b)
[295] 1992 Climate Change Convention, art. 2
[296] 1998 Chemicals Convention, art. 1; 2001 POPs Convention, art. 1.
[297] 1992 UNECE Transboundary Waters Convention, art.2(1) – (2)
[298] Joint procedures in Case C-418/97 and Case C-419/97, ARCO *Chemie Nederland Ltd and Others v the Dutch Minister of Environment,* ECLI:EU:C:2000:318
[299] *Gabcikovo-Nagymaros Project (HungarylSlovakia),* Judgment, I. C. J. Reports, 1997

Mentioning EU Secondary law, reference can eventually be made to:

(i) Directive 2008/98/EC on waste management, field in which prevention plays a vital role and consists of: '*measures taken before a substance, material or product has become waste, that reduce: (a) the quantity of waste, including through the re-use of products or the extension of the life span of products; (b) the adverse impacts of the generated waste on the environment and human health; or (c) the content of harmful substances in materials and products*'[300];

(ii) EIA Directive, whose preamble foresees that: '*the best environment policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects*'[301];

(iii) Directive 80/68 on the protection of groundwater, on the basis of which monitoring and assessment of the effects on the environment are required in advance of an authorization to release substances on behalf of competent bodies[302];

(iv) and finally Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control), whose preamble reads: '*in order to prevent, reduce and as far as possible eliminate pollution arising from industrial activities in compliance with the 'polluter pays' principle and the principle of pollution prevention, it is necessary to establish a general framework for the control of the main industrial activities, giving priority to intervention at source, ensuring prudent management of natural resources and taking into account, when necessary, the economic situation and specific local characteristics of the place in which the industrial activity is taking place*'[303].

Particularly interesting with regard to the prevention principle is the Environmental Impact Assessment (EIA), pursuant to which – on the basis of Article 2(1)[304] – an

[300] Directive 2008/98/EC, 2008, OJ L 312/3
[301] Directive 85/337, 1985, OJ L 175/40
[302] Directive 80/68, 2006, OJ L 161/1
[303] Directive 2010/75/EU, OJ L 334/17, which replaced the original IPPC Directive **96/61/EC of 1996** concerning integrated pollution prevention and control, where reference to prevention was made several times.
[304] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, (85/337/EEC), OJ L 175/40. Art. 2 reads as follows: '*Member States shall adopt all*

evaluation of the effects on the environment of given projects[305] must be promptly submitted on due time[306]. Concurrently, the Strategic Environmental Assessment (SEA) provides for the same requirement to be imposed for what concerns plans and programmes[307]. Since the enactment of the first EIA in 1985, it has been registered a dramatical increase in the number and the quality of the associated requirements on account of the European Union[308]. Originally, the Council suggested that:

> general principles for the assessment of environmental effects should be introduced with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment[309].

However, in 2012 the European Commission eventually specified that the EIA also serves the purpose of evaluating and determining environmental costs and benefits of given projects in light of sustainability requirements[310]. With respect to the covered projects and the plans, the EIA Directive distinguishes between mandatory EIAs, listed in Annex I, and those at the sole discretion of the Member States, according to the so-called '*screening procedure*', listed in Annex II[311]. Conversely, the SEA Directive contains no reference to an equally comprehensive list[312], but nonetheless a SEA is to be considered compulsory for plans or programs which:

> are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning

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measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects'

[305] For the sake of clarity, the EIA Directive refers to 'projects' in generic terms, either public or private, likely to have major consequences on the environment

[306] J. H. Jans, H. H. B. Vedder, *European Environmental Law*, cit. 311 – 312

[307] For the sake of consistency, reference is made to Directive 2001/42/EC of the European Parliament and of the council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197/30

[308] G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. 164

[309] Directive 85/337/EEC, OJ L 175/40

[310] SWD (2012) 355 final

[311] Environmental Impact Assessment, Website of the European Commission, available at: https://ec.europa.eu/environment/eia/eia-legalcontext.htm

[312] Strategic Environmental Assessment, Website of the European Commission, available at: https://ec.europa.eu/environment/eia/sea-legalcontext.htm

> or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC[313],

or rather in respect of whom the Habitats Directive imposes an assessment process[314].

2.3.3. The rectification at source principle

Concerning the principle of rectifying the damage at source, it is significant to note that reference to such principle has already been made in the First EAP of 1973, whose first principle laid down that:

> The best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects'[315].

Subsequently, it was adopted by the Single European Act of 1987 and Article 130r(2) TEC, which postulated that action undertaken by the Community in the environment field should be based, *inter alia*, on the principle that '*damage should, as a priority, be rectified at source*'. Today, the rectification principle is reiterated and acknowledged by Article 191(2) TFEU. Since the explanation of its meaning might not be obvious, in the Walloon waste case of 1992 the Court of Justice clearly stated that the source principle:

> entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste[316].

From this it follows that such principle does not simply consist of prevention as an end in itself, but rather suggests hypothetical conditions for coming up with a satisfactory

[313] Art. 3(2)(a) of the Directive 2001/42/EC, OJ L 197/30
[314] Ibid., art. 3(2)(b)
[315] Programme of action of the EC on the environment, 1973, OJ C 112
[316] Case C-2/90, *Commission v Belgium*, para. 34, ECLI:EU:C:1992:310

solution to a given environmental problem[317]. On a general note, however, it must be acknowledged that the principle of rectifying the damage at source has not retained a prominent position in the context of EC environmental law, when compared to other principles[318], and is also contested nowadays with particular regard to air pollution, insofar as the implementation of such principle might prove to be unrealistic[319].

2.3.4. The polluter pays principle

Finally, the last principle which deserves due mention is the polluter pays principle. It was with the OECD Recommendation of 1972 that a first interpretation was given, consisting of:

> the principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment.

More precisely, it was clarified that:

> the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption[320].

[317] G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. 48

[318] L. Krämer, *The genesis of EC environmental principles* in Research Papers in Law, European Legal Studies, Brugge, Belgium, 2003, 7, 13

[319] For the sake of clarification, it must be noted that the Academy of European Law (ERA), developed what follows: '*if the damage or the impairment which the environment suffers from air pollution, were rectified at source, this would mean that emission limit values for transport means […], outdoor equipment and industrial installations would have to be fixed at levels which would make all transport and other activities much more expensive. Politically it is not possible to impose a policy of rectification at source alone. It also does not appear to be a realistic option to require design of cars, airplanes or installations to lead to zero or near-zero pollution or sound emissions; the same observation applies to liability provisions. The practical EU policy as well as the policy of all Member States pays lip-service to the principle of rectifying damage at source. Noise and air pollution are largely seen as an act of God, as an inevitable by-product of modern life rather than as something which can be largely contained or even stopped, at least during some time of the day and in some areas*'. Source: Air Quality and Nose Legislation, Module 4: Principles for Directives 2008/50/EC and 2002/49/EC, Website of the European Commission

[320] OECD Recommendation, *Guiding principles concerning international economic aspects of environmental policies*, 1972, C(72) 128

The 1992 Rio Declaration as well adopted the approach according to which costs of pollution have to be attributed to the polluter, as laid down in Principle 16[321]. Concerning EC Law, one first definition was given already by the First EAP of 1973, but a more sophisticated one can be attributed to the Council Recommendation of 1975, on the basis of which, by having to bear the costs of pollution, an individual would be on the one hand less likely to pollute, and on the other more likely to make a rational use of natural resources, thereby meeting the criteria of *effectiveness* and *equitable practice*[322].

When analyzing the meanings of the tree components of the principle, namely *polluter*, *pollution* and *pays*, the following should be noted:

(i) the acting subject encompasses a variety of actors, namely '*any natural, legal, private or public person who operates. Or controls the occupational activity or […] to whom decisive economic power over the technical functioning of such an activity has been delegated'*[323];

(ii) the adjective pollution does not refer to a single event, but rather to a whole process, irrespective of the fact that such an action has direct or indirect consequences on the environment[324];

(iii) the duty of payment is not limited to preventive or reparatory measures, but may refer also to criminal liability and economic instruments[325].

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[321] For the sake of completeness, Principle 16 of the Rio Declaration reads as follows: '*National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.*

[322] Communication from the Commission to the Council regarding cost allocation and action by public authorities on environmental matters, Annex to Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, 75/436/Euratom, ECSC, EEC, OJ L 194. *Principles and detailed rules governing their application*, para. 1, reads as follows: '*charging to polluters the costs of action taken to combat the pollution which they cause encourages them to reduce that pollution and to endeavour to find less polluting products or technologies thereby enabling a more rational use to be made of the resources of the environment. Moreover, it satisfies the criteria of effectiveness and equitable practice*'

[323] Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143

[324] For instance, art. 2 (33) of the Directive 2000/60/EC establishing a framework for Community action in the field of water policy – or Water Framework Directive – foresees that: '*pollution means the direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment'*

[325] Concerning the latter, example can be found in the Directive 2004/35/EC, OJ L 143

The clarification of these three components has also been given by jurisprudential cases in many instances. Indeed, for example, in the case *Standley and Others*[326] the ECJ specified that the term 'polluter' does not refer to a single actor, but rather to a plurality, by ruling that:

> the Directive does not mean that farmers must take on burdens for the elimination of pollution to which they have not contributed. […] Member States are to take account of the other sources of pollution', and also that 'the application of the polluter pays principle […] would be frustrated if such persons involved in causing waste escaped their financial obligations.

The interpretations given by the Court is also in favour of the admissibility of the use of presumption in ascertaining a sufficient level of connection between the pollution and the polluter. As a confirmation of this, and in conjunction with the Environmental Liability Directive, in the case *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*.[327], the Court held as follows:

> Directive 2004/35 does not preclude national legislation which allows the competent authority acting within the framework of the directive to operate on the presumption […] that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area.

At the same time, and in connection with the polluter pays principle, '*the authority must have plausible evidence capable of justifying its presumption*'.

Finally, concerning the explanation of who is entitled to pay and how, in the *Futura Immobiliare* case, this is what has been declared by the Court:

> so far as concerns the financing of the cost of management and disposal of urban waste, inasmuch as a service provided on a collective basis to a body of holders is involved, the

[326] This and the following references belong to Case C-293/97 *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*, ECLI:EU:C:1999:215

[327] This reference and the related citations are extrapolated by Case C-379/08, ECLI:EU:C:2010:126, para. 70

> Member States are obliged […] to ensure that, in principle, all the users of that service […] collective bear the overall cost of disposing of the waste[328].

Eventually, the Court added that:

> the polluter pays principle does not preclude the Member States from varying, on the basis of categories of users determined in accordance with users' respective capacities to produce urban waste, the contribution of each of those categories to the overall cost necessary to finance the system for the management and disposal of urban waste[329].

From the above, it can be seen that utmost importance is attributed to environmental principles in the framework of EU law, as confirmed by their incorporation into primary legislation. The jurisprudence of the Courts, as shown in the paragraph, has made reference to such principles in many regards, not only by clarifying their meaning, but also by defending the need for, and usefulness of their implementation. Accordingly, the judgments of the CJEU give evidence of the genuinely common, practical application of the above listed principles, in the field of environmental legislation, at the levels of both the Union and the Member States[330].

2.4. Sectoral Controls and the European Environment Agency (EEA)

As can be derived from the above, the European Union has taken active steps to regulate and to introduce increasingly strict standards to meet environmental policy objectives. Attention has been given to a wide variety of sectors, some of the most relevant of which are: (i) nature protection and conservation; (ii) waste; (iii) chemicals; (iv) water quality; (v) air pollution; (vi) climate change[331].

2.4.1. Nature protection and conservation

[328] Case C-254/08, *Futura Immobiliare srl Hotel Futura and Others etc. v Comune di Casoria*, ECLI:EU:C:2009:479, para. 46
[329] Ibid., para. 52
[330] G. Bándi, *Principles of EU Environmental Law Including (the Objective of) Sustainable Development* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, cit. 52 – 53
[331] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 157

With respect to nature protection and conservation, it is interesting to note that the defense of threatened species has attracted the particular attention of EU environmental legislation already in 1979 with the Wild Birds Directive[332] and, subsequently, in 1992 with the Habitats Directive[333].

The first one, in its latest version, stipulates that '*the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds*', and therefore envisages that Member States shall endeavor to ensure such characteristics[334], mainly by means of the setting up of special protection areas (SPAs) and of the management of habitats, regardless of whether they are located into protected areas or not[335]. Very interestingly, since 1994 these SPAs belong to Natura 2000 network.

At the same time, the second Directive mentioned above seeks to preserve and enhance biodiversity, that is natural habitats and untamed flora and fauna, for the benefit of which national governments must specify special areas of conservation (SACs) and annexed preservation measures[336]. In this regard, it is the responsibility of the Commission to evaluate and, if applicable, endorse the list of sites of Community importance (SCI) drafted and proposed by Member States. Remarkably, according to Article 6(3) of the Habitat Directive, '*appropriate assessment(s)*' of the consequences of given plans or projects likely to have a '*significant effect*'[337] on a site are required, such a condition applying also to the SPAs appointed in accordance with the Wild Birds Directive.

[332] Former Directive 79/409/EEC, OJ L 103/1, now Directive 2009/147/EC, OJ L 20/1
[333] Directive 92/43/EEC, OJ L 206/7
[334] Directive 2009/147/EC, OJ L 20/1, premises and art. 3
[335] A. Farmer (ed.), *Sourcebook on EU Environmental Law,* Institute for European Environmental Policy, 137
[336] Ibid.
[337] As regards the exact meaning of 'significant', in accordance with the Judgment of 7 September 2004, Case C-127/02, which required a reference for a preliminary ruling under art. 234 EC, the Court clarified the following: '*pursuant to the first sentence of Article 6(3) of the Habitats Directive, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project*'

Considering the fact that, pursuant to Article 6(3), no reference is made as how to conduct an '*appropriate assessment*', in 2007 the Commission has elucidated the following[338]:

(i) assessments should be conducted on the basis of the best scientific findings;

(ii) in the framework of Natura 2000 sites, the elements linked to the coherence of either a site or the whole network must be analyzed;

(iii) the decisions undertaken must be detectable;

(iv) the analysis of potential impacts must be taken into due consideration;

(v) best available techniques and methods must be adopted;

(vi) effective mitigation measures must be contemplated;

(vii) the evaluation of the biological integrity and the impact assessment must be evaluated on the basis of Natura 2000 indicators, equally instrumental when monitoring the plan implementation.

Concurrently, the Commission has also provided for the possibility of alternative solutions to be adopted by Member States pursuant to the principle of subsidiarity. Overall, in the absence of satisfactory alternative solutions, if a project is held to be necessary on the basis of a '*overriding public interest*' and if it is covered by the framework of: actions or policies aiming to protect fundamental values for the citizens' life (i.e. health, safety, environment); fundamental policies for the State and the Society; activities of economic or social nature, thereby fulfilling specific obligations of public service, then it can be nonetheless carried out. However, in such circumstances compensatory measures are required.

In the Guidance document, a clarification is made as to what the expression '*compensatory measures'* encompasses, that is either:

(i) mitigation measures, which are an integral part of the proposed plans and projects and whose purpose is to minimize or offset their negative impacts;

[338] This and the following references are extrapolated from: Guidance document on article 6(4) of the 'Habitats Directive' 92/43/EEC, Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission, (2007), para. 1.3 – 1.3.1

(ii) compensatory measures, not related to a given project, which aim at deleting the negative consequences of plans or projects on the Natura 2000 Network, therefore keeping the latter's consistency and ecological continuity.

With respect to waste, the European Union is very active in the field, with policymaking centered around, *inter alia*: waste management and recovery, with focus on recycling; reduction in contaminated waste; waste prevention[339]. As far as waste management is concerned, useful guidelines have been developed, which include principles such as:

(i) protection of human health and the environment[340];

(ii) waste hierarchy[341], according to which waste should be prevented, or otherwise re-used, recycled and restored, with waste sent to landfill ideally being the *extrema ratio*;

(iii) proximity, that governs the carriage of waste[342];

(iv) self-sufficiency[343] in disposal, which relates to both the EU and Member States;

(v) liability for aftercare, with financial guarantees up to the operator;

(vi) life cycle thinking[344].

Interestingly, Annex IVa includes an exhaustive list of economic instruments and other measures to be used as stimulus for the application of the waste hierarchy.

Concerning the significance attributed to the noun 'waste', Article 3(1) of the Waste Framework Directive[345] gives the following definition: '*any substance or object which the holder discards or intends or is required to discard'*. Equally interesting is Article 14, which establishes that '*in accordance with the polluter-pays principle, the costs of waste management […] shall be borne by the original waste producer or by the current or previous waste holder*'. Broadly speaking, this Directive represents the framework for waste management in the European Union and in Chapter III, devoted

[339] L. Krämer, *The genesis of EC environmental principles* in Research Papers in Law, European Legal Studies, Brugge, Belgium, 2003, 7, 65
[340] Art. 13 of Directive 2008/98/EC on waste and repealing certain Directives, OJ L 312/3
[341] Ibid., Art. 4(1)
[342] Ibid., art. 16
[343] Ibid.
[344] L. Krämer, *The genesis of EC environmental principles* in Research Papers in Law, European Legal Studies, Brugge, Belgium, 2003, 7, 65 – 66
[345] Directive 2008/98/EC, OJ L 312/3; Waste Framework Directive, Website of the European Commission, available at: https://ec.europa.eu/environment/topics/waste-and-recycling/waste-framework-directive_en

precisely to waste management, it ideally calls for the following criteria to be met by Member States:

(i) ensure that any original waste producer or other holder carries out the treatment of waste himself or has the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector[346];

(ii) establish an integrated and adequate network of waste disposal installations and of installations for the recovery of mixed municipal waste[347];

(iii) ensure that the production, collection and transportation of hazardous waste, as well as its storage and treatment, are carried out in conditions providing protection for the environment and human health[348];

(iv) ensure that hazardous waste is not mixed[349];

(v) ensure that, in the course of collection, transport and temporary storage, hazardous waste is packaged and labelled in accordance with the international and Community standards in force[350];

(vi) set up separate collection for hazardous waste fractions produced by households to ensure that they are treated in accordance with Articles 4 and 13 and do not contaminate other municipal waste streams[351];

(vii) take the necessary measures to ensure that: waste oils are collected separately [and] treated, giving priority to regeneration or alternatively to other recycling operations […], are not mixed […][352];

(viii) ensure that […] bio-waste is separated and recycled at source or that it is collected separately and not mixed with other types of waste[353].

[346] Art. 15 of Directive 2008/98/EC
[347] Ibid., art. 16
[348] Ibid., art. 17
[349] Ibid., art. 18
[350] Ibid., art. 19
[351] Ibid., art. 20
[352] Ibid., art. 21
[353] Art. 22 of Directive 2008/98/EC

Eventually in 2015 a proposal was made for a Directive amending the Waste Framework Directive, so as to focus on approaches dealing with sustainable consumption and production and promoting overall a more circular economy [354].

2.4.2. Chemicals

Focusing attention on chemicals, from June 1st, 2007 onwards EU law and policy in the field is shaped within the regulatory framework of the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)[355] Regulation[356]. The European Chemical Agency (ECHA) is charged with the management and the effective application of the abovementioned Regulation in conjunction with Member States, rare instance which testifies to the setting up by the EU of an implementation framework[357]. The very purpose of the REACH Regulation, as provided for in Article 1, is to guarantee a high degree of protection of human health and the environment, but also the free flow of substances on the internal market of the EU, and in the meantime to improve competitiveness and innovation in the chemicals industry. Concurrently, paragraphs 2 and 3 of the very same Article 1 outline, respectively: that the Regulation includes provisions regarding substances and preparations that refer to the manufacture, sale on the market or utilization of such substances in themselves, otherwise in preparations or in Articles, and also to the putting on the market of preparations; and that such provisions are supported by the precautionary principle.
By clarifying the meaning of 'substance', Article 3 maintains that it is:

[354] Proposal for a Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste, COM/2015/0595 final - 2015/0275 (COD)
[355] 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, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC
[356] A. Farmer (ed.), *Sourcebook on EU Environmental Law,* Institute for European Environmental Policy, 60; M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 159
[357] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 159

> a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition.

Since it is designed to encompass all chemical substances, it must be considered that its impact turns out to be influential with regards to a variety of EU companies[358].

The REACH Regulation is built on the principles of registration, evaluation, authorization and restriction[359] and its provisions apply to a variety of actors, amongst which: manufacturers, producers, importers, downstream users, agents and users in the supply chain[360]. Overall, REACH imposes obligations on companies and charges them with the onus of proof, therefore requiring them not only to detect and manage the risk of hazards deriving from the produced substances, but also to give ECHA proof of the manners in which such substances can be safely used, and eventually to inform users of the risk management measures[361]. Ultimately, authorities are entitled to limit the usage of certain substances in case of impossibility of managing the risk, and in the long term less hazardous substances should be preferred to the most threatening ones[362].

2.4.3. Water quality

As regards the protection of water quality, there seems to be consensus that it is one of the main sectors in which EU efforts concerning environmental regulation are most focused on[363]. From the 1970s onwards, a number of Directives were implemented, which centered on issues such as: attention to drinking and bathing quality[364]; definition of

[358] Understanding REACH, Website of the European Chemicals Agency, available at: https://echa.europa.eu/regulations/reach/understanding-reach
[359] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 159
[360] A. Farmer (ed.), *Sourcebook on EU Environmental Law,* Institute for European Environmental Policy, 61
[361] Understanding REACH, Website of the European Chemicals Agency, available at: https://echa.europa.eu/regulations/reach/understanding-reach
[362] Ibid.
[363] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 159
[364] Ibid.

quality objectives to be implemented; introduction of standards or practices aimed at controlling the discharge of polluting substances into the water; creation of water management facilities[365].

The Water Framework Directive[366] has broadened the scope and the targets relating to water management and protection[367] and highlighted the increasingly interlinked nature of water sources – as enlisted in Article 2 – with elevated levels of ecological quality representing its ultimate purpose[368]. Already in the premises of the Water Framework Directive, it is asserted that water is definitely not a simple '*commercial product*', but instead a heritage which must be protected and enhanced, thereby showing the high priority given to the field. A very interesting element to note is that the Directive is organized by means of river basins at its core[369], and therefore it is possible to say that this particular aspect makes it '*ecologically driven*'[370].

Article 1 defines the purpose of the Directive, which in broad terms consists in establishing:

> a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater, which: (a) prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems; (b) promotes sustainable water use based on a long-term protection of available water resources; (c) aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances; (d) ensures the progressive reduction of pollution of groundwater and prevents its further pollution, and (e) contributes to mitigating the effects of floods and droughts.

[365] A. Farmer (ed.), *Sourcebook on EU Environmental Law,* Institute for European Environmental Policy, 108
[366] Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy, OJ L 327/1
[367] A. Farmer (ed.), *Sourcebook on EU Environmental Law,* Institute for European Environmental Policy, 108
[368] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 159
[369] Art. 2 of the Directive 2000/60/EC, OJ L 327/1
[370] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 160

Although the Water Framework Directive is far-reaching and ambitious in its goals and purposes, many points of criticism are highlighted in its implementation[371]. Hence, by the middle of the decade going from 2010 until 2020 it was anticipated that the European Commission would have revised the Directive[372]; nonetheless, in June 2020 a decision was taken against such revision, and instead the Water Framework Directive was defined to as the *fulcrum* of the EU's water quality legislation, with the related conditions having to be met by 2027[373]. In line with such an acknowledgment, the Commissioner of the Environment, Virginijus Sinkevičius, affirmed that the Commission agreed on the need of focusing on the best way and practices for implementation and enforcement, «without changing the directive»[374].

2.4.4. Air pollution

With regard to air quality, EU legislation in the field is conducted by means of different instruments, such as the introduction of limits on emission of pollutants and various other toxic substances, or the setting up of strict emission standards and limits[375]. Significant in this regard is the Air Quality Framework Directive[376], aimed at:

(i) defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole;
(ii) assessing the ambient air quality in Member States on the basis of common methods and criteria;

[371] S. Hendry, *The EU Water Framework Directive – Challenges, Gaps and Potential for the Future* in Journal for European Environmental & Planning Law, 2017, 14, 254 – 268
[372] Ibid., 267
[373] *European Commission decides not to revise the WFD*, EurEau, 24 June 2020, available at: https://www.eureau.org/resources/news/456-european-commission-decides-not-to-revise-the-wfd
[374] Ibid.; *EU water law will NOT be changed, confirms European Commission,* European Anglers Alliance, 23 June 2020, available at: https://www.eaa-europe.org/news/14226/eu-water-law-will-not-be-changed-confirms-european-commission.html
[375] A. Farmer (ed.), *Sourcebook on EU Environmental Law,* Institute for European Environmental Policy, 86
[376] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152/1

(iii) obtaining information on ambient air quality in order to help combat air pollution and nuisance and to monitor long-term trends and improvements resulting from national and Community measures;

(iv) ensuring that such information on ambient air quality is made available to the public;

(v) maintaining air quality where it is good and improving it in other cases;

(vi) promoting increased cooperation between the Member States in reducing air pollution[377].

According to the Directive, Member State must additionally: identify regions within domestic borders, which will be dealt with in different ways and in accordance with their own peculiarities and industries; set limits for given substances and benchmark values for air quality; draw up Air Quality Plans – as established by Article 23 – where:

> there is a risk that the levels of pollutants will exceed one or more of the alert thresholds […], indicating the measures to be taken in the short term in order to reduce the risk or duration of such an exceedance[378].

Interesting in the regard of the protection of air quality is the fact that, in its first post-Brexit ruling, the ECJ found the United Kingdom in breach of EU limits to air pollution in a systematic and persistent way and required the country to satisfactorily reduce its emissions of nitrogen dioxide (NO2)[379].

2.4.5. Climate change

With respect to climate change, the EU claims to have a leading role in the field, especially for what concerns the reduction of carbon and greenhouse gas emissions[380].

[377] Ibid., reference is here made to art. 1
[378] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 162
[379] Judgment of the Court (Seventh Chambre) of 4 March 2021, European Commission v United Kingdom of Great Britain and Northern Ireland, Case C-664/18, ECLI:EU:C:2021:171
[380] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 161

This therefore appears to be in conformity with the Union's earliest commitments arising from, *inter alia*, the Kyoto Protocol, the Paris Agreement and the broad commitment of the fight against climate change, and also with the more recent European Green Deal and Fit for 55 package, which will be subsequently analyzed in the course of this dissertation. Very interestingly, whereas in 2009 the European Parliament and the Council promoted the Climate and Renewable Energy Package (CARE), which consisted in a twenty percent reduction in emissions of greenhouse gases emissions by 2020[381], according to the revolutionary Fit for 55 Package these latter should be additionally reduced by fifty-five percent by 2030. Moreover, it was foreseen that the complete carbon-neutrality might become a reality by mid-century[382].

In the context of climate change, it is remarkable that in 2003 the EU Emission Trading Scheme (EU-ETS) was created by means of Directive 2003/87/EC383, which aimed at encouraging the mitigation of and decrease in greenhouse gas emissions '*in a cost-effective and economically efficient manner*'[384]. Article 3 additionally clarified the meaning of '*emissions*', that is '*the release of greenhouse gases into the atmosphere from sources in an installation*', and '*greenhouse gases*', listed in Annex II.

Two sectors have proved to be particularly challenging for EU regulation policy in the field, and precisely the aviation sector and the energy market[385]. Concerning the former, in 2008 Directive 2003/87/EC was amended by Directive 2008/101/EC[386], therefore widening the scope of the EU-ETS through the incorporation of aviation activities in the scheme. Concerning the latter, in many instances it has proven problematic to find a fine balance between the economic purposes of the EU – and in particular the free movement of goods and services –, and the attempts of the Member

[381] A. Farmer (ed.), *Sourcebook on EU Environmental Law,* Institute for European Environmental Policy, 95

[382] For the sake of clarity, I have personally followed the pertinent meetings of the European Parliament, as well as the plenary sessions and the hearings of the Commissioners as part of my internship at Italy's Permanent Representation to the EU. Related info is available in the Websites of the European Parliament, the European Commission and the European Committee of the Regions

[383] 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 and amending Council Directive 96/61/EC, OJ L 275/32

[384] Ibid., art. 1

[385] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 162

[386] Directive 2008/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8/3

States to give financial support to renewable energy providers[387]. Nonetheless, the Court of Justice has reiterated that some sort of restrictions to free trade might be accepted as far as the alleged discriminatory effects of certain measures are justified on the basis of their beneficial impact on the protection of both the environment and human health[388].

2.4.6. The European Environmental Agency

As observed at the beginning of this chapter, a prominent role in the field of environmental policy and governance is played by EU agencies, with their related knowledge and expertise. Agencies are public authorities, set up under secondary legislation, that retain legal personality and a good level of autonomy in performing their tasks and which deliver independent data collection as well as independent surveillance and enforcement[389]. These bodies' aim is indeed to carry out technical, scientific or management functions, such as provided for by their founding acts[390], and consequently to provide valuable insights to EU institutions and Member States[391]. With regard to the environmental field, the most prominent body is definitely the European Environmental Agency (EEA), established by means of Regulation 1210/1990[392].

At the moment of the foundation of the European Environmental Agency, an agreement was found in the European public opinion on the need to strengthen the gathering of scientific environmental-related information in a more consistent,

[387] M. Gehring, F. Phillips, E. Lees, *The European Union* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 162
[388] Ibid.
[389] A. Schout, *EU agencies after 25 years: a missed opportunity to enhance EU governance* in The Hague: Clingendael Policy Brief, 2018, 3
[390] Information Guide – Agencies and Decentralised Bodies of the European Union, European Sources Online ESO, Cardiff University, 2013, 2, available at: http://aei.pitt.edu/74857/1/Agencies_Decentralised_Bodies.pdf
[391] 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*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 57
[392] Council Regulation 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, today replaced by Regulation 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

coordinated and harmonized manner[393]. By contrast, it cannot be said that a similar arrangement was concluded as to what powers and margin of discretion the EEA could have. As a matter of facts, the Commission pushed towards a sufficiently limited delegation of powers to the newborn agency, which was meant to be devoid of regulatory or decisional powers[394]; however, the advice of the Parliament was that of the creation of a body provided not only with regulatory powers, but also with powers of inspection[395]. As a compromise solution, the EEA was given legal personality but not formal regulatory nor administrative powers.

Created in accordance with Article 192 TFEU, its purposes and tasks are laid down in Articles 1 and 2 of the Regulation 401/2009. According to the former, the Agency shall provide Member States with: '*objective, reliable and comparable information*' and '*the necessary technical and scientific support*'; concerning the latter, a comprehensive list is provided. Additionally, Article 3 established that priority shall be given to:

> air quality and atmospheric emissions; water quality, pollutants and water resources; the state of the soil, of the fauna and flora, and of biotopes; land use and natural resources; waste management; chemical substances which are hazardous for the environment; coastal and marine protection.

Interestingly, the EEA proves useful and beneficial to the European Commission and delivers its services to a number of DGs, such as DG Energy and DG Clima, even though it is particularly important with regard to DG ENV, which is entrusted with the responsibility for developing and implementing Commission's policies in the environment field[396]. In spite of the conflicting positions existing at the beginning between the two bodies, today they are characterized by an intense collaboration, as a confirmation of which the EEA's agenda is leaned towards the own needs and requirements of the

[393] 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*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 58
[394] L. Cuocolo, *Le Agenzie per l'ambiente tra diritto comunitario e diritti interni* in V. Salvatore (ed.), *Le Agemzie dell'Unione Europea. Profili istituzionali e tendenze evolutive*, Jean Monnet Centre of Pavia, Pavia, 2011, 68
[395] Ibid.
[396] Directorate-General, ENV, Environment, Website of the European Commission, available at: https://ec.europa.eu/info/departments/environment_en

Commission[397]. In order to fulfil its tasks outlined in Article 1, a relevant duty of the EEA – such as provided for in Article 2(h) of Regulation 401/2009 – is '*to publish a report on the state of, trends in and prospects for the environment every five years, supplemented by indicator reports focusing upon specific issues*'; moreover, it drafts sophisticated reports on specific subjects. This is extremely important as far as it allows the Agency to guarantee the effective dissemination of '*reliable and comparable environmental information, in particular on the state of the environment, to the general public*', as required by Article 2(m) of the aforementioned Regulation, which in turns succeeds in affecting the drafting, implementation and development of environmental policy and legislation[398].

As it can be additionally noted by the Regulation, the EEA is also responsible of the establishment and coordination of the European Environment Information and Observation Network (Eionet), which is composed of: '*the main component elements of the national information networks*; *the national focal points*; *the topic centres*'[399]. Eionet is particularly relevant in the sense that it delivers data and studies to the EEA, the latter of which is consequently reliant on the former, and this therefore shows a great degree of interdependence between the two bodies[400]. Moreover, the Network also encompasses: the European Cooperating States – and especially Western Balkan Countries –, in addition to the current twenty-seven Member States; the other three countries belonging to the EEA, namely Iceland, Liechtenstein and Norway; Switzerland and Turkey[401].

In conformity with the great significance recognized to environmental matters at the global level and by emphasizing their far-reaching nature, the European Environment Agency hence becomes involved in numerous partnerships and exchanges of knowledge and expertise with international organisations – such as UNECE and OECD –, UN specialized agencies – among which the World Meteorological Organisation and the

[397] 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*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 59
[398] Ibid., 60
[399] Artt. 2 – 4 of the Regulation 401/2009
[400] 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*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 60
[401] Ibid. It shall be noted that, at the moment of the publication of the Research Handbook, the United Kingdom was still a EU Member State, therefore A. Volpato and E. Vos made reference to 28 Member States, rather than the current 27.

International Atomic Energy Authority –, and ultimately international programs – for instance the UNEP[402]. Furthermore, the EEA has been maintaining relations with the US Environmental Protection Agency for twenty years, as well as states in Central Asia for fifteen years[403]. Eventually, it manages to have regular contacts and useful exchanges with other bodies in Africa, Australia, Canada, China, India and South America[404]. An implication of crucial importance is that this global network enables the EEA to supply EU institutions and Member States with the best and most reliable technical and scientific assistance for the implementation of EU policies in the environment sector[405]. In the final analysis, it shall be noted that the EEA will retain a prominent role in the context of the monitoring and follow-up activities of the 2030 Agenda for Sustainable Development[406].

2.5. Access to Justice in Environmental Matters

When dealing with the sensitive issue of access to justice, reference shall be made to Article 263 TFEU, pursuant to which:

> the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

This Article clearly shows that the CJEU is entrusted with the task of passing judgments on disputes resulting from actions undertaken by the EU and the related institutions[407].

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[402] 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*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 60; Section '*About us*' of the European Environment Agency; art. 15 of the Regulation 401/2009
[403] Section '*About us*' of the European Environment Agency
[404] Ibid.
[405] 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*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 60
[406] Section '*About us*' of the European Environment Agency
[407] M. van Wolferen, M. Eliantonio, *Access to Justice in Environmental Matters in the EU: The EU's Difficult Road Towards Non-compliance with the Aarhus Convention* in M. Peeters, M. Eliantonio (eds.),

At the same time, the Court is entitled to give preliminary rulings, according to the preliminary reference procedure, for what concerns the interpretation of the Treaties and the acts of institutions, bodies, offices or agencies of the EU. Moreover,

> where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon[408].

With respect to the possibility to resort to the courts for environmental matters for the parties involved – and especially NGOs, or even more precisely environmental NGOs (ENGOs) –, once again the benchmark is Article 263 TFEU providing that:

> any natural or legal person may […] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

From this it follows that there is an obligation for the parties involved in environmental litigations to provide clear evidence of such a direct and individual concern. Notwithstanding this, doubts arise as to whether there is the possibility to bring actions also against acts not directly addressing to NGOs. Not surprisingly, this is not currently the case[409].

In order to clarify the concept of individual concern, it is particularly worth referring to the Plaumann case of 1963, when the Court specified as follows:

> persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed[410].

Research Handbook on EU Environmental Law, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 148

[408] Art. 267 TFEU

[409] C. Lycourgos, A. Vlachogiannis, A. Yiordamli, *Access to Justice of Environmental NGOs: A Comparative Perspective (EU, France, Cyprus* in Friedrich-Ebert-Stiftung, 2021, 6

[410] Case 25/62 *Plaumann & CO v, Commision*, ECLI:EU:C:1963:17

As far as environmental matters are concerned, however, major difficulties arise since the acts contested do not concern a single, specified person, but the whole community instead; by implication, ENGOs are very unlikely to attest compliance with the requirements requested by the Court and pursuant to the aforementioned Articles[411].

