

SUSTAINABILITY AND CONSTITUTIONS: CONSTITUTIONAL LAW AND THE DILEMMA OF THE FUTURE

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Sustainability, constitutional law, environment, future generations, climate change

ABSTRACT

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

I. A NEW “CONSTITUTIONAL KEY CONCEPT”

A search of the text of the constitutions of the 193 Member States of the United Nations shows that 67 of them use the noun “sustainability” or, more

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frequently, the adjective “sustainable”¹. All these references are found in constitutions adopted or amended after 1987, when the United Nations Brundtland Commission’s “Our Common Future” report defined “sustainable development” as “development that meets the needs of the present without compromising the needs of future generations”.

These data can be considered sufficient to affirm that sustainability² is now a new “constitutional key concept” which, like sovereignty, democracy, the rule of law, equality, or freedom, demands attention by constitutional scholars: it too needs to be interpreted, balanced, applied.

But what is meant by sustainability?

The aforementioned Brundtland Report contains two central aspects:

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

The latter consideration does not mean that sustainability, either in common parlance or in legal (including constitutional) parlance, is limited to environmental issues. The term “sustainable” is undoubtedly in fashion today: it can be found in expressions as sustainable finance, sustainable tourism, sustainable architecture, sustainable agriculture, etc.

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

Sustainability therefore contains in itself an intergenerational relationship, as many international documents, beginning from the Brundtland Report, have repeatedly emphasized³. It is no coincidence that the French term *durabilité* is particularly effective, because it conveys the idea of duration more clearly than the English *sustainable*⁴.

¹ For more details on the research methodology, see Tania Groppi, ‘Sostenibilità e costituzioni. Lo Stato costituzionale alla prova del futuro’ (2016) 1 Diritto pubblico comparato ed Europeo 43. The search for the text of the constitutions was updated in December 2022.

² On the origin of this concept, see Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Routledge 2008)

³ Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press 2012) 210

⁴ See Alexandre Touzet, ‘Droit et développement durable’ (2008) 2 Revue de droit public et de la science politique 456

Its appearance in contemporary constitutional law is related to the phenomenon of the “internationalization” of constitutions⁵. The concept of sustainability, as well as that of “future generations”⁶, migrated from international law towards constitutional law, taking advantage of the permeability of contemporary constitutions to external influences. Actually, international law, in order to be effective, needs reception at the domestic level: and it happens that constitutions are the most suitable tools for this purpose.

In this article, I will advance some considerations on the relationship between “future and constitution”, already well developed by the doctrine of constitutional law (Section II); the positive regulation of sustainability in written constitutions (Section III); the challenges this concept raises to the constitutional law of our time (Section IV); the need of a more careful institutional design, focused on procedural sustainability clauses (Section V).

II. FUTURE AND CONSTITUTION: AN OLD RELATIONSHIP

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

Without addressing the complex question of the “rights” of future generations⁷, it is sufficient to point out that contemporary, rigid, constitutions are turned, by their nature, towards the future, much more than other types of legal norms. Therefore, they appear as particularly favorable places to try to ensure that present generations are not unaware of intergenerational solidarity when making their decisions⁸.

Rigidity, first of all, already contains in itself an idea of duration, a time frame that goes beyond that of the normal political decision-making, where the majorities formed by elections decide⁹. The purpose of rigid constitutions is to

⁵ Wen-Chen Chang and Jiunn Rong Yeh, ‘Internationalization of Constitutional Law’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1165

⁶ Raffaele Bifulco, *Diritto e generazioni future: Problemi giuridici della responsabilità intergenerazionale* (Franco Angeli 2008) 89

⁷ The debate on the possibility of configuring real rights for future generations is very broad; see Jörg C. Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar 2006)

⁸ Axel P. Gosseries, ‘Constitutions and Future Generations’ (2008) 17 (2) *The Good Society* 32

⁹ The Constitutions have what has been defined as the “superb claim of duration”; see Otto Kirchheimer, *Gesammelte Schriften, Recht und Politik in der Weimarer Republik*, vol 1 (Nomos 2017) 175

establish rules that oblige political decision-makers, during *normal lawmaking*, not to slavishly follow the will of political majorities¹⁰, but to take into account other principles and values, enshrined in the constitution itself, as expression of the *higher lawmaking* (i.e the constituent power¹¹.) Thus, the rights of minorities are entrusted to the protection of the courts, first of all, of the constitutional courts, which are asked to fulfill a counter-majority function.)

