

## On the concept of sustainability and future generations. A brief constitutional overview\*

## Sobre o conceito de sustentabilidade e gerações futuras. Um breve resumo constitucional\*\*

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## Abstract

The principle of sustainability had its beginnings in the elaboration of international environmental law and immediately took on an intergenerational significance. Initially, the concept of sustainability was mainly perceived as an ethical principle: over time, thanks to the progressive codifications that concerned it and also to the elaborations offered by the theory of justice, it has gained an authentically juridical consistency. Today the principle of sustainability is experiencing a phase of progressive emancipation from the restrictive perimeter of environmental law. In particular, the principle of sustainability is increasingly called upon to serve as the nerve center of the construction and operation of all public apparatuses within which systemic choices are made by the various communities involved.

**Keywords:** Sustainability. Future generations. Human rights.

## Resumo

O princípio da sustentabilidade nasceu na elaboração do direito ambiental internacional e imediatamente assumiu um significado intergeracional. Inicialmente, o conceito de sustentabilidade foi percebido principalmente como um princípio ético: ao longo do tempo, graças às progressivas codificações que o envolveram, e também às elaborações oferecidas pela teoria da justiça, ele amadureceu uma consistência autenticamente jurídica. Hoje o princípio da sustentabilidade vive uma fase de progressiva emancipação apenas do perímetro do direito ambiental. Em particular, o princípio da sustentabilidade é cada vez mais chamado para estimular a construção e operação de todos os aparatos públicos dentro dos quais as escolhas sistêmicas são feitas pelas diferentes comunidades.

**Palavras-chave:** Sustentabilidade. Gerações futuras. Direitos humanos.

## 1 Introduction

The ideal purpose pursued by the principle of sustainability<sup>1</sup> seems to be essentially aimed at the preservation of future generations.

In this sense, the principle of sustainability is usually called upon to regulate and define the limits that present generations encounter, with respect to the exploitation of natural resources, in order to satisfy their needs.

Although born within the framework of international environmental law, today the principle of sustainability seems to have evolved to cover areas ranging from the social organization of communities to the regulation of economic dynamics.

Furthermore, the principle in question has undergone, over the years, a process of progressive “juridification”: from a political concern, an element of sociological analysis and an essentially moral factor, the principle of sustainability has now, in international law as well as in various constitutional systems, taken upon itself the typical consistency of the legal concept.

International law, like that of the European Union<sup>2</sup> but also, as I said, numerous constitutional texts<sup>3</sup>, have at this point absorbed this principle into their

- 1 On the principle of sustainable development, the legal literature is by now exterminated. Among others, see BOCZEC, Boleslaw. *International Law*. Lanham, Maryland, 2005. p. 219. CAFAGNO, Maurizio. *Principi e strumenti di tutela dell’ambiente*. Torino: Giappichelli, 2007. p. 61; CARAVITA, Beniamino. *Diritto dell’ambiente*. Bologna: Il Mulino, 2005. p. 75; DELL’ANNO, Paolo. *Principi del diritto ambientale europeo e nazionale*. Milano: Giuffrè, 2004. p. 75. DIMAN, P. I principi della tutela ambientale. In GIAMPIERO, Di Plinio. *Principi di diritto ambientale*. Milano: Giuffrè, 2008. p. 53; KRAMER, Ludwig. *Manuale di diritto comunitario dell’ambiente*. Milano: Giuffrè, 2002. p. 71; PEPE, Vincenzo. *Lo sviluppo sostenibile tra governo dell’economia e profili costituzionali*. Piacenza: La tribuna, 2002; POLITI, M. Tutela dell’ambiente e «sviluppo sostenibile». Profili e prospettive di evoluzione nel diritto internazionale alla luce della Conferenza di Rio de Janeiro. In BARILE, Giuseppe. *Scritti in memoria di P. Barile*. Padova: CEDAM, 1995. p. 464; PORENA, Daniele. *La protezione dell’Ambiente tra Costituzione italiana e Costituzione globale*. Torino: G. Giappichelli, 2009; SALVIA, F. Ambiente e sviluppo sostenibile. *Riv. giur. Amb*, p. 235, 1998.
- 2 Art. 2 of the Treaty on European Union, as amended by the Amsterdam Treaty, states that «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance». Recently, the principle of sustainable development was enunciated in the European Landscape Convention signed in Florence in 2004. The aforementioned Convention provides in fact, in art. 1 and art. 5, that in relation to social, economic and environmental development processes that cause transformations of the landscape, measures and interventions aimed at eastern such transformations must be adopted in a “perspective of sustainable development. On this topic, see SORACE, D. Paesaggio e paesaggi della Convenzione europea. In CARTEI, Gian Franco. *Convenzione europea del paesaggio e governo del territorio*. Bologna: Il mulino, 2008. p. 22-23.
- 3 In Sweden, art. 2 of the Law on the form of government states that «the personal, economic and cultural well-being of the person is a fundamental purpose of public activity. Public institutions

lexicon. In other words, sustainability - previously essentially an ethical concept - is now widely positivized in a wide range of normative texts and identifies an authentically juridical concept.