This is well-attested by the case Stichting Greenpeace Council (Greenpeace International) and Others v Commission case of 1998 or, more simply, the Greenpeace case[412]. In that judgment, the Court dismissed Greenpeace's appeal against a previous decision of 1995[413], according to which further financial assistance was provided for the construction of two power plants in Gran Canaria and Tenerife. In the finding of the Court, such appeal could not be declared admissible on the grounds that '*the appellants did not have locus standi is consonant with the settled case-law of the Court of Justice*'[414] and were concerned '*in a general and abstract fashion*'[415] which could, therefore, not differentiate them from the rest of the local population on the basis of an outstanding interest[416].

For the purposes of access to justice in environmental matters, particularly relevant is the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters – or Aarhus Convention – mentioned in Chapter One of this dissertation. The Aarhus Convention, to whom the European Union has adhered by means of resort to the Council decision 2005/370/EC[417], has been mainly implemented through the application of secondary legislation, most notably the Environment Impact Assessment Directive[418] and the Aarhus

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411 M. van Wolferen, M. Eliantonio, *Access to Justice in Environmental Matters in the EU: The EU's Difficult Road Towards Non-compliance with the Aarhus Convention* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 150

412 Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) and Others v Commission*, ECLI:EU:C:1998:153

413 Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and Others v Commission*, ECLI:EU:T:1995:147

414 Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) and Others v Commission*, ECLI:EU:C:1998:153

415 Ibid.

416 M. van Wolferen, M. Eliantonio, *Access to Justice in Environmental Matters in the EU: The EU's Difficult Road Towards Non-compliance with the Aarhus Convention* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 151

417 OJ L 124/1

418 M. van Wolferen, M. Eliantonio, *Access to Justice in Environmental Matters in the EU: The EU's Difficult Road Towards Non-compliance with the Aarhus Convention* in M. Peeters, M. Eliantonio (eds.),

Regulation of 2006[419]. From then onwards, the Aarhus Convention has become legally binding upon both the EU Institutions and the Member States in compliance with Article 216(2) TFEU[420].

With regard to the implementation of the Convention at the Member States level, it is interesting to mention the Directive 2003/35/EC, by way of which the EIA Directive was revised so as to encompass a new Article 10a[421] resembling Article 9 of the aforementioned Convention. As a matter of fact, Article 10a envisages the possibility for '*members of the public concerned*' to appeal for justice in order to challenge '*decisions, acts or omissions*' undertaken by Member States. The similarity between the two instruments is, therefore, blatant. Indeed, Article 9 of the Convention, dealing with the last pillar and precisely the access to justice in environmental matters, proclaims as follows:

> Each Party shall […] ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that Article, has access to a review procedure before a court of law or another independent and impartial body established by law. […] Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law.

Research Handbook on EU Environmental Law, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 157

[419] Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264/19

[420] A. Pánovics, *The Missing Link – Access to Justice in Environmental Matters* in ECLIC, 2020, 4, 115

[421] Today, art. 11 of Directive 2011/92

What is of particular relevance in this context is that the Aarhus Convention definitely recognize the leading role of NGOs, since in accordance with Article 2(5) of the Convention the wording '*the public concerned*' relates to:

> the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

As a logical consequence, NGOs are lawfully entitled to uphold their interests in legal proceedings, as actually confirmed by Article 3(4) which states that:

> each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

As outlined above, Article 9 sets out the requirements for accessing to justice. In particular, the first paragraph deals with how can litigants uphold and vindicate their right to information under Article 4; paragraph 2 is concerned with the access to a review procedure, by implying the refusal to authorize an *actio popularis,* since sufficient interests or the impairment of a right must be demonstrated by the parties concerned[422]; paragraph 3 provides for a fairly general nature of the access to justice in environmental matters with reference been made to the '*members of the public'*, instead of just to the '*parties concerned*'[423]. Indeed, as it is envisaged:

> each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

[422] M. van Wolferen, M. Eliantonio, *Access to Justice in Environmental Matters in the EU: The EU's Difficult Road Towards Non-compliance with the Aarhus Convention* in M. Peeters, M. Eliantonio (eds.), *Research Handbook on EU Environmental Law*, Edward Elgar Publishing, Chelthenham, UK, Northampton, USA, 2020, 155
[423] Ibid., 156

This acknowledgment implies that the Aarhus Convention aims at granting the right to access to justice to a broader category of applicants.

In order to comply with the obligations, the stated purpose of the aforementioned Aarhus Regulation is therefore to contribute to the implementation of the Aarhus Convention, especially by '*granting access to justice in environmental matters at community level under the conditions laid down by this Regulation*'[424]. Interestingly enough, the Regulation acknowledges the importance of NGOs and their right to access to justice, by stipulating that those NGOs meeting certain criteria can:

> make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act' [425].

Concurrently, NGOs can '*institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty*'[426].

Concerning the criteria that the Regulation demands to satisfy, they are laid down in Article 11, according to which an NGO must:

(i) be an '*independent non-profit-making legal person'*;
(ii) have the principal purpose of protecting the environment in the framework of environmental law;
(iii) have existed for more than two years;
(iv) ensure that '*the subject matter in respect of which the request for internal review is made is covered by its objective and activities*'.

2.5.1. Constraints for NGOs to resort to justice

It must be noted that many are the constraints placed on the possibility for NGOs to access to justice. A report conducted by the European Environmental Bureau has, for instance,

[424] Regulation 1367/2006, OJ L 264/19, art. 1
[425] Ibid., art. 10
[426] Ibid., art. 12

identified five barriers, and precisely: (i) standing; (ii) time; (iii) knowledge; (iv) money; (v) repercussions[427].

According to the report, standing is '*the ability for environmental groups or citizens to challenge decisions in courts*'[428] and a major difficulty here comes from the necessity to demonstrate a real interest. In spite of the fact that Article 9(2) of the Aarhus Convention effectively considers NGOs as retaining such an interest, the truth is that there is not a consistent understanding and implementation of the provision and of the EIA Directive across EU Member States[429]. Indeed, only a few of them, for instance, have understood the sense of Article 11(3) of the EIA Directive[430] appropriately, so as to guarantee proper access to Justice to NGOs; this is well-outlined in the *Bund für Umwelt und Naturschutz* case from Germany[431] and the *Djurgården-Lilla* case from Sweden[432].

With regard to the first one, the company Trianel was authorized to construct and operate a coal-fired power station in Lünen, which however was supposed to be located within eight kilometers of five special areas of conservation within the meaning of the Habitats Directive. On 16 June 2008, the NGO Friends of the Earth initiated proceedings for the annulment of the contested permit by invoking and infringement of the provisions transposing into German law the Habitats Directive. Notwithstanding the fact that the referring German court stipulated that national legislation did not allow NGOs to bring actions for infringement of the law, it nevertheless recognized that a restriction on access to justice of this sort could be in breach of Directive 85/337, and therefore asked the CJEU if the action filed by Friends of the Earth ought not to be allowed on the basis of Article 10a of the EIA Directive. The CJEU ruled as following:

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[427] European Environmental Bureau, Implement for Life Project, *Challenge Accepted? How to Improve Access to Justice for EU Environmental Laws, 2018, 3*
[428] Ibid., 4
[429] Ibid., 4
[430] Article 11(3) of Directive 2011/92/EU, OJ L 26/1, reads as follows: '*What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article*'
[431] Case C-115/09, ECLI:EU:C:2011:289
[432] Case C-263/08, ECLI:EU:C:2009:631

> Article 10a of Directive 85/337/EEC of 27 June 1985 […] as amended by Directive 2003/35/EC […] precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from the environment law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals. Such a non-governmental organisation can derive […] the right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, as amended, on the infringement of the rules of national law flowing from Article 6 of Di- rective 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 2006/105/EC of 20 November 2006, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.

The dispute relating to the second case, instead, concerned the fact that the Municipality of Stockholm granted development consent to an electricity company concerning the construction of a tunnel in North Djurgården, regardless of the fact that, by evaluating the environmental impact assessment, the Stockholm Regional Authority found the project to be likely to have considerable environmental consequences.

Consequently, the organization Djurgården-Lilla Värtans Miljöförening, which had previously challenged the judgment before the Environmental Appeal Chamber of the Svea Court of Appeal but was dismissed since it did not meet the requirement of at least two thousand members[433], brought an appeal against that decision before the Högsta domstolen. The Supreme Court, in turn, referred the question to the ECJ for a preliminary ruling, asking if Swedish legislation was too restrictive in respect of the right of appeal as foreseen by the Aarhus Convention. In its judgment, the ECJ observed what follows:

> Members of the 'public concerned' within the meaning of Article 1(2) and 10a of Directive 85/337, as amended by Directive 2003/35, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has

[433] For the sake of legal clarity, it must be noted that Paragraph 13 of Chapter 16 of the Environmental Act requires organizations to have at least 2.000 members in order to be allowed to appeal against judgments and decisions covered by that act

> given a ruling on a request for development consent' and, by confirming the restrictive nature of the Swedish rule, 'Article 10a of Directive 85/337, as amended by Directive 2003/35, precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive, as amended, solely to environmental protection associations which have at least 2000 members'[434].

Concerning the barrier posed by time, the excessive length of some legal proceedings must be adequately taken into account, together with the impossibility for or unwillingness of courts and tribunals to proceed with the issuing of an injunction in order to force controversial activities to stop during a given decision on a particular case[435]. It goes without saying that such delays would only increase the risk of prolonged environmental harm up to the point of impossibility to assess the extent of the damage and, accordingly, to entirely restore or, at least, satisfactorily rectify it[436].

With regard to knowledge, it should be noted that in the majority of EU Member States environmental cases are mainly being dealt with by administrative courts, whose judges are not necessarily – and not often – acquainted with environmental processes and conditions[437]. This is also compounded by the cut in public funding since the 2008 crisis. As a matter of fact, the allocation of more resources to the judiciary branch, especially concerning the training of judges on environmental matters, is highly recommended[438].

When referring to money and financial burdens more in general, notwithstanding the fact that Article 11(4) of the EIA Directive requires procedures to be '*not prohibitively expensive*', there is no homogeneous application across EU Member States, which retain a discretionary power in the interpretation of the meaning of such provision[439]. As a consequence, individuals and NGOs are frequently required to pay substantial amounts

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[434] In the aftermath of this judgment, the Swedish Supreme Court set aside the Swedish rule on NGO standing and referred the case back to the Environmental Court of Appeal. As from 1 August 2010, the Environmental Code allows any organization with 100 members or more to appeal decisions on permits and near-related issues. Source: https://unece.org/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/ECJ_C263-08_DLV_SV/Summary_EU_ECJ_C263-08_DLV.pdf

[435] European Environmental Bureau, Implement for Life Project, *Challenge Accepted? How to Improve Access to Justice for EU Environmental Laws, 2018, 8*

[436] Ibid.

[437] Ibid., 9

[438] Ibid.

[439] Ibid., 11

in environmental proceedings, which in turn will likely prevent them from considering legal actions[440].

Finally, with regard to repercussions, it is easily imaginable that large corporations or major investors – in virtue of their financial strength – very frequently resort to questionable behaviors, such as acts of intimidation or reprisals, against individuals and NGOs seeking to compromise their interests for the sake of environmental protection. This eventually succeeds in convincing – or rather forcing – them to refrain from taking legal action[441].

Aside from the difficulties related to the five barriers analyzed above, another major issue concerning the recourse to justice is posed by the fact that the Aarhus Regulation has failed to achieve harmonization with the Treaties as far the requirement to grant satisfactory access to the Courts is concerned. Indeed, in March 2017 the Aarhus Convention Compliance Committee declared the EU to be in breach of compliance with its obligations arising from the Convention itself, given the many constraints on access to justice and resort to the CJEU for citizens and NGOs[442]. *Inter alia*, the Compliance Committee drew attention on some contradictory aspects. For instance:

(i) the Aarhus Regulation referred only to those NGOs answering to certain requirements, while the Aarhus Convention encompasses the broad expression '*members of the public*';

(ii) the CJEU has ruled that only '*acts of individual scope*' are covered by the Regulation;

(iii) the Regulation allowed for the internal review of acts adopted in the framework of environmental law, but general legislation relating to the environment is covered by the Convention;

(iv) the Regulation encompassed only those administrative acts with legally binding and external effects[443].

Accordingly, on October 14th, 2020, a legislative proposal for the amendment the Regulation was submitted by the European Commission, to whom MEPs have

[440] Ibid.
[441] Ibid., 12
[442] A. Pánovics, *The Missing Link – Access to Justice in Environmental Matters,* cit. 118
[443] V. Halleaux, *Access to justice in environmental matters. Amending the Aarhus Regulation*, Briefing of the European Parliament concerning EU Legislation in Progress, 2021, 4, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679078/EPRS_BRI(2021)679078_EN.pdf

subsequently voted in favor during the plenary session of the European Parliament held on May 20th, 2021. The proposal would introduce many novelties, and namely:

(i) the broadening of the definition of '*administrative acts*', so as to include acts of '*general scope*', and no more of '*individual scope'*;

(ii) the possibility to review any administrative act in contravention to EU environmental law regardless of policy objectives, and not solely the review of administrative acts '*under environmental law*';

(iii) the extension of deadlines for the internal review procedures, and precisely of two weeks for NGOs and four weeks for EU institutions[444].

2.6. Conclusions

Coming to the end of the chapter, what can be deduced from the analysis made is that environmental law and policy in the European are ambitious and comprehensive and, undoubtedly, they help maintain high standards of environmental protection. The EU is active in a number of sectors, whether traditional, such as nature conservation, waste management, chemicals, water quality and air pollution, or more recent, such as climate change. This latter, in particular, has been – and still is – broadly taken into account by the von der Leyen Commission, as will be shown later in the dissertation.

At the same time, many are the discrepancies among Member States and their domestic legal systems, which should be adequately taken into account when reflecting on EU environmental law. Indeed, in the absence of a common EU Constitution, the study and analysis of the legal cultures of the twenty-seven Member States acquire more and more importance. It is precisely because of this reason that the next chapter will use a comparative approach to investigate the aspects of domestic environmental legislation in Italy, France and Germany.

444 Ibid., 6; COM(2020) 642 final, 2020/0289 (COD), Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies

CHAPTER THREE – A COMPARATIVE ANALYSIS OF ENVIRONMENTAL LEGISLATION IN ITALY, FRANCE AND GERMANY

3.1. Introduction

As it is widely known, the European Union is not a state: it rather encompasses twenty-seven Member States with diverging historical backgrounds, founding elements, national and legal cultures. Nonetheless, the environmental problems, damages and challenges that these states are bound to face show many similarities between all of them, regardless of borders, economic or social factors, places and circumstances[445]. In particular, the environmental challenges have changed dramatically and rapidly in recent decades and, as a consequence, public opinion concurrently shifted in favor of stronger and more coordinated measures in the field of environmental protection[446].

From this it follows the outstanding importance of the comparative approach in order to better understand and analyze not only the distinctive nature of each constitutional system and of the specific local features, but also the reciprocal influences and interconnections between them. Indeed, the use of comparison enables, *inter alia*, to study and emulate examples of best practice[447], and similarly to avoid repetition of preventable mistakes. At the same time, comparison helps to understand why there are significant distinctions among states with regard to environmental protection, since there is a juxtaposition between the costs and the opportunity costs of preserving adequate environmental quality: for instance, there are Countries which prefer industrial development and financial considerations at the expense of high environmental standards and safeguards[448].

[445] F. Fracchia, *Il diritto ambientale comparato* in federalismi.it, Rivista di diritto pubblico italiano, comparato, europeo, 2017, 7, 2
[446] M. Alberton, *Environmental Protection in the EU Member States: Changing Institutional Scenarios and Trends* in L'Europe in Formation, 2012, 363, 289
[447] F. Fracchia, *Il diritto ambientale comparato*, cit. 4 – 5
[448] A. D. Tarlock, P. Tarak, *An Overview of Comparative Environmental Law* in Denver Journal of International Law & Policy, 2020, 13:1, 86

Since the majority of laws in the field of environmental protection in the European Countries results from EU law and international agreements, it is almost impossible not to detect elements of comparison – and of difference – between legal systems, particularly since many are the examples taken from different states[449]. At the same time, notwithstanding the fact that English is the most commonly used language in the EU, it is important to highlight that most environmental law scholars carry out publications in their mother languages, thereby expressing domestic ideas, standards and goals[450]. It is therefore necessary to understand the major contribution given by the work published in different national languages – which also represent the outcome of domestic cultural and legal background – that might get lost when solely considering papers released in English[451].

That said, it is not surprising the decision to resort to the comparative approach in order to investigate and understand different facets of environmental legislation in EU Member Countries. In particular, I have focused my attention on Italy, France and Germany, because of general reasons of linguistic knowledge, useful to understand Constitutional Charters, handbooks and publications in the original language, without the risk of losing the meaning in the English translation, as well as because of the latest developments that these three countries are undergoing. With regard to this last point, reference can be made for instance to the changes and innovations that have taken place during the Presidencies of Mario Draghi[452], Emmanuel Macron[453] and Angela Merkel[454], or finally to the recent facts which have affected these Countries, *inter alia* the dramatic wildfires in Sardinia or the devastating floods in Western Germany, which emphasize the importance of environmental care.

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[449] J. Darpö, A. Nilsson, *On the Comparison of Environmental Law* in Journal of Court Innovation, 2010, 3:1, 316

[450] L. Krämer, *EU Environmental Law and European Environmental Law Scholarship* in O. W. Pedersen (ed.), *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction*, 1st edn., 2018, Cambridge, Cambridge University Press, 212 – 213

[451] Ibid., 213 – 214

[452] For instance, the Ministry for Environment, Land and Sea Protection has been recently renamed to Ministry for Ecological Transition; also, in May 2021 the Senate has approved the amendment to artt. 9 and 41 so as to explicitly provide for environmental protection

[453] For instance, the introduction of the Ministry for the Ecological Transition, the passing of the Climate Law or the recent judgment concerning *L'Affaire du Siècle*

[454] For instance, Angela Merkel has been dubbed the 'Climate Chancellor' for her commitment towards emissions cut or climate change; equally relevant is that in May 2021 the German Constitutional Court ruled on the partial unconstitutionality of the Federal Climate Change Act

The next sections will analyze the historical evolution of environmental legislation, some major turning points, the legislative and implementation framework and the access to environmental information and justice for both Individuals and NGOs.

3.2. Italy

When the Italian constitution was enacted in 1948 no explicit reference was made to a the right to a 'healthy' environment, nor to environmental protection at all. This may relate to the fact that, by the time, the reasons that led to the promulgation of the constitution were mainly justified on the basis of the need to enshrine the principles of democracy and protection of fundamental rights and freedoms. At the same time, post-war Italy was dramatically suffering from socio-economic problems and from a lack of urbanization, and the agricultural sector – that represented the prevailing mode of economy – had to be developed and exploited in light of the country's recovery[455]. Unsurprisingly, such reasons partially provide convincing arguments as to why environmental protection was not yet a concern back to the post-war years. Nonetheless, proper interpretation of some Constitutional Articles – and particularly Articles 2, 9 and 32 – has been instrumental in allowing connections with the broader right to a healthy environment. Perhaps, even more important were three major turning points in the environmental field, namely the promulgation of:

(i) Law 349/86, with which the Ministry of the Environment was founded;
(ii) Constitutional Law 3/2001, which amended Title V of the second part of the Italian Constitution;
(iii) and eventually, Legislative Decree 152/2006, formally titled '*Testo Unico Ambientale*', but also known as the Environmental Code.

Today, environmental legislation is determined at the central and regional level as well.

For what concerns the state level, Article 117 of the Constitution, and respectively the paragraphs 2 and 3, foresee that:

[455] C. Della Giustina, *Il diritto all'ambiente nella costituzione italiana* in Rivista Giuridica AmbienteDiritto.it, 2020, 1, 3

> The State has exclusive legislative powers in the following matters: […] (s) protection of the environment, the ecosystem and cultural heritage. […] Concurring legislation applies to the following subject matters: […] health protection; […] enhancement of cultural and environmental properties; […] regional land and agricultural credit institutions.

Yet, both the state and the regions are submitted to the observance of EU environmental legislation, which has either negative or positive implications at the domestic level: negative, as far as EU fixes minimum benchmarks and common principles; positive, inasmuch there are common objectives which can have a stimulating effect[456].

3.2.1. Historical evolution of environmental legislation in Italy

Interestingly enough, it should be noted that there had been approximately two broad approaches in the evolution of environmental legislation in Italy: one characterized by the consideration of the environment as a resource to protect and preserve, the other by the acknowledgment of the environment as a fully-fledged legal asset[457]. While at the beginning the focus was set on a sectoral approach, today's environmental legislation is more comprehensive[458].

Historically speaking, it is possible to notice some legal reference to the protection of natural assets and environmental heritage already a few years before the approval of the 1948 Constitution, and precisely in:

(i) the 1930 Criminal Code[459] – and specifically Article 423, concerned with wildfires and forest fires, Article 500, focused on the spread of plant or animal diseases, or Article 733, referring to damages to the archeological, historical and artistic national heritage;

(ii) Articles 844, 890 and 2043 of the Italian Civil Code of 1942, the first of whom related to emissions, the second one concerned the distances from harmful or

[456] A. Degli Esposti, *The Environment and Climate Change Law Review: Italy* in The Law Reviews, 2021, available at: https://thelawreviews.co.uk/title/the-environment-and-climate-change-law-review/italy
[457] Ibid.
[458] Ibid.
[459] For the sake of clarity, it was only with Law 68/2015 that a section dealing with 'Crimes against the environment' was inserted in the Criminal Code, precisely at article 452-bis

hazardous factories and plants, whereas the last one imposed damages for unlawful acts;

(iii) special laws of 1922 and 1939 concerning damages to the archeological, historical and artistic national heritage;

(iv) many other laws and Articles relating to the protection of human health[460].

During the first decades after the entry into force of the Italian Constitution, the lack of any reference to environmental rights has resulted in reliance to and application of other constitutional articles, *inter alia* Articles 2, 9 – both of which lay amongst the fundamental principles – and 32. More in detail, Article 2 reads as follows:

> The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.

Hence, the right to environment is claimed to be linked to the 'inviolable rights' aforementioned.

Article 9 declares that the Republic is charged with the task of protecting Italy's '*natural landscape and historical and artistic heritage'*. It is particularly important to focus on the precise meaning of this Article. To use an expression of Salvatore Settis, the natural landscape and the historical and artistic heritage of the Nation constitute the so-called *inscindibile diade*, that is to say that they are not two separate concepts, but rather a single one[461]. Accordingly, the natural landscape is the depiction of Italy itself, '*il vero volto della Patria*', to quote Piero Calamandrei verbatim[462]; this was – to a certain extent – reiterated by the Constitutional Court at the moment of the Sentence 309/2011[463].

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[460] S. Grassi, *General Introduction, Historical Background* in S. Grassi, M. Cecchetti, A. Andronio, A. Borzì, G. Taddei, A. L. Davis, *Environmental Law in Italy*, 2019, 2nd edn., Kluwer Law International BV, The Netherlands, 65

[461] P. Maddalena, F. Tassi, *Il diritto all'ambiente. Per un'ecologia politica del diritto*, La scuola di Pitagora, [edition missing] 2019, 15

[462] '*Negli anni pesanti e grigi nei quali si sentiva avvicinarsi la catastrofe, facevo parte di un gruppo di amici che, non potendo sopportare l'afa morale delle città piene di falso tripudio e di funebri adunate coatte, fuggivano ogni domenica a respirare su per i monti l'aria della libertà, e consolarsi con l'amicizia, a ricercare in questi profili di orizzonti familiari il vero volto della patria*'

[463] The Court stated what follows: '*La linea di distinzione tra le ipotesi di nuova costruzione e quelle degli altri interventi edilizi, d'altronde, non può non essere dettata in modo uniforme sull'intero territorio nazionale, la cui «morfologia» identifica il paesaggio, considerato questo come «la rappresentazione materiale e visibile della Patria, coi suoi caratteri fisici particolari, con le sue montagne, le sue foreste, le sue pianure, i suoi fiumi, le sue rive, con gli aspetti molteplici e vari del suo suolo, quali si sono formati e son pervenuti a noi attraverso la lenta successione dei secoli» (Relazione illustrativa della legge 11 giugno*

Conversely, Article 32, located under Title II: '*Ethical and Social Rights and Duties*', makes reference to the protection of health, recognized '*as a fundamental right of the individual and as a collective interest'*, with which environmental protection is once again associated. By virtue of the right to health, a healthy environment becomes highly desirable, if not strongly requested[464].

At the same time, equally important is the joint reading of Articles 2 and 3, on the basis of which the Constitutional Court has ruled that the protection of the environment shall be regarded as '*a fundamental interest and a constitutionally guaranteed and protected value*'[465].

According to Camilla Della Giustina, the foregoing suggests that the approach to the environmental issue was reliant on reasons of an episodic and emotional nature, since *ad hoc* interventions were brought forward solely under the pretext of specific environmental factors and diseases, even more so since they could risk undermining human health[466]. In line with her analysis, it is thus possible to say that the then existing jurisprudence in the field of environmental protection and the regulatory measures were mainly of a '*negative and subjective nature*'[467]. By implication, sector-by-sector, command and control and '*end of pipe*' approaches were preponderant by the time[468].

To a certain extent, the foregoing is corroborated by the analysis of Giampaolo Rossi, who has observed and analyzed three historical phases in the evolution of environmental legislation which – in his opinion – are common to almost every legal system, namely:

(i) the phase of the legal irrelevance or lack of interest in the environment;

(ii) the phase of the strengthening of the legal protection and the progressive acknowledgment of the right to the environment as a primary concern;

1922, n. 778 «Per la tutela delle bellezze naturali e degli immobili di particolare interesse storico», Atti parlamentari, Legislatura XXV, Senato del Regno, Tornata del 25 settembre 1920)'

[464] Ibid.
[465] C. Della Giustina, *Il diritto all'ambiente nella costituzione italiana*, cit. 6
[466] Ibid., 7
[467] Ibid.
[468] F. Fonderico, *L'Evoluzione della Legislazione Ambientale* in giuristiambientali.it, 2007

(iii) the final phase, still ongoing, of the recognition of the broad meaning attributed to environmental matters, no more considered merely sectoral in nature[469].

An interesting novelty was introduced by Law 615/1996, that concerned control and prevention measures against polluting emissions deriving from thermal and industrial plants and motor vehicles[470]. Generally speaking, it was during the Seventies that the Italian Republic paid increasing and appropriate attention to environmental protection, partly because of regional and international measures, such as the setting up of the 1968 Club of Rome, the 1972 UN Conference on the Human Environment and the Fist EC Action Programme of 1973[471].

Although environmental protection was progressively conceived as an independent legal sphere, the sector-by-sector approach was still implemented[472]. As a confirmation of this, the protection of the environment was linked, amongst many to:

(i) the establishment of the Italian NHS, by means of Law 833/1978;

(ii) land cultivation and zootechnical activities, for which the regions were given competence according to DPR 616/1977;

(iii) and eventually the protection of areas of natural interest and of the general landscape, via Law 431/1985[473].

As directives – and growing efforts – in the environmental field were being developed at the Community level in the years between the end of the Seventies and the early Eighties and, respectively, the Second, Third and Fourth EAPs were being implemented, sector-specific legislation appeared in the Italian legal system, with reference been made for instance to the very first Directive concerning waste disposal and management, established by means of DPR 915/1982[474]. Remarkable in this period, and for the years that followed, was the institution of the Ministry for the Environment – subsequently known as the Ministry for Environment, Land and Sea Protection (MATTM), and today renamed Ministry for Ecological Transition – trough the *ad hoc* Law 349/1986. Precisely

[469] G. Rossi, *L'evoluzione del diritto dell'ambiente* in Rivista Quadrimestrale di Diritto dell'Ambiente, Giappichelli, 2, 2015, 2 – 3
[470] S. Grassi, *General Introduction, Historical Background*, cit. 66
[471] Ibid.
[472] Ibid.
[473] Ibid.
[474] Ibid.

at the dramatic moment of the Chernobyl disaster, the importance of environmental protection was finally and unequivocally acknowledged, and environmental matters became eventually covered by an autonomous regime[475].

Such a resort to the autonomous regime represented a growing trend at the EC level in the decade between the end of the Eighties and the end of the Nineties, as shown by the Third, Fourth, Fifth and Sixth Action Programmes; this is additionally confirmed by international developments in the environmental area (such as the 1992 UN Rio Conference and the 1997 UN Kyoto Conference), as well as by national ones registered in the different Member States[476]. Concerning this last point, it shall be noted that there were Countries which adopted a '*proactive approach*': in the explanation of Francesco Fonderico, they chose not to be bound by environmental standards and obligations decided at the Community level, but rather to become the promoters of such standards, thereby turning a potential disadvantage in an advantage[477]. What Fonderico has noticed is that Italy, on the contrary, was not able or willing to adopt a cooperative stance in the framework of the creation and definition of environmental legislation at the Community level[478].

Nonetheless, in this decade Italy succeeded in adopting several, important domestic laws in the environmental field, *inter alia*: Law 183/1989 dealing with organizational and functional rearrangements in the area of soil protection; Law 431/1985 on the protection of areas and landscape of environmental interest; Framework Law 394/1991 on protected areas; DPR 203/1988 on the basis of which EEC Directives 80/779, 82/884, 84/360 and 85/203 concerning air pollution control were transposed into the Italian legal system; Law 36/1994 containing provisions on water resources; or DPR 22/1997 which implemented EEC Directives 91/156, 91/689 and 94/62 regarding waste disposal. As far as the enforcement of international conventions is concerned, the following Laws are to be noted: Law 65/1994 which ratified the UN Framework Convention on climate Change; Law 689/1994 enforcing the UN Convention of the

[475] S. Grassi, *General Introduction, Historical Background*, cit. 67
[476] Ibid.
[477] F. Fonderico, *L'Evoluzione della Legislazione Ambientale*, cit. For instance, reference can be made to the leading role assumed by Germany in the Seventies regarding the introduction of stringent vehicle emission limits in the EC, as a result of domestic precautionary policy in the environmental field which lately led to the requirement that cars had to be fitted with the so-called catalytic converter
[478] Ibid.

Rights of the Sea of Montego Bay; Law 715/1994 ratifying the 1980 Geneva Convention on Certain Conventional Weapons harmful to the environment; Law 496/1995 which executed the 1993 *Paris Convention* on the Prohibition of Chemical Weapons; Law 464 of 1998 implementing the 1990 International Convention on oil pollution preparedness, response and cooperation concluded at London.

Equally important in the Nineties, and particularly in 1994, was the setting up of the National Agency for Environmental Protection through Law 61/1994, subsequently incorporated into the National Institute for Environmental Protection and Research (ISPRA)[479], which will be analyzed later in the chapter.

In addition to this, there were two other major events of fundamental importance in the context of the evolution of environmental legislation in Italy in the 2000s. These worth mentioning events, occurred respectively in the years 2001 and 2006, were: (i) the 2001 *reform of Title V* of the *Italian Constitution*, regulating relations between the State and the Regions, by means of Constitutional Law 3/2001; (ii) and the Legislative Decree 152/2006, following the Delegating Law 308/2004, known also as the Environmental Consolidated Act (ECA), according to which the Government was entrusted with the delegation of environmental matters. In light of the reform of Title V and, more remarkably in this context, of Article 117, explicit constitutional reference was made for the first time to the word 'environment' and the broader environmental protection[480]. In light of the *Testo Unico Ambientale*, instead, the so-called '*riordino del diritto ambientale*' – that is the effort to '*reorganize, coordinate and rationalize environmental law*'[481] – was finalized[482].

From 2006 onwards, the Italian Republic has incorporated the changes undertaken by the European Union – via Regulations and Directives – in different, relevant sectors related to environmental issues. Reference shall be made, for instance, to Law 68/2015, concerning instructions on crimes against the environment, with which Title VI-bis '*Dei*

[479] It was created by means of Law 133/2008 converting Decree-Law 112/2008,
[480] C. Della Giustina, *Il diritto all'ambiente nella costituzione italiana*, cit. 9; *Il riordino del diritto ambientale – Giurisprudenza Costituzionale*, available at: https://www.camera.it/cartellecomuni/leg14/RapportoAttivitaCommissioni/testi/08/08_cap02_sch01.htm; Constitutional Law 3/2001, "*Modifiche al titolo V della parte seconda della Costituzione*", Gazzetta Ufficiale 248/2001
[481] S. Grassi, *General Introduction, Historical Background*, cit. 68
[482] Ibid.; B. Polverari, *Il Parlamento ed il riordino del diritto ambientale nella XIV legislatura: il caso della «delega ambientale»* in Camera dei Deputati, *Il Parlamento della Repubblica. Organi, Procedure, Apparati*, Vol. II, 2006, 617

delitti contro l'ambiente' was inserted in the Italian Penal Code, consistently with Directive 2008/99/EC on the protection of the environment through criminal law. Also, Italy has recently attended many different UN conventions and conferences, amongst which the COP 21, and thus the adoption of the 2015 Paris Agreement[483] is of utmost importance. At the same time, equally relevant was the implementation of the guiding principles of the XXI Rio Agenda, via Law 221/2015[484].
Concerning the latest developments in the environmental field that are taking place under the Draghi Presidency, and that have been mentioned in the introduction, *ad hoc* reference will be made in the final chapter.

3.2.2. Three major turning points: Law 349/1986; Constitutional Law 3/2001; Legislative Decree 152/2006

The present subparagraph aims to investigate three major turning points in the evolution of environmental legislation in Italy, instrumental in defining and clarifying some critical aspects.
Following an historical order, reference will be made first of all to Law 349/1986 through which the Ministry for the Environment (hereinafter referred to as MoE) was founded. It is probably not wrong to believe that the enactment of this law, precisely in the Eighties, was to some extent influenced by a new European sensibility towards environmental disasters and tragedies – suffice it to think of the Chernobyl accident – which led to an enhancement of EC environmental measures and policies[485]. The Law was the outcome of the proactive efforts of two different political factions, that is liberals and reformist socialist, willing to safeguard the third-generation rights analyzed in the first chapter[486].

As argued by Fonderico, Law 349/1986 – which was the result of both the draft Law No. 1203, relating to the very creation of the Ministry, and the legislative proposal No. 129, regarding environmental public damage – was deliberately aimed at representing a pivotal moment in the development of the modern environmental law[487]. Interestingly,

[483] Transposed at the domestic level by means of Law 204/2016
[484] S. Grassi, *General Introduction, Historical Background*, cit. 69
[485] Ibid., cit. 66 – 67
[486] F. Fonderico, *L'Evoluzione della Legislazione Ambientale*, cit.
[487] Ibid.

by carrying out the revision of the text of the proposal, the Parliament managed to come up with a *bona fide* General Act on environmental protection[488]. Principles[489], legal arrangements[490] and subjective legal positions[491] were therefore introduced, with the declared intent of originating an extensive system of *social control*, off the public over the administration or of the Parliament over the Government, by means of the reporting obligation – on a periodical basis of two years – on the state of the environment[492]. To a certain extent, Fonderico has concluded that one of the aims of the Law, such as envisaged by the Parliament, was to achieve a horizontal connection between several, different subject areas, such as air, water, or waste[493].

Going deeper into detail, according to Article 1(2), the Ministry of the Environment is entrusted with the task of ensuring – within a comprehensive framework – not only the promotion, preservation and recovery of environmental conditions – in compliance with the fundamental interests of the collectivity and the quality of life – but also the preservation and enhancement of natural assets and the defense of the natural resources from pollution[494].

Furthermore, as alluded to before, Article 14 of the Law foresees that MoE is required to provide and share reliable information on environmental conditions and, at the same time, to promote and spread awareness of environmental-related matters[495]. This appears to be in compliance with the requirements laid down in the Aarhus Convention. According to the Fourth update of the national report of Italy on the implementation of the Aarhus Convention released by the Ministry for the Environment, Land and Sea, the dissemination of information is made possible through, for instance, the consultation of the dedicated website and the report on the state of the environment[496]. Article 14 additionally recognizes that '*any citizen has the right to access to widely disseminated*

[488] Ibid.
[489] i.e. precautionary principle; compensation for environmental harm
[490] i.e. environmental impact assessment; establishment of areas at serious risk of environmental crisis
[491] i.e. conflicts between: the right of access to environmental information and the principle of privacy rights in administrative matters; the right to appeal for environmental organizations, and the legal framework abided by the '*dogma of the individuality of action*'
[492] F. Fonderico, *L'Evoluzione della Legislazione Ambientale*, cit.; article 1(6) of Law 349/1986
[493] Ibid.
[494] Article 1(2) of Law 349/1986
[495] Ministry for the Environment, Land and Sea, *Fourth update of the national report of Italy on the implementation of the Aarhus Convention*, 2017, available at: https://www.mite.gov.it/sites/default/files/archivio/allegati/sviluppo_sostenibile/fourth_update_nr_aarhus.pdf
[496] Ibid.

information on the state of the environment'. And interestingly, apart from citizens, reference is similarly made to environmental organizations, once again showing the compliance of the Law with the Aarhus Convention.

