THE INTER-CONSTITUTIONAL RIGHT-DUTY TO A STABLE CLIMATE. SCIENTIFIC EVIDENCE AND CONSTITUTIONAL PROBLEMS AT STAKE*

Franco Sicuro**

ABSTRACT: La tecnica dell'interpretazione "intercostituzionale" sembra in grado di costruire un diritto-dovere al clima stabile e sicuro, così da indurre le Assemblee legislative ad occuparsi, con dovizia ed effettività, delle possibili soluzioni normative per fronteggiare il cambiamento climatico antropogenico. L'"intercostituzionalità", infatti, come si vedrà intesa quale attività ermeneutica tesa ad integrare i principi e le regole costituzionali presenti nelle Carte fondamentali diffuse a livello sovra- ed internazionale, sembra vivere fisiologicamente nell'attività interpretativa delle Corti piuttosto che nella concreta integrazione tra Carte costituzionali materiali. Ciò appare tanto più vero quando si ragiona di giustizia climatica, anche a causa dell'estrema rarefazione dei riferimenti al clima nelle Costituzioni degli Stati. Di talché, giudici comuni e costituzionali sembrano essere i principali soggetti istituzionali in grado di soddisfare, caso per caso (ma non senza capacità prospettica), le incessanti istanze di giustizia provenienti dalla realtà sociale, sempre più radicate nelle recenti acquisizioni scientifiche. Di fronte a questioni globali come il cambiamento climatico, quando in discussione sono i diritti fondamentali, non sembra si possa ignorare il prodotto dell'interpretazione derivante dal dialogo tra le Corti nazionali e sovranazionali, chiamate ad adeguare il dato scientifico ai concreti risvolti della realtà normativa.

ABSTRACT: *The inter-constitutional interpretation technique seems able to build a right-duty to a healthy and liveable climate to order the national legislature to significantly tighten up the current climate law provisions. Indeed, inter-constitutionality seems to physiologically live within the interpretative activity of the Courts rather than in the concrete integration between material constitutional Charters. This appears even more convincing when addressing climate justice because of the extreme limitation of references to the climate in the State Constitutions. Therefore, ordinary, and constitutional judges seem to be the main actors able to satisfy, case by case, the incessant instances of justice coming from the social reality rooted in the latest scientific findings. Well then, facing global issues such as climate change, one cannot ignore, when discussing fundamental rights, their interpretation offered by the supra and international Courts, as well as the courts of any degree of each State.*

protection of future generations in the climate lawsuit **- 6.** Towards an inter-constitutional right-duty to a stable, safe climate?

1. Introductory notes

Climate change poses an unprecedented challenge to the law, notably to constitutional law. Indeed, the dangers made by anthropogenic global warming requires normative provisions that cannot be left to the fragmented sovereign will of the Nation States, even if the urgency of the matter for the future of humanity can only be addressed within the framework of the state-capitalist systems[1]. Therefore, constitutional law seems to be called today to perform an enormous task of limiting - and not reproducing and consecrating - those freedoms that have characterized its genesis and historical function.

These arguments led some scholar to seriously question the capacity of the law to deliver «an adequate response to the urgent problem of climate change» which «presents a challenge of unprecedented global complexity for the legal systems». Indeed, «there is a profound and counterproductive discrepancy between the complexity of the climate system as part of a living planet, and law's fundamentally fragmentary response, which remain locked (in the main) within path-dependent priorities, boundaries and disciplinary»[2].

Therefore, the discussion below aims to investigate how the inter-constitutional interpretative technique[3] may concur to build an earth legal system able to address climate change. When deciding on a dispute concerning the violation of fundamental rights threatened by global climate change, national courts can only accept the latest scientific findings, which inevitably flow into the legal argument in a boundless hermeneutic circle. In so doing, the courts are entitled to adapt national legislative provisions to an inter-constitutional legality in which the same principles of the material Constitutional Charters may effectively ensure the protection of the biosphere including the scientific evidence[4].

1* Il presente contributo è frutto della rivisitazione del testo della relazione tenuta nell'ambito del Convegno internazionale Leiden Law Conference 2022 - "*The Court as an Arena for Societal Change*" svoltosi nell'Università di Leiden nei giorni 8-9 luglio 2022.

** *Ph.D.* in Diritto costituzionale nell'Università di Bari.

In this regard, N. CHOMSKY - R. POLLIN - C.J. POLYCHRONIOU, C*limate Crisis and the Global Green New Deal: The Political Economy of Saving the Planet*, Verso Books, 2020, p. 190.

2 A. GREAR, *Towards 'Climate Justice? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy*, in 5 *J. Hum. Rights Environ.*, 2014, pp. 103-104.

3 To use the words of GUSMAI, *Giurisdizione, interpretazione e co-produzione normativa*, Cacucci, Bari, 2015, p. 71, the inter-constitutional interpretative technique is «that practical moment of law - perhaps the "highest" in modern constitutional systems - in which judges transform the traditional "validity" of legal provisions into the "effectiveness" of legal norms guaranteeing fundamental rights, overcoming the interpretative limitations linked to the national territory only. To satisfy the demands of justice coming from the social context, the interpreter strives to overcome the indispensable (but not all-encompassing) dimension of the formal validity of the law, when rather than guaranteeing the legitimate expression of fundamental rights, it stifles them in the authoritarian legality of a power always ready to hide itself (…) in the traditional legal formalism». The same Author develops the aforementioned theory in ID, *Il valore normativo dell'attività interpretative-applicativo del giudice nello Stato (inter)costituzionale di diritto*, in *Rivista AIC*, n. 3/2014, pp. 1 ss.

4 On the relevance of scientific data in the court decisions see S. PENASA, *Giudice "Ercole" o giudice "Sisifo"? Gli effetti del dato scientifico nell'esercizio della funzione giurisdizionale in casi scientificamente connotati*, in

In this way, in the transition from the (still official geological epoch of the) Holocene to the Anthropocene[5], States must adopt policies to contain anthropogenic climate change and biodiversity loss, thus providing legal significance «to the relationship between scientific truths in the climate system and human visions of coexistence on Earth»[6]. In other words, anthropogenic earth system disruptions caused by climate change binds courts and legislatures to build a science-based regulatory context to better respond to it. In fact, the unofficial Anthropocene Epoch «accounts for the relationships between the 'scientific' and the 'political' implications' of hearth system transformation caused by humans»[7].

Without claiming exhaustivity, this is a constitutional law paper with the aim of verifying that protecting the climate system requires considering the influential role of all formants[8], Acts of Parliament, courts judgments, constitutional revisions, and environmental activism as «lawyers' formants»[9]. Indeed, climate change causes or increases many inequalities (economic, social, demographic, and cultural) mainly suffered by people with limited access to decision-making processes or justice[10]. Thus, these people often reach out to courts arguing that according to national and international law, States and their (or private) corporations must correct its unambitious climate policies that produces the violation of their fundamental rights. In this way, the full recognition of the right to a stable climate can be better achieved through the lens of the inter-constitutional interpretative technique, thus revealing the openness of constitutional principles (such as those of equality or dignity) to gain further normative meaning in the application of rights and principles contained in material Constitutional Charters of other national and supranational systems[11]. In other

Forumcostituzionale.it, 2015.

5 For more detailed studies in this regard, see L.J. KOTZÉ, *Global Environmental Constitutionalism in the Anthropocene*, Hart Publishing, 2016; J.R. MAY - E. DALY, *Global Environmental Constitutionalism*, Cambridge University Press, Cambridge, 2014; D. AMIRANTE, *Costituzionalismo ambientale. Atlante giuridico per l'Antropocene*, il Mulino, Bologna, 2022; N. WALLENHORST - C. WULFF (eds.), *Handbook of the Anthropocene. Humans between Heritage and Future*, Springer, 2023.

6 To use the words of M. CARDUCCI, voce *Giustizia climatica*, in *Enciclopedia di Bioetica e Scienza Giuridica*, 2022, p. 1.

7 D. CHERNILO, *The Question of the Human in the Anthropocene Debate*, in *20 Eur. J. Soc. Theory 44*, 2017, p. 45.

8 With respect to the concept of legal 'formant', see R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in *Am. J. Comp. L.*, no. 1, 1991, pp. 1-34.