As already said, sustainability comes into being as a rule of relationships between the environment, on the one hand, and interest related to economic development on the other.

It is also known in what way, in this context, the principle immediately assumed an eminently intergenerational value<sup>4</sup>: in fact, according to the well-known description offered by the Brundtland Report<sup>5</sup>, economic development would be sustainable where it allows the satisfaction of the needs of the present generations without, however, compromising the satisfaction of similar needs of future generations<sup>6</sup>.

The ethical and intergenerational dimension of the principle is therefore very clear: it was to be a relationship - the one governed by the principle under exam - between needs, utilities and aspirations of the present generation and those of future generations.

However, in the passage from moral to law, it does not seem that all the criticalities and all the theoretical difficulties have been resolved as far as the principle under exam is concerned.

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promote sustainable development that leads to a good environment for present and future generations”. In another perspective, the Italian Constitution, in art. 97, establishes that public administrations, in coherence with the European Union law, ensure the balance of budgets and the sustainability of the public debt.

- 4 The idea that the principle of sustainable development should be interpreted from a dual perspective, both inter-generational and intra-generational, is supported by DELL'ANNO, Paolo. *Principi del diritto ambientale europeo e nazionale*. Milano: Giuffrè, 2004. p. 74; of the same opinion FRUMENTO, Elena. *Lo stato ambientale e le generazioni future: per una tutela del diritto fondamentale dell'ambiente*. *AmbienteDiritto.it*: legislazione giurisprudenza. Diponível em: [www.ambientediritto.it](http://www.ambientediritto.it). Acesso em: 03 mar. 2022. In addition, see also GESTRI, M. Ambiente (dir. int.). In CASSESE, Sabino. *Diz. dir. pubbl.* Milano: Giuffrè, 2006. p. 220.
- 5 The document entitled “Our Common Future” was released on March 20, 1987 by the World Commission on Environment and Development chaired by Gro Harlem Brundtland. The document, in addition to offering a first and then increasingly widespread definition of sustainable development, also clarified the main factors underlying it. In this sense, for example, the reference to the concept according to which the pursuit of a sustainable development model is intimately linked to the dynamics of population growth is significant and that, therefore, the objective is more easily achievable when the demographic quantities are stabilized at levels consistent with the production capacities of the ecosystem.
- 6 Economic development is sustainable where it satisfies the needs of present generations without compromising those of future generations. This, in summary, is the definition of the principle in question that was offered in the Brudtland Report, that is the first international document where the same principle made its appearance. A first mention of the duty to transmit the existing natural heritage to future generations was already included in the first two articles of the Unesco Convention on the protection of the natural and cultural world heritage signed in Paris in 1972.

## 2 *What to protect and why to protect?*

The theory of justice - in its various and diversified elaborations - seems to have come to offer some ground to support the principle of sustainability and the theory of the interests of future generations.

Furthermore, the perception of living in what has been called the “society of risk”<sup>7</sup> seems, day after day, to have strengthened the aspiration to govern uncertainty and to guarantee, as far as possible, the future.

Indeed, the progressive attenuation of individual risks is a fact that is a characteristic of our age. In this regard, it is sufficient to think of the continuous discoveries of medical sciences for the treatment of pathologies that, in other periods, were deadly or produced very severe consequences.

However, the perception of our exposure to general and collective risks is to the same degree typical of the age in which we live: think, in this regard, of the risks to which our generation is exposed in relation to the danger of a nuclear catastrophe, as well as of those correlated to the progressive serious deterioration of climatic and environmental conditions. Again, think about the severe economic and financial instability to which the dynamics of an increasingly globalized economy expose every person.

The past generations seemed to feel a sort of “veneration” towards the preceding ones<sup>8</sup>: essentially, the previous generations had gradually created the basis for better living conditions for the following ones.