Environmental organizations, of proven national character and operating in at least five Regions, are acknowledged by the MoE on the basis of their programmatic objectives and internal organizations – as provided by their statutes – and on the basis of the continuity of action and external relevance[497]. Therewith, they can report acts and facts harmful to the environment[498], intervene in cases before courts [499]and invoke the annulment of unlawful acts[500]. Moreover, the Fourth update eventually maintains that – according to common judicial practice – associations operating in the field of environmental protection, and not expressly recognized by the aforementioned Law, are reserved the right to take legal action inasmuch as there is evidence of their constant and continuous efforts and concrete actions towards the safeguard of the environment[501].

Switching the focus to Constitutional Law 3/2001, as previously mentioned it led to the amendment of Title V of the Italian Constitution, and therefore to the appearance of the word 'environment' in the Constitutional text for the first time[502]. However, the environment was deemed to have a constitutional value already prior to the passing of this law[503]. In detail, Article 3 of the constitutional law provided for the enactment of a new Article 117, concerning the exercise of the legislative power and the sharing of such power between the state and the regions. First of all, it should be said that, already before this constitutional reform, the Constitutional Court recognized – for reasons of consistence and uniformity – that the regions could claim a role in the legislative power in matter of environmental protection, being the environment acknowledged as a cross-

[497] Ibid.; art. 13 of Law 349/1986
[498] Art. 18.4
[499] Art. 18.5
[500] Ibid.
[501] Ministry for the Environment, Land and Sea, *Fourth update of the national report of Italy on the implementation of the Aarhus Convention*, 2017, available at: https://www.mite.gov.it/sites/default/files/archivio/allegati/sviluppo_sostenibile/fourth_update_nr_aarhus.pdf
[502] C. Della Giustina, *Il diritto all'ambiente nella costituzione italiana*, cit. 9
[503] Constitutional Court, Judgment 407/2002: '*In particolare, dalla giurisprudenza della Corte antecedente alla nuova formulazione del Titolo V della Costituzione è agevole ricavare una configurazione dell'ambiente come "valore" costituzionalmente protetto, che, in quanto tale, delinea una sorta di materia "trasversale", in ordine alla quale si manifestano competenze diverse, che ben possono essere regionali, spettando allo Stato le determinazioni che rispondono ad esigenze meritevoli di disciplina uniforme sull'intero territorio nazionale*'; see also Judgments 273/1998, 382/1999, 507/2000

sectoral issue requiring intervention at both the central and regional levels[504]. Consequently, regions were entitled to derogate *in melius*[505]. The need for uniformity and differentiation could coexist thanks to the principle of *leale collaborazione* (mutual sincere cooperation)[506].

According to the new Article 117, the state was transferred exclusive legislative competence on the protection of environment, ecosystem and cultural heritage, while the regions were recognized – in the framework of the shared competences – the promotion of cultural heritage, environmental assets and cultural activities. At the same time, the implication of this is that regions now enjoy residual competence in other branches having an environmental impact, such as agriculture, forestry, hunting and fisheries[507].

It is claimed that environmental protection – placed under exclusive competence of the state – cannot be perceived as a 'real subject', but rather as a cross-cutting interest which also concerns matters falling within the competence of the regions; indeed, while under the principle of subsidiarity the state is responsible for enforcing a uniform regulation, by virtue of the same principle the regional jurisdiction is likewise recognized[508].

Alternatively, in the opinion of Della Giustina, the subjects listed in Article 117 are '*materie non materie*', since they are essentially finalistic: it is the target which is specified, but not the scope[509]. Consequently, the transfer of exclusive competence at the central level does not preempt regions from taking legislative action: the Constitutional Court itself ruled that the national laws in the environmental field define and guarantee uniform, minimum standards that can be derogated and enhanced at the regional level[510]. The state, therefore, ensures '*una tutela adeguata e non riducibile dell'ambiente*' (the adequate and irreducible protection of the environment).

Nevertheless, some scholars maintain that this reform has led to an increase in the number of conflicts between the state and the regions, therefore adversely affecting

[504] C. De Benedetti, *La tutela dell'ambiente in un decennio di giurisprudenza costituzionale: dall'interesse trasversale al bene unitario* in Giustizia Amministrativa Rivista di diritto pubblico, 2011, 6, 3 – 4
[505] Ibid.
[506] Ibid.
[507] M. Alberton, *Environmental protection in the EU Member States: changing institutional scenarios and trends*, cit. 295
[508] C. De Benedetti, *La tutela dell'ambiente in un decennio di giurisprudenza costituzionale: dall'interesse trasversale al bene unitario*, cit. 16 – 17
[509] Ibid., 11
[510] Ibid., 11

environmental policy and legislation[511]. Indeed, it might be argued that, as a consequence of the 2001 reform, a process of centralization of power took place, to the detriment of the regional level[512]. And indeed, whereas in the first quinquennium (2002 – 2006) following the Constitutional Law both the state and the regions were considered as having a sort of concurrent legislative power in environmental matters[513] and the notion of environment was conceived as a value representative of the Italian Republican order[514], it was during the second quinquennium (2006 – 2011) that it became clear once and for all that environmental legislation falls exclusively within state prerogatives[515]. This was expressed by the ruling 378/2007 of the Constitutional Court:

> La potestà di disciplinare l'ambiente nella sua interezza è stata affidata, in riferimento al riparto delle competenze tra Stato e Regioni, in via esclusiva allo Stato, dall'art. 117, comma secondo, lettera s), della Costituzione, il quale, come è noto, parla di "ambiente" in termini generali e onnicomprensivi. E non è da trascurare che la norma costituzionale pone accanto alla parola "ambiente" la parola "ecosistema". Ne consegue che spetta allo Stato disciplinare l'ambiente come una entità organica, dettare cioè delle norme di tutela che hanno ad oggetto il tutto e le singole componenti considerate come parti del tutto.

Finally, proper attention should be given to Legislative Decree 152/2006. According to the analysis of Bernardo Polverari, the need to reorganize the environmental legal framework represented a core issue for the parliamentary committees concerned during the XIV legislature[516]. The process which led to the adoption of the decree was undoubtedly long and complex and began already in 2001 with the proposal for the Delegating Law No. 308, subsequently passed in 2004.

Following an historical perspective, it must be argued that the presentation of the draft law dates back to October 19th, 2001; its aim was to transfer power to the government for the purpose of reorganizing and coordinating the following sectors:

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[511] M. Alberton, *Environmental protection in the EU Member States: changing institutional scenarios and trends*, cit. 296
[512] Ibid.
[513] For instance, reference can be made to Judgments 407/2002; 536/2002; 96/2003; 222/2003; 226/2003; 227/2003; 307/2003; 331/2003
[514] C. De Benedetti, *La tutela dell'ambiente in un decennio di giurisprudenza costituzionale: dall'interesse trasversale al bene unitario*, cit. 7 and 19
[515] Ibid., 21 – 24
[516] B. Polverari, *Il Parlamento ed il riordino del diritto ambientale nella XIV legislatura: il caso della «delega ambientale»*, cit. 617

(i) waste management and site remediation measures;

(ii) water pollution and natural resources management;

(iii) soil conservation and fight against desertification;

(iv) management of protected areas and protection of flora and fauna;

(v) compensation for environmental damage;

(vi) environmental impact assessment procedures (EIA) and integrated environmental authorization (IEA)[517].

The preliminary examination of the text by the VIII Parliamentary Commission (Environment) began in November 2001, with a long *iter* which was concluded only on November 24th, 2004, with the Delegating Law 308/2004 being published in the *Gazzetta Ufficiale* on December 15th of the same year[518]. Immediately after, the Minister of the Environment proceeded with the appointment of a commission composed of twenty-four experts, entrusted with the task of working on a satisfactory text. The work of the commission ended in autumn 2005, and the text was subsequently transmitted and submitted to the Joint Conference and the Chambers, where it was assigned to the VIII Commission of the Chamber of Deputies and to the 13th Commission of the Senate of the Republic[519]. It was only in April 2006 that this intensive process came to an end, with the final approval of the text of the Legislative Decree 152/2006 and its publication in the *Gazzetta Ufficiale* on April 14th[520].

The Environmental Consolidated Act (ECA) encompasses six parts dealing with:

(i) environmental general principles;

(ii) procedures for SEAs and EIAs, but also Integrated Pollution Prevention and Control (lPPC) permit;

(iii) soil conservation, fight against desertification, water protection against pollution and water resource management;

(iv) waste management and site remediation measures;

(v) air pollution protection and atmospheric emissions;

(vi) compensation for environmental damage[521].

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[517] Ibid., 619

[518] Ibid., 620 and 636

[519] Ibid., 638

[520] Ibid., 647

[521] S. Grassi, *General Introduction, Historical Background*, cit. 68; E. Maschietto, *Environmental law and practice in Italy: overview* in Practical Law Country, Q&A, 1-503-2608, available at:

Nonetheless, such a comprehensive list does not exclude the fact that other key sectors – for instance, the energy regime – are not contemplated[522]. Notwithstanding this critical aspect, it is undeniable that – amongst its merits – the ECA has succeeded in implementing several EU Directives retaining fundamental importance with regard to environmental protection, and in repealing the then existing norms which transposed them.

3.2.3. Legislative and Implementation Framework

As is clear from the above, environmental protection is not expressly provided for by any source of law, nor a proper right to the environment is explicitly recognized by the Constitutional text; for the purpose of delineating environmental protection, the Italian constitutional court and the governmental bodies therefore rely on different sources of law of the domestic legal system[523].

In the first place, reference is made to primary legislation and, inevitably, to Article 117 of the Italian Constitution once again, on the basis of which the state is held responsible for the protection of the environment and the ecosystem. Starting from the assumption that this very same Article additionally entrusted the regions with the task of promoting cultural heritage, environmental assets and cultural activities, it is implied that regional laws in environmental matters are an equally important source[524]. Interestingly, it shall be noted that the Italian primary legislation has hardly ever laid down abstract and general principles, since it rather disciplines concrete cases concerning given, specific, environmental emergencies[525]. Another relevant source is represented by the constitutional jurisprudence, the case law of the constitutional court and the *erga omnes* implication of its judgments.

Moving the focus to secondary legislation, the importance of regulations should be recognized, with the acknowledgment that regulations issued by the government take

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https://uk.practicallaw.thomsonreuters.com/1-503-2608?transitionType=Default&contextData=(sc.Default)&firstPage=true; Legislative Decree 152/2006

[522] S. Grassi, *General Introduction, Historical Background*, cit. 68

[523] S. Grassi, *General Introduction,* cit. 76

[524] Ibid.

[525] Ibid.

precedence over those issued by the regions, these latter prevailing over regulations of the local entities[526]. Then, reference should be made to technical norms which, by virtue of their specific nature, are vital for the sake of environmental protection, and lastly to '*urgent and occasional ordinances*' which sometimes regulate whole environmental protection areas[527]. The conclusion to be drawn is that, notwithstanding Legislative Decree 152/2006, one cannot speak of a uniform legal system in the field of environmental protection yet[528].

Concerning governmental bodies, it should be noted that although both the parliament and the government play a crucial role, three elements should be properly assessed:

(i) environmental policy guidelines are mainly dictated by international agreements and standards, and in the present case mostly of EU origin;

(ii) the drafting of environmental laws and action programmes tend to emphasize the weaknesses inherent in the institutional apparatus;

(iii) the implementation of EU environmental law is beyond the monitoring capacity of both the central government and the MoE itself[529].

Proceeding with the analysis, environmental policies fall within the sphere of competence of the Parliament and, accordingly, the parliamentary commissions charged with addressing environmental issues are provided for in both the Chamber of Deputies (VIII Commission 'Environment, Territory and Public Works')[530] and the Senate (13th Commission 'Territory, Environment, Environmental Assets')[531]. Interestingly, the Parliament passes the so-called 'European Delegation Law' (Law 234/2012) on an annual basis, comprising EU Directives – in this case of an environmental nature – that must be enforced by the Italian Republic[532]. The mechanism for meeting the compliance with commitments arising from EU membership is laid down precisely in the European Delegation Law, which at the same time governs the procedures to be followed in the

[526] Ibid., 77 – 78
[527] Ibid.
[528] Ibid., 79
[529] Ibid., 74 – 75
[530] Website of the Chamber of Deputies, available at: https://www.camera.it/leg18/99?shadow_organo_parlamentare=2808
[531] Website of the Senate of the Republic, available at: http://www.senato.it/leg/18/BGT/Schede/CommissioniStoriche/0-00013.htm
[532] S. Grassi, *General Introduction,* cit. 69

framework of the Country's involvement in the lawmaking process[533]. The other legislative tool implemented by the Parliament is the 'European Law', providing for immediately effective measures for ensuring consistency with European legislation, which covers, among many:

> amendments to national legislation needed in case of pending infringement proceedings or decisions of the EU Court of Justice; measures for the implementation of EU acts; implementation of international treaties signed in the framework of EU's external relations[534].

Finally, the Parliament is also responsible for authorizing ratification of international conventions – once again in relation to environmental field – and passing laws for their implementation[535].

Particularly relevant in the context of the analysis of competent bodies is the reference to the MoE, mentioned earlier in the text, which retains a coordination function in the sector. Created under Law 349/1986, it was renamed Ministry for the Environment and Land by means of Legislative Decree 300/1999, the so-called Bassanini Reform, and eventually given the name of Ministry for the Environment, Land and Sea via Legislative Decree 181/2006 (subsequently Law 233/2006): this evolution shows the progressive enlargement of the Ministry's scope of powers[536]. After being reformed through DPR 142/2014, the MoE became organized into seven directorates concerned with the following issues:

(i) waste and pollution;
(ii) land and water;
(iii) nature and sea;
(iv) climate and energy;
(v) environmental assessments and authorizations;

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[533] Website of the Presidency of the Council of Ministers, Department for European Policies, *European Delegation Law (Legge di delegazione europea*), available at: http://www.politicheeuropee.gov.it/en/legislation/european-delegation-law-legge-di-delegazione-europea/
[534] Website of the Presidency of the Council of Ministers, Department for European Policies, *European Law (Legge europea)*, available at: http://www.politicheeuropee.gov.it/en/legislation/european-law-legge-europea/
[535] S. Grassi, *General Introduction,* cit. 69
[536] S. Grassi, *General Introduction,* cit. 70

(vi) sustainable development and environmental damage and the relationship with the European Union and international bodies;

(vii) general affairs and staff[537].

Nevertheless, two aspects are worth mentioning: in spite of the founding of a competent Ministry, there has been a failure to avoid the fragmentation of the environmental legislation in Italy[538]; there are other regulatory authorities which retain an important role with regard to the environmental sphere[539].

As far as the second premise is concerned, apart from the more predictable Ministry of Agricultural, Food and Forestry Policies, Ministry of Cultural and Environmental Heritage, Ministry of Health, or Ministry of Foreign Affairs, reference can eventually be made to: the Ministry of the Economy and Finance (with reference to environment-related expenses); the Ministry of Economic Development (in relation to the environmental impact of certain industrial activities); the Ministry of Infrastructures and Transportation (given the environmental implications of infrastructures); the Ministry of Education, University and Research (in the framework of environmental education); the Ministry of the Interior (responsible for environmental emergencies and general public security).

The central government also enjoys the presence of several technical organisms and agencies with a regulatory role, the most important of which are:

(i) ISPRA (Istituto Superiore per la Protezione e la Ricerca Ambientale), that is the Italian Institute for Environmental Research and Protection, established by Decree 112/2008, subsequently converted into Law 133/2008[540];

(ii) ENEA (Agenzia nazionale per le Nuove Tecnologie, l'Energia e lo Sviluppo Economico Sostenibile), meaning the National Agency for New Technologies, Energy and Sustainable Economic Development, founded under Law 282/1991, and today regulated by **Law 221/2015**[541]**;**

[537] Ibid.
[538] Ibid., 71
[539] E. Maschietto, *Environmental law and practice in Italy: overview,* cit.
[540] Website of ISPRA, available at: https://www.isprambiente.gov.it/en/istitute/index?set_language=en
[541] Website of ENEA, available at: https://www.enea.it/en/enea/about-us

(iii) IRSA (Istituto di Ricerca sulle Acque del Consiglio Nazionale delle Ricerche), in other words the National Water Research Institute of the National Research Council, founded in 1968;

(iv) ISS (Istituto Superiore di Sanità), namely the national Health Institute, currently the main research body for public health at the domestic level, officially created in 1934[542].

Apart from central authorities, also the regions retain relevant legislative powers in key areas and, among the various competences conferred upon them, they can set standards and threshold values, or even design plans for the control of air and water pollution, waste disposal, environmental risks, and protection of natural assets[543].

The relocation of administrative functions in the environmental field to the regional authorities began in 1977 via Decree No. 616 and concerned sectors such as urban planning (Article 80); protection of natural assets (Article 83); hunting and fishing (Articles 99 and 100); water management and conservation, soil hygiene and waste management, air and water pollution caused by thermal and industrial plants, noise pollution control (Article 101); but also the delegation of functions in the sphere of natural beauty (Article 82)[544]. The regions, additionally, are now competent for health-related subjects, just like for agricultural, forestry and soil protection issues[545]. Nonetheless, in the absence of a clarification of the meaning attributed to the word 'environment' in the Constitutional charter, the trend that emerged over the years is that of the strengthening of the competence of the state at the expenses of the region themselves, subsequently confirmed by the reform of Title V of the Constitution, as outlined earlier in the text.

Within the context of competences in the field of environmental protection, it is equally worth mentioning the important role played by provinces and municipalities. According to Law 142/1990, the first carry out control and programming tasks within the territories over which they exercise competence, relating, *inter alia*, to soil management, air and water pollution control, waste disposal and landfill issues, and polluting waste, while the latter are mainly entrusted with health protection, whilst retaining interesting

[542] Website of Istituto Superiore di Sanità, available at: https://www.iss.it/web/iss-en/history
[543] S. Grassi, *General Introduction,* cit. 72
[544] This article has been repealed several times between 1999 and 2008
[545] S. Grassi, *General Introduction,* cit. 73

powers also in relation to sewage systems and noise pollution control, namely sectors over which they can exercise better control**.** Eventually, important functions are fulfilled also by Regional Environmental Protection Agencies (ARPA) operating in each of the twenty-one Italian regions[546].

Since, as can be deduced, the various tiers of government become embroiled with the task of environmental protection almost simultaneously, flexibility, cooperation and coordinated solutions are required[547].

3.2.4. Access to Environmental Information and Justice for Individuals and NGOs

By specifically focusing on the right to receive environmental information, it shall be noted that it is defended and guaranteed by means of resort to both international and domestic legislation. In the Italian case, it is the public administration that carries the responsibility to guarantee the publicity, transparency and dissemination of the information concerned. Focusing on the constitutional level, through the reading of Articles 3 and 97 it can be envisaged, respectively, that:

> all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country

and that:

> public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration.

Apart from the Constitution and the repeatedly analyzed Law 349/1986, whose Article 14 stipulates that the Ministry for the Environment shall ensure the dissemination of

[546] Ibid., 74
[547] Ibid., 75

relevant environmental information and, concurrently, that citizens retain the right to access to such information, reference shall additionally be made to EU Law. Particularly relevant in this analysis is Directive 90/313/ EEC on the freedom to access to information on the environment, which has similarities with Law 349/1986 – enacted shortly before –, as well as with the subsequent Uniform Text on Local Entities.

Concerning the latter, it was established by means of Legislative Decree 267/2000; its Article 10 explicitly provides for the right to information, proclaiming that individuals and associations are entitled to have access to administrative acts, to receive information on the status of acts e procedures, and to accede, broadly speaking, to all the information held by the administration. This principle of environmental information is, amongst other, further reinforced by the provisions of Legislative Decree 152/2006, '*Norme in materia ambientale*'. At the same time, it shall be noted that in the year 2001 the Aarhus Convention of 1998 got ratified with *piena ed intera esecuzione* by means of Law No. 108.

Concerning the importance of EU Law with regard to domestic legislation, reference shall be made to Directive 2003/4/EEC on public access to environmental information which, already in its Preamble, acknowledges that:

> (8) It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest. (9) It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies.

Such Directive was implemented in the national legal system via Legislative Decree 195/2005, which:

(i) at Article 2 provides for the definition of 'environmental information', by offering a comprehensive meaning;

(ii) at Article 3 establishes that public authorities shall make available environmental information to anyone who makes request for it, regardless of the interests behind such request;

(iii) at Article 5 clarifies the cases of exclusion from the access to environmental information;

(iv) at Article 7 provides for both the regime on access and the judicial guarantees of the applicant.

As far as the cases of exclusion are concerned, it shall be noted that environmental information can be denied in several instances, particularly when its dissemination risks undermining:

(i) privacy regarding the resolutions of public authorities, in accordance with law;
(ii) international relations, public order and public security, or national defense;
(iii) judicial proceedings or the possibility for the public authority to carry out preliminary criminal investigations;
(iv) commercial and industrial trade secrets, in accordance with existing arrangements, intended to protect a legitimate economic and public interest;
(v) intellectual property rights;
(vi) the confidentiality of personal data or regarding a physical person, in the absence of previous consent to the public disclosure of sensitive information;
(vii) interests or protection of anyone who has voluntarily offered the information requested, in the absence of a statutory obligation, unless the interested party previously authorized its dissemination;
(viii) protection of the environment and the landscape to which the information refers, as in the case of the collocation of rare species.

Consequently, it follows that a restrictive application of the right to access to environmental information is required.

Articles 7 additionally specifies that, in the case of total or partial rejection of a request to access environmental information, and in the case of failure to respond within the foreseen deadline, the applicant can submit a complaint to the court within the limit of thirty days or can apply for review by resorting to the competent ombudsman operating in the territory. It shall eventually be noted that this Legislative Decree probably stands as one of the greatest achievements in the field of the regulation of access to information related to the environment.

Particularly relevant, however, is also mention to Legislative Decree 33/2013 – subsequently revised by Legislative Decree 97/2016 – whose Article 40, titled '*Publication of and access to environmental information'*, foresees that the administrative authorities shall provide for environmental information in their possess for the purposes

of their institutional activities and that the information must be contained in a specific section called '*Environmental Information'*.

Paying due attention to case law concerning the right to have access to and receive environmental information, reference can be made – amongst many – to T.A.R. Lazio (RM) Sez. II-ter n. 2141 of February 2018, on the basis of which it was made clear that:

> è proprio la particolare complessità della informazione ambientale che, nell'interesse di una conoscenza diffusa delle condizioni degli elementi costituitivi dell'ecosistema e dei fenomeni antropici, richiede la condivisione con gli interessati di tutti i dati scientifici relativi agli elementi fisici, chimici e biologici che ne determinano l'assetto[548].

In spite of this acknowledgment, the fact remains that indiscriminate access – as alluded before – is not foreseen, as further confirmed by T.A.R. Lazio (RM) Sez. I-bis n.4800 of May 2018.

By focusing on the issue of the access to justice, it shall be recalled that the protection of the environmental interests of individuals and NGOs lies, above all, in the Italian Constitution, fundamental and supreme law of the country. First and foremost, the access to courts is legitimated by Article 24, which stipulates as follows:

> Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts. The law shall define the conditions and forms of reparation in case of judicial errors.

Alternatively, Article 113 provides that:

> the judicial safeguarding of rights and legitimate interests before the bodies of ordinary or administrative justice is always permitted against acts of the public administration.

However, as is apparent from the reading, no mention is made to the existence of collective interests as such; the jurisprudence therefore retains an essential role in the

[548] *'[…] it is the complexity of environmental information, in light of a widespread knowledge of the constituent elements of the ecosystem and of anthropic phenomena, requires that the interested parties shall be provided with the available scientific data relating to the physical, chemical and biological elements that determine its structure*'.

interpretation of such a right. To give an unequivocal example, the right to health, as provided for by Article 32 of the Constitution, establishes that:

> the Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent.

Needless to say, also the right to a healthy environment – even though in an implicit way – falls under the category of collective interests, also given its repercussions on several other constitutional rights. Throughout time, an important progress was achieved with the passing of Law 349/1986, since reference was made to the possibility for associations to bring judicial proceedings in relation to environmental harm and seek administrative review of unlawful acts.

However, a distinction should be drawn between administrative and judicial remedies. Concerning the former, several are the possible types of appeals, such as: opposition, hierarchical appeals and extraordinary appeals to the President of the Republic, as provided for by DPR 1199/1971. Concerning the latter, it is possible to appeal to the courts in case of infringement of environmental interests by means of unlawful conduct, activities or acts of either private subjects or public authorities[549]. Another distinction that shall be taken into account is that between ordinary and administrative courts: the first are entitled to rule on disputes concerning subjective rights, while the latter can pass judgments on those concerning legitimate interests[550].

When environmental interests are not directly guaranteed by law, they are nonetheless associated with the protection of other types of rights, for the sake of which appeals are allowed[551]. At the same time, it remains compulsory for the claimant to be in a position such to maintain the impairment of a right and the existence of a concrete harm, as a result of the specific act against which the appeal is filed[552]. Interestingly – in compliance with Article 24 of the Constitution – Article 313(7) of the Legislative Decree 152/2006 concerning environmental damage, declares that the injured parties whose right to health or property assets have been negatively affected by a given incident, have *locus*

[549] S. Grassi, *General Introduction,* cit. 390
[550] Ibid., 392
[551] *Inter alia,* reference can be made to property rights
[552] S. Grassi, *General Introduction,* cit. 390

standi to file complaints against the perpetrator of such damage. The legal standing before national courts in the matter of environmental damage has been further reiterated by Judgment 126/2016 of the Constitutional Court, which reiterated the 'polluter pays' principle and held that the environmental damage must be compensated for by primary, complementary and compensatory remedial measures, as provided for in Directive 2004/35/CE[553]. At the same time, it is impossible not to mention that it was the Court of Auditors which, already in the Seventies, introduced the hypothesis of compensatory measures for environmental damage for the first time; particularly relevant in this context is ruling 61/1979, where it was determined that the state held a direct interest in environmental protection and that environmental damage entailed the liability for damage to the treasury[554].

Lastly, with regard to the *locus standi* of environmental associations, it is necessary to mention one last time: Articles 13 and 18 of Law 349/1986, which relate to the identification of environmental protection associations by the Minister for the Environment through *ad hoc* decrees, and to the right of such associations to resort to justice; and the Italian Environmental Code[555], which refers to such associations in many instances. For the sake of accuracy, seventy-nine are the environmental association identified up to the present day[556]. Nonetheless, according to case law, also those environmental association not identified in the ministerial decree may have the possibility

[553] Corte Cost., Sentenza n.126/2016, postulates what follows:: '*Il quadro normativo è tuttavia profondamente mutato con la direttiva 21 aprile 2004, n. 2004/35/CE (Direttiva del Parlamento europeo e del Consiglio sulla responsabilità ambientale in materia di prevenzione e riparazione del danno ambientale) che, nel recare la disciplina del danno ambientale in termini generali e di principio, afferma che la prevenzione e la riparazione di tale danno nella misura del possibile «[contribuiscono] a realizzare gli obiettivi ed i principi della politica ambientale comunitaria, stabiliti nel trattato»; tenendo fermo, peraltro, il principio «chi inquina paga», pure stabilito nel Trattato istitutivo della Comunità europea (n. 1 e n. 2 del "considerando"). In particolare, nell'Allegato II della direttiva, che attiene alla «Riparazione del danno ambientale», si pone in luce come tale riparazione è conseguita riportando l'ambiente danneggiato alle condizioni originarie tramite misure di riparazione primaria, che sono costituite da «qualsiasi misura di riparazione che riporta le risorse e/o i servizi naturali danneggiati alle o verso le condizioni originarie». Solo qualora la riparazione primaria non dia luogo a un ritorno dell'ambiente alle condizioni originarie, si intraprenderà la riparazione complementare e quella compensativa*'

[554] Forgione, G., *Danno Ambientale*, http://www.forgionegianluca.it/GIUSTIZIA_CONTABILE/DOTTRINA/responsabilita_amministrativa_contabile/DANNO_AMBIENTALE/DANNO_AMBIENTALE.php [Accessed: 16 August 2021]

[555] Legislative Decree 152/2006

[556] Website of the Ministry of the Ecological Transition, available at: https://www.mite.gov.it/pagina/elenco-delle-associazioni-di-protezione-ambientale-riconosciute

to resort to law, on the grounds that the necessary requirements are evaluated on a case-to-case basis[557].

Very interestingly, the legal standing of environmental associations has been confirmed and reinforced in recent years by some key Judgments, such as T.A.R. Lombardia-Milano, sez. II, n. 2491 of December 2020, or Consiglio di Stato, sez. II, n. 3170 of 2021. Concerning the first case, the Administrative Court recognized the legal standing of the environmental association Legambiente in the light of the protection of those interests which are closely related to the environmental ones, although not overlapping[558]. Indeed, also by referring to the existing administrative case law[559], the Court stipulated that the *locus standi* of environmental associations shall be subject to an extensive interpretation, and shall therefore be allowed also when administrative acts, which may risk undermining the quality of living in a given territory, are concerned[560]. This extensive interpretation was also favored in the second case mentioned above, in the framework of which the Council of State affirmed that the concept of environmental protection encompasses any situation which may result in environmental damage, in the name of which environmental association are entitled to take legal action, as a consequence of recent practice developed in the field[561].

Hence, the conclusion that although the Italian legal system adopts a restrictive approach concerning the access to justice, pursuant to which an *interesse legittimo* – and so the demonstration of the infringement of a subjective right – is required, the case law has nonetheless proved that such an access is broadly granted.

3.3. France

[557] S. Grassi, *General Introduction,* cit. 393
[558] S. Lazzari, *La legittimazione a ricorrere delle associazioni ambientaliste* in Labsus, 2021, available at: https://www.labsus.org/2021/03/la-legittimazione-a-ricorrere-delle-associazioni-ambientaliste/
[559] Reference is made to: Cons. St., sez. IV, 19 febbraio 2015, n. 839
[560] Ibid.
[561] E. Felici, C. Leonardi, *La legittimazione ad agire delle associazioni ambientaliste e il concetto di tutela ambientale* in Rivista Giuridica dell'Ambiente, 2021, 22, available at: http://rgaonline.it/wp-content/uploads/2021/06/FELICI-LEONARDI-Consiglio-di-Stato-II-19-aprile-2021-n.-3170-rev-rt-2.pdf

The evolution and affirmation of environmental legislation in France has some common features of the Italian case, but also a number of differences in terms of priorities and developments.

The French Constitution, in its present version, establishes that:

(i) '*The President of the Republic may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses, published in the Journal Officiel, submit to a referendum any Government Bill which deals […] with reforms relating to the economic, social or environmental policy of the Nation'*, as provided for by Article 11;

(ii) '*Statutes shall […] lay down the basic principles of […] the preservation of the environment'*, as laid down in Article 34;

(iii) (iii) the Economic, Social and Environmental Council would retain a key role in the field, in accordance with Articles 69 – 71 under Title XI.

At the same time, just like in the Italian case – even if slightly earlier – it was in the Seventies that French environmental law underwent a series of major changes, with the creation of the Ministry of the environment in 1971, and the passing in 1976, respectively, of Law 629 on the protection of nature and Law 663 on the facilities classified for environmental protection (ICPE)[562].

Another similarity lies in the fact that it was only in the noughties that environmental law was codified, with the French Environmental Code and the Charter for the Environment being adopted precisely in the years 2000 and 2005, the latter of whom was added to the Constitution. So, a major difference between the two countries is that environmental protection in France is given more legal guarantees.

Finally, special mention should be given to the acknowledgment of the high influence of international and European developments with regard to national public opinion and policymaking, as a result of which several principles enshrined in international law and conventions were introduced in the domestic legal system[563].

[562] I. Alogna, *Environmental Law of France* in N. A. Robinson, E- Burleson, L. Lye (eds.), Comparative Environmental Law and Regulation, Thomson-Reuters and Westlaw, 2018, 2

[563] Apart from the principles analyzed in the following paragraphs, reference can be made to the non-regression principle, added to the Environmental Code in 2016, which has its origins in article 311-6 of the Montego Bay Convention on the Law of the Sea

3.3.1. Historical evolution of environmental legislation in France

From an historical point of view, some features of environmental law can be traced back to the Middle Age, wherein it is possible to identify the presence of safety measures designed for water purification as well as for waste disposal, reduction of fetid and nauseating odors and epidemic prevention measures[564]. Later in time, at the beginning of the XIX century, and precisely in 1810, an imperial decree instituted the first national regulation on classified facilities, concerning insalubrious and hazardous factories and ateliers, that formed the basis for the modern legislation in the industrial sector[565], while in 1884 a prefectural decree provided for an obligation to collect garbage in *ad hoc* bins[566].

While the French Constitution of 1958 attributed due importance to the environmental issue, it should however be noted that the Seventies of the last century marked a real turning point for environmental law as we know it today[567]. More in detail, in January 1971 the French Ministry for the Protection of Nature and the Environment was created under the Pompidou Presidency, at the very time when environmental concerns were gaining increasing importance within the domestic public debate[568], as well as within the broad European and international contexts. That marked a huge innovation in the field, not only to the extent that *Le Figaro* underlined how the environment was still an emerging concept by the time, but also that the designated minister, Robert Poujade, later spoked of '*le ministère de l'impossible*', negatively impacted by lobby pressure and budgetary concerns[569]. From the Nineties onwards, the importance of the Ministry for the Environment – theretofore scarce – started to increase at the governmental level, complemented by an increase in power and responsibility.

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[564] L. Neyret, *France* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 173

[565] G. Ullmann, *Classified installations. Two centuries of legislation and nomenclature*, 2016, Cogiterra Editions, Paris

[566] I. Alogna, *Environmental Law of France*, cit. 5

[567] L. Neyret, *France*, cit. 173

[568] As a confirmation of this, in a speech on February 8, 1970 Georges Pompidou declared what follows: '*La nature nous apparaît de moins en moins comme la puissance redoutable que l'homme du début de ce siècle s'acharne encore à maîtriser, mais comme un cadre précieux et fragile qu'il importe de protéger pour que la terre demeure habitable à l'homme'*

[569] C. Lestienne, *Environnement: il y a 50 ans, la création du «ministère de l'impossible»* in Le Figaro Histoire, 2021, available at: https://www.lefigaro.fr/histoire/archives/environnement-il-y-a-50-ans-la-creation-du-ministere-de-l-impossible-20210107

During that period, there was also the setting up of relevant agencies, such as the French National Institute for Industrial Environment and Risks (INERIS) in 1990, or the French Environment and Energy Management Agency (ADEME)[570] in 1991[571].

Focusing again on the Seventies, reference should additionally be made to the above-mentioned Laws 629 and 663 of 1976. Concerning the former, it is composed of six chapters and forty-three Articles; particularly noteworthy is Article 1, establishing that:

> the protection of natural areas and landscape, the preservation of flora and fauna, the maintenance of a ecological balance and the protection of environmental resources against any source of degradation are of general interest.

Also, it proclaimed that it is the duty of any individual to ensure the protection of the natural environment[572].

Concerning Law 663/1976, it is composed of eight titles and twenty-nine Articles; amongst the general provisions comprised in Title I, Article 1 declares that the law itself applies to an official list of classified installations considered to ideally have negatively repercussions, *inter alia*, on: health, public safety, agriculture and protection of nature and the environment[573].

Equally relevant was the subsequent Law 95-101 of 1995, also named the *Loi Barnier*, relating to the enhanced protection for the environment, which introduced three major changes in the field. The first novelty dealt with the creation of a national commission on public debate, aimed at organizing public discussions concerning those development or infrastructure projects which might have a significant impact with regard

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[570] Today known as the French Agency for Ecological Transition

[571] P. Février, *7 Janvier 1971: Création du ministère de la Protection de la nature et de l'environnement* in Institut de France, 2021, available at: https://www.institutdefrance.fr/actualites/7-janvier-1971-creation-du-ministere-de-la-protection-de-la-nature-et-de-lenvironnement/

[572] The original text reads: '*La protection des espaces naturels et des paysages, la préservation des espèces animales et végétales, le maintien des équilibres biologiques auxquels ils participent et la pro tection des ressources naturelles contre toutes les causes de dégradation qui les menacent sont d'intérêt général. Il est du devoir de chacun de veiller à la sauvegarde du patrimoine naturel dans lequel il vit*'

[573] The original text reads: '*Sont soumis aux dispositions de la présente loi les usines, ateliers, dépôts, chantiers, carrières et d'une manière générale les installations exploitées ou détenues par toute per sonne physique ou morale, publique ou privée, qui peuvent présenter des dangers ou des inconvénients soit pour la commo dité du voisinage, soit pour la santé, la sécurité, la salubrité publiques, soit pour l'agriculture, soit'pour la protection de la nature et de l'environnement, soit pour la conservation des sites et des monuments*'

to land use and environment[574]. The second one, was the creation of an environmental department in each of the French *départements*[575]. The last one, instead, concerned the creation of risk prevention plans for foreseeable natural risks (such as wildfire, streams or earthquakes)[576].