9 See S. BAGNI, *La costruzione di un nuovo "eco-sistema giuridico" attraverso i formanti giudiziale e forense*, in *DPCE online*, 2021, p. 1029.

10 As underlined by the *Join Statement on Human Rights and Climate Change* (2019), «*It is to be welcomed that national judiciary and human rights institutions are increasingly engaged in ensuring that States comply with their duties under existing human rights instruments to combat climate change*» (no. 7).

11 For instance, in the Belgian case *Klimaatzaak* the claimants state that Belgian constitutional rights should be read in the light of the Articles 2 and 8 ECHR, enlarging their constitutional meaning. More generally, the recognition of a right to a stable and safe climate is pursued through reference to regulatory sources, including extra-state ones, based on the most recent scientific acquisitions and oriented from an inter-temporal perspective (the reference to future generations is constant), to allow judges to overcome the constraints of legislative data alone and to develop solutions that can also be circulated in other states. For instance, as will be seen better in the text, in the Belgian case *Klimaatzaak* the claimants highlight the temporal and the extra-territorial dimension of climate change also to clarify the ecosystemic declination of the causal link and the obligations of the various countries to take maximum measures to reduce it. In this way, faced with global issues such as climate change, when fundamental rights are in question, it does not seem possible to ignore the product of the interpretation deriving from the dialogue between national and supranational courts, called to adapt the scientific data to the

words, principles such as equality, environmental protection and the dignity of every living being do not have a national identity. This is the great value of the method of intercostitutionality. Not surprisingly, the plaintiffs frequently use these foreign constitutional arguments as well as scientific findings to challenge current climate policies adopted by the State and to give new strength to local constitutional principles and rights, such as the right to a healthy living environment (including a livable climate). As a result, these interpretative convergences between constitutional realities may lead countries throughout the world to build up a new constitution drafting process to similarly adopt human rights related to environmental (and climate) governance[12]. In short, the inter-constitutional interpretative convergences precede the material integration between principles contained in countries constitutional charters.

2. Climate justice, between technique and democracy

In this scenario, even the traditional concept of constitutional democracy is under discussion. Indeed, «the "classical" categorizations of the European and North American democratic systems» are based on «anthropomorphic requirements of representativeness and freedom that define democracies exclusively human responsiveness»[13]. On the other hand, the protection of the current and future generations against anthropogenic climate change requires that «between democracy and nature, between negotiable or deliberative choices and coercion in the name of the "*pro-Natura*", the latter must prevail, not only to meet "non-balanceable" needs, but above all to pull the constitutional regulations in a different, non-negotiable direction»[14]. In other words, the legitimacy of law-making is not only situated in majority decisions within the political institution but rather in the latest scientific findings which allow life regeneration in the earth[15]. In fact, considering the scientific method's perpetual questioning, some scholar suggests that the technical-scientific findings supporting climate change eliminates any potential for human skepticism. The lack of full scientific certainty shall not be used as a reason to adopt unambitious climate policies or postponing them, but rather a call to action to fulfil our obligations to the environment and preserve our humanity on this planet[16].

In this regard, the latest scientific findings seem to become the measure of constitutional freedoms, notably the economic ones, within a world where scientific artifice will make it possible what was "natural" life. In fact, in all the climate cases so far, the fact of the anthropogenic climate change claimed by the plaintiffs based on scientific assessments of -

concrete implications of the regulatory reality.

12 In this regard, see J.C. GELLERS, *The Global Emergence of Constitutional Environmental Rights*, Routledge, 2018.

13 See A. GUSMAI, *Right to Food and " Tragedy " of the Commons*, in *Revista Jurídica Científica do Centro de Ciências Jurídicas da Universidade Regional de Blumenau. Vol. 20, n. 41. Blumenau, CCJ - FURB*, 2016, p. 13, according to whom «in the "name" of nature, the power cannot be fully democratic, because it would fall into the self-destructive «human stupidity» above denounced from biologists and ecologists».

14 *Ibidem.*

15 See Q. CAMERLENGO, *Natura e potere. Una rilettura dei processi di legittimazione politica,* Mimesis, Milano-Udine, 2020, pp. 95 ss.

16 See M. CARDUCCI, voce *Giustizia climatica*, p. 10.

among other - the IPCC is not disputed in the courtrooms. In so doing, taking action to protect healthy and livable climate requires to recognise the importance of human and non-human beings in the biosphere. Considering the *Nuevo Constitucionalismo* of Andean countries, some scholars have suggested a shift towards a new type of State known as the Caring State. This model entails the government taking responsibility for the welfare of every member of the community, as well as promoting a culture of mutual care and concern for individuals and the environment as the key factor of the biotic community[17].

This scenario imposes to re-think about the traditional legal boundaries of the role of the judiciary in constitutional democracy since courts judgments could amend or update climate policies away from the latest scientific findings. It appears necessary to put in the legal sphere the continuous scientific knowledge to avoid «The Sixth Extinction»[18]. It is not an easy-to-fix problem because of the very close link that envelops science («*ou l'enjeu du siècle*»[19]) with the economy and ideology of development, as well as the need to ensure the independence of scientific sources from party interest.

These issues are already evident in the United Nations Framework Convention on Climate Change (UNFCCC): Article 2 aims to prevent human-made interference with the climate system, while Articles 3 and 4 prioritize sustainable development establishing an open international economic system, even if the Article 3 unfolded the principle of the protection of the climate system and the precautionary principle. Recently, international sources have clarified the obligation of states to adjust to the scientifically proven parameters that are universally accepted: both the thirteenth UN Sustainable Development Goals («*Acting urgently to combat climate change and its impacts*») and the Dec. 1/CP21, which, among others, is formally drawn the normativity of the UNFCCC's Reports. Moreover, the Paris Agreement aims to address human-caused climate change, even though it may not explicitly prioritize the climate emergency over economic development needs (as outlined in Articles 4, 6, 8, and 14). Furthermore, the IPCC's Special Report on Global Warming 1.5°C in 2018 highlights the urgency of addressing the climate emergency as a top priority for all nations to work together on by 2030, in a future-oriented perspective[20]. The European Union has incorporated international sources through European Regulations No. 2018/842[21],

17 In this respect, see the reflections of S. BAGNI, *Dal Welfare State al Caring State?*, in ID., (eds.) *Dallo Stato del* bienestar *allo Stato del* buen vivir. *Innovazione e tradizione nel costituzionalismo latino-americano*, Bologna, 2013, pp. 19 ss.

18 See R.E. LEAKEY - R. LEWIN, *The Sixth Extinction: Patterns of Life and the Future of Humankind*, Doubleday, 1995.

19 See J. ELLUL, *La technique ou l'enjeu du siècle*, Colin, Paris, 1954.

20 The duty of interstate cooperation to prevent and mitigate the harmful effects of human-made pollution on the ecosystem dates to the UN Conference on the Human Environment (UNCHE) held in Stockholm in 1972. In fact, in the following Declaration was underscore the «*solemn responsibility*» of current generations to «*protect and improve the environment for present and future generations*» (Principle 1).

21 The Regulation (EU) 2018/842 establishes obligations for Member States «*with respect to their minimum contributions for the period from 2021 to 2030 to fulfilling the Union's target of reducing its greenhouse gas emissions by 30 % below 2005 levels in 2030*» (art. 1) in the sectors of «*energy, industrial processes and product use, agriculture and wasta ad determined pursuant to Regulation (EU) No. 525/2013*» (art. 2). The Regulation (EU) 2018/842 «*also lays down rules on determining annual emission allocations and for the evaluation of Member States' progress towards meeting their minimum contributions*» (art. 1).

2018/1999[22], 2020/852[23], and 2021/1119[24], which are directly applicable to Member States and include scientific and normative provisions[25]. In this respect, the European Parliament resolution of 15 January 2020 on the *European Green Deal* (2019/2956 (RSP)) provides «*that all people living in Europe should be granted the fundamental right to a safe, clean, healthy and sustainable environment and to a stable climate, without discrimination, and that this right must be delivered through ambitious policies and must be fully enforceable through the justice system at national and EU level*»[26].