Therefore, rigid constitutions are a suitable means to entrench sustainability¹². Indeed, one of the main problems in adopting decisions that consider the needs of the future, to the detriment, if necessary, of the interests of the present, is the dynamics of electoral democracy. Political elites tend to seek the short-term consensus of the current voters, without considering the interests of those who, not being present, cannot influence the electoral competition by their vote.

The future-oriented attitude of rigid constitutions is even more emphasised in post-World War II constitutions: they include “programmatic norms”, which, even if not directly applicable, are nevertheless prescriptive and, as such, binding for the legislator, under penalty of the unconstitutionality of its decisions¹³.

The tendency to insert programmatic norms is particularly accentuated in the most recent constitutions, approved as a result of the democratization processes in the constitutional cycle after 1989¹⁴, which very often are explicitly addressed at “transforming” the existing social and economic structure¹⁵.

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

¹⁰ See the essays published in Gustavo Zagrebelsky, Pier Paolo Portinaro, Jörg Luther (eds), *Il futuro della costituzione* (Einaudi 1996)

¹¹ Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1993)

¹² Kristian Skagen Ekeli, ‘Green Constitutionalism: The Constitutional Protection of Future Generations’ (2007) 20 (3) *Ratio Juris* 378; Joerg C. Tremmel, ‘Establishing Intergenerational Justice in National Constitutions’ in Joerg C. Tremmel (ed), *Handbook of Intergenerational Justice* (Edward Elgar 2006) 187; Axel P. Gosseries, ‘The Intergenerational Case for Constitutional Rigidity’ (2014) 27 (4) *Ratio Juris* 528

¹³ On the “programmatic clauses”, in the perspective discussed here, see Michael C. Dorf, ‘The Aspirational Constitution’ (2009) 77 *The George Washington Law Review* 1631

¹⁴ On the possibility of identifying a post-1989 “constitutional cycle”, see Tania Groppi, ‘La Constitution tunisienne de 2014 dans le cadre du «constitutionalisme globale» (2016) 1 *Constitutions* 7

¹⁵ On “transformative constitutionalism”, see Karl E. Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146

III. THE IRRESISTIBLE GROWTH OF SUSTAINABILITY IN RECENT CONSTITUTIONS

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

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

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

Of course, even when there are no specific clauses on sustainability or on future generations, this does not mean that there are no implicit protection clauses, which could possibly be developed by interpretation.

By limiting the analysis to the explicit clauses, and without examining them in detail here, it must be said that in most cases, the references are found in the field of the protection of the environment or natural resources (62 constitutions)¹⁶, whereas only in five constitutions does the use of the noun or adjective relate to other issues. In particular, the constitutions of Italy, Kosovo, Spain, and Hungary only contain references to economic and financial sustainability, while the constitution of Japan is unique, as it refers to “sustainability of human rights”¹⁷.

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

Looking at the date of adoption of the norms that contain these references, it is clear that, in almost all cases, they are included within new constitutions, adopted after 1989 and, therefore, subsequent to the Brundtland Report. In some countries, these provisions have been introduced, also in the last decades, by constitutional amendments. It is the case, for example, of Belgium, France,

¹⁶ As for the protection of the environment, existing research has already shown the tendency to insert specific provisions in the constitutions approved or modified during the last decades (147 constitutions): David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 45

¹⁷ In Italy, a 2022 constitutional revision introduced an explicit reference to the environment and future generation in Article 9 of the Constitution, whereas the reference to sustainability (introduced in 2012) is contained in Article 81, on the public budget and finances.

Luxembourg, Greece, Portugal, and Mexico, as well as Italy and Spain (the latter limited to financial sustainability).

As for the “geographical” perspective, the expression is found in all regions of the world. It can be considered as an indicator of the trend towards “global constitutionalism”: a phenomenon that developed especially in the 1990s and 2000s, consisting of the growing presence of elements of convergence and uniformity in constitutions, which tended to transform from expressions of national identity to a sign of belonging to a global community¹⁸.

While the reference to sustainability is present in constitutions belonging to different geographical areas, it finds a particularly significant place in those that bear the name of “new Andean constitutions”¹⁹: the constitutions of Bolivia, Ecuador, and Venezuela contain countless provisions on sustainability and sustainable development, including economic and financial aspects. The explicit reference to sustainability in those constitutions goes hand in hand with the many provisions they devote to environmental issues, as in many other Latin American constitutions, especially Brazil (1988) and Colombia (1991). This approach has been followed also by the Constitutional Convention of Chile in 2022, although finally the proposed constitution was rejected in the final referendum of September 4, 2022 (*plebiscito de salida*)²⁰. These constitutions devote long and detailed articles to environmental issues, which present quite innovative profiles: for example, the codification of “Earth’s rights” (*Pacha Mama*) in the Constitution of Ecuador (Article 71) or the *Agroambiental Tribunal* provided for by the Constitution of Bolivia (Article 189).