As the environmental issue was acquiring increasing importance over the end of the century at the European and international level, and as a number of dramatic accidents having serious ramifications for the ecological balance occurred[577], at the beginning of the XXI century there was a significant development of environmental legislation in France that led, in only five years, to the codification first, and the constitutionalisation later, of environmental law. Indeed, in 2000 there was the adoption of the French Environmental Code, which represented a great novelty at the time; in this context, it is interesting to note, as remarked by Ivano Alogna, that France was a pioneer in the field of the codification of law already since the Napoleonic Code[578]. This Environmental Code was soon followed by the adoption of the Charter for the environment in 2004, subsequently added to the Constitution in 2005. Concerning this second development, it can be noticed that around five decades have passed before the French Constitution got amended so as to include due reference to environmental issues[579].

Despite this delay, it should however be acknowledged that, during the last few years, France has succeeded in asserting itself as a leading actor in the environmental protection sector. Noteworthy are the case of the Erika oil tanker[580] that led to the adoption of Erika I, II and III maritime safety packages – the second of whom led to the establishment of the European Maritime Safety Agency (EMSA) – as well as the Grenelle I and II Laws of 2009 and 2010. Concerning the *Erika* case, the influence of EU law with regard to the French legal system is remarkable. Indeed, in that context the *Cour de*

[574] Art.2
[575] Art.9
[576] Art.16
[577] For instance, reference is made to the Amoco-Cadiz and Erika oil spill cases of 1978 and 1999, or to the explosion of the AZF chemical factory in Toulouse in 2001
[578] I. Alogna, *Environmental Law of France* in N. A. Robinson, E- Burleson, L. Lye (eds.), Comparative Environmental Law and Regulation, Thomson-Reuters and Westlaw, 2018, 6
[579] Ibid., 7
[580] As one can read in the website of the European Commission, MEMO/01/387, '*On 12 December 1999, the Erika, a 25 year-old single-hull oil tanker flying the Maltese flag and chartered by TOTAL-FINA, broke in two some 40 nautical miles off the southern tip of Brittany, polluting almost 400 kilometres of French coastline. The damage caused to the environment and the exceptionally high cost of the damage to fisheries and tourism make the Erika oil spill one of the major environmental disasters of recent years*', available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_01_387

Cassation – Chambre Criminelle relied on the 1969 Vienna Convention on the Law of the Treaties, according to which '*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*'[581], to confirm the compliance of Law 83-583 with the MARPOL Convention of 1973[582], in spite of the fact that the national law was overly restrictive if compared with the Convention[583].

Concerning the Grenelle Law I, in 2007 the French Government decided for the formation of six working groups, composed by both state and non-state actors, aimed at investigating ways to reform the existing policy in the field of environmental protection.[584] This led to the formulation of a list of recommendations – submitted to the two Chambers of the Parliament in 2008 – absolutely in line with European and international standards[585], with the main goal to cut greenhouse gas emissions by three-quarters by 2050[586]. The main commitments undertaken in respect of environmental protection concerned the fields of: (i) building and housing; (ii) transports; (iii) energy; (iv) health; (v) agriculture; (vi) biodiversity[587]. The subsequent Law Grenelle II of 2010 mainly consisted in clarifying the goals and objectives Grenelle I even further, and focused on the fight against climate change, articulated in three distinct areas: (i) reduction of energy consumption; (ii) reduction of greenhouse gases emissions; (iii) promotion of renewable energies[588].

In the recent years, reference shall eventually be made to the Paris Agreement on climate change, adopted on December 12th, 2015 in the context of COP 21, and the draft project of the Global Pact for the Environment, proposed in 2017 by the *Club des Juristes*, which:

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[581] Art.31(1) of the Vienna Convention on the Law of the Treaties of 1969
[582] International Convention for the Prevention of Pollution from Ships
[583] L. Neyret, *France*, cit. 175
[584] *Grenelle I* in Climate Change Laws of the World, available at: https://climate-laws.org/geographies/france/laws/grenelle-i
[585] Common commitments were, for instance, the fight against climate change or the 23% reduction of GHG emissions by 2020
[586] *Le Grenelle de l'environnement: quels engagements?,* in Vie Publique, 2019, available at: https://www.vie-publique.fr/eclairage/268585-le-grenelle-de-lenvironnement-quels-engagements
[587] Ibid.
[588] *Environnement: l'essentiel de la loi Grenelle 2*, in Vie Publique, 2019, available at: https://www.vie-publique.fr/eclairage/268502-environnement-lessentiel-de-la-loi-grenelle-2

> for the most part, will be a multilateral treaty, equipped by legal force, dedicated to the **principles that guide environmental action […] (and)** if adopted, will be the **first international treaty on the environment as a whole**[589].

3.3.2. Two major turning points: *Code de l'environnement* and *Charte de l'environnement*

The Environmental Code was drawn up in 2000 in response to the concrete need for the reorganization of the existing arrangements, with a view to guarantee legal uniformity and harmony[590]. As such, it is argued that it is a clear example of codification '*à droit constant*'[591], inasmuch as no fundamental revision of the existing norms and laws occurred, since the goal was simply to codify different pieces of legislation in a single text[592].

Consisting of two parts, legislative and regulatory, and articulated in seven books, the Environmental Code encompasses laws and directives in the matter of the environment that apply both to continental France and each and every Overseas Departments and Territories. Proceeding in order, the seven books cover the following subjects: (i) common provisions; (ii) physical environments; (iii) natural spaces; (iv) fauna and flora; (v) pollution, risk and nuisance prevention measures; (vi) provisions applicable to the *collectivités d'outre-mer*; (vii) environmental protection in the Antarctic. Particularly noteworthy is Article L. 110-1, according to which the definition of what constitutes the common heritage of the French State is given. Quoting *verbatim*:

> Les espaces, ressources et milieux naturels terrestres et marins, les sons et odeurs qui les caractérisent, les sites, les paysages diurnes et nocturnes, la qualité de l'air, la qualité de l'eau, les êtres vivants et la biodiversité font partie du patrimoine commun de la nation. Ce

[589] I. Alogna, *Environmental Law of France*, cit. 2; Website of the Global Pact for the environment
[590] I. Alogna, *Environmental Law of France*, cit. 6
[591] Ibid.
[592] C. Cerda-Guzman, *La codification à droit constant, un oxymore?* in F. Rueda, J. Pousson-Petit, *Qu'en est-il de la simplification du droit?, Presses de l'Université Toulouse, Toulouse, 2010, 67 – 79*

> patrimoine génère des services écosystémiques et des valeurs d'usage. Les processus biologiques, les sols et la géodiversité concourent à la constitution de ce patrimoine[593].

Attention should additionally be paid to the definition of some core principles, crucial in the context of the sustainable and durable management of natural resources, that reiterate some of the EU principles analyzed in the previous chapter. For the sake of clarity, these principles are:

(i) precaution, on the basis of which risks have to be managed long before the event of natural disasters or major pollution: the focus is on prevention, rather than reaction to a given crisis;

(ii) preventive action and rectification at source, through the implementation of the best available technologies and at an acceptable cost;

(iii) polluter pays, according to which the perpetrators have the duty to repair and compensate for the damage caused: this especially applies to chemical factories and in the event of oil spills;

(iv) information and participation, in respect of which every citizen has the right to have access to adequate environmental information, to be informed of any project or public decision deemed to have a negative impact on the environment, to give opinions and be taken into account;

(v) eco solidarity, which requires to give due consideration to the environment when adopting relevant decisions;

(vi) sustainable use of natural resources;

(vii) complementarity;

(viii) non-regression, whereby the continuous improvement of environmental protection is contemplated.

Just a few years later, another substantial change occurred under the Presidency of Jacques Chirac, following a promise made in 2001 in light of the electoral campaign of 2002. Indeed, at the moment of a speech made at Orléans on May 3rd, 2001, Chirac declared:

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[593] '*The spaces, resources and natural terrestrial and marine environments, the sites, the diurnal and nocturnal landscapes, the air quality, the living beings and the biodiversity are part of the common heritage of the Nation. Biological processes, soil and geodiversity contribute to such heritage'*

> l'écologie, le droit à un environnement protégé et préservé doivent être considérés à l'égal des libertés publiques. Il revient à l'Etat d'en affirmer le principe et d'en assurer la garantie. Je souhaite que cet engagement public et solennel soit inscrit par le Parlement dans une charte de l'environnement adossée à la Constitution[594].

As a matter of fact, the Environmental Charter – adopted in 2004 – was incorporated into the Constitution by means of Constitutional Law 205 of March 1st, 2005, approved in equal terms by both the National Assembly and the Senate, in compliance with Article 89 of the French Constitution. This meant that the Charter was given the same constitutional status of the Declaration of the Rights of Man and of the Citizen of 1789, and of the Preamble to the 1946 Constitution, making it the first and only constitutional text consecrated to environmental protection in its entirety. This stance was reiterated and confirmed, *inter alia*, by the *Conseil constitutionnel* in 2008 via decision No. 564 DC, stipulating that:

> rights and duties set out in the Charter for the Environment, have constitutional status. They are thus binding upon the Government and administrative authorities within the limits of the areas under their jurisdiction.

According to Christian Dadomo, some of the reasons that led to the enactment of the Environmental Charter consisted in the willingness to: (i) meet societal concerns regarding the importance of the environment; (ii) follow the global trend of the constitutionalisation of environmental protection; (iii) repair the shortcomings of domestic environmental law; (iv) recognize the constitutional value of environmental protection as a human right.

Entering into detail, the provisions of the Environmental Charter, namely the Preamble and the ten Articles: are applicable to all persons, whether physical or juridic, private or public; shall be protected, interpreted and implemented by administrative and ordinary courts, as much as by the Constitutional Court; can be invoked by individuals before the courts not only in private and public proceedings, but also before the Constitutional Court

[594] *Une charte de l'environnement addossée à la Constitution* in Le Monde, available at: https://www.lemonde.fr/archives/article/2001/05/05/une-charte-de-l-environnement-adossee-a-la-constitution_4173404_1819218.html

via the *Question prioritaire de constitutionnalité.* Concerning the last possibility, the recent Article 61 – 1 of the Constitution, indeed, proclaims that:

> if during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period.

With reference to the provisions contained in the Charter, it is noteworthy to highlight that already the Preamble makes it clear that:

> the future and very existence of mankind are inextricably linked with its natural environment; the environment is the common heritage of all human beings; […] the safeguarding of the environment is a goal to be pursued in the same way as the other fundamental interests of the Nation.

Read in conjunction, Articles 1 and 2 establish that each person: '(i) *has the right to live in a balanced environment which shows due respect for health*; (ii) […] *has a duty to participate in preserving and enhancing the environment'.* Remarkably, by means of the joint reading of these two provisions, the *Conseil constitutionnel*, in the decision No. 2011-116 QPC, has concluded that there is the so-called *duty of care* to which every individual is subject[595].

Very interestingly, Articles 3, 4, 5 and 7 additionally reiterate, respectively:

(i) the prevention principle, inasmuch as individuals *'shall […] foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequences of such damage'*;

(ii) the principle of remediation for environmental damage, since the perpetrator '*shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment'*;

(iii) the precautionary principle, given that '*when the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge,*

[595] Cons. Const. 8 April 2011, decision No. 2011-116 QPC; I. Alogna, *Environmental Law of France*, cit. 7

may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to deal with the occurrence of such damage';

(iv) and the right to information and participation, insofar as individuals shall '*have access to any information pertaining to the environment in the possession of public bodies and to participate in the public decision-making process likely to affect the environment'*.

3.3.3. Legislative and Implementation Framework

As is clear from the above, the main sources of environmental law in France – following the order of the hierarchy of sources of law – are: (i) the Constitution, and therefore the Environmental Charter enclosed to it, whose guardian is the *Conseil constitutionnel*; (ii) the Environmental Code and other codes of specific nature, such as the Mining Code, the Energy Code and the Public Health Code; (iii) EU law; (iv) international law, in compliance with Article 55 of the Constitution reading:

> Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.

With regard to the implementation framework, it shall be noted that environmental legislation in France, inasmuch as this is a unitary state, is characterized by strong centralization[596]. As a matter of fact, Article 34 of the Constitution provides for a comprehensive list of matters pertaining to statutes, among which today it figures the preservation of the environment[597], while Article 37 additionally foresees that '*matters other than those coming under the scope of statute law shall be matters for regulation*'.

[596] L. Neyret, *France*, cit. 180; M. Alberton, *Environmental Protection in the EU Member States: Changing Institutional Scenarios and Trends*, cit. 298

[597] Article 34 was amended in 2005 by means of Constitutional Law n°2005-205 through which the Charter for the Environment was annexed to the Constitution

This implies that the framework legislation is subject to parliamentary approval, while the implementing provisions are promulgated by the central government[598].

At the central level, the major role played by the Ministry for the Environment – today known as Ministry for the Ecological Transition – shall be acknowledged. It shall be noted that until July 2020 the Ministry was composed by the Minister himself[599], the Cabinet and seven departments: (i) infrastructure; (ii) transportation and the sea; (iii) risks prevention; (iv) energy and climate; (v) planning, housing and nature; (vi) civil aviation; (vii) maritime fisheries and aquaculture[600]. Given the fact that the Minister for the Environment is charged with the definition and implementation of national policies in the environmental field, a decision was taken by him so as to make the impact assessment of any plans or proposal subject to prior approval of a competent authority[601]. Very interestingly, it is *Loi Énergie-climat* No.2019-1147 which additionally defines the competences of the Environmental Authority, namely this advisory body in charge of evaluating projects deemed to have significant environmental impacts[602]. According to the jurisprudence, the Environmental Authority shall retain its full independence from external influences.

Equally important are the General Council for the Environment and Sustainable Development (CGEDD) [603], as well as administrative bodies and agencies, first among many the Environment and Energy Management Agency (ADEME)[604] and French Agency for biodiversity (AFB)[605], all of which are under the direct authority of the Minister in charge[606].

Moreover, since environment and environmental protection represent a horizontal issue to be dealt with, which requires collaboration, cooperation and joint efforts, noteworthy is the contribution given by other ministries, first among many the Minister for Territorial Cohesion and Relations with Local Government.

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[598] M. Alberton, *Environmental protection in the EU Member States: changing institutional scenarios and trends*, cit. 298
[599] Or it would be better to say *herself*, since as of July 2020 the post is held by Barbara Pompili
[600] L. Neyret, *France*, cit. 180
[601] Further info is available at: https://www.ecologie.gouv.fr/lautorite-environnementale
[602] *France. Law and Practice* in Chambers and Partners website, 2020, available at: https://practiceguides.chambers.com/practice-guides/environmental-law-2020/france
[603] Website of Ministère de la transition écologique, available at: https://www.ecologie.gouv.fr/conseil-general-lenvironnement-et-du-developpement-durable-cgedd
[604] Disciplinateed by Article L. 131-2 of the Environmental Code
[605] Created by the means of Law n° 2016-1087 of August 8th, 2016
[606] L. Neyret, *France*, cit. 181

Concerning its local representation, the central government is additionally extended at both the regional level and the level of the departments. As far as the first level is concerned, five regional departments in the field of environmental, planning and housing can be mentioned. Such departments, entrusted with the monitoring of the proper implementation of national policies in the field, are: (i) climate change; (ii) biodiversity conservation; (iii) natural resources and landscapes; (iv) social cohesion and solidarity between territories; (v) environmental health, risk prevention and management[607].

As far as the second level is concerned, instead, the Ministry for the Environment is given direct representation by means of the regulatory authority of the Prefect[608]. The latter's office is therefore relevant since he is tasked with the implementation of government directives and with working on the social and economic development of the territory in which he operates[609]. In the environmental field, the Prefect is entitled to regulate, for instance, hunting and fishing, nature protection, water and noise pollution[610]. In order to execute his tasks, the prefect avails himself of local administrative departments, among them the Regional Directorates for the Environment, Planning and Housing (DREAL), or the Departmental Direction of the Territories (DDT)[611].

A significant aspect of the implementation framework of French environmental law consists in the already-mentioned strong centralization. In this respect, the allocation of powers between the state and the local governments – or it would be better to say '*the territorial communities of the Republic*', which comprehend '*the Communes, the Departments, the Regions, the Special-Status communities and the Overseas Territorial communities*[612]' – is not easily definable, insofar as the Constitution itself does not contain any article providing for a clear and satisfactory distribution of this kind. In this respect, the above-mentioned Article 34 exclusively foresees that the statutes '*lay down the basic principles of: […] the self-government of territorial communities, their powers and*

[607] Ibid., 180
[608] *France. Law and Practice* in Chambers and Partners website, 2020, available at: https://practiceguides.chambers.com/practice-guides/environmental-law-2020/france
[609] Further info can be found at: https://www.prefectures-regions.gouv.fr/ile-de-france/Region-et-institutions/La-prefecture-de-Paris-et-d-Ile-de-France/Le-role-du-prefet/Le-role-du-prefet
[610] L. Neyret, *France*, cit. 180
[611] *France. Law and Practice* in Chambers and Partners website, 2020, available at: https://practiceguides.chambers.com/practice-guides/environmental-law-2020/france
[612] Art. 72 of the Constitution reads as follows: '*The territorial communities of the Republic shall be the Communes, the Departments, the Regions, the Special-Status communities and the Overseas Territorial communities to which article 74 applies. Any other territorial community created, if need be, to replace one or more communities provided for by this paragraph shall be created by statute*'

revenue'. However, in accordance with Article 72, it is eventually determined the following:

> in the manner provided for by an Institutional Act, except where the essential conditions for the exercise of public freedoms or of a right guaranteed by the Constitution are affected, territorial communities or associations thereof may, where provision is made by statute or regulation, as the case may be, derogate on an experimental basis for limited purposes and duration from provisions laid down by statute or regulation governing the exercise of their powers.

But nonetheless, in spite of the consolidated practice of centralization, it shall be noted that a wave of decentralization has originated at the beginning of the Eighties of the XX century and got strengthened in recent years. Particularly relevant in this context are the *Lois Defferre*:

(i) Law n° 82-213 of March 1982, on the rights and freedoms of municipalities, departments and regions;

(ii) Law n° 83-8 of January 1983, on the distribution of powers between municipalities, departments, regions and the state;

(iii) Law n° 83-663 of July 1983 which supplemented the Law passed on January of the very same year[613].

Among the novelties introduced by these Laws, the French State was given an *a posteriori* control over the acts of the local authorities, whereas the regions were given some prerogatives until then retained by the State[614]. Within the context of this transfer of power, remarkable is Law n°. 83-8, which provided the tri-partite system of local governments, namely regions, departments and communes, with a number of prerogatives in the environmental field. As a confirmation of this, Article 1 of the Law[615] postulated that:

> Les communes, les départements et les régions règlent par leurs délibérations les affaires de leur compétence. Ils concourent avec l'Etat à l'administration et à l'aménagement du territoire,

[613] Website of *Vie publique*, available at: https://www.vie-publique.fr/eclairage/38438-les-lois-defferre-premieres-lois-de-decentralisation
[614] Ibid.
[615] For the sake of argument, Article 1 was abrogated by means of Law n° 96-142 of February 1996

> au développement économique, social, sanitaire, culturel et scientifique, ainsi qu'à la protection de l'environnement et à l'amélioration du cadre de vie.

Ultimately, Law n° 2008-757 of August 2008 should be properly taken into account, inasmuch as local governments were given legal standing to demand reparation as a result of any accident or situation which may have caused whatever sort of environmental damage to the local territory. As such, mention can be made, for instance, to Article L. 162-6, on the basis of which the relevant authority must carry out the evaluation of the nature and implications of the environmental damage.

3.3.4. Access to Environmental Information and Justice for Individuals and NGOs

Starting from a constitutional point of view, Article 7 of the Charter for the Environment explicitly provides the following:

> Each person has the right, in the conditions and to the extent provided for by law, to have access to any information pertaining to the environment in the possession of public bodies and to participate in the public decision-making process likely to affect the environment.

Broadly speaking, in France the obligation to public dissemination of environmental information subsists. This is done by means of publication of such information in the Official Journal of the French Republic or in the Official Bulletins[616]. As a matter of fact, the public is in possession of plenty of information concerning, among many: (i) international treaty and conventions, EU law and national legislation in the field; (ii) plans, programmes and documents delineating public policies concerning the environment; (iii) public reports on the state of the environment; (iv) relevant information on activities likely to have a significant environmental impact; (v) environmental impact assessments[617]. Also, every four years the Ministry of Environment publishes a report on the current state of the environment[618].

[616] Further info is available at: https://ree.developpement-durable.gouv.fr/la-convention-d-aarhus/article/l-acces-a-l-information-sur-l-environnement
[617] Ibid.; Environmental Code
[618] More info available at: https://www.ecologie.gouv.fr/linformation-environnementale

With regard to the meaning attributed to the right to information, Article L124-2 of the Environmental Code stipulates what follows:

> Est considérée comme information relative à l'environnement au sens du présent chapitre toute information disponible, quel qu'en soit le support, qui a pour objet :
> 1° L'état des éléments de l'environnement, notamment l'air, l'atmosphère, l'eau, le sol, les terres, les paysages, les sites naturels, les zones côtières ou marines et la diversité biologique, ainsi que les interactions entre ces éléments ;
> 2° Les décisions, les activités et les facteurs, notamment les substances, l'énergie, le bruit, les rayonnements, les déchets, les émissions, les déversements et autres rejets, susceptibles d'avoir des incidences sur l'état des éléments visés au 1° ;
> 3° L'état de la santé humaine, la sécurité et les conditions de vie des personnes, les constructions et le patrimoine culturel, dans la mesure où ils sont ou peuvent être altérés par des éléments de l'environnement, des décisions, des activités ou des facteurs mentionnés ci-dessus ;
> 4° Les analyses des coûts et avantages ainsi que les hypothèses économiques utilisées dans le cadre des décisions et activités visées au 2° ;
> 5° Les rapports établis par les autorités publiques ou pour leur compte sur l'application des dispositions législatives et réglementaires relatives à l'environnement[619].

Concerning the exercise of this right, reference shall be made to Law No. 78-753 on various measures to improve relations between the administration and the public and various administrative, social and fiscal provisions – whose Article 4 regulates the right of access to administrative documents –, and the subsequent Decree No. 2005-1755 relating to the freedom of access to administrative documents and the reuse of public information. As far as specific matters are concerned, it is possible to mention, for instance, Law No. 2006-686 concerning the issues of transparency and safety in nuclear matters.

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[619] '*For the purposes of this chapter, information relating to the environment is considered to be any information available, whatever the medium, the purpose of which is: (i) the state of the elements of the environment, in particular the air, atmosphere, water, soil, land, landscapes, natural sites, coastal or marine areas and biological diversity, as well as the interactions between these elements; (ii) decisions, activities and factors, in particular substances, energy, noise, radiation, waste, emissions, spills and other discharges, likely to have an impact on the state of the elements concerned […]; (iii) the state of human health, safety and living conditions of people, buildings and cultural heritage, insofar as they are or may be altered by elements of the environment, decisions, activities or the factors mentioned above; (iv) the cost and benefit analyses, as well as the economic assumptions used in the context of the decisions and activities referred to in (ii); (v) reports drawn up by public authorities or on their behalf on the application of legislative and regulatory provisions relating to the environment*'

More in detail, the main sources governing the access to environmental related information are:

(i) Constitutional Law No. 2005-205 relating to the Charter for the Environment; (ii)

(ii) the Aarhus Convention, ratified by France on July 8th, 2002, and came into force on October 6th, 2002 by means of Law No. 2002-285[620];

(iii) EU Directive 2003/4/EC of January 28th, 2003, on public access to environmental information and repealing Council Directive 90/313/EEC;

(iv) the Environmental Code, providing for many provisions concerning the right to information, especially within Book I, Title II, Chapter IV.

In accordance with Article L. 124-3 of the Environmental Code, the authorities responsible for sharing the information requested by natural or legal persons are the state, local authorities and their groups, as well as public establishments, but also those serving a public service mission connected with environmental matters, to the extent that such information relates to the exercise of the mission.

In broad terms, each legal or moral person, whether national or non-national citizen, is entitled to have access to and be provided with environmental information, regardless of any underlying interest: as such, there is no need to give a justification of such request[621]. However, there might be cases of exclusion, on the basis of which the access to the information can be refused. More in detail, as laid down in Article L.124-4 of the Environmental Code, this occurs when the information requested risks to affect:

(i) the interests mentioned in Articles L.311-5 to L.311-8 of the Code of relations between the public and the administration, exception made for the interests contemplated by paragraphs *e* and *h* of 2° of Article L 311-5;

(ii) the protection of the environment to which it relates;

(iii) the interests of the natural person who has provided, without being constrained to do so by a legislative or regulatory provision or by an act of an administrative or judicial authority, the information requested without consenting to its disclosure.

[620] https://www.notre-environnement.gouv.fr/rapport-sur-l-etat-de-l-environnement/la-convention-d-aarhus/article/la-convention-d-aarhus#top

[621] Further info is available at: https://ree.developpement-durable.gouv.fr/la-convention-d-aarhus/article/l-acces-a-l-information-sur-l-environnement

Additionally, the Article provides for other three cases of exclusion, concerning requests: made for documents that are still under preparation; relating to information not held by that given public body; of an excessively general nature. In any event, Article L.124-6 eventually clarifies that:

> Le rejet d'une demande d'information relative à l'environnement est notifié au demandeur par une décision écrite motivée précisant les voies et délais de recours[622].

Ultimately, mention should be made to the circular of 11 May 2020 relating to the implementation of the provisions governing the right of access to information relating to the environment, promoted by Elisabeth Borne, former Minister for the Ecological and Social Transition. This circular aims at clarifying six issues: (i) conditions laid down by the main existing texts concerning the access to environmental information; (ii) field of application; (iii) legal reasons justifying the refusal to provide information; (iv) requests concerning access to environmental information; (v) measures aimed at simplifying the access to environmental information, with a comprehensive list of relevant authorities; (vi) public diffusion of environmental information.

Moving the focus to the access to justice, in France it is granted both for individuals and associations. In accordance with Article L. 141-1 of the Environmental Code, provided that they have been founded at least three years before the incident in question:

> Lorsqu'elles exercent leurs activités depuis au moins trois ans, les associations régulièrement déclarées et exerçant leurs activités statutaires dans le domaine de la protection de la nature et de la gestion de la faune sauvage, de l'amélioration du cadre de vie, de la protection de l'eau, de l'air, des sols, des sites et paysages, de l'urbanisme, ou ayant pour objet la lutte contre les pollutions et les nuisances et, d'une manière générale, oeuvrant principalement pour la protection de l'environnement, peuvent faire l'objet d'un agrément motivé de l'autorité administrative[623].

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[622] '*The rejection of a request for information relating to the environment is notified to the applicant by a reasoned written decision specifying the means and time limits for appeal*'.

[623] '*The associations regularly declared and exercising their statutory activities in the field of the protection of nature and the management of wild fauna, the improvement of the living environment, the protection of water, air, soil, sites and landscapes, town planning, or having for object the fight against pollution and nuisances and, in general, working mainly for the protection of environment, can be the subject of a motivated approval of the administrative authority*'.

Additionally relevant in this context are Article L. 141-2, on the basis of which:

> Les associations de protection de l'environnement agréées au titre de l'article L. 141-1 ainsi que les fédérations départementales des associations agréées de pêche et de protection du milieu aquatique et les associations agréées de pêcheurs professionnels sont appelées, dans le cadre des lois et règlements en vigueur, à participer à l'action des organismes publics concernant l'environnement[624];

as well as Article L. 142-3, in which it is decided that:

> Lorsque plusieurs personnes physiques identifiées ont subi des préjudices individuels qui ont été causés par le fait d'une même personne et qui ont une origine commune, dans les domaines mentionnés à l'article L. 142-2, toute association agréée au titre de l'article L. 141-1peut, si elle a été mandatée par au moins deux des personnes physiques concernées, agir en réparation devant toute juridiction au nom de celles-ci. […] L'association qui exerce une action en justice en application des dispositions des alinéas précédents peut se constituer partie civile devant le juge d'instruction ou la juridiction de jugement du siège social de l'entreprise mise en cause ou, à défaut, du lieu de la première infraction[625].

More in detail, there are two interim proceedings which can be brought before administrative tribunals. The first is explicated in Articles L.122-2 of the Environment Code[626] and L.554-11 of the Administrative Justice Code[627], and foresees the possibility to suspend the approval of any decision concerning whatever project which, by reason of

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[624] '*The environmental protection associations approved under Article L.141-1 as well as the departmental federations of approved fishing and aquatic environment protection associations and approved associations of professional fishermen are called upon, within the framework of the laws and regulations in force, to participate in the action of public bodies concerning the environment*'

[625] '*When several identified natural persons have suffered individual damages which were caused by the act of the same person and which have a common origin, in the fields mentioned in Article L. 142-2, any association approved under Article L. 141-1 may, if it has been mandated by at least two of the natural persons concerned, bring compensation before any court on their behalf. […] The association which takes legal action in application of the aforementioned provisions may bring a civil action before the examining magistrate or the trial court of the head office of the company in question or, failing that, the place of the first offense*'

[626] Art. L.122-2 reads: '*If a request lodged with the administrative court against an authorization or a decision approving a project referred to in I of article L.122-1 is based on the absence of an impact study, the summary judge , seized of a request for suspension of the contested decision, grants it as soon as this absence is noted'*

[627] Art. L.554-11 reads: '*The decision to suspend an authorization or a decision to approve a development project undertaken by a public authority obeys the rules defined by article L.123-16 of the environment code*'

its size or implications, is likely to have negative environmental repercussions. The other is delineated in Articles L. 123-12 of the Environmental Code[628] and L. 554-12 of the Administrative Justice Code[629], and authorizes the suspension of any decision consisting in the approval of whatever works – previously subject to public investigation – if such an approval raises doubts about its legality[630].

Very recently, and precisely in December 2020, Law No. 2020-1672 relating to the European Public Prosecutor's Office, environmental justice and specialized criminal justice deserves due attention. By means of this Law, the *Convention judiciaire d'intérêt public* (CJIP) – that is, the judicial convention of public interest – was created, inasmuch as a mechanism dealing with the offenses referred to in the Environment Code and the associated infringements was inserted in Article 41-1-3 of the code of criminal procedure[631].

In reference to access to justice and environmental litigations, precisely in February 2021 a landmark decision has taken place. Indeed, in the so-called *Affaire du Siècle*, the administrative tribunal of Paris held France accountable for its failure to comply with the commitments undertaken in the field of climate change mitigation. Dating back to 2018, a complaint was filed by four NGOs, namely Oxfam France, Greenpeace France, Fondation pour la nature et l'homme and Notre affaire à tous, according to which the failure of France to satisfactorily reduce GGFs in the period ranging from 2015 to 2018 – commitments undertaken under the Paris Agreement – was

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[628] Art. L.123-12 reads: '*The public inquiry file includes, in addition to the impact study or environmental assessment, when required, the documents and opinions required by the laws and regulations applicable to the project, plan or program. It also includes a non-technical presentation note, insofar as these elements are not already included in the file required under the specific regulations of the project. If the project has been the subject of a public debate procedure organized under the conditions defined in Articles L.121-8 to L. 121-15, consultation as defined in Article L.121-16, or any other procedure provided for by the texts in force allowing the public to participate effectively in the decision-making process, the file includes the results of this procedure. When no prior consultation has taken place, the file shall mention it*'

[629] According to article L. 554-12: '*The decision to suspend a planning decision submitted to a preliminary public inquiry obeys the rules defined by paragraphs 1 and 2 of article L. 123-12 of the environment code reproduced below: "L.123-12, paragraphs 1 and 2.-The administrative judge of summary proceedings, seized of a request for the suspension of a decision taken after unfavorable conclusions of the investigating commissioner or the commission of inquiry, grants this asks whether it includes any means capable of creating, in the current state of the investigation, a serious doubt as to the legality of the latter.*
The provisions of the preceding paragraph also apply when a decision has been taken without the investigation required by this chapter having taken place".'

[630] Further information is available at: https://ree.developpement-durable.gouv.fr/la-convention-d-aarhus/article/l-acces-a-la-justice. More in detail, two cases are contemplated:

[631] Further information is available at: https://www.ecologie.gouv.fr/convention-judiciaire-dinteret-public-cjip

an alleged violation of a fundamental right enshrined in the Constitutional Charter, and precisely '*the right to live in a balanced environment which shows due respect for health'* provided for by Article 1 of the Environmental Charter[632]. This is the umpteenth demonstration of the increasing importance that the public opinion attaches to the environment and environment-related matters. As a matter of fact, societies are undergoing several changes in order to meet present and future environmental claims and satisfy the requirements of European and international law.

3.4. Germany

On the contrary of Italy and France, Germany is a federal state and, as such, environmental legislation has been developed both at the Federal and Länder's level. If it is true that some sort of legal recognition of environmental protection has ancient roots – as it is also true for Italy and France – it was from the 1970s onwards, and particularly in the aftermath of the Chernobyl Accident of 1986 that major changes occurred. For instance, the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety was founded precisely in 1986, as was the case in Italy.

Over the years, the Country has succeeded in asserting itself as a leading actor in the EU legal landscape, also thanks to the 'Climate Chancellor' Angela Merkel, yet at the same time it has experienced a number of defeats; for instance, it shall be noted that Germany has not yet provided itself with an Environmental Code. This section will, therefore, try to investigate both the positive and the negative features.

3.4.1. Historical evolution of environmental legislation in Germany

[632]Sources: https://www.liberation.fr/france/2018/12/18/climat-lancement-d-un-recours-en-justice-contre-l-etat-pour-inaction_1698405/; https://www.oxfamfrance.org/laffairedusiecle/; https://notreaffaireatous.org/en/actions/the-legal-action-of-the-affaire-du-siecle/; https://www.universal-rights.org/blog/the-french-case-of-the-century-ushers-in-new-era-of-environmental-litigation/; https://www.bclplaw.com/en-US/insights/france-and-climate-change-state-failure-and-liability-for-environmental-harm.html

From an historical point of view, it is possible to retrace some relevant signs of environmental awareness already back to the Prussian Industrial Code of 1845, on the basis of which industrial and commercial facilities held up as dangerous and devoid of any license could not operate[633]. Later in time, in the Second Reich novelties concerning, for instance, strong urbanization and industrialization, but also rapid dynamics of man-made development started to have significant impacts on the natural and animal environment[634]. As a consequence, concerns appeared and raised, especially with regard to human health: the origins and causes of epidemic diseases were believed to have an environmental origin and were attributed, *inter alia*, to pollution[635]. That was the period in which words like *Naturschutz* (derived from 'nature' and 'protection') or *Naturdenkmal* (from 'nature' and 'monument'), and even *ad hoc* movements, such as the *Heimatbewegung*, started to appear[636]. For instance, the Heimatbewegung focused on the protection not only of historical, cultural and natural monuments, but also of threatened flora and fauna[637]. Concurrently, decrees and laws for the protection of natural sights, such as the 1902 Prussian Veranstaltungsgesetz, were enacted, as well as the ones concerning the fight against pollution, for instance the 1860 Industrial Code or the 1900 Civil Code [638].