However, the right to a healthy and liveable climate is not formally recognised in the Constitutions of the European countries but emerges from the interpretative convergences of the courts that we defined inter-constitutional interpretative techniques.

Therefore, to better understand the upcoming general discussions, we have selected certain relevant high-profile cases placed before constitutional or ordinary jurisdictions that either see climate change as the central issue raised in court or that have a notable outcome on governments' climate policies. The decision to discuss non-constitutional cases originates from the following issues. First, it deals with the fact that some legal system does not provide for a constitutional complaint or does not establish a constitutional jurisdiction[27]; second,

22 This Regulation establishes a mechanism to govern the implementation of strategies and measures intended to meet the objectives and targets of the Energy Union and the long-term commitments of the European Union towards reducing greenhouse gas emissions, in line with the Paris Agreement. For the initial ten-year period from 2021 to 2030, this includes the Union's energy and climate targets for 2030. The mechanism aims to promote cooperation among Member States, including regional cooperation where appropriate, to achieve the objectives and targets of the Energy Union. Additionally, it ensures that the Union and its Member States report in a timely, transparent, accurate, consistent, comparable, and comprehensive manner to the UNFCCC and Paris Agreement Secretariat.

23 «*Given the systemic nature of global environmental challenges*», this Regulation recognized that «*a systemic and forward-looking approach to environmental sustainability is needed that addresses growing negative trends, such as climate change, biodiversity loss, global overconsumption of resources, of food, ozone depletion, ocean acidification, deterioration of freshwater systems and changing earth systems, as well as the emergence of new threats, such as hazardous chemicals and their combined effects*». To achieve these ambitious goals, the Regulation (EU) 2020/852 establishes a framework to facilitate sustainable investments and amends Regulation (EU) 2019/2088, introducing *criteria* for environmentally sustainable economic activities and calling for transparency of environmentally sustainable investments and of financial products.

24 The Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'). In the awareness that «*A fixed long-term objective is crucial to contribute to economic and societal transformation, high-quality jobs, sustainable growth, and the achievement of the United Nations Sustainable Development Goals, as well as to reach in a just, socially balanced, fair and cost-effective manner the long-term temperature goal of the Paris Agreement*», the Regulation (EU) 2021/1119 commits the European Union to intensify its efforts «*to tackle climate change and to delivering on the implementation of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (…), guided by its principles and on the basis of the best available scientific knowledge, in the context of the long-term temperature goal of the Paris Agreement*».

25 In this respect, see Italian Civil Cassation, injunction no. 4568/21 and injunction no. 7343/21.

26 For more detailed studies on the European *Green Deal*, see J. VAN ZEBEN, *The European Green Deal: The future of a polycentric Europe?*, in *European Law Journal*, n. 26/2022, pp. 300 ss.

27 In this respect, D. MARKELL - J. B. RUHL, *An Empirical Survey of Climate Change Litigation in the United States*, in *Envtl. L. Rep.*, n. 40/2010, p. 10644, have provided a general definition of climate justice, understanding it as «any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts».

with the similar nature of plaintiffs (environmental movements, young legal associations, etc.) who stand up for the collective legal interests of current and future generations threatened by climate change; third, with the evocated responsibility of the State to do 'its part' to prevent dangerous climate changes; ultimately, with the systematic constitutional interpretation which in jurisdictions with centralised constitutional adjudication has expanded the reach of constitutional interpretation up to ordinary courts. As a result, many courts now develop constitutional law, not just those specifically designated for it. These courts communicate with each other, creating a shared constitutional material fed by the meanings that constitutional principles assume in the application of the Charter of Rights of other national and supranational systems[28].

Moreover, plaintiffs use the same arguments in different climate cases, in order to induce States to meet of their obligations. In doing so, «it is aimed at influencing public policy and at producing social change demanding climate justice to protect human rights, the adoption of regulations in conformity with international standards, the mitigation of greenhouse gases, adaptation to the impact of climate change, as well as compensation for climate-associated loss and damage»[29]. In this respect, in Europe, was significant the *Climate Litigation Network* offered by the Dutch *Urgenda*. Indeed, the Dutch Foundation achieved the first conviction of a State for civil liability since its unambitious policies to prevent the damage caused by anthropogenic climate change, which may lead to irreversible and serious consequences for humankind and the environment[30]. Thus, environmental activists use consistent and similar arguments in various climate cases to achieve a global outcome based on the latest scientific findings that bind States, which shows an evident constitutional meaning. In this way, within the limits of their powers[31], judges may amend current climate policies that disregard the latest scientific findings and may contrast greenhouse gas emissions caused by States and private corporations. Then the judiciary could hold the power to provide an effective response in matters that require an integrated, multilevel, and scientific approach. As we said, this response seems to be improved by the inter-constitutional interpretative technique through constitutional provisions codifying fundamental rights to a healthy environment gained in strength, notably for future generations.

3. Climate justice and its global spread

The rise of climate litigation worldwide carries with it several questions regarding the role of the judiciary to correct unambitious States' efforts to address the climate emergency and to

28 In doing so, constitutional, and ordinary Courts worldwide implemented a kind of jurisprudential cross-fertilization, evidencing the increased role of the judiciary in advancing the strategy to address global climate change and to protect citizens' fundamental rights threatened by it. This kind of jurisprudential cross-fertilization concurs to achieve the uniformity of interpretation of the national or international sources on climate stability aimed by the inter-constitutional interpretative technique.

29 S. BALDIN, *Towards the judicial recognition of the right to live in a stable climate system in the European legal space? Preliminary remarks*, in *DPCE online*, n. 2/2020, p. 1423.

30 See P. MADDALENA, *Ambiente e biosfera: la rovina del pianeta e quella del territorio*, in *Questa Rivista*, n. 3/2023.

31 On the issues related to the role of the judiciary in in advancing the strategy to address global climate change see M. MAGRI, *Il 2021 è stato l'anno della "giustizia climatica"?*, in *Questa Rivista*, n. 4/2021, pp. 12 ss.

tackle the violation of citizens' fundamental rights threatened by global climate change. In different countries, individuals and legal associations reach out to court's arguing that some national policies are incompatible with some of their fundamental rights, thus invocating the duties of the State to protect of them.

In this way, we discuss climate lawsuits in Europe, North and South America that have contributed to grew up the level of ambition of State's climate policies. Moving from the analysis of the cases below, constitutional, or ordinary courts often held there is a specific obligation on the State to adequate its climate policies to national, international, and scientific sources to address climate change. Importantly, in the decision of the German Constitutional Court in *Neubauer et al. versus Germany*, the Court ordered the legislature to correct its current climate policies, thus embracing «a *planetary perspective* in the context of the Anthropocene trope (…) when adjudicating matters related to global disruptors such as climate change that affect all earth system processes and everyone - humans and non-humans - everywhere, now and in future»[32]. By contrast, in other countries (such as in the U.S.A.), Courts frequently applies principles of proportionality and reasonableness in order to not interfere with the legislature policies.

Although often rooted in a human-centred perspective, climate lawsuits afford several elements that suggest identifying an inter-constitutional duty of liveable climate on the State and (trans-)national corporations. The inter-constitutional interpretative technique involves constant historicization of the national law by borrowing further normative meanings from external sources to enhance the existing constitutional order to protect people against future limitations of freedom. This approach is developed by judges with the aid of various scientific sources often invoked by plaintiffs to guide the interpretation of relevant fundamental rights, thus advancing a future-oriented constitutionalisation of a healthy and liveable climate.

3.1. In Europe: from the *Urgenda* case to the *Neubauer* case

The European climate lawsuits seem to have common features, such as the active role taken by the judiciary power even in the civil law system, despite the diversity of each legal system and tradition.

To begin with, the consistent element appears to be the international and European commitments that require countries to implement their current climate policies to reduce the levels of CO2 in the atmosphere and prevent surpassing the tipping points identified in the IPCC report V. Moreover, through reference to the IPCC's reports, the national climate policies are regularly updated on the most current scientific knowledge. So doing, the latest scientific findings become a condition of the legitimacy of the same law. In this way, in the Italian *Giudizio Universale* case, climate advocacy groups argue that scientific sources become an interposed parameter of the constitutionality[33] of the current climate policies of the State.