On the contrary, any explicit reference is absent in vast regions of the world which, notoriously, have serious environmental problems, such as the United States or Canada in North America, Brazil, Chile, and Argentina in South America, Australia in Oceania and, in Asia, China, India, Kazakhstan, Indonesia or, in Europe, Russia. However, the absence of sustainability clauses does not automatically mean that in those constitutions the needs of the future generation or the environmental rights are not constitutionally protected: for example, the constitution of Brazil contains endless provisions on the environment.

¹⁸ The phrase “global constitutionalism” is used with various meanings, but in this sense, see Mark Tushnet, ‘The Inevitable Globalization of Constitutional Law’ (2009) 49 (4) *Virginia Journal of International Law* 987; David S. Law and Mila Versteeg, ‘The Evolution and Ideology of Global Constitutionalism’ (2011) 99 *California Law Review* 1163

¹⁹ Regarding environmental protection, the research of Boyd (n 16) 282, shows that Latin America ranks first in the process of constitutionalizing these rights, including in terms of creativity.

²⁰ Pedro Cisterna Gaete, *Radiography of an Ecological Constitution: The Chilean Constitutional Draft*, September 1, 2022, <<https://gnhre.org/2022/09/radiography-of-an-ecological-constitution-the-chilean-constitutional-draft/>> accessed 20 February 2023

As for qualitative examination, in most cases sustainability or sustainable development are conceived as “tasks, or duties, of the state” (those which the Germans define as *Staatsziele*): goals that public authorities must pursue, as is the case also for the rights of future generations and, in some constitutions, for the protection of the environment as well (which, however, is qualified by many constitutions as a subjective right). Therefore, with a few exceptions²¹, sustainability clauses can be considered as substantial provisions of a programmatic nature, which require the active intervention of public authorities.

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

The only constitution that identifies an independent authority with explicit reference to sustainability was the Tunisian Constitution of 2014, which provided for a “constitutional independent authority for sustainable development and the rights of future generations” with advisory functions on bills in economic, social, and environmental matters, as well as for development programs (Article 129). This provision was not implemented by legislation, and it was finally repealed by the new, authoritarian Constitution enacted by the President Kaied in 2022.

IV. NEW CHALLENGES FOR OLD PROBLEMS: DO WE NEED A SUSTAINABILITY CLAUSE?

The sustainability clauses are formulated in such general terms that they raise important questions as to their effectiveness. In case of an insufficient legislative implementation, the problem thus arises of direct applicability by judges (for example, for the purposes of compensation, to claim responsibility for the non-execution by public authorities). However, even if these clauses were not considered as *self-executing* and they were qualified as standards for judicial

²¹ Only in a few cases, with reference to the protection of the environment, is sustainability configured as a subjective right: see, for example, the Constitution of Ecuador, Article 14: “The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and good living (*sumak kawsay*), is recognized”.

review, the fact remains that it is extremely difficult for constitutional judges to declare the unconstitutionality of the inactivity of the legislator, raising the dilemma of how courts can deal with legislative omissions²².

Indeed, even if the obstacle constituted by standing (often raised when the rights of future generations are put forward) can be overcome in one way or another, the extreme discretion left to constitutional judges would remain. They, in very technical matters be it pensions, biotechnology, balanced budgets, environmental protection, natural resources, climate change—would be (and they increasingly are)²³ called upon to indicate to the legislator the measures to be taken to preserve the needs of future generations, intervening significantly in the sphere of political decision-making: it is in fact undeniable that the insertion of sustainability in the balancing and in the control of proportionality implies a sacrifice, sometimes heavy, of expectations and even of rights of present generations.

Not to mention the likelihood that, faced with such open and generic clauses, the least active constitutional judges may dismiss guaranteeing them, opting instead for solutions aimed at avoiding the challenges, by favoring, more or less openly, the discretion of the legislator²⁴.

We are therefore faced with a difficult dilemma.

On the one hand, the democratic decision-making process does not seem to be the right forum to adequately take into account the needs of sustainability, due to its short-term, even very short-term perspective, linked to the timing and pressures of the electoral process.