However, as a result of the socio-economic crises originated in the aftermath of World War I and Word War II, and of the related need for economic reconstruction and reborn industrialization, the Country took a step backwards. In particular, in the period of the Third Reich a belief arose that the ideas behind environmentalism were representative of rightwing political extremism[639]. A notable exception, however, was represented by the *Reichsnaturschutzgesetz* adopted in Nazi Germany in 1935, even though its full implementation was soon suspended as a result of the concentration of funds on the

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[633] H. Schlemminger, C. Martens (eds.), *German Environmental Law for Practitioners*, 2004, 2nd edn., Kluwer Law International, The Hague, 25

[634] R. Dominick*, Nascent Environmental Protection in the Second Empire* in German Studies Review, 1986, 9:2, 257; K. Ditt, J. Rafferty, *Nature Conservation in England and Germany 1900-70: Forerunner of Environmental Protection?* in Contemporary European History, 1996, 5:1, 12

[635] R. Dominick*, Nascent Environmental Protection in the Second Empire*, cit. 258

[636] Ibid., 263 – 264; K. Ditt, J. Rafferty, *Nature Conservation in England and Germany 1900-70: Forerunner of Environmental Protection?*, cit. 12

[637] K. Ditt, J. Rafferty, *Nature Conservation in England and Germany 1900-70: Forerunner of Environmental Protection?*, cit. 12

[638] R. Dominick*, Nascent Environmental Protection in the Second Empire*, cit. 286 – 288

[639] G. Jones, C. Lubinski. *Historical Origins of Environmental Sustainability in the German Chemical Industry, 1950s-1980s*, in Harvard Business School Working Paper, 2013, 14-018, 3

military sector in preparation for World War II[640]. Either way, it should be nonetheless highlighted that the Act entailed a number of consequences, since: (i) it led to the protection of some species of flora and fauna, to the creation of protected areas; (ii) the expression '*Landschaftsschutzgebiet'* (landscape protection area) was coined by it for the first time[641]; (iii) it served as the basis for the enactment of the forthcoming Federal Nature Conservation Act of 1976[642]. Environmental considerations were equally set aside in the second post-war period, when in both sides of Germany there was an increasing focus on the economic miracle, and thus on national industry recovery and development, which could not justify environmental care[643].

It was only a decade after the end of the War that the awareness of the environment as a resource to be valued started to raise again within the public opinion of West Germany, leading to a greater political commitment to environmental protection, especially from the Social Democratic Party[644]. However, it took until 1969 – and precisely until the Federal Elections which saw the victory of the center-left coalition formed by the Social Democratic Party and the Free Democratic Party – for environmental policy to regain due consideration. It is possible to say that this new direction in the area was, to a certain extent, anticipated by the new Chancellor Willy Brandt in the context of the official Government Declaration to the *Bundestag* in the month of October of that year: in his statement, Brandt pointed out that the federal government was persuaded that nature conservation deserved more consideration[645]; however, for the sake of completeness it should be noted that already in 1961 he became famous for the statement '*The sky over the Ruhr must become blue again*', which showed a new environmental sensibility within the realm of politics.

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[640] D. Motadel, *Review Article. The German Nature Conservation Movement in the Twentieth Century* in Journal of Contemporary History, 2008, 43:1, 142

[641] Environment and society portal, available at: https://www.environmentandsociety.org/tools/keywords/reichsnaturschutzgesetz-reich-conservation-act

[642] Reichsnaturschutzgesetz, available at: https://www.stadtgrenze.de/s/p3r/natsch/natsch.htm

[643] H. Weidner, *25 Years of Modern Environmental Policy in Germany. Treading a Well-Worn Path to the Top of the International Field*, in Discussion Paper FS II 95 – 301, Wissenschaftszentrum Berlin für Sozialforschung, 1995, 1

[644] Ibid.

[645] The original transcription is the following: '*Meine Damen und Herren, die Bundesregierung ist mit vielen draußen im Lande und sicher auch mit vielen in diesem Hause der Überzeugung, daß dem Schutz der Natur, von Erholungsgebieten, auch dem Schutz der Tiere, mehr Aufmerk- samkeit geschenkt werden muß'*. The full text is available at: https://www.willy-brandt-biografie.de/wp-content/uploads/2017/08/Regierungserklaerung_Willy_Brandt_1969.pdf

Particularly noteworthy was the adoption of the Environmental Programme in September 1971 – which thus preceded the first EAP of July 1973 – by means of which efforts were devoted to the definition first, and implementation then, of some innovative policies in the field. Some of the most important points discussed and stated therein, in light of a long-term planning in the field of environmental protection, were:

(i) environmental policy as the combination of measures aimed at safeguarding the environment to the benefit of human health and a dignified existence, but also at broadly protecting soil, air, water, fauna and flora from human activities, and at eliminating the human consequences of human impact;

(ii) the *Verursacherprinzip*, with the agent causing the damage required to repay the costs arising from environmental damage;

(iii) environmental protection as needing to be sustained by measures of a financial, fiscal and infrastructural kind;

(iv) an environmentally-friendly technical progress, or '*Umweltfreundliche technik'*;

(v) environmental protection as concerning every citizen and being at the core of German Federal Government policy;

(vi) the establishment of a council of experts in the field of environmental protection;

(vii) the need a close cooperation between the different levels of government;

(viii) the need for international cooperation[646].

From the foregoing the acknowledgment of the incorporation of key EC principles such as the principles of precaution (*Vorsorgeprinzip),* polluter-pays (*Verursacherprinzip*) and cooperation (*Kooperationsprinzip*) into the domestic legal system[647].

This Programme, which furthermore focused on one hundred and forty-eight concrete measures in the field, continued in 1976, with a new conception of environmental policy as *Querschnittsaufgabe*, namely a cross-sectoral task[648]. Indeed,

[646] Translated from: Deutscher Bundestag 6. Wahlperiode, Drucksache VI/2710. Full original text available here: https://dserver.bundestag.de/btd/06/027/0602710.pdf

[647] H. Weidner, *25 Years of Modern Environmental Policy in Germany. Treading a Well-Worn Path to the Top of the International Field*, cit. 5

[648] M. Jänicke, H. Jörgens, K. Jörgensen, R. Nordbeck, Governance for sustainable development in Germany: Institutions and policy making, in Forschungsstelle für Umweltpolitik (FFU), OECD, 2001, 7

nthe subsequent update of the programme in 1976 led to the inclusion of new objectives among the purposes of the precautionary principle: it is possible to mention the protection of human health or of natural ecosystems, but also the prevention of damage to cultural and economic assets, or eventually the preservation of flora, fauna, and natural landscapes[649].

During the second Brandt Cabinet, a number of crucial legislative acts in the field of environmental legislation and, more specifically, pollution control was adopted; for instance, mention can be made to the 1971 Air Traffic Noise Act, the 1972 Leaded Petrol Act, the 1972 Waste Disposal Act, the 1972 DDT Act, the 1974 Federal Air Quality Protection Act and the 1974 Federal Emissions Control Act. Very interestingly, in the same year 1974, the Federal Enviroment Agency (*Umweltbundesamt* or UBA) was created as '*an independent higher federal authority'*, by means of the Law called '*Gesetz über die Errichtung eines Umweltbundesamtes*'[650] and in accordance with Article 87 III (GG). Today, the UBA consists of a *Zentralbereich*, namely the head office, and five organizational units and sectors: (i) environmental planning and long-term environmental strategies; (ii) water and soil protection; (iii) waste; (iv) safety of chemical products; (v) and *Deutsche Emissionshandelsstelle*, the office responsible for emissions trading[651]. According to §2, the Agency is in charge of:

(i) providing the Federal Ministry of the Environment with assistance and scientific advice with regard to the following subjects: soil conservation; emission; water and waste management; drafting of laws and regulations inherent in the field;
(ii) monitoring the state of the environment;
(iii) collaborating on the drafting of impact assessment;
(iv) providing the public with environmental information;
(v) managing the information system in the context of environmental planning and an environmental documentation center[652].

[649] K. W. Zimmermann*, Zur Anatomie des Vorsorgeprinzips*, in Aus Politik und Zeitgeschichte B, 1990, 6, 5
[650] Available at: http://www.gesetze-im-internet.de/ubag/
[651] *A.C. 68 e A.C. 110: le agenzie nazionali per la protezione dell'ambiente in Francia, Germania, Regno Unito e Giappone*, 2013, 1 – 2, available at Camera dei deputati, Servizio Biblioteca, Ufficio Legislazione Straniera
[652] Ibid.

Notwithstanding these efforts, in the period between 1974 and 1978 environmental policy was set aside, partially as a result of the inception of the Schmidt Cabinet in 1974, but mostly as a result of the recession[653]. However, green movements were increasing their influence and gaining political significance in response, as demonstrated by the fact that in the Federal election held in 1983 the Green Parties succeeded in obtaining the five point six percent of votes, which in turn allowed them to gain twenty-seven seats and be elected in the *Bundestag*[654]. At the same time, other key pieces of legislation were passed, such as the 1976 Federal Water Management Act, the 1976 Federal Nature Conservation Act and the 1980 Chemicals Act[655].

Generally speaking, the drafting and implementation of environmental policies accelerated in the aftermath of the Chernobyl disaster of April 1986, and the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety was founded on June 6th and assigned to the CDU politician Walter Wallmann. The new Minister was finally given full prerogatives in the environmental field, until then retained by the Minister for the Interior, the Minister for Agriculture and the Minister for Health[656]. Today, the Ministry enjoys the collaboration of three federal agencies, namely the aforementioned Federal Environmental Agency *(Umweltbundesamt*), the Federal Agency for Nature Conservation (*Bundesamt für Naturschutz*) and the Federal Office for Radiation Protection (*Bundesamt für Strahlenschutz*), but also of some advisory bodies, such as the Council of Environmental Advisors (*Rat von Sachverständigen für Umweltfragen*) and the Advisory Council on Global Change (*Wissenschaftlicher Beirat Globale Umweltveränderungen*). Moreover, this reborn interest in environmental protection was further confirmed at the moment of the EC Presidency in 1987, when Germany succeeded in putting the protection of the ozone layer at the very top of the agenda[657].

Afterwards, as revolutionary movements were increasing and speeding up in Eastern Europe, a new form of cooperation between the Ministries of the Environment in

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[653] H. Weidner, *25 Years of Modern Environmental Policy in Germany. Treading a Well-Worn Path to the Top of the International Field*, cit. 7
[654] Ibid., 8 – 9
[655] O. Dilling, W. Köck, *Germany* in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, Oxford, Oxford University Press, 2019, 196
[656] Further information available at: https://actionguide.info/m/orgs/149/
[657] R. Watanabe, L. Mez, *Special Feature on the Kyoto Protocol. The Development of Climate Change Policy in Germany*, in International Review for Environmental Strategies, 2004, 5:1, 111

both FDR and GDR was established in 1989, in the framework of a memorandum of understanding on the joint planning and implementation of six pilot projects in the GDR – which received the financial support of the FDR –, and of the creation of a joint environment commission[658]. Subsequently, when on August 31st, 1990, the two governments agreed on and signed the Unification Treaty, and the Country was later unified in the month of October, a decision was taken so as to apply the Basic Law – with the related rights and obligations – also to the former East Germany.

Interestingly, in the period 1994 –1998 Germany was a leading actor in the environmental field at both the international and EU level, as for instance proved by the fact that the first Conference of the Parties under the UNFCCC (COP 1), which saw the participation of Angela Merkel as the new Minister for the Environment, was held in Berlin in 1995. Remarkable in this period were, for instance, the passing of the Environmental Auditing Law in 1995; the amendment of the Energy Sector Act, which became known as the Revised Energy Sector Act in 1998; and the Federal Soil Protection Act, always in 1998, which consisted in the prevention management of dramatic changes in the soil, and in polluted sites rehabilitation[659]. The year 1998, to some extent, marked a turning point, since the SPD and the Green Party entered in a coalition and succeeded, *inter alia*, in introducing the Eco Tax and focusing on renewable energies[660]. In 2001 not only seventeen members of the Council of Sustainable Development were formally appointed, but also the first meeting of the so-called 'Green Cabinet' was held, in the context of which three priorities for a national strategy in the field were laid down: (i) climate protection and energy policy; (ii) environmentally compatible transportation; (iii) environment, nutrition and health'[661]. Later on, noteworthy were, for instance, the Emissions Trading Act and the Allocation Act of 2004.

Finally, it was since the election of Angela Merkel as Federal Chancellor in 2005 that environmental legislation in Germany definitely became an important part of the

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[658] H. Weidner, *25 Years of Modern Environmental Policy in Germany. Treading a Well-Worn Path to the Top of the International Field*, cit. 17 – 18

[659] R. Watanabe, L. Mez, *Special Feature on the Kyoto Protocol. The Development of Climate Change Policy in Germany*, cit. 116; *History of Energy and Climate Energy Policy in Germany: CDU perspectives 1958-2014* in Konrad Adenauer Stiftung

[660] R. Watanabe, L. Mez, *Special Feature on the Kyoto Protocol. The Development of Climate Change Policy in Germany*, cit. 120 – 121

[661] M. Jänicke, H. Jörgens, K. Jörgensen, R. Nordbeck, *Governance for sustainable development in Germany: Institutions and policy making* in Forschungsstelle für Umweltpolitik (FFU), OECD, 2001, 9

domestic legal system, to such an extent that Merkel was referred to as the 'Climate Chancellor'. In particular, she has played and continues to play a leading role in both the domestic and international scene. For instance, at the moment of her first Presidency of the Council of the EU, Merkel succeeded in finding a common agreement on the '20-20-20 goals' on the basis of which the EU committed itself to achieve the following objectives by 2020: (i) the reduction of CO2 emissions by twenty percent when compared to 1990 levels; (ii) the increase in energy efficiency by twenty percent; (iii) the use of twenty percent of renewable energies.

At the domestic level, instead, it is possible to mention, for instance, the Integrated Energy and Climate Programmme adopted by the *Große Koalition* in 2007, which started with the following premise:

> In time for the start of the UN Climate Change Conference in Bali, the German government has elaborated a historic energy and climate programme which is without precedent both in the history of German climate policy and internationally. […] Our package doubles Germany's previous climate protection efforts. At present, we have achieved an 18 percent reduction in greenhouse gas emissions compared to 1990. The programme will enable us to achieve a reduction of around 36 percent. We have thus taken a major step towards achieving our climate protection target of - 40 percent by 202'[662].

Equally relevant was the 2007 Integrated Energy and Climate Program (IEKP), in the context of which it was agreed that Germany would have cut CO2 emissions by forty percent by 2020, whereas in the meantime the EU would have achieved just a thirty percent cut[663].

3.4.2. Three major turning points: Constitutional Amendments of 1972, 1994 and 2006

First of all, it should be noted that Germany, as opposed to Italy and France, is a federal state, whose Constitution – precisely at Article 70 – stipulates that Länder are allocated

[662] Full text available at: https://elaw.org/system/files/Germany%201.pdf
[663] *History of Energy and Climate Energy Policy in Germany: CDU perspectives 1958-2014* in Konrad Adenauer Stiftung, 44

exclusive legislative powers, unless the Federation is vested which equal prerogatives by the Constitution itself. As a matter of fact, Article 73 enumerates the matters falling under exclusive legislative power of the Federation, namely nuclear protection, air transport and railways, foreign affairs and defense, whereas Article 72(3) eventually clarifies that:

> if the Federation has made use of its power to legislate, the Länder may enact laws at variance with this legislation with respect to: hunting (except for the law on hunting licenses); protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life); […] regional planning.

Even more relevant in this context was the amendment made to Article 74 in 1972, concerning the matters under concurrent legislative powers, by means of which the federal government was provided with prerogatives in the field of waste management, air and noise pollution control, but also criminal law relating to environmental protection[664]. As such, Article 74 today reads the following:

> Concurrent legislative power shall extend to the following matters: […] the promotion of agricultural production and forestry (except for the law on land consolidation), ensuring the adequacy of food supply, the importation and exportation of agricultural and forestry products, deep-sea and coastal fishing and coastal preservation; […] measures to combat human and animal diseases which pose a danger to the public or are communicable […]; the law on food products including animals used in their production, the law on alcohol and tobacco, essential commodities and feedstuffs as well as protective measures in connection with the marketing of agricultural and forest seeds and seedlings, the protection of plants against diseases and pests, as well as the protection of animals; […]waste disposal, air pollution control, and noise abatement (except for the protection from noise associated with human activity); […] hunting; protection of nature and landscape management; land distribution; regional planning; management of water resources.

It follows from the foregoing that the need for environmental protection and regulation was finally given explicit constitutional recognition. And this is even more true if one considers the 1994 amendment to the Constitution, by means of which Article 20a,

[664] H. Weidner, *25 Years of Modern Environmental Policy in Germany. Treading a Well-Worn Path to the Top of the International Field*, cit. 3 – 4

concerning the protection of the natural foundations of life and animals, was introduced. The constitutional provision is, *verbatim*, the following:

> Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

Not only the fact that due attention was paid to the protection of the natural and animal assets, but especially the recognition that such protection was needed for the sake of future generations – in light of an intergenerational responsibility – remarked a landmark change.

However, it would be wrong to attribute a prescriptive character to the provision[665]. Indeed, Article 20a delineates the so-called *Staatszielbestimmung*, that is to say a rule which simply sets objectives for state action[666]; also, it is not included under the basic rights, but rather under the section devoted to the Federation and the Länder[667]. As such, no fundamental right to the environment is enshrined therein. Indeed, a debate arose already in the Eighties as to whether the amendment would have resulted in a fundamental right or, rather, precisely in a *Staatsziel*, 'state goal'[668]. In the end, the position of the SPD prevailed and led to the drafting of the Article as we know it today. Nonetheless, this does not make the provision less significant.

Focusing more specifically on its meaning, it shall be noticed that the expression '*natural foundations of life and animals*' has a broad meaning, broadly encompassing both the *Umwelt*, namely the environment, and the rights of animals[669]. This latter is eventually confirmed by the jurisprudence: for instance, Section 90a of the German Civil Code establishes that '*animals are not things. They are protected by special statutes'*.

The final major change is marked by the 2006 Reform, that up to date is the most extensive work of constitutional revision in the history of Germany. Interestingly, the revision process led to a redistribution of powers between the center and the Länder, and

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[665] A. Marocchino, *L'esperienza tedesca* in F. Fracchia, *Il diritto ambientale comparato* in federalismi.it, Rivista di diritto pubblico italiano, comparato, europeo, 2017, 7, 33

[666] Deutscherbundestag, Plenarprotokoll, 11/8/378, available at: http://dipbt.bundestag.de/doc/btp/11/11008.pdf#P.387

[667] A. Marocchino, *L'esperienza tedesca*, cit. 33 – 34

[668] M. Zemel, The Rise of Rights-Based Climate Litigation and Germany's Susceptibility to Suit, in Fordham Environmental Law Review, 2018, 29:3, 506

[669] Ibid., 34

specifically the repeal of Article 75 concerning the framework legislation, considered to be ineffective and to unnecessarily complicate the legal system especially in the environmental field, where consistence and uniformity were needed[670]. As far as the environmental field was concerned, a proposal was delineated so as to establish a comprehensive Environmental Code, and the regulatory powers of the Federation got widened[671].

With regard to the Environmental Code, it had to be subdivided into an introductory act concerning the incorporation of previous legal arrangements into the new law, two legislative provisions for the enforcement of the Code and six books which were foreseen to cover the following matters: (i) general provisions and project authorization; (ii) water law; (iii) nature conservation law; (iv) law on non-ionizing radiation; (v) emissions trading; (vi) renewable energies[672]. Amongst its purpose, the Code was supposed to lead to: the standardization and harmonization of the several existing laws which complicated the scenario; the simplification of authorization procedures; and eventually to a structural continuity in environmental legislation. As such, in the light of its many positive and innovative aspects, the general consensus was that of a comfortable situation, with the Federal Minister for the Environment, Sigmar Gabriel, involving the stakeholders on a regular basis already at the earliest stages[673].

However, when formal consultations began in winter 2007, unexpected difficulties, such as an excessive number of proposals for amendments, or the fear that the approval of the Code could led to the strengthening of the standards in force, gave rise to the suspicion of an unfavorable climate for the proposal[674]. And indeed, as of today, Germany – on the contrary of Italy and France – is still devoid of a homogenous and comprehensive Environmental Code, and the problems of over-regulation and excessive bureaucratization continue to persist.

3.4.3. Legislative and Implementation Framework

[670] Ibid.
[671] S. Gabriel, *The Failure of the Environmental Code. A retrospective* in Environmental Policy and Law, 2009, 39:3, 174
[672] Ibid.
[673] Ibid., 175
[674] Ibid., 176

By focusing on the legislative framework, reference shall be made firstly to the aforementioned Article 20a of the Grundgesetz, which serves as the basis for the Country's environmental policy, as well as to Articles 70 to 74 GG. AlthoughAarticle 70 postulates that '*The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation'*, it shall however be noted that German environmental law is essentially decided by and laid out in federal legislation[675].

Amongst its several prerogatives, the federal government is empowered to oversee the lawful implementation of federal laws on the part of the federal states – as provided for by Article 84(3) GG – and to establish – in compliance with Article 87(3) – '*autonomous federal higher authorities as well as new federal corporations and institutions […] for matters on which the Federation has legislative power*'. Also, pursuant to Article 80 the federal government may be entitled to issue statutory instruments, which generally happens by means of explicit consent by the Bundesrat. With this premise, it can be argued that the cited Articles make up the bulk of the Country's environmental law[676].

Nevertheless, apart from the federal level, it is important to highlight the fact that environmental matters are mainly addressed and governed by the Constitutions of the Länder, and the various pieces of national legislation. Indeed, notwithstanding the fact that the Bundestag is vested with the responsibility to enact environmental laws, the Länder – and thus national authorities – retain enforcement and administrative powers.

Apart from the Constitutions of the Federation and those of the Länder, and the Acts of the Bundestag and of national parliaments, relevant are both the federal and national authorities, such as the Federal Ministry for the Environment and its national counterparts, or a number of agencies, such as the Federal Environmental Agency mentioned earlier in the chapter. At the same time, there is an undeniable influence of EU environmental law with regard to the federal system, and as such domestic legislation in various key sectors is essentially influenced and shaped by European regulation and directives.

[675] O. Dilling, W. Köck, *Germany,* cit. 194 – 195
[676] H. Schlemminger, C. Martens (eds.), *German Environmental Law for Practitioners*, cit. 33

With reference to the principal environmental regimes, they can be summarized as follows:

(i) the emission control system is regulated by the Federal Emission Control Act;

(ii) the waste sector is governed by the Close Cycle Management Act;

(iii) water management comes under the Federal Water Resources Act;

(iv) soil conservation falls under the Federal Soil Protection Act;

(v) nature and landscape conservation are regulated by the Nature Protection and Landscape Conservation Act;

(vi) environmental impact assessment procedures are determined by the Environmental Impact Assessment Act[677].

In particular, the Emission Control Act, the Water Resources Act and the Close Cycle Management Act were recently revised in May 2013, as a result of the transposition of EU Directive 2010/75/EU, namely the Industrial Emission Directive, into the Country's legal system.

Very interestingly, the term '*bureaucratic legalism*' has been used to designate and describe environmental law in the Country. The meaning of the expression, as explained by Robert Kagan, is the following:

> legal and regulatory authority is concentrated in a single (often nationwide) judicial or administrative bureaucracy; decision makers are relatively insulated from local pressures and aggressive lawyers, for they are expected above all to adhere closely to centrally formulated, uniformly applicable legal rules[678].

To this end, state actors basically resort to administrative law and its instruments.

With specific reference to the enforcement of environmental law as promulgated by the federal government, Articles 83 and 84 GG are worth mentioning, inasmuch as the first establishes that '*The Länder shall execute federal laws in their own right insofar as*

[677] D. Elshorst, *Q&A on Environmental Law in Germany* in Clifford Chance, 6 – 7, available at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/12/qa-on-environmental-law-in-germany.pdf

[678] R.A, Kagan, *How Much Do National Styles of Law Matter?* in L. Axelrad (eds.), *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism,* 1st edn., University of California Press, Berkeley, 2000

this Basic Law does not otherwise provide or permit', while the second provides as follows:

> Where the Länder execute federal laws in their own right, they shall provide for the establishment of the requisite authorities and regulate their administrative procedures. If federal laws provide otherwise, the Länder may enact derogating regulations. […] The Federal Government, with the consent of the Bundesrat, may issue general administrative provisions. The Federal Government shall exercise oversight to ensure that the Länder execute federal laws in accordance with the law. For this purpose the Federal Government may send commissioners to the highest Land authorities and, with their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.

As seen above, it is important not to underestimate the role played by the Länder, which are given primary attention by the federal government. Indeed, the Länder are primarily responsible for the implementation of environmental law and, therefore, a high degree of cooperation is desired and takes place at the different governmental levels. In order to ensure and guarantee cooperation and coordination between the federal government and the federal states, the *Umweltministerkonferenz*, namely the Conference of Environment Ministers, was created in 1972, which comprises both the Federal Ministry for the Environment and the competent Ministries operating in each and every Länder[679]. Also, in addition to the Länder's ministries, a number of local associations, such as the Association of German Cities, the German Association of Towns and Municipalities or the Association of German Counties, must be involved in the context of the drafting process of a given bill, in the event that their interest are affected by that[680].

With regard to the Länder, it should be considered not only that the responsible environmental administrations are organized differently among the sixteen states, but also that significant differences remain in terms of the different levels of public authority. In general terms, all Länder are primarily in charge of the following sectors: (i) air pollution control; (ii) noise prevention; (iii) nature and landscape conservation; (iv) waste

[679] *A Guide to Environmental Administration in Germany*, German Environment Agency, 2017, 61, available at: https://www.umweltbundesamt.de/sites/default/files/medien/376/publikationen/190722_uba_lf_environadmin_21x21_bf.pdf
[680] Ibid., 60 – 61

management; (v) water management[681]. They accomplish their tasks by means of general administration and *ad hoc* bodies or agencies responsible for fulfilling given objectives.

In Länder of greater geographical dimensions, the regional presidencies – that is to say, the administrative divisions – retain a fundamental role in carrying out environmental tasks[682]. By contrast, smaller states and the three *stadtsaaten* or city-states – namely Berlin, Hamburg and Bremen – are not provided with similar middle-tier authorities. At the same time, in most Länder there are specific administrative bodies designated to address precise environmental sectors on behalf of the Länder authorities at the local level. In some cases, the task of environmental protection may be assigned to national departments and agencies; in others, it may fall within the competence of municipalities, *Stadtkreis* or *kreisfreie Stadt* (respectively, urban districts and the district-free cities)[683]. From the foregoing, the assumption that local governments are free to choose how to operate[684].

3.4.4. Access to Environmental Information and Justice for Individuals and NGOs

With regard to the right to environmental information in Germany, reference shall be made above all to the remarkable *Umweltinformationsgesetz*, meaning the Environmental Information Act, which has been implemented on February 14th, 2005, with the aim to transpose the Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC. It is important to underscore that the underlying aim of the Environmental Information Act is to enhance transparency; as such, it lays down rules on public access to information in matters concerning the environment, for the purpose of which public authorities – but equally some specific private bodies[685] –

[681] Ibid., 51
[682] H. Schlemminger, C. Martens (eds.), *German Environmental Law for Practitioners*, cit. 30
[683] Ibid., 31
[684] *A Guide to Environmental Administration in Germany*, cit. 58
[685] Such bodies are referred to as 'Bodies subject to a disclosure obligation'. Part 1, Section 2 gives the following definition: '*government and other bodies of the public administration. Bodies advising those institutions shall be treated as part of the institution that appoints their members. Bodies subject to a disclosure obligation shall not include (a) the supreme federal authorities when acting in the context of the legislative process or issuing statutory instruments, and (b) federal courts unless they are performing public administrative functions; any natural or legal person governed by private law having public functions or providing public services relating to the environment, in particular services of general interest*

are required to disclose environmental data to whomsoever requests access on the basis of a justified interest[686]. This proves to be crucial, inasmuch as access to reliable information is a means of allowing citizens to fully and effectively participate in administrative decision-making and supervise administrative activities[687]. In particular, competent bodies are requested to disclose relevant information by making it public in electronic databases or other electronic formats which are easily accessible[688].

More specifically, Section 10 of Part IV foresees that the public must be kept up to date '*to an appropriate extent and in an active and systematic manner*'. In order for this to happen, the public must be given information about:

> […] texts of international treaties, Community legislation adopted by European Community institutions and provisions adopted by federal, state or municipal authorities on the environment or relating to it; policies, plans and programmes relating to the environment; progress reports on the implementation of the legislation and policies, plans and programmes referred to in numbers 1 and 2 above when prepared or held in electronic form by the relevant body subject to a disclosure obligation; data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment; authorisations with a significant impact on the environment and environmental agreements and summary presentations and evaluations of environmental impact […].

Another effective safeguard mechanism is provided to in Section 11, on the basis of which the federal government is required to publish reports on the state of the environment on a regular basis and, at any rate, no more than every four years.

Furthermore, in accordance with Section 4 of the *Umweltinformationsgeset*, the request for environmental information must be formulated in a specific manner; in the contrary case, the applicant will be notified and given the opportunity to reformulate it in a clearer way. However, grounds for refusal of such information are likewise foreseen

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relating to the environment, under the control of the Federation or a legal person under public law supervised by the Federation'.

[686] *Environmental Information Act*, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, available at: https://www.bmu.de/en/download/environmental-information-act/. Part 2, Section 3 establishes: '*Every person shall have the right in accordance with this Act to freely access environmental information held by or for a body subject to a disclosure obligation as defined in section 2 subsection (1) without having to state a legal interest. This shall be without prejudice to other rights to access information'*

[687] *Access to environmental information*, UBA Website, available at: https://www.umweltbundesamt.de/en/access-to-environmental-information

[688] Part 2, Section 7

under Part 3. More precisely, information will be denied if its dissemination is believed to negatively affect the following issues:

> international relations, defence or important interests of public security; the confidentiality of the proceedings of bodies subject to a disclosure obligation referred to in section 2 subsection (1); the course of justice, the ability of any person to receive a fair trial or the ability to conduct an enquiry of a criminal, administrative or disciplinary nature; the state of the environment and its elements[689].

The refusal is equally justified if the request:

> is manifestly unreasonable; concerns internal communications of body subject to a disclosure obligation referred to in section 2 subsection (1); is lodged with a body not holding environmental information and cannot be forwarded pursuant to section 4 subsection (3); concerns the disclosure of material in the course of completion or unfinished documents or data; is formulated in an unspecific manner[690].

Finally, bodies of the public administration or legal persons expressly designated are tasked with the monitoring of the compliance with the Act[691]. Concerning the Länder, it shall be added that they have provided themselves with peculiar laws related to access to environmental information, which mostly coincide with the *Umweltinforrnationsgeset* or, at least, refer to it[692].

Shifting attention to the issue of access to justice, it shall be noted that it is regulated by Articles 92 to 104 GG. According to Article 93(1)(4a), the Federal Constitutional Court is entitled to rule on:

> constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority.

[689] Part 3, Section 8
[690] Part. 3, Section 9
[691] Part 5, Section 13
[692] *Access to environmental information*, UBA Website, available at: https://www.umweltbundesamt.de/en/access-to-environmental-information

Hence, the assumption that the *Grundgesetz* allows for a reasonably liberal recourse to justice in the context of the infringement of a constitutional right[693].

With specific reference to environmental rights, as previously asserted they are not explicitly recognized by the Constitution up to date[694]. Nonetheless, in a Judgment of the First Senate of November 2014 concerning the Aviation Tax Act, the Court established what follows:

> the objective of environmental protection pursued by the legislature constitutes a factual reason. Its legitimacy results, inter alia, from the mandate to preserve natural resources, as a responsibility to future generations, as stated in Art. 20a GG (cf. BVerfGE 118, 79 <110>; 128, 1 <37>). This mandate may require taking measures for the protection against threats and legitimize risk provisioning. Climate protection, as one aim of the tax, also belongs to the environmental goods protected under Art. 20a GG[695].

Unfortunately, however, no clarification regarding the meaning of the intended 'measures' nor 'threats' concerned was given. Yet in spite of this, in Germany – likewise Italy – the practice is to appeal to other constitutionally enshrined rights, such as Article 2 on personal freedoms, concerning the right to life and physical integrity, or Article 3 on equality before the law, or even Article 14, regarding the right to property, each of whom seen in the framework of Article 1, according to which there is the inviolability of the human dignity.

Apart from granting access to justice for individuals, German environmental law foresees the same possibility for environmental associations, in compliance with Aarhus Convention and EU Directive 2003/4/EC. Particularly relevant for this purpose is the Environmental Appeals Act (UmwRG). With regard to Article 2, it is explicitly provided that:

> a German or foreign association that is recognized pursuant to Article 3 may, without having to assert that its own rights have been violated, file appeals in accordance with the Rules of Procedure of the Administrative Courts against a decision pursuant to Article 1 paragraph

[693] M. Zemel, *The rise of rights-based climate litigation and Germany's susceptibility to suit* in Fordham Environmental Law Review, 2018, 29:3, 502
[694] Reference is made to the discussion about Art.20a GG
[695] Aviation Tax Act, BVerfG, Judgment of the First Senate, IBvF **3/11** ¶ 47

(1), first sentence or failure to take such a decision if the association: Asserts that a decision pursuant to Article 1 paragraph (1), first sentence or failure to take such a decision violates statutory provisions that protect the environment, establish individual rights, and could be of importance for the decision; Asserts that promotion of the objectives of environmental protection in accordance with its field of activity as defined in its bylaws is affected by the decision pursuant to Article 1 paragraph (1), first sentence or failure to take such a decision; was entitled to participate in a procedure under Article 1 paragraph (1) and expressed itself in that matter according to the applicable statutory provisions or, contrary to the applicable statutory provisions, was not given an opportunity to express itself.

Furthermore, any association not recognized by Article 3 can equally fill an appeal as far as: *'(1) it fulfils the requirements for recognition at the time the appeal is filed; (2) it has applied for recognition; (3) a decision regarding recognition has not yet been made for reasons for which the association is not responsible*'.

However, it shall be noted that the initial version of Article 2 – dating back to 2006 – was quite different from the present form. Indeed, at that time evidence of the fact that the contested decision infringed '*legislative provisions which seek to protect the environment, which confer individual rights and which may be relevant to the decision*' had to be provided. This should be considered within the overall context of Germany's approach to the question of access to justice. Indeed, in Germany – in a similar way to Italy where there is the need for an *interesse legittimo* – the restrictive approach is implemented, pursuant to which action before the court is justified on the basis of the infringement of a 'subjective right'; as such, in order for NGOs to resort to justice, the existence of a private interest had to be proved[696].

Very interestingly, the *locus standi* has been enhanced in the aftermath of the 2011 Trianel Case[697], in the context of which the environmental organization BUND/Friends of the Earth contested the decision of the district authority of Arnsberg to authorize the construction of the Trianel power plant, in view of its negative environmental impact. However, pursuant to the original version of the aforementioned Article 2(1) UmwRG,

[696] N. de Sadeleer, G. Roller, M. Dross, *Access to Justice in Environmental Matters,* ENV.A.3/ETU/2002/0030 Final Report, 2001, 21, available at: https://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf

[697] Case C-115/09, available at: https://curia.europa.eu/juris/document/document_print.jsf;jsessionid=21967BDD85B691F7460653D61A021508?docid=82053&text=&doclang=EN&pageIndex=0&cid=1690582

the organization was denied the necessary legal standing. The Higher Administrative Court of North Rhine-Westphalia therefore referred the case to the CJEU, requesting clarification as to the lawful interpretation of Article 10a of the EIA Directive[698]. The Court of Justice ruled that:

> although it is for the Member States to determine, […] within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.

Indeed, this would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness. It is with these premises that, in the end, Article 2 of the Environmental Appeals Act was considered inconsistent with EU law and underwent the process of amendment that led to the current version, thereby acknowledging greater right of access to justice for environmental organizations.

3.5. Conclusions

The comparative analysis carried out in this chapter has been instrumental in showing both the common features and the discrepancies between Italy, France and Germany in

[698] Quoting verbatim, the questions where: '(*1) Does Article 10a of Directive 85/337 ... require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals? (2) Unless Question 1 is answered unreservedly in the affirmative: Does Article 10a of Directive 85/337 ... require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to base their argument on the infringement of environmental provisions relating to the approval of a project which are derived directly from Community law or which transpose Community environmental legislation into domestic law, including provisions intended to serve the interests of the general public alone, rather than those which, at least in part, protect the legal interests of individuals? (a) If Question 2 calls, in principle, for an affirmative response: Must provisions of Community environmental legislation satisfy any substantive conditions in order to be capable of forming the legal basis for an action?*'

the context of the rise and development of environmental constitutionalism and environmental rights.

As mentioned earlier in the introduction, since the European Union is composed of twenty-seven Member States, each of which has its own historical roots, identity, culture, legal system and identifying characteristics, it would be certainly wrong to study, analyze and evaluate European environmental law without first focusing on national cases. As such, I have conducted my analysis on three states with different institutional structure which – as shown – are at once similar and different. And even though these three Countries are bound to the compliance with EU law, it could be demonstrated that the historical evolution of national legislation in the field, but also the cultural and linguistic nuances of the words and concepts employed in the relevant texts and laws, render each system distinguishable yet harmonized within the broader context of the European Union.

CHAPTER FOUR – ENVIRONMENTAL PROTECTION IN THE "ROARING TWENTIES OF CLIMATE ACTION"

4.1. Introduction

At the end of the first chapter, it has been shown that the environmental issue has become crucial with regard to the *acquis communitaire*, thereby explicitly recognizing the importance of environmental protection and legislation in the European Union. However, the setting of high environmental standards has soon gone hand in hand with the reticence – if not the strong opposition – of a couple of Member States. This might be one of the reasons why there was a lack of consideration given to environmental policy by the different European Commissions that have followed over time[699]. That is all the more reason for this final chapter to focus on the most recent European Commission which, to some extent, represented a break with the past.