32 L.J. KOTZÉ, *Neubauer et al. versus Germany*: *Planetary Climate Litigation for the Anthropocene?*, in *German Law Journal*, n. 22/2021, p. 1425.

33 To use the words of C. CASONATO, *La scienza come parametro interposto di costituzionalità*, in *Rivista AIC*, n. 2/2016.

In addition, the case law that will be discussed seems to be united by the full awareness of the global dimension of climate change.

As it has been said at the beginning, the Dutch *Urgenda* provided a concrete *Climate Litigation Network* used by various environmental associations active in the prevention of climate change. This *Climate Litigation Network* has brought to speak of «lawyers formants» aimed to produce a global result through «pre-judicial dialogue»[34]. Thus, these «lawyers formants» concur to recognise an inter-constitutional right-duty to a stable climate "from below", starting from the dynamic assemblage of shared appeal schemes used by plaintiffs to contrast unambitious climate policies of the State. Once again, the duty precedes the rights, although, before the judges, plaintiffs usually rely more on the violation of the latter, rather than the former.

Against the similar claim of the plaintiffs, Courts provide quite different interpretative solutions.

For instance, in the *Urgenda* case the Court of Appeal agreed with *Urgenda* that the European Convention on Human Rights could be directly invoked in the case because the State has a positive obligation to protect the «right to life» (under Article 2 ECHR) and the «right to respect for private and family life» (Article 8 ECHR), thus condemning the Dutch State taking measures based on international climate science and international policy documents the Dutch State itself signed. It is widely accepted by these sources that the Earth will suffer irreversible damage once its temperature increases by an average of 2°C. To prevent this, developed countries must reduce their emissions by 25-40% compared to 1990 levels by 2020. The Court found that the State had acted unlawfully under tort law by reducing emissions by less than 25%. This decision also prioritizes the rights of future generations by holding the Dutch State accountable for its climate-related obligations.

By contrast, in the Belgian case *Klimaatzaak* the Francophone Court of Brussels stated that legal persons aiming for climate protection have sufficient interest necessary to get standing for legal action concerning the violation of climate and environmental law but refused to recognise the binding nature of the IPCC reports for the Belgian State. So doing, the Francophone Court of Brussels concluded that it does not have the power to bind the Legislature to the specific parameter established by international and scientific sources, thus reiterating a dogmatic concept of the tripartition of powers doctrine, in contrast with the aim of the plaintiffs, which is to obtain an efficacy climate regulation through litigation. However, on 30 November 2023, the Brussels Court of Appeal found that the climate action of the federal authorities and the regions of Brussels and Flanders violated Articles 2 and 8 of the ECHR and their duty of care. Partially reversing the first instance judgment, the Court of Appeal imposed binding minimum greenhouse gas emissions reduction targets to be achieved by 2030, thereby following in the footsteps of the Dutch *Urgenda* case.

Another relevant European climate lawsuit is the French case *Affaire du Siècle*. Four NGOs (*Notre Affaire à Tous, Greenpeace France, Oxfam France and Fondation pour la Nature et l'Homme*) brought an action before to the Administrative Court of Paris to claim the state's responsibility for «*l'illegalité de l'inaction climatique*» and «*le prejudice écologique cause*». In fact,

34 S. BAGNI, *La costruzione di un nuovo "eco-sistema giuridico"*, cit., pp.1053.

the French Civil Code expressly punish the «*préjudice ècologique*» (art. 1246), defined by art. 1247 c.c. as «*une atteinte non négligeable aux éléments ou aux fonctions des écosystémes ou aux bénéfices collectifs tirés par l'homme de l'environnement*». In this way, after recognising standing to the plaintiffs, the Court established the responsibility of the State for the «*préjudice ècologique*» caused the cutting of greenhouse emissions. In addition, it seems very relevant that French applicants referred to «*un consensus normative (voire d'une conscience juridique)*» to protect «*le droit de vivre dans un système climatique soustenable*». This argument provides proof of the aforementioned 'pre-judicial dialogue' preceding climate litigation.

The right to live in a healthy climate is also invoked in the Italian case *Giudizio Universale*, even if no substantive judgement has yet been issued. A coalition of environmental groups challenged in court the validity of the current climate policies issued by the Italian State, arguing that they violate scientific evidence fixed by UNFCCC's report. According to the plaintiffs, the unambitious national policies on climate change have damaged several of their fundamental rights, even if they do not claim compensation for climate-associated loss and damage (which is symbolic). Indeed, they aim to identify the binding nature of scientific sources on anthropogenic climate change fixed in international and European sources, such as UNFCCC. Furthermore, the complaint clarifies for the first time the object of a right to a stable climate, arguing that the State must protect the stability of the global climate system. Just like in the *Urgenda* case, although climate change is acknowledged as a global problem, this does not release the State from its duty to be responsible towards others, since the responsibilities of the Italian Republic are enshrined in precise domestic constitutional obligations (the renewed Article 9 and Articles 10, 11 and 117).

In the field of constitutional adjudication, youth climate activists brought a constitutional complaint (*Verfassungsbeschwerde*) directly to the Federal Constitutional Court of Germany. The Court ruled that part of the Federal Climate Act (*Klimaschutzgesetz*) was inadequate because the German Parliament did not regulate the post-2030 GHG reduction process effectively or stringently enough, shifting the burden of much more significant GHG reductions onto future generations, who will have to bear a much greater effort than that required until 2030 to achieve the climate neutrality goals, which the law sets at 2050.

As it can be inferred by the Court's ruling, even if «Art. 20a GG does not entail any subjective rights, (…), It is true that the protection mandate laid down in Art. 20a GG compasses climate action (…) » and «It is also a justiciable provision». Based on the scientific literature available, the Tribunal understands that the constitution mandates that government action must result in achieving climate neutrality. It requires political and legal intervention starting at the state level and extending globally.

By the judgements on climate change, the State cannot use the inaction of other states as an excuse for its ineffective response. The institutions of the Federal Republic of Germany have specific domestic constitutional obligations that they must fulfil. Foremost, the *BVerfG* clarifies that «The amount of time remaining is a key factor in determining how far freedom protected by fundamental rights will have to be restricted - or how far fundamental rights may be respected - when making the transition to a climate-neutral society and economy» (§ 121). It means that the relative mildness or severity of the restrictions on freedoms depends

on how much time remains to reduce greenhouse gases. Moreover, the Court clarifies that the State is obliged to protect plaintiffs' fundamental rights from any unjustified and independent delay in reducing greenhouse gases. When creating regulations to ensure specific rights, the legislature should consider the future and not only current conditions, because present actions will determine the circumstances in which future generations can enjoy the same liberties (*intertemporale Freiheitssicherung*[35]). Given the central position held by *BVerfG* in the Constitutional order, the Tribunal gave the federal legislature until Dec. 31, 2022, to make necessary changes to the *Klimaschutzgesetz*, as it contained unconstitutional provisions. A new constitutional complaint was brought in January 2022 to verify if the new emission reduction targets comply with IPCC's Report which has been rejected.

In short, the decision by the German Constitutional Court in *Neubauer et al. versus Germany* has brought Louis J. Kotzé to underline that «Neubauer offers an example of how courts could and should start following a planetary perspective that is grounded in the Anthropocene context when adjudicating matters related to global disruptors such as climate change that affect all earth system processes and everyone - humans and non-humans - everywhere, now and in future»[36]. Indeed, the Constitutional Tribunal «has managed to adjudicate the matter not purely from a traditional and localized domestic context as one would expect», but it «has innovatively managed to embrace a more holistic planetary view of climate science, climate change impacts, planetary justice, planetary stewardship, earth system vulnerability, and global climate law, within the context of a human-dominated geological epoch, to guide its reasoning and findings»[37].