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

The risks, in this situation, are numerous, in particular that of the loss of confidence in the constitution, in the face of its ineffectiveness²⁵, to the point of

²² On the role of jurisdictions and constitutional courts in guaranteeing the principle of intergenerational responsibility, closely linked to the one in question here, see Bifulco (n 6) 175

²³ All the judicial decisions on climate change, including the landmark case of the German Constitutional Court of March 24, 2021, 1 BvR 2656/18

²⁴ This is what happened in Norway, notwithstanding the constitutional revision aimed at strengthening the environmental protection clause (Article 112): Supreme Court, judgement of December 22, 2020, in the case HR-2020-2472- P (case no. 20-051052SIV-HRET)

²⁵ In this meaning, see Ole Pederersen, 'Environmental Rights and Future Generations' in Mark Tushnet, Thomas Fleiner, Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 407

making the absence of substantive clauses appear preferable to their non-application²⁶.

The question is therefore whether more appropriate institutional solutions than those currently found in comparative law can be imagined; constitutional law could contribute to guaranteeing sustainability, in the first place, environmental sustainability: a task that remains crucial, given the very limited effectiveness of international law in this area.

V. CONCLUSION: TOWARDS A PROCEDURAL SUSTAINABILITY CLAUSE

In conclusion, to make constitutional sustainability clauses effective, a more careful constitutional design is required. As the lack of a future-oriented vision in the decision-making process is at the origin of ineffectiveness, this is the main shortcoming to be addressed. In other words, the key guarantee should move from the substantive level to the procedural level: constitutional clauses should not be limited to enshrining the principle of sustainability, or the protection of future generations, in the matters of the environment, finance, retirement, etc. They should identify the decision-making procedures and mechanisms to be followed to take decisions that could have an impact on the possibilities of life in the future on the planet²⁷. The compliance with those procedures should be subject to the control of the constitutional courts.

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

What is needed is the inclusion in the decision-making process of mandatory opinions, delivered by bodies (to be regulated at constitutional level), designated to enhance the principle of sustainability. This, however, should be done, not in the name of the representation of the future generations (since, without wanting to retrace the long discussions on the subject, it is difficult to speak of representation

²⁶ In this sense, see Matthias Hartwig, ‘La costituzione come promessa per il futuro’ in Raffaele Bifulco, Antonio D’Aloia (eds), *Un diritto per il futuro: Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Jovene 2008) 67

²⁷ To some extent, all legal norms influence future situations. It therefore becomes crucial to identify those that have a strong impact not so much on future situations, but on “future life possibilities”: in this regard, for an attempt to delimit “critical resources”; see Skagen Ekeli (n 12) 387

in reference to subjects not yet born)²⁸, but in the name of the principle of precaution. It is necessary to introduce into the legislative process a moment of a technical-scientific nature, which allows a critical integration and mediation of scientific knowledge and of what, in the current state of this knowledge, can reasonably be assumed to be the future impact of current decisions²⁹.

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

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

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

In some countries, important doctrinal and political debates took place³⁰; in some cases, legislative provisions that go in this direction do exist³¹ and have attracted the attention of international organizations in their search for institutional mechanisms to grant sustainability³², but the constitutional provisions are very rare.

²⁸ On the contrary, this was the aim of the proposals to introduce a sort of “fourth power” for sustainability, in the form of a “Sustainability Council”, put forward by Jörg C. Tremmel, ‘Parliaments and Future Generations—the Four-Branches-Model’ in Dieter Birnbacher and May Thorseth (eds), *The Politics of Sustainability: Philosophical Perspectives* (Routledge 2015) 212

²⁹ As reported, for example, by Stefano Grassi, ‘Ambiti della responsabilità e della solidarietà intergenerazionale: tutela dell’ambiente e sviluppo sostenibile’ in Raffaele Bifulco and Antonio D’Aloia (eds), *Un diritto per il futuro: Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale* (Jovene 2008) 189

³⁰ For certain references to the German experience and to the debate which took place on the occasion of the constitutional revision, which led to the insertion of Article 20a of the *Grundgesetz*, see Tremmel (n 12) 196; Bosselmann (n 2) 138

³¹ See the legislative solutions adopted in Wales, Norway, Canada, Finland, New Zealand, and Germany, summarized in Maja Göpel and Catherine Pearce, *Guarding Our Future: How to Include Future Generations in Policy Making* (World Future Council Foundation 2014)

³² See Marcel Szabò, ‘National Institutions for the Protection of the Interest of Future Generations’ (2015) 2 (2) E-pública. Revista Electronica de Direito Publico 10

It is therefore a field to be explored, which also opens up new perspectives for reflection on the role of parliaments, constitutional judges, and experts in the democratic-pluralistic State.

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