In the first place, in order to understand the context and perhaps even the reasons that led to this revived interest in environmental protection, it becomes necessary to refer either to the global movement founded by Greta Thunberg, soon followed by students strikes worldwide, or to the dramatic natural disasters that affected each and every continent, or again to scientific reports testifying to the negative impacts of climate change. As a consequence of this, by 2019 several national parliaments of the EU Member States, as well as the European Parliament itself, had declared the state of climate emergency[700], and a wide range of parties theretofore insensitive to environmental issues finally started to treat environmental protection as a real priority[701]. It is therefore no surprise that in the European elections of 2019 the European Parliament witnessed the emergence of the highest number – at least until now – of Green Members of the European Parliament.

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[699] C. Burns, *Environment and Climate 2050. Common purpose or constraining dissensus?*, in C. Damro, E. Heins, D. Scott (eds.), *European Futures. Challenges and crossroads for the European Union of 2050*, 1st edn., Routledge, Abingdon – New York, 2021, Ch. 5

[700] Ibid.

[701] C. Godet, *An update on EU climate policy. Recent developments and expectations* in A. Orsini, E. Kavvatha, *EU Environmental Governance. Current and future challenges*, 1st edn., Routledge, Abingdon – New York, 2021, Ch. 1

On July 16th, 2019, Ursula von der Leyen was appointed as President of the European Commission, thereby becoming the first elected woman to hold such a prestigious office. In the aftermath of the election, President von der Leyen outlined what follows:

> I want to move Europe forward in the next five years to a climate-friendly Europe, a climate-friendly Continent, a Europe that serves people.

Very interestingly, environmental issues had already been given high consideration at the moment of her electoral campaign, figuring among her political guidelines for the period going from 2019 until 2024. Indeed, in '*A Union that strives for more*', President von der Leyen had focused on six priorities, first among which the promise of a European Green Deal[702]. In particular, her commitments consisted in: (i) aspiring to achieve a climate-neutral Europe by 2050, for the sake of which a European Climate Law was deemed to be necessary; (ii) ensuring a just transition; (iii) going beyond the Paris Agreements goals, with a reduction GHGs emissions by at least fifty percent by 2030[703]; (iv) an improved ETS; (v) a carbon border tax; (vi) presenting a Biodiversity Strategy for 2030, for the protection of environmental, natural and maritime assets; (vii) focusing on a zero-pollution ambition, so to protect European citizens' health from both environmental damage and pollution; (viii) addressing the problem of single-use plastics[704].

Broadly speaking, this suggests that issues such as climate change and decarbonization are intended to be given primary attention in the context of environmental law and policy for the decades to come. Also, by emphasizing the link between environmental quality and human health, President von der Leyen reiterated that:

> European citizens' health and the planet's health go together: it is the quality of the air we breathe, the water we drink, the food we eat and the safety of the products we use.

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[702] U. Von Der Leyen, *A Union that strives for more. My agenda for Europe*, Political Guidelines for the Next European Commission 2019 – 2024, available at: https://ec.europa.eu/info/sites/default/files/soteu_2020_en.pdf

[703] It shall be noted that, during her first State of Union speech, President Von Der Leyen proposed an increase to at least 55% GHGs emissions when compared to 1990 levels. The transcription of the full speech is available at: https://www.bruegel.org/2020/09/unpacking-president-von-der-leyens-new-climate-plan/

[704] Ibid., 5 – 7

However, in spite of the nobility of these goals, the fact remains that the European Union is made of twenty-seven Member States completely different from each other, with different priorities, resources and capabilities. Yet there are still leading Member States – and I will refer to Italy, France and Germany – that are taking advantage of this landmark change in the environmental protection field and are therefore improving and strengthening their national systems *vis-à-vis* this new opportunity. As such, the aim of the present chapter is to analyze some of the main changes that are taking place in the field of environmental law and policy both in the European Union after the election of Ursula von der Leyen, and consequently in the three Member States considered so far.

4.2. '*A Union that strives for more*'

In her political guidelines, President von der Leyen has declared her desire for a European Union that strives for more, a leading actor in the field of ambitious and competitive policies, among which environmental ones[705]. And it goes without saying, fundamental in this context is the roadmap for the European Green Deal, adopted later on by the European Commission on December 11th, 2019. In an announcement on the same day, she affirmed that this latter is*:*

> Europe's new growth strategy. It will cut emissions while also creating jobs and improving our quality of life. It is the green thread that will run through all our policies – from transport to taxation, from food to farming, from industry to infrastructure. With our Green Deal we want to invest in clean energy and extend emission trading, but we will also boost the circular economy and preserve Europe's biodiversity. The European Green Deal is not just a necessity: it will be a driver of new economic opportunities[706].

Subsequently, these priorities had been restated in the Commission's 2020 Work Programme (CWP 2020), released on January 29th, 2020[707]. By declaring the willingness

[705] U. Von Der Leyen, *A Union that strives for more. My agenda for Europe*, Political Guidelines for the Next European Commission 2019 – 2024, cit. 5
[706] Full text is available at: https://ec.europa.eu/commission/presscorner/detail/en/ac_19_6745
[707] For the sake of argument, reference to '*building a climate-neutral, green, fair and social Europe*' was additionally made in the new Strategic Agenda of the European Council for the period from 2019 until 2024 which, apart from climate change, focused on environmental protection, on the quality of

to focus on and integrate the United Nations Sustainable Development Goals, the idea of the Commission was to achieve a European Green Deal, which quoting *verbatim*:

> will drive us forward to climate neutrality by 2050 and at the same time focus on adaptation. It will help protect and preserve the biodiversity, the natural heritage and the oceans that bring so much wealth to our Union. And it will do so by making our economy and industry more innovative, resource efficient, circular and competitive. The European Green Deal is our new growth strategy. It will help create jobs and make Europe more competitive globally. Our new industrial strategy will be essential in making this happen as an enabler of both the ecological and digital transitions[708].

Furthermore, Annex I, concerning the new initiatives, provided for eight policy objectives and correlated measures, among which reference will herein been made to: the European Green Deal, in the context of which the initiatives referred to are the Communication on the European Green Deal of 2019, the European Climate Law enshrining the 2050 climate neutrality objective of 2020, and the European Climate Pact of 2020; and Protecting our environment, whose related initiatives – dating back to 2020 – are the EU Biodiversity Strategy for 2030, the Eighth Environmental Action Programme and the Chemicals strategy for sustainability.

With regard to this '*deal by Europe for Europe*', its importance was further emphasized in the President's first State of Union Address of September 16th, 2020, taking place against the backdrop of the COVID-19 pandemic, that focused on the need to recovery from the ongoing dramatic situation. In this regard, the European Green Deal was said to be the blueprint for the needed transformation towards emissions cut, efficiency improvement, and a broader, radical change in the context of environmental protection[709]. Also, mention was further made to the NextGenerationEU – thirty-seven percent of which will be reserved to the objectives provided for by the European Green

environment, air and water, and on sustainable agriculture and biodiversity loss'. Full text is available at: https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf

[708] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2020, *A Union that strives for more*, 2020. Available at: https://ec.europa.eu/info/sites/default/files/cwp-2020-publication_en.pdf

[709] State of Union Address 2020, available at: https://ec.europa.eu/info/sites/default/files/soteu_2020_en.pdf

Deal, and another thirty percent will be allocated through green bonds – as well as to the new European Bauhaus, namely an environmental, social and cultural initiative of the European Commission related to the European Green Deal.

Noteworthy is the fact that, in spite of the ongoing crisis, the European Commission decided not to set aside the original priorities, but instead to take advantage of the situation in order to strengthen and enhancing environmental policies. The present section will therefore briefly focus on the European Green Deal, its objectives and priorities, on the European Climate Law and ultimately on the Fit for 55 Package.

4.2.1. The European Green Deal

Going deeper into detail, the European Green Deal was officially presented on December 11th, 2019. Despite the fact that the European Union had already made successful attempts to reduce greenhouse gases emissions, equal to twenty-three percent lower than the former 1990 levels, it was indisputable that greater efforts were needed in the field. By focusing on scientific evidence and public needs, the European Green Deal was thus meant to act as a guide for the following years and was designed to be applicable to the different branches, such as chemicals, agriculture, industrial field, energy and transport[710].

In order to achieve and guarantee an inclusive and fair transition for anyone – also by means of the Just Transition Mechanism – it had to consist of a roadmap of actions to be taken so to encourage the intelligent natural resources usage, to go towards a circular economy, and to put an end to climate change, to avoidable pollution and to the loss of biological diversity[711]. However, there was also an inherent negative aspect given that, in order for these goals to be accomplished, considerable economic investment was needed, whose estimate costs were deemed to be equal to two hundred and sixty-billion euro of supplementary investment per year. For this reason, on January 14th, 2020, the European Green Deal Investment Plan and the Just Transition Mechanism were presented. While

[710] Website of the European Commission, *The European Green Deal sets out how to make Europe the first climate-neutral continent by 2050, boosting the economy, improving people's health and quality of life, caring for nature, and leaving no one behind*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6691
[711] Ibid.

the first, also known as the Sustainable Europe Investment Plan, was meant to be used to leverage public investment and to release private funds by means of InvestEU, the second was meant to financially sustain – also by means of *ad hoc* investments – the most affected regions, sectors and workers in light of such a challenging transformation[712].

A month later, on March 4th, 2020, a proposal was made for the European Climate Law which, in the words of President von der Leyen:

> is the legal translation of our political commitment, and sets us irreversibly on the path to a more sustainable future. It is the heart of the European Green Deal. It offers predictability and transparency for European industry and investors. And it gives direction to our green growth strategy and guarantees that the transition will be gradual and fair[713].

On May 20th, 2020, in the middle of the outbreak of the COVID-19 pandemic, there was the presentation of both the 'Farm to Fork' Strategy and the EU Biodiversity Strategy for 2020, aimed at improving either sustainability or human and natural health, at protecting lands and waters, at recovering the functionality of ecosystems and protection of biodiversity, and finally at letting the European Union become a leading actor at the international level[714]. These two strategies' importance is well explained by the statement of Frans Timmermans, the Executive Vice-President of the European Commission:

> the coronavirus crisis has shown how vulnerable we all are, and how important it is to restore the balance between human activity and nature. At the heart of the Green Deal the Biodiversity and Farm to Fork strategies point to a new and better balance of nature, food systems and biodiversity; to protect our people's health and well-being, and at the same time to increase the EU's competitiveness and resilience. These strategies are a crucial part of the great transition we are embarking upon[715].

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[712] Website of the European Commission, *Financing the green transition: The European Green Deal Investment Plan and Just Transition Mechanism*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_17

[713] Website of the European Commission, *Committing to climate-neutrality by 2050: Commission proposes European Climate Law and consults on the European Climate Pact*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_335

[714] Website of the European Commission, *Reinforcing Europe's resilience: halting biodiversity loss and building a healthy and sustainable food system*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_884

[715] Website of the European Commission, *Factsheet: From farm to form: Our food, our health, our planet, our future*. It can be downloaded here: https://ec.europa.eu/commission/presscorner/detail/en/fs_20_908

The 'Farm to Fork' strategy was intended to allow a successful transition to a viable and sustainable food system, with a focus on food security, human health and cutting of environmental footprint of the European food chain; also, specific goals were set, such as a fifty and twenty percent decreases in the use, respectively, of pesticides and fertilizers, or the expansion of ecological agricultural measures to twenty-five percent of farmland[716]. At the same time, the Biodiversity Strategy was meant to address the causes of biodiversity loss and to put the issue at the core of the EU's economic growth strategy. In particular, some of the targets set are: (i) the recovery of compromised ecosystems and water sources; (ii) the enhancement of forests, flora and fauna health; (iii) the cutting of pollution; (iv) the development and promotion of sustainable farming practices[717]. Among its concrete goals, it was decided to work on the transformation of thirty percent of lands and seas into protected areas.

On September 17th, 2020, there was the presentation of the 2030 Climate Target Plan, consisting in a reduction of greenhouse gas emissions by minimum fifty percent by 2030, when compared to former 1990 levels. In accordance with President von der Leyen, it was also thanks to such a Plan that Europe could '*emerge stronger from the coronavirus pandemic by investing in a resource-efficient circular economy, promoting innovation in clean technology and creating green jobs'*. At the same time, Kadri Simson, Commissioner for Energy, affirmed what follows:

> Based on existing policies and the plans of Member States, we are on course to surpass our current 40% target for 2030. This shows that being more ambitious is not only necessary, but also realistic. The energy system will be at the heart of this effort. We will build on the success story of the European renewables sector, look at all the tools at our disposal to increase our energy efficiency and lay a firm foundation for a greener Europe[718].

[716] Website of the European Commission, *Reinforcing Europe's resilience: halting biodiversity loss and building a healthy and sustainable food system*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_884

[717] Ibid.

[718] Website of the European Commission, *State of the Union: Commission raises climate ambition and proposes 55% cut in emissions by 2030*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1599

As such, it follows that the 2030 Climate Target Plan was meant to play a crucial part in the recovery of the European Union in light of the pandemic, promoting investments, advances in clean technologies, competitivity and green jobs creation[719].

With regard to the previously mentioned European Climate Pact, officially launched on December 9th, 2020, the idea behind was to '*help everyone in Europe take action in their everyday lives, and give everyone the opportunity to get involved in the green transition and inspire each other*', quoting the Vice-President Timmermans[720]. As such, states, regions, communities, students and civil society could be entitled to actively participate, provide scientific and reliable information and deliver opinions, all of which in turn would contribute to the effective success of the Green Deal[721]. Very interestingly, the Pact could profit from an open mandate and an ever-growing scope.

On January 18th, 2021, the design phase of the New European Bauhaus initiative – mentioned earlier in the text – was launched. It represents a creative and innovative initiative, and more precisely an environmental, economic and cultural project, instrumental in promoting 'a greener and fairer lifestyle'[722]. By setting up a space for collective creativity and experimentation, therefore promoting social inclusion, it aims at connecting different but complementary disciplines such as science, technology, art and culture, in order to create new solutions for ordinary problems[723]. In particular, through this initiative the Commission underlined that the European Green Deal does not merely consist of legislative or economic measures, but it can be broadly perceived as a cultural project as well. In this regard, President von der Leyen affirmed:

> The New European Bauhaus is a project of hope to explore how we live better together after the pandemic. It is about matching sustainability with style, to bring the European Green Deal closer to people's minds and homes. We need all creative minds: designers, artists, scientists, architects and citizens, to make the New European Bauhaus a success.

[719] Ibid.
[720] Website of the European Commission, *The European Climate Pact: empowering citizens to shape a greener Europe*, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2323
[721] Ibid.
[722] Website of the European Commission, *State of the Union 2021 – Achievement 2020-2021*, available at: https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021_en
[723] Website of the European Commission, *New European Bauhaus: Commission launches design phase*, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_111

Finally, very recently, and precisely on the 14th of July, two pivotal moments took place. First of all, the European Commission launched the 'Fit for 55' legislation package, consisting of a set of interlinked proposals designed to ensure full compliance with the 2030 climate targets and, perhaps most importantly, to make Europe the first climate-neutral continent by 2050[724]. In addition to this, other proposals for concretely achieving the challenging 2030 climate targets and for fully implementing the European Green Deal were made[725].

According to what proclaimed on the website of the European Commission[726], the proposals advanced cover the following aspects: (i) '*Transforming our economy and societies*'; (ii) '*Making transport sustainable for all*'; (iii) '*Leading the third industrial revolution*'; (iv) '*Cleaning our energy system*'; (v) '*Renovating buildings for greener lifestyles*'; (vi) '*Working with nature to protect our planet and health'*; (vii) '*Boosting global climate action'.*

(i) The first proposal consists of emissions cut, new jobs creation and growth and reduction of external energy dependency.

(ii) The second insists on the promotion of clean technologies, low-emissions vehicles and appropriate infrastructure systems, but also with the proposals for carbon pricing for the aviation and maritime sectors, as well as for sustainable aviation fuels[727].

(iii) The third deals with measures that, instead of causing the loss of jobs, will promote higher employment in key sectors such as energy, transport and construction[728].

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[724] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, '*Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*. It can be downloaded here:https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN

[725] Website of the European Commission, Architecture Factsheet, available at: https://ec.europa.eu/commission/presscorner/detail/en/fs_21_3671

[726] Website of the European Commission, *Delivering the European Green Deal*, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en

[727] More precisely, the targets are the following: 55% reduction of emissions from cars by 2030; 50% reduction of emissions from vans by 2030; 0 emissions from new cars by 2035

[728] It is estimated that, by 2030, 35million buildings may possibly be renovated and 160.000 green jobs could be created in the construction sector

(iv) The fourth focuses on either the forty percent target for new renewable resources or the thirty-six or thirty-nine percent reduction target for final and primary energy consumption, to be both achieved by 2030. Interestingly, the Social Climate Fund will sustain the EU citizens negatively affected by the proposed measures and there will be a budget of seventy-two billion euro over seven years for financing the renovation of buildings and the access to zero and low emission mobility[729].

(v) The fifth proposal aims at restoring forests, soils, marshy lands and peatlands and at achieving a sustainable management of natural resources, which in turn will more easily guarantee the absorption of CO2 and mitigate the impacts of climate change[730].

(vi) Finally, the last proposal, also as a result of the previously mentioned ones, consists in engaging in a climate cooperation with international partners, also by means of investments in renewable energy technologies and promotion of green transport[731].

The various objectives of the European Green Deal are supported and complemented by several EU environmental strategies and actions plans, and among them the following: biodiversity strategy for 2030; chemicals strategy; circular economy action plan; forest strategy; plastic strategy; zero pollution action plan; the 8th Environment Action Programme. With particular regard to the latter, it will steer environmental policy in the European Union until the year 2030 and guarantee the compliance with the UN's 2030 Agenda and of course the attainment of the Sustainable Development Goals[732]. Six are the priority objectives contemplated, and namely:

(i) fulfilling the 2030 greenhouse gas emission reduction target and 2050 climate neutrality;

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[729] More in detail, the proposals of the Commission are the following: (i) Member States are requested to renew 3% minimum of the floor area of all public buildings on a year basis; (ii) a goal of 49% of renewables in building construction by 2030; (ii) a 1.1% annual increase on the use of renewables in warming and cooling until 2030

[730] Very interestingly, as far as the carbon sink is concerned the former target was 230 Mt, the current is 268 Mt and the new one is 310 Mt

[731] Remarkable is the fact that 30% of the European Union's Neighbourhood, Development and International Cooperation Instrument supports climate goals, and that one third of global public climate finance derives from both the European Union and the Member States

[732] Website of the European Commission, *Environmental action programme to 2030*, available at: https://ec.europa.eu/environment/strategy/environment-action-programme-2030_en

(ii) reinforcing adaptive capacity and resilience, while contrasting vulnerability to climate change;

(iii) going in the direction of both a regenerative growth model and a circular economy;

(iv) focusing on a zero-pollution ambition and therefore on the protection of ecological and human health;

(v) safeguarding biodiversity and reversing the damages caused to it, and also enhancing the so-called natural capital;

(vi) mitigating environmental and climate pressures in the production and consumption field[733].

Whereas the proposal for the 8th EAP was already advanced back in October 2020, it was only in July 2021 that the Commission started to prepare a monitoring framework, whose draft will be discussed with Member States on September 9th, 2021, and subsequently with the interested stakeholders[734].

To conclude, particularly relevant in the context of the success of the European Green Deal is the NextGenerationEU, the most ambitious stimulus package financed in the EU, which will boost the economic and financial recovery and lead to the construction of a greener Europe[735]. In particular, thirty percent of the multiannual financial budget of the European Union for the period 2021-2028 and of the NGEU – the latter consisting in two hundred and fifty-billion euro – are earmarked for green investments[736].

4.2.2. European Climate Law

[733] Ibid.

[734] Further information is available on the website of the European Commission: https://ec.europa.eu/environment/news/8th-environment-action-programme-commission-consults-monitoring-framework-headline-indicators_en

[735] Website of the European Commission, *Recovery Plan for Europe*, available at: https://ec.europa.eu/info/strategy/recovery-plan-europe_en

[736] Website of the European Commission, *Finance and the Green Deal*, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/finance-and-green-deal_en; Website of the European Commission, *Sustainable bonds: social bonds, green bonds*, available at: https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/sustainable-bonds-social-bonds-green-bonds_en#green-bonds

The legislative proposal for the European Climate Law was adopted on March 4th, 2020, setting the climate neutrality target into binding legislation and requiring the Commission to revise existing laws and policies in order to ensure their adherence to this objective[737]. As such, both the Institutions and Member States in the European Union are thus strictly required to accomplish the established target[738].

Subsequently, on September 17th, 2020, the proposal was revised so as to include the new objective of a net decrease in emissions by fifty-five percent minimum by 2030[739]. After several months, on April 21st, 2021, the Council and the Parliament concluded a provisional agreement, and on July 29th the European Climate Law entered into force[740].

According to the text of the proposal, being climate change a pressing issue which requires joint action, and having the European Green Deal already embarked on an ambitious growth strategy for the EU and prepared the ground for Europe to become the first climate-neutral continent by 2050, a comprehensive Climate Law was needed[741]. The legal basis for such a Law is represented by Articles 191 – 193 TFEU, confirming and clarifying EU prerogatives with regard to climate change[742]; in addition to this, the lawfulness of the proposal is further justified by the principles of subsidiarity and proportionality. In accordance with the former, the text specifies what follows:

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[737] 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 final – 2020/0036 (COD). In the explanatory memorandum, it is stated the following: '*The proposal aims to complement the existing policy framework by setting the long-term direction of travel and enshrining the 2050 climate-neutrality objective in EU law, enhancing adaptation efforts, establishing a process to set out and review a trajectory until 2050, regular assessment and a process in case of insufficient progress or inconsistencies. It also tasks the Commission to review existing policies and Union legislation in view of their consistency with the climate-neutrality objective as well as with the trajectory identified'*. For the sake of consistency, see also art. 1

[738] See art. 2

[739] Briefing of the European Parliament, EU Legislation in Progress, European Climate Law, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649385/EPRS_BRI(2020)649385_EN.pdf; Website of the European Commission, *Delivering the European Green Deal*, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en

[740] Ibid.

[741] 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 final – 2020/0036 (COD). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN

[742] In particular, Art.192(1) establishes that: '*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191*'

> Climate change is by its very nature a trans-boundary challenge that cannot be solved by national or local action alone. Coordinated EU action can effectively supplement and reinforce national and local action and enhances climate action. Coordination of climate action is necessary at European level and, where possible, at global level, and EU action is justified on grounds of subsidiarity.

Concerning the latter, it is further clarified that:

> the proposal complies with the proportionality principle because it does not go beyond what is necessary in order to set the framework for achieving climate neutrality. The proposal aims to provide a direction by setting the EU on a path to climate neutrality, certainty on the EU's commitment and for transparency and accountability by setting out a process of assessment and reporting.

Remarkably, the explanatory memorandum leaves no doubt that the proposal:

> aims to provide a direction by setting a pathway to climate neutrality, and enhance certainty and confidence on the EU's commitment for businesses, workers, investors and consumers, as well as transparency and accountability, thus sustaining prosperity and job creation. […] in order to provide predictability and confidence for all economic actors, including businesses, workers, investors and consumers, to ensure that the transition towards climate neutrality is irreversible, to ensure gradual reduction over time and to assist in the assessment of the consistency of measures and progress with the climate-neutrality objective, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission to set out a trajectory for achieving net zero greenhouse gas emissions in the Union by 2050.

Hence, it follows that over the two decades from 2030 until 2050 the Commission will be entitled to implement delegated acts for the integration of the Regulation, by establishing an EU path for the fulfillment of the 2050 objective. Moreover, the Climate Law additionally draws attention to the need to ensure continuing progress towards improved adaptability and resilience, less vulnerability to climate change and the fulfillment of the climate-neutrality target[743]. As such, by September 30th, 2023, and every

[743] See artt. 4 – 5

five years onwards, the Commission will assess any collective progress made by all of the twenty-seven Member States[744], as well as the consistency of national measures[745]; in case of the latter's inconsistency, the Commission will issue *ad hoc* recommendations[746].

4.2.3. Fit for 55 Package

The Fit for 55 Package, presented by the Commission on July 14th, 2021, consists of a series of interconnected proposals designed either to revise existing legislation, by making it more ambitious, or to draw up new proposals when appropriate. The ultimate purpose is thus to control and guarantee that EU policy and legislation in the field are in compliance with the latest climate goals, the green transition and the broader 2030 and 2050 ambitions[747]. In particular, as laid down in the Communication, the world faces a challenging decade marked by environmental, climate and biodiversity emergencies, and far-reaching goals and targets – no more simply suggestions, but full-fledged obligations provided for in the European Climate Law – are needed more than ever, also in light of '*intergenerational and international solidarity*'[748].

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[744] Art. 5.1 reads as follows: '*By 30 September 2023, and every 5 years thereafter, the Commission shall assess, together with the assessment foreseen under Article 29(5) of Regulation (EU) 2018/1999: (a) the collective progress made by all Member States towards the achievement of the climate-neutrality objective set out in Article 2(1) as expressed by the trajectory referred to in Article 3(1); (b) the collective progress made by all Member States on adaptation as referred to in Article 4*'

[745] Art. 6.1 foresees that: '*By 30 September 2023, and every 5 years, thereafter the Commission shall assess: (a) the consistency of national measures identified, on the basis of the National Energy and Climate Plans or the Biennial Progress Reports submitted in accordance with Regulation (EU) 2018/1999, as relevant for the achievement of the climate-neutrality objective set out in Article 2(1) with that objective as expressed by the trajectory referred to in Article 3(1); (b) the adequacy of relevant national measures to ensure progress on adaptation as referred to in Article 4*'

[746] Additionally, Article 7 establishes that, when conducting assessment, the Commission should pay attention to: *'(a) information submitted and reported under Regulation (EU) 2018/1999; (b) reports of the European Environment Agency (EEA); (c) European statistics and data, including data on losses from adverse climate impacts, where available; and (d) best available scientific evidence, including the latest reports of the IPCC; and (e) any supplementary information on environmentally sustainable investment, by the Union and Member States, including, when available, investment consistent with Regulation (EU) 2020/... [Taxonomy Regulation]*'

[747] Website of the Council of the European Union, available at: https://www.consilium.europa.eu/en/policies/eu-plan-for-a-green-transition/

[748] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*, COM(2021) 550 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN

Interestingly, this represents the most exhaustive package proposed by the Commission up to the present day with regard to climate and energy, additionally covering fuels, transports, building sector, soil use and silviculture[749]. The aim remains to ensure that the targets are reached in a '*fair, cost-efficient and competitive way*', to strengthen competitiveness, investments and innovation, to work towards a sustainable economy and to take steps to ensure that the EU becomes concretely a global leader in the fight against climate change[750].

In the Fit for 55 Package there is a combination of policies consisting in pricing[751], targets[752], standards[753] and support measures[754], and precisely:

(i) a revision of the EU Emissions Trading System (ETS), including in the aviation sector, and its extension to maritime, road transport and buildings sectors;
(ii) an updated Energy taxation Directive;
(iii) a new Carbon Border Adjustment Mechanism;
(iv) an updated Effort Sharing Regulation;
(v) an updated Land Use, Land Use Change and Forestry Regulation;
(vi) an updated Renewable Energy Directive;
(vii) an updated Energy Efficiency Directive;
(viii) stricter CO2 performance for cars and vans;
(ix) new infrastructure for alternative fuels;
(x) more sustainable aviation fuels in the context of ReFuelEU;
(xi) cleaner maritime fuels in the context of FuelEU;
(xii) a new Social Climate Fund and improved Modernisation and Innovation Funds[755].

[749] Ibid.
[750] Ibid.; Website of the Council of the European Union, available at: https://www.consilium.europa.eu/en/policies/eu-plan-for-a-green-transition/
[751] See (i), (ii) and (iii)
[752] See (iv) to (vii)
[753] See (viii) to (xi)
[754] See (xii)
[755] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*, COM(2021) 550 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0550&from=EN

From this it follows a balanced package, whose legislative and policy proposals contained therein are to some extent related to each other and complementary.

4.2.4. 2021 State of the Union Address

On September 15th, 2021, President von der Leyen held the annual State of the Union Address[756]. She started mentioning the succession of natural and ecological disasters that have affected several EU Countries throughout the summer, stressing the importance of current scientific findings. In particular, she mentioned the latest United Nations Intergovernmental Panel on Climate Change (IPCC) report, released on August 9th, 2021, in which it is observed that climate change and its dramatic consequences are human induced[757]. But nonetheless, the report eventually added that, although many implications are already 'irreversible', it is still possible to act for limiting climate change, as further underlined by President von der Leyen.

In particular, she affirmed that a relevant change is already occurring within the European Union. Among the different examples, she mentioned the new European Bauhaus, and reiterated that '*if the European Green Deal has a soul, then it is the new European Bauhaus*'. Furthermore, by referring to her last year's speech, President von der Leyen proudly declared that the target and goals announced therein are now becoming a concrete reality, complemented by legal obligations. In this regard, the European Union is the first major economy to having introduced such an ambitious and comprehensive legislation.

In the context of the green transition, which must be fair for everyone, particularly relevant is the Social Climate Fund, which will address energy poverty. At the same time, President von der Leyen announced that the EU will double the external funding for biodiversity, with particular regard for the sake of the most vulnerable nations. However,

[756] It is possible to re-watch the speech here: https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021_en

[757] Website of the IPCC, *Climate change widespread, rapid, and intensifying – IPCC*, 2021, available at: https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/; Website of the *UN, IPCC report: 'Code red' for human driven global heating, warns UN chief*, 2021, available at: https://news.un.org/en/story/2021/08/1097362

since international cooperation becomes increasingly necessary, the COP 26 that will take place in Glasgow will prove to be crucial, inasmuch as the world major economies will have to turn their commitments for climate neutrality into concrete actions. And indeed, with particular regard to climate commitments and climate finance, President von der Leyen concluded by affirming what follows:

> While every country has a responsibility, major economies have a special duty towards the least developed and the most vulnerable countries. The so-called climate finance is essential for them, both for mitigation and adaptation. In Mexico and in Paris the major economies committed to provide $100 billion a year until 2025 [to them]. (While) Europe contributes $25 billion a year, other (countries) still leave a gaping hole towards reaching the global target. (As such) closing that gap will increase the chance of success in Glasgow. My message today is that Europe is ready to do more: we will now propose an additional €4 billion for climate finance until 2027, but we expect the United States and our partners to step up to this. This is vital, because closing the climate finance gap […] would be such a strong signal for global climate leadership, and it is time to deliver now: we have no time to wait anymore.

4.3. Italy

As outlined in the previous chapter, the Italian Constitution of 1948 did not provide for any sort of environmental protection nor for any explicit reference to the environment as such. And indeed, while an expedient to avoid this problem was the resort to and application of a number of Constitutional Articles, such as 2, 9 and 32, it was only by means of the Reform of Title V of the Italian Constitution in 2001 that the word 'environment' figured for the first time in the text. However, a negative aspect is that not only Article 117 is not included among the fundamental principles, but also it is unsatisfactory, inasmuch as it is simply recognizes that the state retains exclusive legislative powers with regard to the protection of the environment and the ecosystem.

Over the years, the necessity for further constitutional reforms with environmental relevance arose, especially with reference to the possibility of amending Article 9 – that in contrast with Article 117 figures among the fundamental principles – which in its current state reads: '(the Republic) *safeguards natural landscape and the historical and artistic heritage of the Nation'*.

In this regard, it is particularly noteworthy to mention that on September 24th, 2003, the Assembly of the Senate approved a legislative project concerning an amendment to Article 9, with the inclusion of the 'natural environment' among the subjects placed under the protection of the Republic[758]. When submitted to parliamentary scrutiny in the Chamber (*Commissione 1ª,* A.C. 4307), a new, more comprehensive unified text was approved[759]. As such, on October 28th, 2004 the Italian Chamber of Deputies approved by almost a unanimous vote of majority – and precisely three hundred and three voters out of three hundred and twelve – what could have been a landmark amendment to Article 9, on the basis of which it was foreseen that the Republic had to safeguard not only the environment and the ecosystems (used in the plural), but even biodiversity and animals, for the sake of future generations[760]. Three elements are worth analyzing here:

(i) the expression 'ecosystems' is not simply an echo of the word 'ecosystem' contained in Article 117, but rather is an improved wording which encompasses different types of ecological systems, whether smaller or bigger;

(ii) the reference to 'future generations' is the result of international influence, conventions and declaration, such as the Stockholm Declaration of 1972[761] and the Rio Declaration of 1992[762];

(iii) the embedding of environmental protection was influenced by Article 20a[763] of the German Basic Law[764].

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[758] *Iniziative Costituzionali – Tutela dell'ambiente (art.9)*, available at: http://leg15.camera.it/cartellecomuni/leg14/RapportoAttivitaCommissioni/testi/01/01_cap02_sch02.htm

[759] Ibid.

[760] '(*La Repubblica) tutela l'ambiente e gli ecosistemi, anche negli interessi delle future generazioni. Protegge la biodiversità e promuove il rispetto degli animali*'.

[761] Already in the Preamble, it is clarified that: '*To defend and improve the human environment for present and future generations has become an imperative goal for mankind - a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of world-wide economic and social development*'. Furthermore, in Principle 2 it is established: '*The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate*'

[762] Principle 3 reads: '*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*'

[763] Article 20a foresees: '*Mindful also of its responsibility towards future genera- tions, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*'

[764] E. Lucchese, *La riforma dell'art.9 Costituzione nel testo approvato alla Camera*, 2004, available at: https://www.forumcostituzionale.it/wordpress/wp-content/uploads/pre_2006/222.pdf

Very importantly, the *Commissione 1ª* of the Senate during the session of December 13th, 2005, agreed on the text, and refused to proceed with further amendments; unfortunately, however, the parliamentary *iter* got interrupted at the end of the legislative term [765].

As of today, the reform of Article 9 is still a matter of debate. The urgency may be due to the von der Leyen commission taking office, along with the priority given to the Green Deal, as well as to the global student movement launched by Greta Thunberg, which is now well rooted in Italy. As a confirmation of this, already back in 2019 the Prime Minister Conte – in line with European requirements and trends – underlined the need to proceed with such a reform, emphasizing the importance of enshrining environmental and biodiversity protection, and if possible, also sustainable development, among the fundamental principles of the Constitution, and further mentioning elements such as 'ecological transition, 'circular economy' and 'culture of recycling'[766].

Again in 2019, and precisely on April 2nd, Senator Perilli presented a constitutional bill concerning an amendment to Article 9, which in its final form was meant to be: '*La Repubblica tutela l'ambiente e l'ecosistema, protegge le biodiversità e gli animali, promuove lo sviluppo sostenibile, anche nell'interesse delle future generazioni'*, therefore recognizing not only environmental, ecosystem and animal protection, but also sustainable development, at the benefit of future generations[767]. Since Italy had already aligned itself with European standards by means of the Constitutional reform of 2001, it was deemed to be the right time to go towards a more comprehensive and effective discipline in the field of environmental protection, this latter constituting a priority for the Republic and therefore needing to be enshrined among the fundamental principles. In the context of the protection afforded to either the environment or the animals, it is possible to identify the concept of sustainable development, a crucial value which has too long been considered – misleadingly – as a limit to scientific and economic development[768].

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[765] *Iniziative Costituzionali – Tutela dell'ambiente (art.9)*, available at: http://leg15.camera.it/cartellecomuni/leg14/RapportoAttivitaCommissioni/testi/01/01_cap02_sch02.htm

[766] *Conte, ambiente e sviluppo sostenibile tra i principi della Carta*, Ansa, 2019, available at: https://www.ansa.it/canale_ambiente/notizie/istituzioni/2019/09/09/conte-ambiente-e-sviluppo-sostenibile-tra-principi-carta_a7dddacf-7e5d-4fb2-938a-8585ff728564.html

[767] Senato della Repubblica, XVIII Legislatura, Disegno di Legge Costituzionale di iniziativa del senatore Perilli, N. 1203, available at: https://www.senato.it/service/PDF/PDFServer/DF/344113.pdf

[768] Ibid.

Subsequently, on June 9th, 2021, the Italian Senate approved by means of two hundred and twenty-four votes in favour, twenty-three abstentions and no votes against, the draft bill No. 83 presented by Senator De Petris concerning amendments not only to Article 9, but also to Article 41[769].