3.2. In the U.S.A.: from *Juliana et al. v. Us.* to *Held v. State of Montana* case

The rise of climate litigation in the U.S. goes back to 2007, with the landmark case *Massachusetts v. EPA*, where the Supreme Court held that a federal agency (such as EPA) could not invoke policy preferences to refuse to regulate carbon dioxide and other greenhouse gases, thus adopting an unambitious environmental policy.

On August 8, 2015, an environmental association (Earth Guardians), a climatologist former director of the NASA Goddard Institute for Space Studies (Dr James Hansen) acting on behalf of future generations, a group of young people claimed the District Court of Oregon a «complaint for declaratory and injunction relief» against the United States Government (*Juliana et al. v. US.).* According to a scheme later adopted in the European climate lawsuits, these plaintiffs claimed to recognise State's duty to prevent environmental harm that have compromised their «rights to life, liberty, and property», disregarding the Fifth Amendment. In doing so, the American «constitutional complaint» showed the active role of environmental and youth groups, acting for future generations, and the relevance of various scientific sources to address climate change.

However, on appeal, the rigid American declination of the doctrine of the separation of power led the Court to seriously doubt its power to correct government policies[38]. In doing so, the inter-constitutional interpretative technique seems still far from being applied by

35 In this regard, see G. KIRCHHOF, *Intertemporale Freiheitssicherung*, Mohr Siebeck, 2022.
36 L.J. KOTZÉ, *Neubauer et al. versus Germany*, cit., p. 1425.
37 *Ibidem*.

American Courts. Indeed, the importance of economic rights poses a challenge in aligning State policies with scientific evidence and embracing bold interpretative solutions at a global level, such as those in Latin America.

Ultimately, on march 13, 2020, Rikki Held and fifteen other Montana young citizens field a complaint for declaratory and injunctive relief against the State of Montana, challenging through the use of the *Public Trust Doctrine*, the constitutionality of Defendants' long-standing implementation of a fossil fuel-based state energy system that causes climate change in violation of their constitutional rights guaranteed under Article II, Sections 3, 4, 15, and 17; Article IX, Sections 1 and 3 of the Montana Constitution.

3.3. In the Latin America: The *Generationes Futuras v. Minambiente* case

Not surprisingly, Andean climate change case law appears deeply divergent from the North American climate lawsuits. Indeed, the principles of *buen vivir* or *sumac kawsay* have led to the recognition of Nature as a '*sujeto de derechos*' or even a constituent subject (Ecuador Constituent Assembly of 2008, soon followed by Bolivia in 2009), according to the Andean cosmo-vision. The *buen vivir* principle is incorporated in the Andean constitutional law, requiring ambitious climate and environmental policies to limit economic irresponsible freedoms. Thus, Andean climate litigation offers fundamental constitutional arguments to recognise an inter-constitutional right-duty to live in a healthy climate even beyond the traditional rights-based approach.

In this paper, we discuss the *Generaciones Futuras v. Minambiente* case. In 2018, a group of young environmental activists brought an *Acciòn de Tutela* in Colombia against the federal government responsible for its unambitious climate policies causing significant damage to the Amazon rainforest. Therefore, the plaintiffs claimed to the Supreme Court of Justice of Colombia to impose on the Government the adoption of an intergenerational plan to achieve the ambitious goal of protecting Nature and its components (lithosphere, hydrosphere, atmosphere, and biosphere) with the widest possible participation of citizenship and scientific groups.

After recognising the Colombian Amazon rainforest as «*sujeto de derechos*», the Supreme Court of Colombia has stated in favour of the applicants, acknowledging that there is a link between climate change and the infringement of basic human rights, as the former leads to the latter. In addition, contrary to the Nord American case law, the Court ordered the government to carry out an «intergenerational pact for the life of the Colombian Amazon» with the widest and most concrete participation of the scientist and the national community, to curb deforestation in the Amazon rainforest and concur limiting global warming[39].

The Supreme Court emphasized and strengthened the State's duty to protect the environment system and its components, particularly the Amazon rainforest, thus removing

38 The content of the judgment is very different from the findings of European climate caselaw concerning the «recurrent objection to the justiciability of the application». In this perspective, see S. BAGNI, *La costruzione di un nuovo "eco-sistema giuridico"*, cit., p. 1058.

39 Indeed, despite Colombia's international commitments to reduce the destruction of forests, the most recent statistics show that deforestation has increased by 44% between 2015 and 2016.

Nature from the compensatory logic of balancing. In doing so, the judgment prioritized the preservation of the environment as a whole, rather than just human interests.

The inter-constitutional interpretative technique cannot ignore this constitutional approach that could add further normative meanings to the European and North American strategies to address climate change. In other words, despite the resistance posed by Andean courts to open their constitutional framework to principles from others constitutional realities, the Andean cosmo-vision could enforce those «planetary perspective» that nourishes «planetary climate litigation», to use the words of Louis Kotzé. In short, the «planetary climate litigation» appears surrounded by interpretative convergences of national and supranational courts that concur to build an ambitious regulatory context to address global climate change.

4. Climate justice and the inter-constitutional interpretative technique

The aforementioned lawsuits suggest that courts will play an important role in contrasting unambitious States' efforts to address the climate emergency[40]. Indeed, even the decision of the judges who showed a more deferential approach to legislature has relevant political effects, and they mostly involve preserving the existing economic model by which they are influenced.

In terms of general theory of law, the expansion of judicial activity has led to discuss of the advent of a neo-constitutionalism, a vision of constitutionalism adapted to the characteristics of today's «open constitutional state». Although the defining boundaries are blurred, neo-constitutionalism aims to introduce into caselaw a «cultural constitutional law»[41], able to outline innovative interpretative convergences between different constitutional realities. In this way, «constitutional jurisprudence is (...) characterized by a case-law approach» that «certainly relativizes them in the application, but generalizes in inspiration», allowing «an articulated and fruitful relation to the jurisprudence of others who deal with similar cases, contributing to the formation» of a «common general cultural context»[42]. As with all "trans-epochal" phenomena, climate litigation also questions the belonging of the value "justice", disputed between *lex* (i.e. the product of a majority) and *ius*, which arise in the interpretation of several interconnected documents of constitutional significance[43]. In this perspective, the intellective activity of the judge, whether ordinary or constitutional, can only consist of the constant historicization of the law, by which the judge borrows from the outside (from rights and principles contained in supranational documents) further normative meanings to be added to the pre-existing constitutional order. Such activity is not parallel, but crossed with the action of the legislature since it is the same

40 On the role of the judiciary in climate litigations, cfr. G. VIVOLI, *L'insostenibile leggerezza degli obiettivi climatici: come gli impegni assunti dagli Stati vengono presi sul serio dai giudici*, in *Questa Rivista*, n. 1/2022, pp. 1 ss.

41 This is a clear reference to the famous book of P. HÄBERLE, *Verfassungslehre als Kulturwissenschaft*, Duncker & Humblot, 1998.

42 G. ZAGREBELSKY, *Diritto allo specchio*, Einaudi, Torino, 2018, p. 104.

43 G. ZAGREBELSKY, *op. ult. cit.*, pp. 132 ss.

indeterminate structure of principles and (inter)constitutional rights that has also extended to judges the responsibility for the management of constitutional democracies[44].

Hence, from an inter-constitutional perspective, are relevant not only each single Constitution but all those documents that aim to extend the protection of fundamental rights under threat due to the excessive concentration of CO2 in the atmosphere. These charters, as the Constitutions with which they form an interpretative network, are nourished and regenerated using «other equally constitutional documents *quoad substantiam* (if not *quoad formam*)», generating an «"inter-constitutional" order» in which «every Constitution (in the material sense)» stands «as an "inter-constitution"», for the very fact of enclosing in itself the fundamental principle of openness to other Charters' in a perspective of better protection of fundamental rights[45]. However, according to the constant historicization in which the interpretative activity consists, inter-constitutionality seems to physiologically live within the interpretative activity of judges, rather than in the concrete integration between material constitutional charters[46]. This appears even more convincing when addressing the problem of climate justice, because of the extreme limitation of formal references to the climate in the State Constitutions[47], as well as the resistance posed by Constitutions, with the only significant exception of South Africa, to explicitly adopt inter-constitutional perspectives[48].