Concerning the former, the purpose is to add a third comma, by stipulating: '(La Repubblica) *tutela l'ambiente, la biodiversità e gli ecosistemi, anche nell'interesse delle future generazioni. La legge dello Stato disciplina i modi e le forme di tutela degli animali'*; however, sustainable development is not contemplated here. Nevertheless, this does not make the Article less important: indeed, it will lead to an important evolution in the Constitutional text which, at the time of the founding fathers, simply considered the environment as a complex of monuments[770].

Concerning the latter, which currently reads '*Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and coordinated for social purposes*', the intention is to amend the second and third sections, by setting the requirement for a private economic enterprise not in contrast with health and the environment – in addiction to safety, liberty and human dignity – and by adding environmental purposes together with social ones[771]. This is to some extent in line with the international 'do no harm' principle, relevant also in the context of NextGenerationEU[772] and enshrined in the Recovery and Resilience Facility Regulation, according to which '*no measure included in a Recovery and Resilience Plan (RRP) should lead to significant harm to environmental objectives within the meaning of Article 17 of the Taxonomy Regulation*'[773]. Interestingly, it is argued that Article 41 could have

[769] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.* in Forum di Quaderni Costituzionali, 2, 461, 2021, ISSN 2281-2113, available at: https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2021/06/29-Santini-FQC-2-21-1.pdf
[770] Ibid., 467
[771] The amendment would be the following: '*L'iniziativa economica privata è libera. Non può svolgersi in contrasto con l'utilità sociale o in modo da recare danno alla salute, all'ambiente, alla sicurezza, alla libertà, alla dignità umana. La legge determina i programmi e i controlli opportuni perché l'attività economica pubblica e privata possa essere indirizzata e coordinata a fini sociali e ambientali*'
[772] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost*, cit. 471; K. Neuhoff, J. Lehne, *How 'green' the EU recovery is depends on member states* in Climate Home News, 2020, available at: https://www.climatechangenews.com/2020/07/24/green-eu-recovery-depends-member-states/
[773] Commission Notice, *Technical guidance on the application of "do no significant harm" under the Recovery and Resilience Facility* Regulation, C(2021) 1054 final, available at: https://ec.europa.eu/info/sites/default/files/c2021_1054_en.pdf

been the most appropriate one for including *ad hoc* reference to sustainable development[774]; unfortunately, this was not the case.

From the above, it therefore follows that Italy is achieving progress as regards environmental law and policy, progress which to a certain extent is being speeded up under the Draghi Premiership. Already at the time of his programmatic speech at the Senate of February 17th, 2021, Mario Draghi attached great importance to the environmental issue, making in the first instance reference to global warming which, together with pollution, hydrological issues and rising seas, has an impact on human life and health. Very interestingly, in that speech he commented on the fact that the enlargement of the cities at the expenses of the natural environment may have been one of the causes behind the virus transmission from animals to human beings[775]. According to him, the multifaceted challenges that societies are undergoing further concern agriculture, health, protection of the territory, biodiversity, global warming and greenhouse effect, and as such environmental protection requires a fresh, ambitious approach[776]. From an economic perspective, he argued that:

> Climate change, like the Pandemic, penalizes some productive sectors while there is no expansion in other sectors to compensate. […] The economic policy response to climate change and the Pandemic will have to be a combination of structural policies that facilitate innovation. Financial policies will have to facilitate access to businesses capable of growing to capital and credit, and expansive monetary and fiscal policies that facilitate investment and create demand for the new sustainable businesses that have been created. We want to leave a better planet, not just a better currency.

Furthermore, Draghi mentioned the Presidency of G20, around the three pillars 'People, Planet and Prosperity, in which:

> […] Italy will have the responsibility to lead the Group towards the exit from the Pandemic, and to re-launch green and sustainable growth for the benefit of all. It will be about rebuilding and better rebuilding. Together with the United Kingdom - with which we have parallel

[774] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost*, cit. 471
[775] The transcript of the speech is available at: https://www.senato.it/japp/bgt/showdoc/18/Resaula/0/1208137/index.html?part=doc_dc-ressten_rs-gentit_cdpdcdmecd
[776] Ibid.

> presidencies of the G7 and the G20 this year - we will focus on sustainability and the "green transition" in the perspective of the next Conference of the Parties on climate change (COP 26), with particular attention to actively involving the younger generations, through the "Youth4Climate" event.

Very interestingly, his intention to put climate change and environmental matters at the top of the Italian agenda was reaffirmed by the designation of Roberto Cingolani as the new Minister for the Ecological Transition, taking inspiration among many from France, and replacing the former, more traditional Environmental Ministry.

It is possible to argue that this is a *superministry* meant to guide Italy towards a sustainable production system, and indeed it is given prerogatives which traditionally fall within the competence of the Ministry of Economic Development; in particular, in addition to traditional responsibilities in the environmental field, it will exercise competence over matters such as energy, transport emissions, sustainable development, circular economy[777]. The Ministry for the Ecological Transition will additionally oversee the implementation of the green transition and of EU funding. Concerning this latter, one hundred and twenty-three-billion out of the two hundred and nine-billion euro allocated to Italy in the framework of NextGenerationEU will be destinated to the twin green and digital transitions; in particular, the European Commission requires thirty-seven percent of NGEU funding to be used for achieving the objectives of the European Green Deal[778].

Furthermore, in light of both the domestic and the European recovery from the COVID-19 pandemic, Italy is implementing policies, measures and actions with regard to both climate change and environmental protection issues. These measures, of a response[779], recovery[780], or redesign[781] type, fall within the categories of climate mitigation measures and other environmental measures[782].

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[777] I. Dominioni, *What's Italy's New Ministry For Ecological Transition* in Forbes, 2021, available at: https://www.forbes.com/sites/irenedominioni/2021/02/27/whats-italys-new-ministry-for-ecological-transition/?sh=10f542edfe42

[778] V. Neri, *Il Green Deal europeo in Italia. Come cambierà il nostro paese grazie alla transizione verde* in Lifegate, 2020, available at: https://www.lifegate.it/green-deal-europeo-in-italia

[779] Emergency measures in the short term (a few months to one year) to address concerns that have directly emerged from the COVID-19 pandemic and may include forced action.

[780] Socioeconomic measures in the medium term (one to a few years) with an environmental and climate focus to "build back better" from COVID-19, and usually involves planned, intentional action.

[781] Paradigm shifts and measures in the long term (more than a few years to a few decades) toward redesigning current socioeconomic and sociocultural systems to be sustainable and resilient.

[782] Further information is available at: https://platform2020redesign.org/countries/italy/

(i) The first category encompasses the building sector, in the context of which relevant are Decreto Rilancio[783] or the National energy efficiency fund[784], but also sustainable transportation[785];

(ii) the second category includes measures to promote waste management and circular economy, and significant here is the Decree law 111/2019, or *Decreto Clima*[786].

With due reference to *Decreto Clima*, it is the first environmental Decree Law ever passed in Italy and it applies to a number of sectors sensitive to climate change[787]. As a general rule, Article 1 deals with air quality, Articles 2 and 3 with sustainable transport, Articles 4 and 4-bis with reforestation, Article 5 with infringement proceedings, Article 6 with the disclosure of environmental data, and Article 7 with the promotion of the sale of bulk products[788]. Equally important are Article 1-bis, concerning the coordination of public policies for achieving UN Sustainable Development Goals, Article 1-ter, providing for environmental information campaigns in schools, as well as Articles 4-ter, encompassing measures to contrast climate change[789]. Very importantly, Article 8-bis additionally establishes that the provisions of the Decree shall apply to either the regions with a special status or the autonomous provinces of Trento and Bolzano, within the limits of their special status.[790]

In conclusion, from the above it follows that Italy is making serious efforts toward compliance with EU requirements, also with a view to align itself with other Member States' advanced standards. Such commitment towards environmental protection, climate change and sustainable development is reiterated in President Draghi's speech at the Leaders Summit on Climate, of April 22nd, 2021:

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[783] D. L. n. 34 of 19 May 2020. Art.119 provides, for instance, for incentives for energy efficiency, photovoltaic or earthquake bonus

[784] For instances, it concerns the supply of energy to public buildings and social housing, district heating and cooling or the reduction of energy consumption by industries

[785] Further information is available at: https://platform2020redesign.org/countries/italy/

[786] Ibid.

[787] Further information is available at: https://www.mite.gov.it/comunicati/decreto-clima-un-primo-importante-passo-contrastare-i-cambiamenti-climatici

[788] Full text is available at: https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2019-10-14&atto.codiceRedazionale=19G00125&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=10&qId=b715e7a7-8c09-48c8-babf-fe0a16b76eda&tabID=0.7380076157886978&title=lbl.dettaglioAtto#

[789] Ibid.

[790] Ibid.

> As we fight the pandemic in our countries, we cannot lose sight of the other crisis we face: tackling climate change. In the Paris agreement, we pledged to limit global warming to 1.5 degree Celsius compared to pre-industrial levels. But the actions we have taken since have proven insufficient. Under current policies, we are set to achieve 3 degrees of global warming. We need to reverse course, and do it soon. The fiscal plans we are designing to help our countries recover from the Covid-19 offer a unique opportunity. We can transform our economies and pursue a greener and more inclusive growth model. In Europe, we launched a 750 billion euro joint plan – what we called the Next Generation EU. One of its objectives is to support the environmental transition in Europe and make the EU carbon neutral by 2050. Around 10% of it, roughly 70 billion euro, will go in investment in green infrastructure, circular economy and sustainable mobility in Italy only. Italy is my own country, it is a beautiful but fragile country. The fight against climate change is a fight for our history and our landscapes. We need to frame our efforts towards sustainability within an effective and inclusive multilateral approach. Italy holds the Presidency of the G20 this year, and the safeguard of our planet is one of the main objectives of our program. G20 countries account for 75% of global emissions. We have a special responsibility in ensuring we deliver on the objectives of the Paris Agreement. […] We want to act now, not to regret it later[791].

4.4. France

France, like Italy, has undergone an important constitutional revision process in March 2005, as a result of which the 2004 *Charte de l'environnement* was given the same legal status as the 1789 *Déclaration des droits de l'homme et du citoyen* and the 1946 Preamble to the Constitution. In opposition to either Italy or Germany, the French *bloc de constitutionnalité* expressly provides for, recognizes and guarantees comprehensive provisions on environmental protection and environmental rights.

Nonetheless, there is always scope for improvement, and as a confirmation of this a revision process of Article 1 is currently underway, with a proposed amendment – submitted to the Council of Ministers by the Minister of Justice Dupond-Moretti on January 20th, 2021 – which will further state that the Republic '*garantit la préservation*

[791] Full speech is available here: mhttps://www.governo.it/it/articolo/intervento-del-presidente-draghi-al-leaders-summit-climate/16684

de l'environnement et de la diversité biologique et lutte contre le dérèglement climatique', therefore operating a distinction between the environment and the biological diversity, and eventually paying attention to climate change[792]. According to the government, this constitutional bill represents:

> la traduction de l'engagement du Président de la République de mettre en œuvre la proposition des members de la Convention citoyenne pour le climat de rehausser à l'article 1er de notre Constitution le principe de la preservation de l'environnement sans toutefois prévoir de hiérarchie entre les norms constitutionnelles[793].

It was further added that, notwithstanding the first, major result achieved by means of the 2005 constitutional revision process, the new Article 1 will succeed in further reinforcing the legal and constitutional status of environmental protection[794].

More in detail, the bill was approved by the National Assembly on March, and subsequently also by the Senate, although with some modifications; respectively in June and July, the text was voted once again with modifications by both the two Assemblies[795]. Remarkably, the Senate strongly opposed the use of the verb 'to guarantee', and as a result the revised wording provides that:

> La République préserve l'environnement ainsi que la diversité biologique et agit contre le dérèglement climatique, dans les conditions prévues par la Charte de l'environnement de 2004[796].

[792] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost*, cit. 478
[793] Website of the French Senate, espace presse, PJLC "Article 1er de la Constitution et préservation de l'environnement", 2021, available at: http://www.senat.fr/espace_presse/actualites/202102/climat/pjlc_article_1er_de_la_constitution_et_preservation_de_lenvironnement.html
[794] Projet de loi constitutionnelle complétant l'article 1er de la Constitution et relatif à la préservation de l'environnement (JUSX2036137L) in Légifrance, 2021, available at: https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000043022845/
[795] *Projet de loi constitutionnelle complétant l'article 1er de la Constitution et relatif à la préservation de l'environnement* in Vie Publique, 2021, available at: https://www.vie-publique.fr/loi/278185-loi-environnement-article-1-constitution-referendum-climat
[796] Ibid.; G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost*, cit. 478

Once adopted, the text will have to be subject to approval by referendum, even though it shall be noted that the constitutional revision process will come to an end in case of failure to vote the text in identical terms, as decided on July 6th by the Prime Minister[797].

At the same time, on August 22nd the landmark 'Climate and Resilience' Law n. 2021-1104 was adopted, and subsequently published in the Official Journal on August 24th, after a two-years process whose first step was the setting up of the Citizen's Climate Convention[798]. In that respect, Barbara Pompili, the current Minister for Ecological Transition, underlined the historical significance of the moment by affirming the following:

> Today we are bringing ecology into the lives of the French. With more than 305 articles and a field of action that touches all areas of daily life, from consumption to housing, including travel, it is the largest ecological law of the five-year term. […] The Ministry of Ecological Transition will be there to implement all the measures in the text as quickly as possible[799].

Article 1 of the Law reiterates the French Republic's commitment to comply with EU targets and standards, in line with the Paris Accord and the European Green Deal, by providing as follows:

> En cohérence avec l'accord de Paris adopté le 12 décembre 2015 et ratifié le 5 octobre 2016, et dans le cadre du Pacte vert pour l'Europe, l'Etat rappelle son engagement à respecter les objectifs de réduction des émissions de gaz à effet de serre, tels qu'ils résulteront notamment de la révision prochaine du règlement (UE) 2018/842 du Parlement européen et du Conseil du 30 mai 2018 relatif aux réductions annuelles contraignantes des émissions de gaz à effet de serre par les Etats membres de 2021 à 2030 contribuant à l'action pour le climat, afin de respecter les engagements pris dans le cadre de l'accord de Paris et modifiant le règlement (UE) no 525/2013.

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[797] *Projet de loi constitutionnelle complétant l'article 1er de la Constitution et relatif à la préservation de l'environnement* in Vie Publique, 2021, available at: https://www.vie-publique.fr/loi/278185-loi-environnement-article-1-constitution-referendum-climat

[798] Website of the French Government, *The Climate and Resilience Law has been promulgated*, 2021, available at: https://www.gouvernement.fr/la-loi-climat-et-resilience-a-ete-promulguee

[799] The original version of the excerpt from the speech is: '*Nous faisons aujourd'hui entrer l'écologie dans la vie des Français. Avec plus de 305 articles et un champ d'action qui touche tous les domaines de la vie quotidienne, de la consommation au logement, en passant par les déplacements, il s'agit de la plus grande loi écologique du quinquennat. Je suis fière d'avoir porté ce texte transformateur, et je tiens à remercier les parlementaires pour leur travail intense et exigeant, qui a permis d'enrichir le texte. Le ministère de la Transition écologique sera au rendez-vous pour mettre en œuvre au plus vite toutes les mesures du texte*'. Available at: https://www.ecologie.gouv.fr/loi-climat-resilience

Reflecting some of the one hundred and forty-six suggestions made by the Citizen's Climate Convention, the Law focuses on five pillars: consuming, producing and working, moving, housing and eating[800]. Two elements, in conclusion, are particularly noteworthy: (i) Article 280 amends the Environmental Code, by adding a Title III in the Second book, in which the offense of ecocide is introduced[801]; (ii) at the end of the Law it figures Title VIII[802] concerning provisions on the assessment of the status of both the climate and the environment; the task of evaluating the proper application of the required measures, as well as the lawfulness of the actions of the local authorities, will be assigned to the High Climate Council[803].

It is apparent from the foregoing that France is highly committed to implement the necessary measures to comply with the purposes and objectives provided for by the European Green Deal, in respect of which the Country was in favor from the beginning. Indeed, since when the European Commission presented the Green Deal in December 2019, the decision received ample consensus at the domestic level[804].

As a further confirmation of the government's environmental sensitivity, the recovery plan 'France Relance', issued in September 2020, consisted of three key priorities, namely the environment, competitiveness, and social and territorial cohesion[805], and primarily focused on the ecological transition, which was allocated an investment of thirty-billion euro out of the overall amount of one hundred-billion euro[806]. Concerning the measures adopted, they fall within six broad categories, namely: (i) climate mitigation; (ii) climate adaptation; (iii) cross-cutting measures; (iv) other environmental measures; (v) international cooperation; (vi) others.

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[800] *Loi du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets* in Vie Publique, 2021, available at: https://www.vie-publique.fr/loi/278460-loi-22-aout-2021-climat-et-resilience-convention-citoyenne-climat

[801] The text of the law available at: https://www.legifrance.gouv.fr/download/pdf?id=x7Gc7Ys-Z3hzgxO5KgI0zSu1fmt64dDetDQxhvJZNMc=

[802] Titre VIII, Dispositions relatives à l'évaluation climatique et environnementale, artt. 298 – 305

[803] Reference is made to art. 299. Full text is available at: https://www.legifrance.gouv.fr/download/pdf?id=x7Gc7Ys-Z3hzgxO5KgI0zSu1fmt64dDetDQxhvJZNMc=

[804] Website of the French Government, *France applauds the new European Commission's Green Deal*, 2019, available at: https://www.gouvernement.fr/en/france-applauds-the-new-european-commission-s-green-deal

[805] National Recovery and Resilience Plan, 2021, available at: https://www.economie.gouv.fr/files/files/PDF/2021/PNRR-SummaryEN-extended.pdf

[806] Further information is available at: https://platform2020redesign.org/countries/france/

Remarkable in the context of the recovery from the pandemic is that it was precisely thanks to a joint French and Germany initiative that it was eventually possible to reach an agreement concerning the NextGenerationEU recovery plan at the European Council of July 2020[807]. The French Recovery and Resilience Plan encompasses the same three priorities of the 'France Relance', and with particular regard to the environmental issue it focuses on four areas: (i) energy retrofitting; (ii) environment and biodiversity; (iii) green infrastructure and mobility; (iv) green energy and technologies[808]. Given that fifty percent of the total investment is destined to the climate transition, the Country expects to rapidly meet EU targets.

Lastly, it is interesting to mention that very recently, and precisely in July 2021, the European Commission approved a French plan of over thirty-billion euro to support the production of electricity coming from renewables, by means of which the Country will not only succeed in reaching the renewable energies targets, but also contribute to a large extent to the fulfilment of the climate neutrality goal by 2050[809]. As the executive Vice-President Margrethe Vestager pointed out:

> this aid measure will stimulate development of key renewable energy sources, and support a transition to an environmentally sustainable energy supply, in line with the EU Green Deal objectives. The selection of the beneficiaries through a competitive bidding process will ensure the best value for taxpayers' money while maintaining competition in the French energy market[810].

4.5. Germany

Germany is considered to be a leader in the environmental field, to such an extent that Angela Merkel was even nominated 'Climate Chancellor' in light of her commitment towards emissions cut, as alluded to in the previous chapter.

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[807] National Recovery and Resilience Plan, 2021, available at: https://www.economie.gouv.fr/files/files/PDF/2021/PNRR-SummaryEN-extended.pdf
[808] Ibid.
[809] Website of the European Commission, *State aid: Commission approves €30.5 billion French scheme to support production of electricity from renewable energy sources,* available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3922
[810] Ibid.

For instance, at the UN Climate Action Summit of September 2019 she declared her willingness to work for Germany to reach a level of net-zero carbon emissions by 2050[811]. At the same time, her second Presidency of the European Council was highly significant and marked three major successes with regard to environmental policy, inasmuch as it was possible not only to reach an agreement on increasing the 2030 target for the reduction of CO2, now raised to fifty-five percent instead of fifty percent, but also to approve the two ambitious projects constituted by the European Green Deal and the NextGenerationEU plan.

Concerning the former, Chancellor Merkel emphasized the need for Europe to become a leading actor in the field of climate protection[812]. Also, the Federal Minister for the Environment, Nature Conservation and Nuclear Safety Svenja Schulze stressed its nature of a '*smart, resolute, comprehensive concept'* which would put climate and environmental protection '*at the heart of European policy'*; she further underlined the importance of climate neutrality, an objective which was already enshrined in the context of Germany's Climate Action Programme 2030[813].

Concerning the latter, it shall be noted that NGEU pays particular attention to the green transition – one of the two generational challenges together with the digital transition – and to the implementation of the European Green Deal, for the sake of which green investments are to be prioritized, in line with the 'do no harm' principle[814].

Unsurprisingly, Germany – one of the first signatories to the Paris Climate Agreement – is both a key international player and pioneer in climate policies and negotiations. For instance, already in the aftermath of the Fukushima nuclear accident the Country committed itself to the abandonment of the nuclear power by 2020. Also, in line with the Energy Transition – in the context of which in 2019 the Energy Efficiency Strategy 2050 was approved – it further decided to exit from coal-generated power by

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[811] B. Wehrmann, *Germany's Climate Action Programme 2030* in Clean Energy Wire, 2019, available at: https://www.cleanenergywire.org/factsheets/germanys-climate-action-programme-2030

[812] *Germany sets out its green priorities for Council presidency* in Interreg Europe, available at: https://www.interregeurope.eu/policylearning/news/9296/germany-sets-out-its-green-priorities-for-council-presidency/

[813] S. Schulze, *Putting climate and environmental protection at the heart of European policy* in Global Solutions Journal, 2020, available here: https://www.global-solutions-initiative.org/press-news/climate-environmental-protection-eu-european-policy-svenja-schulze/

[814] 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, *Europe's moment: Repair and Prepare for the Next Generation* {SWD(2020) 98 final}, COM(2020) 456 final, 6, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0456&from=EN

2038, for which particularly relevant is the Coal Phase-out Act[815]. Entered into force in August 2020, it provides for the full dismantling of coal-fired plants by 2028; as such, Article 2, paragraph 2, provides for gradual steps: hard coal and brown coal power shall be reduced to fifteen gigawatts by 2022 and subsequently to respectively eight and nine gigawatts by 2030[816]. At the same time, an amendment was made to the German Renewable Energy Sources Act, by means of which there was an increase in renewable energies to sixty-five percent by 2030[817].

With broad regard to the fight against climate change, whereas the Country's engagement towards climate protection was already clear in the Climate Protection Plan 2050 back in 2016, with the most recent Climate Protection Programme 2030 – enacted in 2019 but recently revised in 2021 – attention is additionally paid to the reduction of greenhouse gas emissions by sixty-five percent by 2030[818]. Promoted by the Green Cabinet and benefiting from the allocation of fifty-four-billion euro until 2023, it is one of the instruments thanks to which Germany expects to meet in time its 2030 climate target and the requirements of the Paris Agreement, as well as to reach both the carbon-neutrality and climate-neutrality goals.

The Programme, which adopts environmentally balanced and climate-friendly measures, providing for either positive incentives or strict rules[819], is constituted by four core elements.

(i) The first element is a comprehensive program of measures aimed at ensuring incentives for CO2 emissions reduction, including public investments, support

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[815] A Pioneer in Climate Policy in Facts About Germany, available at: https://www.tatsachen-ueber-deutschland.de/en/germany-glance/pioneer-climate-policy

[816] *Art. §2(2) of* Gesetzes zur Reduzierung und zur Beendigung der Kohle- verstromung und zur Änderung weiterer Gesetze (Kohleausstiegsgesetz) reads as follows: '*(2)Um den Zweck des Gesetzes nach Absatz 1 zu erreichen, verfolgt dieses Gesetz insbesondere das Ziel, die verbleibende elektrische Nettonennleistung von Anlagen am Strommarkt zur Erzeugung elektrischer Energie durch den Einsatz von Kohle in Deutschland schrittweise und möglichst stetig zu reduzieren: (i) im Kalenderjahr 2022 auf 15 Gigawatt Steinkohle und 15 Gigawatt Braunkohle, (ii) im Kalenderjahr 2030 auf 8 Gigawatt Steinkohle und 9 Gigawatt Braunkohle und (iii) spätestens bis zum Ablauf des Kalenderjahres 2038 auf 0 Gigawatt Steinkohle und 0 Gigawatt Braunkohle'. Further information is available at:* https://www.bundesregierung.de/breg-en/issues/sustainability/kohleausstiegsgesetz-1717014

[817] Ibid.

[818] *Innovative Force behind Climate Cooperation* in Facts About Germany, available at: https://www.tatsachen-ueber-deutschland.de/en/climate-and-energy/innovative-force-behind-climate-cooperation

[819] Website of the Federal Ministry of Finance, *What is the Climate Action Programme 2030?*, available at: https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Priority-Issues/Climate-Action/2019-09-19-climate-action-programme-2030.html

programs and tax fiscal instruments; some examples are the expansion of renewable sources (which shall constitute sixty-five percent of electricity production by 2030), premiums for the purchase of electric cars and an increase charging infrastructure, a reduction in the price of train ticket and increased public funding for public transport, the protection of forests and soils[820];

(ii) The second element consists in the gradual adoption of a regulatory framework, matched by appropriate incentives; for instance, support will be given to the substitution of heating installations, while at the same time oil central heating will be forbidden as of 2026;

(iii) The third element is the introduction of carbon pricing, with allowances that will be slightly increased on a gradual basis; as such, individuals and businesses are given time to prepare for the transition without, as a result, suffering from severe financial constraints. Moreover, very interestingly, the additional revenue will be allocated to climate action measures, or otherwise returned to contributors;

(iv) The last element to consider is the ongoing and periodic review, on a yearly basis, of the successful achievement of the 2030 climate targets, with the help of an external body of experts that will guarantee objectivity, as well as of the climate cabinet.

The underlying purpose of the entire Climate Action Programme 2030 is therefore to ensure compliance with climate goals, to guarantee a just and affordable transition for all and to promote, in the long term, climate-friendly activities and behaviors[821].

With regard to the pursuit of the 2030 climate target, equally and especially relevant is the *Klimaschutzgesetz*, or Climate Change Act, which gives legal significance to federal climate targets and policies, thereby making Germany the first Country to enshrine them in law. Particularly noteworthy is the fact that the Act, which was enacted at the end of 2019, recently underwent an amendment process.

In fact, on April 29th, 2021, following a complaint filed by a group of climate activists, supported by NGOs and environmental associations such as BUND (Friends of

[820] Ibid.
[821] Ibid.

the Earth Germany) and Fridays for Future, the First Senate of the Federal Constitutional Court declared the partial unconstitutionality of the Climate Change Act. The Act, in line with the Paris Agreement, established the obligation to decrease the Country's greenhouse gas emissions by fifty-five percent *minimum* by 2030. With a view to achieving the carbon neutrality goal by 2050, it further provided for sectoral annual emission amounts under Sections 3(1) and 4(1), in conjunction with Annex 2[822].

However, what was supposed to be a challenging, long-term program turned out to rather focus on the medium-term, having the necessary measures and steps been defined only up to 2030, thereby with the inherent risk of the gradual relaxation of the measures thereafter[823]. As such, not only the climate policies endorsed were deemed inadequate and unsatisfactory, but also, broadly speaking, the Act placed an unjustifiable burden on future generations, emphasizing the concept of intergenerational justice[824]. By underling the young age of the complainants, the Court consequently observed that, although it was not possible to assess failure to comply with the principle of duty of care enshrined in Article 20a GG[825], the Act was nonetheless in breach of the freedoms of the complainants [826]. Furthermore, it noted that:

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[822] Website of the Federal Constitutional Court, Constitutional complaints against the Federal Climate Change Act partially successful, Press Release No. 31/2021 of 29 April 2021, Order of 24 March 2021, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html. The full text in its original version is available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210324_1bvr2656618.html. The full text of the Federal Climate Change Act is available at: https://www.gesetze-im-internet.de/englisch_ksg/englisch_ksg.html#p0079

[823] J. Könneke, *Out of order: How Germany can become a climate leader once more* in European Council on Foreign Relations, 2021

[824] German climate law is partly unconstitutional, top court rules in DW News, 2021, available at: https://www.dw.com/en/german-climate-law-is-partly-unconstitutional-top-court-rules/a-57369917; K. Appun, J. Wettengel, *Germany's Climate Action Law* in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/factsheets/germanys-climate-action-law-begins-take-shape; C. Nijhuis, *Germany passes new Climate Action Law, pulls forward climate neutrality target to 2045* in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/news/germany-passes-new-climate-action-law-pulls-forward-climate-neutrality-target-2045; J. Könneke, *Out of order: How Germany can become a climate leader once more* in European Council on Foreign Relations, 2021

[825] Art. 20(a) GG reads: '*Mindful also of its responsibility towards future genera- tions, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*'

[826] Website of the Federal Constitutional Court, Constitutional complaints against the Federal Climate Change Act partially successful, Press Release No. 31/2021 of 29 April 2021, Order of 24 March 2021, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html; S. Amelang, German top court finds key climate legislation insufficient in landmark ruling in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/factsheets/german-top-court-finds-key-climate-legislation-insufficient-landmark-ruling

> these future obligations to reduce emissions have an impact on practically every type of freedom, because virtually all aspects of human life still involve the emission of greenhouse gases and are thus potentially threatened by drastic restrictions after 2030[827].

In light of the fact that the contested norms, in their current state, could not satisfactorily guarantee the transition to climate neutrality within the limits set, the Court required the legislator to issue *ad hoc* provisions not later than December 31st, 2022[828]. Nevertheless, it is remarkable that, with a view to avoid hypothetical delay, amendments were proposed by the federal government already on May, 12th, and subsequently approved by both the Bundestag and the Bundesrat respectively on June 24th and 25th[829].

The amended Climate Change Act provides for stricter climate criteria, increasing the 2030 target reduction in greenhouse gas emission to sixty-five percent, with the commitment of reaching the eighty-eight percent by 2040. At the same time, precise annual climate targets are laid down from the year 2030 onwards[830]. By means of these new provisions, the Country expects to meet the climate neutrality goal by 2045, that is five years earlier than what previously set forth in the former version. At the same time, the Act underlined the importance of natural sources of carbon sinks, such as forests, instrumental in counterbalancing the unavoidable emissions, in respect of which concrete measures will be undertaken. By further increasing and enhancing the positive impact of natural sinks, it is assumed that the Country will achieve a negative emissions balance starting from 2050[831]. Finally, an independent council of Experts on Climate Change will be in charge, among many, of drafting both yearly reports concerning the evaluation of emissions data and biannual reports on the effectiveness and well-functioning of the measures adopted[832].

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[827] Website of the Federal Constitutional Court, Constitutional complaints against the Federal Climate Change Act partially successful, Press Release No. 31/2021 of 29 April 2021, Order of 24 March 2021, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html

[828] S. Amelang, German top court finds key climate legislation insufficient in landmark ruling in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/factsheets/german-top-court-finds-key-climate-legislation-insufficient-landmark-ruling

[829] Website of the Presse- und Informationsamt der Bundesregierung, *Climate Change Act 2021. Intergenerational contract for the climate*, available at: https://www.bundesregierung.de/breg-de/themen/klimaschutz/climate-change-act-2021-1936846

[830] Ibid.

[831] Ibid.

[832] K. Appun, J. Wettengel, *Germany's Climate Action Law* in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/factsheets/germanys-climate-action-law-begins-take-shape

Promoter of the amended *Klimaschutzgesetz*, Minister Schulze is of the opinion that it '*creates more intergenerational justice, more planning security and determined climate protection that does not stifle the economy but rebuilds and modernizes it*'[833]. Together with Minister Schulze, also the Minister for Finance Olaf Scholz welcomed the latest version of the Act, considering himself as one of the advocates – if not proper driving forces – of such an '*ambitious, yet achievable climate law*'[834].

Competing as Chancellor candidate for the forthcoming federal elections, Minister Scholz is insisting on environmental and climate issues and is promoting the concept of an international climate club comprising G7 and G20 partners[835]. In order to boost the implementation of the Paris Agreement and of climate protection measures in a broad sense, without at the same time distorting competition and threatening the competitiveness, he maintains that such an international partnership would focus on minimum standards and common goals, with a cooperative and collaborative stance in the climate field in a number of respects[836].

With regard to the Federal election, the three favored candidates, namely Olaf Scholz (SPD), Armin Laschet (CDU) and Annalena Baerbock (Green Party), have

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[833] C. Nijhuis, *Germany passes new Climate Action Law, pulls forward climate neutrality target to 2045* in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/news/germany-passes-new-climate-action-law-pulls-forward-climate-neutrality-target-2045

[834] *Germany: Ministers propose more ambitious climate goals* in DW News, 2021, available at: https://www.dw.com/en/germany-ministers-propose-more-ambitious-climate-goals/a-57435554; E. Meza, *SPD chancellor candidate Olaf Scholz proposes international climate organization* in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/news/spd-chancellor-candidate-olaf-scholz-proposes-international-climate-organisation

[835] The text of the key-issues paper presented before the Federal Cabinet is available here: https://www.bundesfinanzministerium.de/Content/EN/Downloads/key-issues-paper-international-climate-club.pdf?__blob=publicationFile&v=3

[836] *Germany's Scholz proposes 'climate club' to avoid trade friction* in EURACTIV.com, available at: https://www.euractiv.com/section/climate-environment/news/germanys-scholz-proposes-climate-club-to-avoid-trade-friction/; E. Meza, *SPD chancellor candidate Olaf Scholz proposes international climate organization* in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/news/spd-chancellor-candidate-olaf-scholz-proposes-international-climate-organisation; Website of the Federal Ministry of Finance, *The German government wants to establish an international climate club*, available at: https://www.bundesfinanzministerium.de/Content/EN/Pressemitteilungen/2021/20210825-german-government-wants-to-establish-an-international-climate-club.html. In a statement, Minister Scholz affirmed: '*Climate action remains the greatest challenge of our time. Germany aims to be carbon-neutral by 2045, the EU wants to achieve this by 2050. What is needed now is implementation. But one thing is clear: it is not possible to tackle climate change successfully at the level of individual countries or of the EU. This is why we want to create an international climate club for everyone who is moving forward with ambitious climate goals. This open, collaborative club will set joint minimum standards, drive climate action that is internationally coordinated and ensure that climate action makes a country more competitive at the international level. Following our achievement of introducing a global minimum taxation rate, we now want to make similar strides in the area of climate action. We can again overcome major challenges through concerted international action*'

repeatedly insisted on climate and environmental issues. Although environmental policy has always been a priority for the Greens, and notwithstanding the fact that Laschet is not particularly in favor of climate policies – having for instance rejected motions on animal welfare and environmental protection – the fact remains that climate and energy issues retain considerable importance in the electoral campaign[837].

With regard to the electoral programmes[838], the SPD reiterated the nature of climate change as the 'challenge of the century'; overall, the ultimate aim of the proposed measures – in some cases ambitious and reflecting those of the Greens – is to be socially just and stimulate the economy. The CDU/CSU coalition presented vaguer proposals and resorted to the use of expressions like 'as quickly as possible' and 'significantly' instead of establishing precise and strict goals and deadlines. Finally, Green Party's programme was of course far-reaching and challenging, yet moderate in contrast to what could have been envisaged[839].

Climate issues were equally discussed in the first TV debate held on August 29th, as well as in the last one held on September 19th. With regard to the former, having Baerbock proposed radical measures such as two percent of the area of the Country devoted to wind turbines, mandatory solar panels required in all new houses or the ban on engine cars from 2030 onwards, Laschet accused her of placing an excessive burden on companies. At the same time, Scholz insisted on the need for more challenging targets, for instance with regard to the expansion of renewable energies and the electricity network, criticizing CDU, and precisely the current government, for their lack of concern[840]. With regard to the final debate, Laschet affirmed that the CDU started to

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[837] K. Schacht, *Climate change, migration: How Merkel's potential successors measure up* in DW News, 2021, available at: https://www.dw.com/en/climate-change-migration-how-merkels-potential-successors-measure-up/a-58261469

[838] The factsheet '*German parties' energy and climate policy positions for the 2021 general election'* is available at: https://www.cleanenergywire.org/factsheets/vote21-climate-energy-german-parties-election-programmes

[839] S. Amelang, K. Appunn, C. Nijhuis, B. Wehrman, J. Wettengel, *Climate and COVID define campaigns as Merkel's era comes to an end.Vote21 - German elections set the scene for key decade of energy transition* in Clean Energy Wire, 2021, available at: https://www.cleanenergywire.org/dossiers/vote21-german-elections-set-scene-key-decade-energy-transition

[840] G. Chazan, *First German election debate reveals gulf on climate change policy* in Financial Times, available at: https://www.google.it/amp/s/amp.ft.com/content/19b64f93-23f4-420e-893c-8752ceeffae1; K. Appun, *Chancellor candidates focus on climate and industry in first TV debate* in Clean Energy Wire, available at: https://www.cleanenergywire.org/news/chancellor-candidates-focus-climate-and-industry-first-tv-debate

approach the issue of climate change already under Helmut Kohl, whereas Scholz reiterated the willingness to reach climate neutrality by 2045[841].

Be that as it may, it follows from the foregoing that environmental and climate policies and concerns are undoubtedly and definitively on the agenda in the so-called '*roaring twenties of climate action*', to use the words of President von der Leyen. As such Germany, by reason of its nature of a leading actor in the European scene and its contribution to the shaping of crucial EU policies, also in the environmental and climate fields, is not immune to such a trend, and even the climate skeptic parties had to revise their position.

4.6. Conclusions

It would have been a mistake to conclude the present dissertation without making reference to the latest developments in the environmental field. There is no doubt that now more than ever extensive attention is paid to climate change and the related issues and concerns, likely to adversely affect virtually all aspects of our daily life. However not only the existing generation, but also and especially the future one will suffer from further delay, inaction or indifference. It is precisely for the sake of future generations that Countries all over the world are making every possible effort to undertake necessary policies, enact crucial pieces of legislation and implement environmental and climate-friendly measures.

As clear from the above, the European Union is a pioneer in the field and, since the election of Ursula von der Leyen as President of the European Commission, further substantive progress has been made, by means of ambitious laws, policies and programmes of a challenging and far-reaching nature. In the aftermath of the COVID-19 pandemic, the European Union confirmed its stance on the matter, namely that environmental and climate concern must be given primary importance; this became evident in the context of the drafting of recovery plans and measures, such as NGEU. As such, the Union gave a clear demonstration of collective strength and ensured coherence

[841] B. Knight, *German Election: SPD's Olaf Scholz wins final TV debate* in DW News, 19/09/21, available at: https://www.dw.com/en/german-election-spds-olaf-scholz-wins-final-tv-debate/a-59234530 [Accessed: 23 September 2021]

and consistency in environmental policymaking. In the course of the chapter, it has been therefore showed that, instead of lowering environmental standards as a result of the crisis, these latter were instead raised.

In parallel with the European Union, also Italy, France and Germany, as a result of either domestic or international influence and pressure, are going through an evolutionary process in the field of environmental protection and are adapting their societies and legal systems to the ever-changing nature of climate change. Notwithstanding the uncertainty about future developments in the long-term, it is clear that the transformation of today's society is heading in the direction of an increased environmental sensibility; as such, European and world governments have understood the importance of and need for far-reaching measures, and are thus consolidating their efforts in various spheres.

Conclusions

The aim of the present dissertation was to investigate the evolution and current status of environmental legislation in the European Union and, in particular, in Italy, France and Germany. Being this field extremely vast, with a wide range of measures and policies, for the purpose of this dissertation a necessary selection has been made. Particular attention has been given to the historical evolution, including landmark events, EU principles and sectors, legislative and implementation frameworks and access to justice and environmental information. At the same time, the leitmotif connecting the different chapters was the evolution and affirmation of environmental constitutionalism both in the EU and in the three Countries concerned, up until the latest developments, including the proposals for *ad hoc* constitutional amendments in Italy and France and the amendment to the Climate Change Act in Germany. In the introduction it has been argued that the three Countries herein considered have followed a similar path in some respects and indeed, this has been proved and confirmed. At the same time, the comparative approach adopted here has been instrumental not only in allowing comparison, but also in showing significant differences and, overall, highlighting the importance of carefully considering the legal, cultural, historical and linguistic context of each state.

The first chapter has shown the emergence and evolution of environmental constitutionalism, understood as a global trend as a result of which one hundred and forty-eight of the one hundred and ninety-six modern Constitutions acknowledge the protection of the environment and of the adjoining human rights. It has been proved that environmental rights, of either a substantive or procedural type, became even more widespread as a result of the United Nations Conference on the Human Environment of 1972 and the United Nations Conference on Environment and Development of 1992, which led to the adoption, respectively, of the Stockholm Declaration and the Rio Declaration. Also, equally relevant was the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters – or Aarhus Convention – of 1998 which, with its three pillars dealing with access to environmental information, public participation in environmental decision-making and access to justice in environmental matters, has been instrumental in granting a number of fundamental environmental rights to the public. In the final analysis, the chapter has

demonstrated that the issue of environmental protection in the EU is of such importance that the Member States must attain the highest standards. Unsurprisingly, this has implications for the applicant countries as well, for which the satisfaction of the Copenhagen criteria, and thus of the *acquis Communautaire*, whose Chapter 27 focuses on environment, is an essential point. In this regard, the Constitutions of the most recent EU Member States have been analyzed.

Along the lines of the end of the first chapter, the second one has focused on environmental legislation in the European Union, analyzing the historical evolution, with a particular regard for the Seven Environmental Action Programmes implemented until now. Then, reference has been made to the principles enshrined in Article 191(2) TFEU, pursuant to which:

> Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Finally, after properly taking into account a number of sectors, namely nature protection and conservation, waste, chemicals, water quality, air pollution and climate change, and the European Environmental Agency, attention has necessarily been given to the issue of access to justice in environmental matters, quoting relevant Conventions and case law.

Subsequently, the third chapter has focused on the comparative analysis of environmental law in Italy, France and Germany, three states with different institutional structure. It is undisputable that many are the similarities between these three countries, where environmental law has experienced a series of major changes mostly from the Seventies onward. For instance, the creation of the Environmental Ministries dates back to the decade between the Seventies and the end of the Eighties, and precisely in 1971 in France and respectively in 1986 and 1987 in Italy and Germany, in the aftermath of the Chernobyl disaster. Another common element is the distribution of competences between the central government and the regional, local or Länder's ones. Finally, it is impossible not to mention the constitutional amendments that have led to the adoption and strengthening of environmental protection measures. However, many differences persist.

For instance, as of today, Germany is still devoid of a homogenous and comprehensive Environmental Code, on the contrary of Italy and France; nonetheless, the Country is a leader in the field, with particular regard to climate change. This is especially thanks to Angela Merkel who, firstly as the Federal Environmental Minister and then as the German Chancellor, has showed such a great engagement and dedication that she was eventually nicknamed the 'Climate Chancellor'. At the same time, whereas all the three Countries can claim different sorts of environmental constitutionalism, France is the only country to have provided for further constitutional guarantees, inasmuch as on March 1st, 2005, by means of Constitutional Law 205, the 2004 Environmental Charter was incorporated into the Constitution and given the same constitutional status of the Declaration of the Rights of Man and of the Citizen of 1789, and of the Preamble to the 1946 Constitution. As a matter of fact, the French *Charte de l'environnement* is the first and only constitutional text consecrated to environmental protection in its entirety up to the present day.

Finally, the last chapter has confirmed the increasing commitment of Italy, France and Germany to the protection of the environment and the fight against climate change. In particular, it has been shown that Italy and France are undergoing two different constitutional revision processes and are allocating a portion of the funds received in the framework of NextGenerationEU to the successful implementation of the green transition. At the same time, Germany has recently amended its *Klimaschutzgesetz*, providing for stricter climate criteria which are expected to lead the Country to meet its climate neutrality goal by 2045. Also, in light of the forthcoming federal elections, the three favored candidates, namely Olaf Scholz (SPD), Armin Laschet (CDU) and Annalena Baerbock (Green Party), have repeatedly insisted on climate and environmental issues. In particular, Minister Scholz has described himself as one of the advocates of the amended *Klimaschutzgesetz* and promoted the creation of an international climate club comprising G7 and G20 partner.

These developments seem to correspond to the idea of '*a climate-friendly Europe, a climate- friendly Continent, a Europe that serves people*' advocated by President von der Leyen in the aftermath of her election on July 16th, 2019. And indeed, the analysis made of the latest changes, progresses and achievement, both at the EU and domestic levels, seem to suggest that the European Union has effectively entered the so-called

'*Roaring Twenties of Climate Action*'. However, EU environmental law represents a field in constant evolution and the long-term implementation of EU guidelines, policies and measures is dependent also and above all upon Member States. As such, it is too early to draw any firm conclusions about the success and effectiveness of recent EU instruments, such as the Green Deal and the related measures, and the fulfillment of key goals such as climate neutrality. Indeed, there is a challenge with regard the effective and sustainable deployment of the latest EU policies at the Member States level, some of whom are particularly hostile to issues such as climate change. Nevertheless, European and international societies have understood the need to act preventively in order to tackle global warming, environmental degradation and climate change and are evolving in the direction of an increased environmental sensibility. In particular, the majority of national governments is responding promptly, addressing environmental concerns and implementing the necessary changes to be consistent with EU requirements in the field. In spite of the uncertainty about future development in the long-term, this trend inspires confidence.

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Summary

Over the past few years, the world has witnessed a rapid increase in the number and rate of environmental disasters. These phenomena became even clearer over the last two summers, with dramatic floods, wildfires, earthquakes and extreme heat that have profoundly affected practically all continents, and therefore the entire world. When reflecting on the dynamics of natural disasters, a reference to scientific findings, and in particular the latest United Nations Intergovernmental Panel on Climate Change (IPCC) report becomes necessary, since it is expressly stated therein that the devastating consequences of climate change are human-induced.

The implication of anthropogenic activities with regard to both environmental and human health received widespread attention from the last decades of the twentieth century onwards, when scientists suggested that the world was entering a new era marked by extensive and lasting human influence, subsequently denominated *Anthropocene* by Paul J. Crutzen and Eugene Stoermer. In particular, there are concerns about the socio-economic and environmental impacts of unsustainable and environmentally harmful human activity. Very interestingly, it became clear soon that the humankind is not only the driver behind significant ecological and environmental changes, but also one of its victims. While serious concerns arise as regards human safety, health and the broad theme of the enjoyment of human rights and freedoms of the present generation, the situation gets worse if considering the consequences of our inaction today with regard to future generations. This intergenerational aspect is investigated in the analysis of Professor Richard P. Hiskes, who acknowledged that, having the present generation extensively used natural resources and consequently caused environmental degradation, it is unlikely that the future generations will enjoy environmental rights in a satisfactory manner. As a consequence, environmental constitutionalism and the limits – in addition to the benefit – arising therefrom represent the best way to tackle environmental damage and guarantee the enjoyment of environmental rights to the generations to come.

Interestingly enough, it is possible to say that the majority of national Constitutions around the world nowadays include provisions for the protection of the environment and the adjoining environmental rights, also as a result of what David R.

Boyd refers to as a '*environmental rights revolution'* that took place between the end of the XX century and the beginning of the XXI century. More precisely, it is estimated that in one hundred and forty-eight of the one hundred and ninety-six modern national Charters there is a certain kind of environmental constitutionalism, with reference been made to environmental rights as such or other kinds of duties and responsibilities. Indeed, the constitutional environmental rights are of different types, and are very commonly linked to further types of constitutional rights and related obligations, among which it is possible to mention the right to life, health, and dignity. This corresponds to recent phenomenon known as '*Global Environmental Constitutionalism*', concept that can be attributed to Louis J. Kotzé and was further reiterated and investigated by James R. May and Erin Daly. Tellingly, the inclusion of provisions concerning environmental protection in national constitutions becomes a powerful tool for establishing obligations with respect to the environment, as well as regulatory and compliance mechanisms. Moreover, reference is not simply made to the right to a safe environment, and indeed many constitutional Charters have been revised in order to include broader rights to participation, information, justice, climate and sustainable development.

Although explicit constitutional environmental rights are becoming the norm in several modern constitutions around the world, the fact remains that concepts and terms may vary and the interpretation of the meaning attached to *healthy*, *favourable*, and *sustainable* is not always easy and linear. This stems from the recognition of the challenging nature of constitutionally protected environmental rights and from fundamental doubts as to what '*environment'* effectively implies. Particularly relevant is the case of *Minors Oposa v Factoran*, which marked a milestone for environmental protection inasmuch as it recognized an intergenerational responsibility to protect and maintain a healthy environment. As underlined by Justice Feliciano, '*it is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to a balanced and healthful ecology*'.

Be that as it may, the fact remains that there is a close connection between the enjoyment of several human rights and freedoms and the current degree of environmental quality, in line with the acknowledgment of the '*human right to a healthy environment*'. As such, scholars maintain that linking the protection of environmental rights within broader human rights law is both necessary and beneficial. In this context, reference shall

be made to the Three Generations Theory of Human Rights, developed by Karel Vasak in the late 1970s, and in particular to the third generation, the most recent one. While the first two encompass, respectively, *negative* and *positive* rights, the third one covers *collective* rights, towards which states and the global community as a whole have a responsibility, in accordance with the concepts of humanity and fraternity. Unfortunately, not only the third-generation human rights are unclear and general in nature, but also it is definitely not easy to properly identify who is legally responsible for compliance with these rights and for fulfilling the related obligations. Nonetheless, reference to collective rights has been made in several texts, among which it is particularly important to mention the Stockholm Declaration of June 1972 and the Rio Declaration of 1992.

At the same time, especially relevant is a main distinction between substantive and procedural environmental rights. The first ones encompass, for instance, the right to live in a healthy environment, which presupposes the fundamental access to natural resources, and have been enshrined in the Stockholm Declaration; since then, the substantive right to a healthy environment has been embodied in several constitutional Charters. Tellingly, it is generally recognized that substantive rights are self-executing and therefore directly applicable, but also unlikely to be subject to political shift or constitutional amendments; thus, they are the most reliable way of ensuring appropriate legal protection of the environment. With regard to the latter, remarkable is Principle 10 of the Rio Declaration, which has further influenced the adoption of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters – or Aarhus Convention – of 1998. The Aarhus Convention provides for three pillars that deal with access to environmental information, public participation in environmental decision-making and access to justice in environmental matters. Therefore, it follows that these procedural environmental rights are crucial as a way of increasing awareness, guaranteeing and promoting public participation and democracy through the exchange of ideas, ascertaining state liability and enhancing the lawfulness and loyalty of governmental action.

Focusing on the Aarhus Convention – to whom the European Union has adhered by means of resort to the Council decision 2005/370/EC – and particularly on the third pillar, Article 9 interestingly sets out the requirements for accessing to justice in environmental matters. What is of particular relevance in this context is that the Aarhus

Convention, by means of the expression '*the public concerned*', definitely recognizes not only a right for the individuals, but also for NGOs, in accordance with Article 2(5) as well. This implies that the Aarhus Convention aims at granting the right to access to justice to a broader category of applicants. And, in order to comply with the obligations, the Aarhus Regulation as well acknowledges the importance of NGOs and their right to access to justice.

The European Union has attached outstanding importance to the protection of the environment, which has contributed to the expansion and progression of the Union's legal body. In particular, it shall be noted that the environmental provisions enshrined in the Treaties, and especially those referred to in Articles 11 and 191 – 193 TFEU, have further influenced the path to EU Membership of post-communist states in the 1990s. In order for the pre-accession assessment procedure to be successful, applicant countries had to satisfy the three specific requirements provided for in the so-called 'Copenhagen criteria', or 'Accession criteria'. Notably, the last condition foresees the implementation of the *acquis Communautaire*, whose Chapter 27 precisely focuses on environment. As such, the last twelve EU Member States committed themselves to amend their constitutions so as to include environmental protection, and to likewise implement *ad hoc* policies.

From the foregoing the assumption that the European Union is a leading actor in the environmental field, being actively involved in environmental action and cooperation, and thus committed to the implementation and promotion of the concepts of healthy environment and sustainable development. Indeed, the EU has acceded to over forty international environmental agreements at the global, regional, and sub-national level as well. Such international agreements cover, for instance, climate change mitigation, biodiversity protection, waste management plans, ozone layer protection, transboundary water and air pollution, and also environmental governance and liability more broadly. It is interesting to note that Jan Wouters, André Nollkaemper and Erika de Wet have talked about the *Europeanisation* of international law according to which, inasmuch as international norms are directly binding upon EU institutions and Member States, international law is now part of the EU legal system and becomes thus *Europeanised*. As a consequence, domestic legislation and policy are becoming increasingly influenced and shaped by European law, and Member States are required to maintain high standards in a number of fields, in this case the environmental one.

From an historical perspective, five phases – marked by and corresponding to the adoption of EU Treaties – clearly shows the evolution of environmental law in the European Union, also from a constitutional point of view. The First Phase is assumed to have started in 1957, year of the founding Treaty of the EEC, or Treaty of Rome. Although this Treaty did not cover environmental issues as such – which indeed were not yet a concern by the time –, the EEC nevertheless undertook some sort of environmental protection over the years, specifically for the purpose of achieving the common market.

The beginning of the Second Phase was undoubtedly influenced by the 1972 Stockholm Conference, as a result of which urgent intervention was deemed necessary in the field and for the purpose of environmental protection. In the month of October of that very year, the Paris European Summit was held, where the Heads of State or Government of EEC Member States focused on the objectives and policies that had to be undertaken in order for the EU to be created. Relevant in this second phase was the First Environment Action Programme (EAP), dating back to November 1973.

Subsequently, the Third Phase was characterized by and arose as a consequence of the Single European Act of 1987, which granted the EEC prerogatives in the field of environmental policy; for the very first time, a Treaty expressly included environmental protection among its provisions and objectives.

Shortly thereafter, the year 1992 witnessed the development of the United Nations Conference on Environment and Development of Rio de Janeiro. Right after this Conference took place, the entry into force of the Treaty of Maastricht on November 1st, 1993 signaled the beginning of the Fourth Phase of the evolution of EU policy, the so-called post-Maastricht phase. This latter was characterized by: '*promotion through the Community of a harmonious and balanced development of economic activities, sustainable and non- inflationary growth respecting the environment*'.

In the final analysis, the beginning of the Fifth Phase of the evolution of EU policy in the environmental field dates back to 1997, year when the Treaty of Amsterdam was enacted. Since then, the general consensus has been that the Treaty of Amsterdam had favored the passage from a purely economic organization to a genuine political one which guaranteed more liberties and safeguards to EU citizens. With due regard to the constitutionalisation of the environmental dimension, the Treaty inscribed both environmental protection and sustainable development in the general provisions and, in

Article 2 EC, it expressly mentioned a '*harmonious, balanced and sustainable development of economic activities'*, as well as '*a high level of protection and improvement of the quality of the environment*' among the Community's responsibilities.

Nonetheless, it is possible to envisage one last phase of the policy and constitutional evolution of EU environmental legislation, which must be traced back to the Lisbon Treaty of 2009 and is still ongoing. This time, the Treaty explicitly referred to the need for an enhanced role of the European Union in domestic and international environmental problems, especially for what concerned the fight against climate change, in addition to the repeated emphasis on '*the sustainable development of the Earth'*, with a clear linkage with the global dimension and the worldwide relations in the field. Particularly relevant about this phase is the seventh Environment Action Programme, which ended very recently in 2020, titled '*Living well, within the limits of our planet*'. Its priorities arose from contemporary, serious issues such as a dramatic increasing of demographic density in the Union's urban zones and, what is even more remarkable, this EAP not only consisted in a programme for action to 2020, but also it set a roadmap to 2050, thereby showing a clear long-term vision.

With regard to the EU Treaties, a reference shall be made to Article 191 TFEU, which not only lays down the objectives that '*the Union policy on the environment shall contribute to pursuit*' – and namely environmental protection and preservation, protection of human health, prudent and rational utilization of natural resources, and promotion of international measures to deal with regional or worldwide environmental problems, among which climate change – but also the general principles that shall guide EU action, that is: precaution; preventive action; rectification at source; polluter pays.

According to the precautionary principle, whose origins, are to be identified with the German *Vorsorgeprinzip* of the 1970s, proper and prompt intervention is required to avoid the risk of potential environmental hazards. Said principle is also valid in the absence of scientific evidence that may justify that action to occur. With regard to the principle of prevention, it is valuable for three main reasons: (i) it is the more beneficial way of seeking environmental protection, also given that once pollution spreads – even if in a controlled manner – it is less likely for any remedial measure to lead to satisfactory improvements in environmental standards; (ii) it serves the purpose of both environmental protection and economic development, thanks to technological and

creative solutions; (iii) treating damages and degradation in due course proves to be efficient also in the sense that it avoids pollution to contaminate any further media. The principle of rectification at source does not retain a prominent position when compared to other principles and is furthermore contested nowadays with particular regard to air pollution, insofar as the implementation of such principle might prove to be unrealistic. Finally, the last principle consists of three interesting elements: the acting subject *polluter* encompass a variety of actors; the adjective *pollution* does not refer to a single event, and both the direct or indirect consequences of an action are considered; the duty of payment is not limited to preventive or reparatory measures but may refer also to criminal liability and economic instruments.

It is logical to infer that the European Union has taken active steps to regulate and to introduce increasingly strict standards to meet environmental policy objectives. Attention has been given to a wide variety of sectors, some of the most relevant of which are nature protection and conservation; waste; chemicals; water quality; air pollution; climate change. In particular, this latter is the less traditional and the most recent, and yet is not adequately addressed in a number of countries. However, the EU claims to have a leading role in the climate field, especially for what concerns the reduction of carbon and greenhouse gas emissions, and this became even more noticeable since the election of Ursula von der Leyen as President of the European Commission.

As it is widely known, the European Union is not a state, but rather encompasses twenty-seven Member States with diverging historical backgrounds, founding elements, national and legal cultures. Nonetheless, the environmental problems, damages and challenges these states suffer from are similar, regardless of borders, economic or social factors, places, and circumstances. In particular, the environmental challenges have changed dramatically and rapidly in recent decades and, as a consequence, public opinion concurrently shifted in favor of stronger and more coordinated measures in the field of environmental protection. From this it follows the outstanding importance of the comparative approach, in order to better understand and analyze not only the distinctive nature of each constitutional system and of the specific local features, but also the reciprocal influences and interconnections between them.

Since the majority of laws in the field of environmental protection in the European Countries results from EU law and international agreements, it is almost impossible not

to detect elements of comparison between legal systems. At the same time, notwithstanding the fact that English is the most commonly used language in the EU, it is important to highlight that most environmental law scholars carry out publications in their mother languages, thereby expressing domestic ideas, standards and goals. It is therefore necessary to understand the major contribution given by the work published in different national languages – which also represent the outcome of domestic cultural and legal background – that might get lost when solely considering papers released in English. Hence, the decision to adopt a comparative approach to investigate environmental legislation in Italy, France and Germany, three EU Member States which, to some extent, have experienced a similar path in the environmental field.

When the Italian constitution was enacted in 1948, no explicit reference was made to a the right to a *healthy* environment, nor to environmental protection at all. This may relate to the fact that, by the time, the reasons that led to the promulgation of the constitution were mainly justified by the need to enshrine the principles of democracy and protection of fundamental rights and freedoms. At the same time, post-war Italy was dramatically suffering from socio-economic problems and from a lack of urbanization, and the agricultural sector – that represented the prevailing mode of economy – had to be developed and exploited in light of the country's recovery. Nonetheless, proper interpretation of some Constitutional Articles – and particularly Articles 2, 9 and 32 – has been instrumental in allowing connections with the broader right to a healthy environment. In particular, on the basis of the joint reading of Articles 2 and 3, the Constitutional Court has ruled that the protection of the environment shall be regarded as '*a fundamental interest and a constitutionally guaranteed and protected value*'. However, according to Camilla Della Giustina, the approach to the environmental issue was reliant on reasons of an episodic and emotional nature, since *ad hoc* interventions were brought forward solely under the pretext of specific environmental factors and diseases, even more so since they could risk undermining human health. Generally speaking, it was during the Seventies that the Italian Republic paid increasing and appropriate attention to environmental protection. This occurred partly because of regional and international measures, such as the setting up of the 1968 Club of Rome, the 1972 UN Conference on the Human Environment and the Fist EC Action Programme of 1973. Subsequently, three major turning points in the environmental field were

particularly remarkable, and namely the promulgation of: Law 349/86, with which the Ministry of the Environment was founded; Constitutional Law 3/2001, which amended Title V of the second part of the Italian Constitution and led to the appearance of the word 'environment' in the text for the first time; and eventually, Legislative Decree 152/2006, formally titled '*Testo Unico Ambientale*' (Environmental Consolidated Act), but also known as the Environmental Code.
Concerning the Ministry for the Environment – subsequently known as the Ministry for Environment, Land and Sea Protection (MATTM), and today renamed Ministry for Ecological Transition – it was instituted precisely at the dramatic moment of the Chernobyl disaster, when the importance of environmental protection was finally and unequivocally acknowledged. As such, it is not wrong to believe that the enactment of this Law 349/86, precisely in the Eighties, was to some extent influenced by a new European sensibility towards environmental disasters and tragedies.

The evolution and affirmation of environmental legislation in France has some common features of the Italian case, but also a number of differences. Just like in the Italian case – even if slightly earlier – it was in the Seventies that French environmental law underwent a series of major changes, with the creation of the Ministry of the Environment in 1971, today known as Ministry for the Ecological Transition. Another similarity lies in the fact that it was only in the noughties that environmental law was codified, with the French Environmental Code and the Charter for the Environment being adopted precisely in the years 2000 and 2005, the latter of whom was added to the Constitution. So, a major difference between the two countries is that environmental protection in France is given more legal guarantees. Remarkably, the *Code de l'environnement* and *Charte de l'environnement* represent two major turning point in the history of environmental legislation in France. The Environmental Code was drawn up in 2000, in response to the concrete need for the reorganization of the existing arrangements, with a view to guarantee legal uniformity and harmony. As such, it is argued that it is a clear example of codification '*à droit constant*', inasmuch as no fundamental revision of the existing norms and laws occurred, since the goal was simply to codify different pieces of legislation in a single text. On the other hand, the Environmental Charter – adopted in 2004 – was incorporated into the Constitution by means of Constitutional Law 205 of March 1st, 2005. This meant that the Charter was given the same constitutional status of

the Declaration of the Rights of Man and of the Citizen of 1789, and of the Preamble to the 1946 Constitution, making it the first and only constitutional text consecrated to environmental protection in its entirety.

On the contrary of Italy and France, Germany is a federal state and, as such, environmental legislation has been developed both at the Federal and Länder's level. If it is true that some sort of legal recognition of environmental protection has ancient roots – as it is also true for Italy and France – it was from the 1970s onwards that major changes occurred. Particularly noteworthy was the adoption of the Environmental Programme in September 1971 – which thus preceded the first EAP of July 1973 – by means of which efforts were devoted to the definition first, and implementation then, of some innovative policies in the field. Generally speaking, however, the drafting and implementation of environmental policies accelerated in the aftermath of the Chernobyl disaster of April 1986. As a result of this accident, the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety was founded, as was the case in Italy. Interestingly, in the period 1994 –1998 Germany became a leading actor in the environmental field at both the international and EU level, for instance proved by the fact that the first Conference of the Parties under the UNFCCC (COP 1), which saw the participation of Angela Merkel as the new Minister for the Environment, was held in Berlin in 1995. It was precisely since the election of Angela Merkel as Federal Chancellor in 2005 that environmental legislation in Germany definitely became an important part of the domestic legal system, to such an extent that Merkel was referred to as the 'Climate Chancellor'. Undoubtedly, the country has succeeded in asserting itself as a leading actor in the EU legal landscape, yet at the same time it has experienced a number of defeats. Concerning this last point, it shall be noted that Germany has not yet provided itself with an Environmental Code, on the contrary of Italy or France. Furthermore, it is worth mentioning the *Klimaschutzgesetz*, or Climate Change Act, which was enacted at the end of 2019, but has recently undergone an amendment process in the aftermath of the judgment of the First Senate of the Federal Constitutional Court held on April 29th, 2021which declared its partial unconstitutionality. Nonetheless, the Country underwent three significant constitutional amendment processes in 1972, 1994 and 2006. Particularly relevant is Article 20a, which pays attention not only to the protection of the natural asset, but also of animals; moreover, recognition that such protection was needed for the sake of future

generations – in light of an intergenerational responsibility – represented an important novelty. The reference to animal protection has had a positive influence on the Italian legal system with regard to a new amendment to Article 9, which is currently underway, concerning a third comma that will read as follows: '(La Repubblica) *tutela l'ambiente, la biodiversità e gli ecosistemi, anche nell'interesse delle future generazioni. La legge dello Stato disciplina i modi e le forme di tutela degli animali*'. At the same time, Germany recorded successes at the international level as well. For instance, Merkel's second Presidency of the European Council was highly significant and marked three major novelties with regard to environmental policy, inasmuch as it was possible not only to reach an agreement on increasing the 2030 target for the reduction of CO2, now raised to fifty-five percent instead of fifty percent, but also to approve the two ambitious projects constituted by the European Green Deal and the NextGenerationEU plan.

Notwithstanding the fact that these three Countries have aligned themselves with EU standards in the environmental field, the fact remains that the setting of high environmental standards has soon gone hand in hand with the reticence – if not the strong opposition – of a couple of Member States. This might be one of the reasons why there was a lack of consideration given to environmental policy by the different European Commissions that have followed over time. As such, the most recent European Commission under the presidency of Ursula von der Leyen, in office from July 16th, 2019, to some extent represented a break with the past, and environmental and climate issues were given primary attention already at the moment of the electoral campaign. Indeed, in '*A Union that strives for more*', President von der Leyen had focused on six priorities, first among which the promise of a European Green Deal, subsequently referred to as '*Europe's new growth strategy*'. With regard to this '*deal by Europe for Europe*', its importance was further emphasized in the President's first State of Union Address of September 16th, 2020, taking place against the backdrop of the COVID-19 pandemic, that focused on the need to recovery from the ongoing dramatic situation. In this regard, the European Green Deal was said to be the blueprint for the needed transformation towards emissions cut, efficiency improvement, and a broader, radical change in the context of environmental protection. In the middle of an unprecedent crisis, the EU showed its strength by moving forward, instead of taking steps backwards. In the von der Leyen's speech, mention was further made to the NextGenerationEU – thirty-seven percent of

which will be reserved to the objectives provided for by the European Green Deal, while another thirty percent will be allocated through green bonds – as well as to the new European Bauhaus, namely an environmental, social and cultural initiative of the European Commission related to the European Green Deal.

On September 15th, 2021, President von der Leyen held her second, annual State of the Union Address. She started mentioning the succession of natural and ecological disasters that have affected several EU Countries throughout the summer, stressing the importance of current scientific findings. In particular, she mentioned the latest United Nations Intergovernmental Panel on Climate Change (IPCC) report, released on August 9th, 2021, according to which the impact of human activities with regard to the climate system is dramatic and remarkable. But nonetheless, the report eventually added that, although many implications are already 'irreversible', it is still possible to act for limiting climate change, as further underlined by President von der Leyen. In particular, she affirmed that a relevant change is already occurring within the European Union. And indeed, in spite of the reluctance of some world governments and EU Member Countries, there are states, like Italy, France and Germany, that are taking advantage of this landmark change in the environmental protection field and are therefore improving and strengthening their national systems *vis-à-vis* this new opportunity.

Italy, for instance, is achieving a number of progresses as regards environmental law and policy, both at the domestic and international level. In particular, such progress to a certain extent is being speeded up under the Draghi Premiership. Already at the time of his programmatic speech at the Senate of February 17 th, 2021, Mario Draghi attached great importance to the environmental issue, making in the first instance reference to global warming which, together with pollution, hydrological issues and rising seas, has an impact on human life and health. Very interestingly, in the same speech he further commented on the fact that the enlargement of the cities at the expenses of the natural environment may have been one of the causes behind the virus transmission from animals to human beings. With regard to the domestic level, Italy can boast a new Ministry for the Ecological Transition, a *superministry* meant to guide Italy towards a sustainable production system, which is also given prerogatives that traditionally fall within the competence of the Ministry of Economic Development; in particular, in addition to traditional responsibilities in the environmental field, it will exercise competence over

matters such as energy, transport emissions, sustainable development, circular economy. The Minister will additionally oversee the implementation of the green transition and of EU funding. Concerning this latter, one hundred and twenty-three-billion out of the two hundred and nine-billion euro allocated to Italy in the framework of NextGenerationEU will be destinated to the twin green and digital transitions. With regard to the international level, remarkable are the Italian co-presidency of COP 26 and the presidency of the G20.

Concerning France, the country is undergoing two major changes. First of all, although the *bloc de constitutionnalité* expressly provides for, recognizes and guarantees comprehensive provisions on environmental protection and environmental rights, there is always scope for improvement. As a confirmation of this, a revision process of Article 1 is currently underway, with a proposed amendment which will further state that the Republic '*garantit la préservation de l'environnement et de la diversité biologique et lutte contre le dérèglement climatique*', therefore operating a distinction between the environment and the biological diversity, and eventually paying attention to climate change. At the same time, on August 22nd the landmark 'Climate and Resilience' Law n. 2021-1104 was adopted after a two-years process. Article 1 of the Law reiterates the French Republic's commitment to comply with EU targets and standards, in line with the Paris Accord and the European Green Deal. As a further confirmation of the government's environmental sensitivity, the recovery plan 'France Relance' was issued in September 2020. Consisting of three key priorities, namely the environment, competitiveness, and social and territorial cohesion, it primarily focused on the ecological transition. Remarkable is the fact that the French Recovery and Resilience Plan, which encompasses the same three priorities of the 'France Relance', has destined fifty percent of the total investment to the climate transition, and consequently the Country expects to rapidly meet EU targets.

Germany – one of the first signatories to the Paris Climate Agreement – is both a key international player and pioneer in climate policies and negotiations. In line with the Energy Transition – in the context of which in 2019 the Energy Efficiency Strategy 2050 was approved – the Country further decided to exit from coal-generated power by 2038, for which particularly relevant is the Coal Phase-out Act. Entered into force in August 2020, it provides for the full dismantling of coal-fired plants by 2028. Equally relevant is the Climate Protection Programme 2030, in the framework of which attention is paid to

the reduction of greenhouse gas emissions by sixty-five percent by 2030. Hence, it is one of the instruments thanks to which Germany expects to meet in time its 2030 climate target and the requirements of the Paris Agreement, as well as to reach both the carbon-neutrality and climate-neutrality goals. Finally, reference shall be made to the abovementioned Climate Change Act, which was deemed inadequate and unsatisfactory and, broadly speaking, placed an unjustifiable burden on future generations. Although the Court required the legislator to issue *ad hoc* provisions not later than December 31st, 2022, the necessary amendments had been approved by both the Bundestag and the Bundesrat already on June 24 th and 25th, respectively. The amended Climate Change Act provides for stricter climate criteria, by means of which the Country expects to meet the climate neutrality goal by 2045, that is five years earlier than what previously set forth in the former version. Very interestingly, in light of the Federal elections scheduled for September 26th, climate and energy issues retained considerable importance in the different electoral campaigns. In particular, the three favored candidates, namely Olaf Scholz (SPD), Armin Laschet (CDU) and Annalena Baerbock (Green Party), have repeatedly insisted on climate and environmental issues. This shows a new common sensibility, in spite of the fact that environmental policy has always been a priority for the Green Party. It follows from the foregoing that environmental and climate policies and concerns are undoubtedly and definitively on the agenda in the so-called '*roaring twenties of climate action*', to use the words of President von der Leyen.

There is no doubt that now more than ever extensive attention is paid to climate change and the related issues and concerns, which are likely to adversely affect virtually all aspects of our daily life. However not only the existing generation, but also and especially the future one will suffer from further delay, inaction or indifference. It is precisely for the sake of future generations that Countries all over the world are making every possible effort to undertake necessary policies, enact crucial pieces of legislation and implement environmental and climate-friendly measures. As clear from the above, the European Union is a pioneer in the field and, since the election of Ursula von der Leyen as President of the European Commission, further substantive progress has been made, by means of ambitious laws, policies and programmes of a challenging and far-reaching nature. In the aftermath of the COVID-19 pandemic, the European Union confirmed its stance on the matter, namely that environmental and climate concern must

be given primary importance; this became evident in the context of the drafting of recovery plans and measures, such as NGEU. As such, the Union gave a clear demonstration of collective strength and ensured coherence and consistency in environmental policymaking.

Notwithstanding commitments and efforts, it shall ultimately be noted that the field of environmental law is in constant evolution and the long-term implementation of EU guidelines, policies and measures is dependent also and above all upon Member States. As such it is too early to draw any firm conclusions about the success and effectiveness of recent EU instruments, such as the Green Deal and the related measures, and the fulfillment of key goals such as climate neutrality. Although this underscores the challenge of the effective and sustainable deployment of the latest EU policies at the Member States level, some of whom are particularly hostile, the fact remains that environmental law in the European Union is becoming more ambitious, comprehensive and far-reaching in its scope. At the same time, the majority of national governments is responding promptly, addressing environmental concerns and implementing the necessary changes to be consistent with EU requirements in the field.