Therefore, common, and constitutional judges appear to be the sole actors able to satisfy, case by case, the incessant instances of justice coming from the social reality[49]. These instances, disregarded by the representative institutions, result in the demand for new fundamental rights, rooted even more in the results of scientific research. Well then, facing global issues such as climate change, one cannot ignore, when discussing fundamental rights, their interpretation offered by the supra and international Courts, as well as the courts of any degree of each State. In fact, as we said with the aforementioned climate lawsuit, claimed by people who suffered the irreversible damages made by anthropogenic climate change, judges may transform the traditional "validity" of laws into the "effectiveness" of legal norms guaranteeing fundamental rights, overcoming the interpretative limitations linked to the national territory only[50].

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44 In this respect, see A. GUSMAI, *Giurisdizione, interpretazione*, cit., pp. 52 ss.

45 A. RUGGERI, *Salvaguardia dei diritti fondamentali ed equilibri istituzionali in un ordinamento "intercostituzionale"*, in *Rivista AIC*, n. 4/2013, pp. 10-11.

46 With respect to the dynamic approach of the inter-constitutional interpretative technique, see A. GUSMAI, *Giurisdizione, interpretazione*, cit., pp. 52 ss.

47 Indeed, only ten Constitutional Charters contain an explicit reference to the climate emergency, all of which belong to countries certainly not at the top for climate-altering emissions: Algeria, Ivory Coast, Cuba, Ecuador, Dominican Republic, Thailand, Tunisia, Venezuela, Vietnam, and Zambia.

48 Article 39 (of the *Bill of Rights*) states that «*When interpreting the Bill of Rights, a court, tribunal or forum: a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom; b) must consider international law; c) may consider foreign law*».

49 On these issues, see P. BARD, *In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law*, in *European Law Journal*, n. 27/2022, pp. 185 ss.

50 On the growing environmental constitutionalism see P. VIOLA, *From the Principles of International Environmental Law to Environmental Constitutionalism: Competitive or Cooperative Influences?*, in D. AMIRANTE - S. BAGNI (eds), *Environmental Constitutionalism in the Anthropocene*, Routledge, London-New York, 2022.

The inter-constitutional interpretation technique would seem to be more easily achievable in ordinary courts, rather than in the field of constitutional jurisdiction. Indeed, constitutional courts have frequently been highly jealous of their role as guardians of the State's constitutional legality, not easily accepting to ground their reasoning on principles and arguments drawn from judgments of other national and supranational courts involved in the protection of fundamental rights.

In this regard, apart from the aforementioned U.S. Supreme Court caselaw, we shall also mention the Italian constitutional caselaw, since the Court, even recognising the existence of Charters of Rights that «are integrated, complementing each other in the interpretation»[51], has ended to deny the inter-constitutional interpretative technique[52]. In these cases, the old statist view still seems difficult to dismiss, thus hindering the emergence of transnational environmental law.

The *ius*, known as the material dimension of constitutional principles, thus tends to universalize itself, that is, to generate a sort of «common constitutional heritage» among States, in which seek instruments and arguments necessary for the protection of fundamental rights[53]. Thereby, national, supra, and international legislatures (that produce provisions) and Courts (that find rules), simultaneously, are now involved in normative production, within an inter-constitutional system. In the field of climate and environmental politics, legislature, however, are often interested in adopting policies to slow down, in the name of unconfessed economic interests, the advent of a global *supra*-constitutionality, focused on the protection of fundamental rights and the implementation of inter-constitutional principles. A *supra*-constitutionality that, as has been recently envisaged, should lead to the establishment of an international Constitutional Court, called to interpret the constitutional principles common to all the States gathered in a kind of *Federation of the Earth* (art. 88 of the *Draft Constitution of the Earth*)[54].

If the establishment of an international Constitutional Court seems to be a far-reaching objective, the process of integration, already in progress, between the Charters and the Courts is transforming the traditional principle of legality into a more complex and real juridical principle (*i.e.* a principle of «*giuridicità*» as the former Italian constitutional court president Paolo Grossi advised)[55]. Such principle appears more adherent to the plurality of public and social powers that make dynamic the inter-constitutional order for the protection of fundamental rights under threat due to climate change. Legislatures, judges, and public administrations, as constitutional bodies, concur as active protagonists of the constitutional development. Across their conflict, legislatures and courts control each other, to preserve the delicate balance of the (inter-)constitutional system of rights. In doing so, each one performs a substantial political function, aimed at the better protection of fundamental rights. Judges, indeed, interpret not only formal legislative provisions but also judicial scenarios, for their

51 Italian Constitutional Court, judgement no. 388 of 1999.
52 On the inter-legality, see J. KLABBERS - G. PALOMBELLA (eds.), *The Challenge of Inter-legality*, Cambridge University Press, 2019.
53 See G. ZAGREBELSKY - V. MARCENÒ, *Giustizia costituzionale*, il Mulino, Bologna, 2018, pp. 545-569.
54 L. FERRAJOLI, *Per una Costituzione della Terra. L'umanità al bivio*, Feltrinelli, Milano, 2022, pp. 190-191.
55 In this regard, see P. GROSSI, *Ritorno al diritto*, Laterza, Roma-Bari, 2015, pp. 85-87.

part interpreted by the scientific community. Even from a legal point of view, the irreversibility of climate change is nowadays tangible evidence, undeniable in the light of scientific sources. As such, it exposes fundamental rights to a certain injury, in terms of "if" and "when", against which the judge has the duty, in face of the legislature's *inertia*, of providing adequate protection and, in this way, contributing to the formation of a «new "eco-legal system"» based on «principles and interpretative criteria that aspire to be ubiquitous, valid for every legal order, both domestic and international, and that is based on an eco-centric vision of the relationship between man and Nature»[56].

Nevertheless, there seem to be a need for clarification. The inter-constitutional interpretative technique may be more convenient for the purpose of adopting common and inter-state policies, aimed at stabilizing the climate. But a total transposition of the creative function of the law in the hands of judges alone can only be avoided if the State representative institutions were active to deepen the dialogue with the scientific community, from the initial stage of the *iter legis*. In other words, a dialogue is needed, beginning from the work of the parliamentary committees, between the scientific community and the legislative bodies. This approach appears appropriate to identify, in a transparent manner, the optimal scientific solution (as supported by most scientists) on which legislative choices that affect climate and environmental balance must be based. In this way, it would be possible to reach a political-scientific provisions (the product of legislative activity based on scientific evidence) to be introduced later in the hermeneutic circle nourished by the inter-constitutional interpretation of the Courts. As we do so, scientific assessments of - among other - the IPCC would be elevated to a sort of presupposed *Grundnorm*, able to legitimize the normativity of a legal order[57].

On the juridical-constitutional level, then, the traditional static sources (the legislator produces provisions, and the judge applies them to the concrete case, limiting to this its activity) will be concretized into more realistic dynamic sources, which see legislators and judges co-produce law[58]. This appears to be more true in the case of climate justice, wherein the same scientific legitimation re-determines the limits of the validity of the normative provisions.

Quite the opposite, without such an approach, it would lay only on the judge, as the actor physiologically responsible for adopting technical solutions based on the latest scientific findings who cannot invoke *non-liquet*, to (re-)establish the necessary dialogue with the scientific community. Thereby, in the absence of a political-scientific provisions adopted by the national legislatures, the inter-constitutional interpretation of the Courts will be hardly able to achieve the uniformity of interpretation to which it inevitably aspires. We cannot go further in deepening these complex issues in such an amount of space. Yet, to disregard these operating dynamics of interactions and relations between state powers on the

56 S. BAGNI, *La costruzione di un nuovo "eco-sistema giuridico"*, cit., p. 1029.

57 In this way, R.E. KIM - K. BOSSELMANN, *International environmental law in the Anthropocene: Towards a purposive system of multilateral environmental agreements*, in *Trans. Env. Law*, n. 2/2013, pp. 285 ss., recognise in the protection of the integrity of Earth's life-support system «a potential grundnorm or goal of international environmental law».

58 In this respect, see A. GUSMAI, *Il diritto all'autodeterminazione: una libertà "perimetrata" dal sapere scientifico?*, in *Dirittifondamentali.it*, n. 1/2019, pp. 10-11.

production of law in the concrete development of the inter-constitutional reality would relegate any discussion on climate justice to the mere abstraction of ethical-moral possibilities.

5. The Courts and the protection of future generations in climate lawsuit

The inter-constitutional right to a healthy and liveable climate aim to ensure the integrity of the ecosystem worldwide. In a world ruled by markets that are more and more independent from the sovereignty of the single Nations, a global regulation is unavoidable to such right, even if, as we said at the beginning, the role of State legislatures and judges remains central to protect it.

In both cases, in the Anthropocene epoch, the law cannot ignore the prospect of renewing life on Earth. In this way, the inter-constitutional interpretative technique offers a future-oriented interpretative solution to protect the natural environment and its components: the duty of the States to adopt ambitious climate policies including a reference to the needs of future generations. In fact, according to the thesis supported by Ost[59], to grasp the essence of the Anthropocene epoch in the constitutional sphere is necessary to re-interpret the social contract upon which is based modern constitutionalism through the principles of responsibility and interdependence between the individual, society, and nature. Therefore, the concepts of duties, responsibilities, interdependence, (inter-generational) solidarity[60], and scientific findings are integrated to the legal discourse. The interpretation of these concepts given by Courts helps to ensure the future humans, potentially threatened by unambitious climate and environmental policies. In short, climate justice is inevitably a kind of intergenerational justice[61].

In other words, climate change seems to put in constitutional law «an idea of supremacy or (…) of a time hierarchy», in which the «constitutional *ius* prevails over the ordinary *lex* since the former is the right of stability prevails over the temporary power expressed by law. (...) The law is the right of change, but change, in the constitutional state, must take place in continuity»[62]. The inter-constitutional right to live in a healthy climate is also inevitably a future-oriented right which requires strictly defined boundaries to the economic freedom of States and corporations in their activities.

However, in the field of inter-constitutional law, it seems incorrect to distinguish «present generations» and «future generations», as if «humanity is renewed in time by cohesive crowds of people that follow one another with discontinuity: crowds of people that are admitted on the scene of history, each in its compactness, to take the place of the current generation»[63]. In other words, at the (inter-)constitutional level, it appears very difficult to

59 See F. OST, *Le droit constitutionnel de l'environnement: un changement de paradigme?*, in M.A. COHENDET (eds.), *Droit constitutionnel de l'environnement*, Mare&Martin, Paris, 2021.

60 Whit respect to the principle of solidarity, see F. PIZZOLATO, *Il principio costituzionale di fraternità. Itinerario di ricerca a partire dalla Costituzione italiana*, Edizioni Città Nuova, 2012; V. TONDI DELLA MURA, *La solidarietà fra etica ed estetica. Tracce per una ricerca*, *www.associazioneitalianadeicostituzionalisti.it*, 2010.

61 See D. PORENA, *Giustizia climatica e responsabilità intergenerazionale*, in *Rivista AIC*, n. 3/2023, pp. 186 ss.

62 G. ZAGREBELSKY, *Il giudice delle leggi artefice del diritto*, ES, Napoli, 2007, pp. 49-50.

63 G. ZAGREBELSKY, *Senza adulti*, Einaudi, Torino, 2016, p. 55.

differentiate between human 'present' or 'future' beings. Doing so would reintroduce the idea of balancing that could lead to the unrestricted pursuit of modern economic freedoms.

Anyway, at the international level, future generations emerge in the most important environmental political documents of the 20th century. For instance, the Art. 3 UNFCCC stress «*the Parties*» to «*protect the climate system for the benefit of the present and future generations of humankind*». Likewise, the needs of future generations are enshrined in the Aarhus Conventions (Art. 1) as well as in the UNESCO Declaration on the Responsibility of the Present Generation Towards Future Generation (1997) and in the Preamble of the Charter of Fundamental Rights of the European Union, underscoring the «*responsibilities and duties with regard to other persons, to the human community and to future generations*». Moreover, according to the Rio Declaration (1992), «*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*». The protection of future generations is also echoed by the Paris Agreement calling for «*intergenerational equity*».

At the constitutional level, an increasing number of Constitutional Charters are emphasizing future generations[64]. For instance, re-founding the Republican Pact (also) on environment[65], the renewed Article 9 of the Italian Constitution[66] assign to the Republic the responsibility of safeguarding the environment while also considering the interests of future generations. As it has been said, the responsibility towards future generations mentioned in art. 20a GG led the *BVerfG* to adopt the new concept of intertemporal protection of freedoms (*intertemporale Freiheitssicherung*) to pursue very different interests. In this way, the inter-constitutional interpretative technique strengthens future generation interests' protection not only among judicial (and "pre-judicial") dialogue but also with the inevitable reference to scientific knowledge. Indeed, future generation interests' or (less frequently) rights enters the (inter)constitutional approach not only through representative institutions and jurisprudence[67]. It is the technical-scientific method to identify new normative meanings - scientifically founded - to be added to the pre-existing (inter-)constitutional legality. In doing so, the latest scientific findings became a way to reduce further Parliament's opportunities to implement economic system strongly tied to the coal industry and oil exports[68].

In short, the inter-constitutional interpretative technique incorporates a future-oriented perspective «in the natural terms of irreversibility, as the thermodynamic time that is not by

64 See R. BIFULCO, *Diritto e generazioni future*, FrancoAngeli, Milano, 2008; A. D'ALOIA, *Generazioni future (diritto costituzionale)*, in *Enc. Dir.*, Annali, IX, 2016.

65 To use the words of A. MORRONE, *Fondata sull'ambiente*, *Editoriale*, in *Istituzioni del federalismo*, n. 4/2022.

66 See R. BIFULCO, *Primissime riflessioni intorno alla l. cost. 1/2022 in materia di tutela dell'ambiente*, in *federalismi.it - paper*, 6 aprile 2022; S. GRASSI, *La cultura dell'ambiente nell'evoluzione costituzionale*, in *Rivista AIC*, n. 3/2023, pp. 216 ss.; G.M. FLICK, *L'articolo 9 della Costituzione oggi: dalla convivenza alla sopravvivenza*, in *federalismi.it - paper*, 12 luglio 2023.

67 In this way, very significant seems to be the Norwegian case *Arctic Oil*. Indeed, the claim of *Greenpeace Nordig*, *Natur og Ungdom and Bestefolerenes Klimaaksjon* aims to give future generations political power by using their rights to challenge government decisions. It helps to address issues with the legitimacy and effectiveness of democratic decision-making on climate change in constitutional democracies where the voice of future generations is often overlooked.

68 For more detailed studies about the relationship between science and democracy, see S. JASANOFF, *Designs on Nature: Science and Democracy in Europe and the United States*, Princeton University Press, 2005.

the equivalent homogeneity of the classical intergenerational justice»[69]. Therefore, the future-oriented principle of prevention extends the field of constitutional law as far as scientific predictions allow it[70]. In this way, States must adopt climate policies incorporating intertemporal and global issues, overcoming the traditional national sphere of modern constitutionalism.

As we have said just above, climate justice is faced with the constant difficulty of representing future generations as subjects of rights[71]. In fact, a debate has emerged on the question of whether it is possible to represent future generations in the law and how to advocate for future generations in the courtroom. So, it is the courts that are forced to judge upon the legitimacy of the representation of future generations by the environmental claimants', who «use relevant legal sources to substantiate that future generations are to be considered in the context of climate change»[72]. Just as scholars have long reported, in the European constitutional law «"Rights of future generations" is an inappropriate term that we use to hide the truth: future generations, precisely because they are not living now, have no right to claim against previous generations. When 'is broken the unity of time' between subjective right and its present owner, the category of subjective right becomes unusable and, in its place, to help is that of duty»[73].

It is not surprising therefore that, except for Latin America[74], modern constitutionalism does not recognise future generations as rights holders, but their interests are laid down in law, particularly constitutional law. Otherwise, as Hans Jonas taught us, the current generation holds a duty towards the unborn humans[75].

In this future-oriented scenario, inter-state climate policies rooted in the latest scientific findings become an «internal world policy»[76] in which the economic, scientific, and technological progress constantly produces new instances of advocacy claims by citizens that

69 M. CARDUCCI, voce *Giustizia climatica*, cit., p. 8.

70 Moreover, the precautionary principle states that a lack of certainty regarding potential risks should not lead to postponing precautionary measures. As is well known, in 1992, the Maastricht Treaty formally introduced the precautionary principle within the EC Treaty as a principle of environmental law and policy. Nowadays, Article 191 TFUE states that Union policy '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'. On these issues, see *amplius* A.M. NICO, *La tutela dell'ambiente nella Convenzione Europea dei Diritti dell'Uomo*, in F. GABRIELE - A.M. NICO (eds.), *La tutela multilivello dell'ambiente*, Cacucci, Bari, 2005.

71 On the issues related to the representation of future generation in law, see E. PARTRIDGE (eds), *Responsibilities to Future generations: Environmental Ethics*, Prometheus Books, 1981; A. GOSSERIES, *On Future Generations' Future Rights*, *16 Journal of Political Philosophy*, 2008, pp. 446 ss.

72 See L.E. BURGERS, *Justicia, the People's Power and Mother Earth. Democratic legitimacy of judicial law-making in European private law cases on climate change*, (University of Amsterdam, 2020), available at https://dare.uva.nl/search?identifier=0e6437b7-399d-483a-9fc1-b18ca926fdb5, p. 205.

73 G. ZAGREBELSKY, *Diritto allo specchio*, cit., p. 109.

74 Indeed, in Andean constitutionalism, the subjectivity of Nature is extended with all its components. However, in North American constitutionalism, the 'Posterity clause' is part of the Preamble of the Constitution and future generations are recognised as holders of rights, but to guarantee them the exercise of rights to life, liberty, and property.

75 H. JONAS, *Il principio responsabilità. Un'etica per la civiltà tecnologica*, Einaudi, Torino, 1979, p. 52.

76 To use the words of C.F. von Weizsäcker repeat by J. HABERMAS, *L'inclusione dell'altro. Studi di teoria politica*, Feltrinelli, Milano, 2013, p. 139.

incessantly question formal constitutional law. In short, there is an increasing constitutional awareness about future generations that inter-constitutional interpretative technique may disseminate among national Courts to bind the economic policies of the States and private corporations.

6. Towards an inter-constitutional right-duty to a stable and safe climate?

All these arguments led a scholar to seriously invoke a global integral constitutionalism in which the environmental protection is transformed in a more general principle of *Biophilia*[77]. In this scenario, the preservation of the natural environment becomes the condition for the better protection of human rights under threat due to climate change[78], notably the right to life, health, adequate food, water, housing, and a liveable climate. As we said at the beginning, the Courts give a meaningful contribution to protecting these rights by providing equal access to justice; taking and forcing the executive, legislature, and private sector to take climate change seriously; assisting the progressive and principled development of climate change law and policy; and making reasoned and scientific-based decisions[79]. In other words, national Courts implement a shared legal approach of clear constitutional significance regarding the protection of living and future generations, building up a cultural inter-constitutional law to protect the environment and climate system as presupposed condition of life on Earth[80].

However, it is a challenge to recognise the full right to a liveable climate, as stated by the plaintiffs, because it is not clearly defined in legal sources or court judgments. In this way, we preferred to speak of a right-duty to a stable and safe climate: a right invoked by the plaintiffs, whom legally defending themselves against violations of their fundamental rights endangered by climate change, they affirm the existence of a right to a healthy climate that they ask judges to recognise; a duty on the States to ensure the conditions of re-generation of life (not only human) on Earth, according to the international and scientific sources. For these reasons we defined it as an inter-constitutional right-duty due to its global and inter-temporal impact rooted in a universally recognised scientific knowledge[81].

Such an interpretative scenario seems to be fed by the recent modification of Article 9 of the Italian Constitution in which, although not formally sanctioned, climate protection appeared incorporated in the protection of ecosystems as a precondition for the protection of the environment in all its components. In doing so, art. 9 of the Italian Constitution does not leave the implementation of the duty to protect the environment and the climate to the

77 See D. AMIRANTE, *Costituzionalismo ambientale*, p. 255.

78 For more detailed studies about the relationship between environment and climate change, see R. BIFULCO, *Ambiente e cambiamento climatico nella Costituzione italiana*, in *Rivista AIC*, n. 3/2023, pp. 132 ss.

79 See B.J. PRESTON, *The Contribution of the Courts in Tackling Climate Change*, in *Journal of Environmental Law*, 28, 2016, pp. 11-17.

80 In this way, with specific regard to the environmental law produced by both Courts and Legislature, see D.R. BOYD, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and Environment*, University of British Columbia Press, 2012.

81 In this regard, L. FERRAJOLI, *Costituzionalismo oltre lo Stato*, Mucchi Editore, Modena, 2017, pp. 58 ss., has recently invoked the implementation of a global public sphere introducing transnational judiciary institutions to protect the human life on Earth.

discretion of the State but thus intends to align Italian legislation with those supranational ones that fix the duties of combating climate change on the States[82]. These duties to adopt ambitious climate policies are intertwined with the extraterritorial scope of fundamental rights protected by art. 2 Cost. In doing so, Article 9 Cost. must be read in close correlation with Articles 2, 10, 11 and 117, c. 1 Cost. Understood in this way, it allows the introduction into the legal system of climate obligations developed at the supranational level while fueling the dynamic and holistic approach of inter-constitutional interpretation. Therefore, if the legislator should not implement the new Article 9 Cost. and the supranational provisions, the ordinary and constitutional Court will be able to realize the new constitutional principle of the protection of the environment which presupposes the protection of a stable and safe climate through the interinstitutional hermeneutics.

At this point, after providing the outlines of the inter-constitutional interpretative technique relating to climate justice, a question arises: how compatible is with constitutional democracy a global legal system that seems to govern liberties by scientific evidence? The answer is not easy, but we will try here to illustrate some arguments.

Let us focus again on the right-duty to a liveable climate, which is undoubtedly a material constitutional right. As we said, the inter-constitutional interpretative technique may be more convenient for the purpose of adopting common and inter-state policies, aimed at stabilizing the climate. In this way, we stress that a dialogue is needed, beginning from the work of the parliamentary committees, between scientists and the legislative bodies[83]. In fact, this approach it seems appropriate to identify, in a transparent manner, the optimal scientific solution (as supported by most scientists) on which legislative choices that affect climate and environmental balance must be based[84]. In doing so, it would be possible to reach political-scientific provisions (the product of legislative activity based on the latest scientific findings) to be introduced later in the hermeneutic circle nourished by the inter-constitutional interpretation of the Courts. By contrast, a tacit scientific authoritarianism of the State would arise, each intended to choose their own scientists to justify unambitious climate policies, so preventing the consolidation of the uniformity of inter-constitutional convergences.

Ultimately, in the Anthropocene, incorporating scientific evidence into democratic decision-making without draining democracy is a challenging task for constitutionalism. The inter-constitutional interpretative technique appears to be the only way to achieve it.

82 In this respect, see R. BIFULCO, *Ambiente e cambiamento climatico*, cit., pp. 139-140.

83 At international level, a new law-making procedure that include expert opinion is invoked by D.-T. AVGERINOPOULOU, *Science-Based Lawmaking. How to Effectively Integrate Science in International Environmental Law*, Springer, 2020.

84 For instance, at European level, on 10 July 2020, Parliament adopted a «*resolution outlining its priorities as regards the upcoming chemicals strategy for sustainability*». The strategy is based on robust and up-to-date scientific evidence, and it should be used to develop coherence and synergies between chemicals legislation, occupational safety and health, and related EU legislation, such as legislation on water, soil and air, legislation on sources of pollution. In this regard, also relevant is the Habitats Directive (1992): for instance, Article 17 clarifies that several scientific parameters are used to assess the conservation status of species and habitat types protected under the Directive. Moreover, sites are selected on scientific grounds using the science-based criteria laid down in the Directive (Annex III).