Today, and in the short course of a few decades, this sentiment seems to have been overturned: it seems that the present generations are the first not to enjoy better living conditions than the preceding ones and to pay for some excesses produced by the previous generation. In this regard, it would be the case to point at the aforementioned nuclear risk, the serious deterioration of natural conditions and the out-of-control expenditure for social security in many States.

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7 See BECK, Ulrich. *La società del rischio. Verso una seconda modernità*. Roma: Carocci, 2000. The widespread perception of the risks, fears, uncertainties and sense of precariousness deriving from the models of dominant social organization, refer to the observations of BAUMAN, Zygmunt. *La solitudine del cittadino globale*. Milano: Feltrinelli, 2000.

8 RESTA, E. Tra Generazioni. In BIFULCO, Raffaele; D'ALOIA, Antonio. *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*. Napoli: Jovene, 2008. p. 416, argues that «il rapporto tra le generazioni presenti e le passate, tra i contemporanei e i loro progenitori, è genealogicamente fondato su un obbligo che lega il debitore al suo creditore: i vincoli sentimentali e le “venerazioni” altro non sono che il mascheramento del debito. [...]. Nell’ambito della originaria comunità delle stirpi la generazione vivente riconosce ogni volta un’obbligazione giuridica nei confronti delle precedenti, dominata dalla persuasione mitico religiosa che la propria generazione (la “specie”) esiste grazie ai sacrifici e alle opere, se non alla “volontà” degli antenati. Questi allora devono essere ricompensati con altrettanti sacrifici e opere».

Perhaps, today as never before, there is a need to affirm the principle according to which the community of the living is obliged to be concerned not only with its current living conditions but also, necessarily, with the living conditions of future individuals.

The problem, however, as has been noted, becomes very complex when we stop addressing it in ethical terms only and we start talking about *rights*.

Whether and how to “legalize” the relationship between present individuals and future individuals - the latter deprived not only of legal subjectivity but also of *identity*<sup>9</sup> - is among the most debated problems in the theories of justice.

In truth, on the level of legal science, legal systems have now extensively tested solutions and methods of protection to safeguard adhesion interests as well as the interest of subjects lacking the ability to act legally.

Even the unborn child, in a great variety of legal systems, enjoys regulatory provisions that guarantee its interests and future existence<sup>10</sup>.

The problem, however, does not seem to be just *how* to protect the position of future generations but rather *what* to protect and *why* to protect it.

In other words, we need to ask ourselves whether the overall conceptology of future generations finds better accommodation in the category of *rights* (of future generations) or in that of *duties* (of present generations towards future generations).

Again, we must ask ourselves whether it is adequate to talk about *interests* of future generations or whether we can go so far as to talk about real *rights*. Whether

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9 The delicate question is summarized by PARFIT, Derek. *Reasons and Persons*. Oxford: Oxford University Press, 1984. p. 351: «if we choose High rather than Low Consumption, the standard of living will be higher over the next century [...]. Given the effects of [...] such policies on the details of our lives, different marriages would increasingly be made. More simply, even the same marriages, the children would increasingly be conceived at different times [...] this would in fact to make them different children. [...] Return next to the moral question. If we chose high consumption, the quality of life will be lower more than a century from now. But the particular people who will then live would never have existed if instead we have chosen low consumption. Is our choice on high consumption worse for this people? Only if it is against their interest to have been born [...] we can suppose that it would not go as far as this. We can conclude that if we choose high consumption, our choice will be worse for no one». See also KEIJZERS, Gerard. *Business, Government and Sustainable Development*. London: Routledge, 2005. p. 57, who argues that «when the planet is plundered and thus provides future generations with an existence that is extraordinarily sparing, but which they nevertheless consider worth living, then, in Parfit’s opinion, no harm, according to utilitarian reasoning has been done. The alternative is that they would not exist at all – an alternative that they would not prefer».

10 Particularly, WEISS, Edith Brown. *In fairness to Future Generations: International Law Common Patrimony, and Intergenerational Equality*. New York: Dobbs Ferry, 1989. p. 15 ss., say that «since the interests of future generations may sometimes conflict with those of some members of the present generation, it is important to designate a representative of future generations, or a guardian ad litem. This could take the form of an ombudsman for future generations». The idea of a trust for the conservation of the common cultural heritage of humanity in the interest of future generations is proposed SANTIS, V. Eredità culturale e responsabilità intergenerazionale. In BIFULCO, Raffaele; D’ALLOIA, Antonio. *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*. Napoli: Jovene, 2008. p. 557.

we should speak of a mere obligation of present generations or of a real relationship between the latter and future generations, this even though it is possible to hypothesize a responsibility not merely moral but juridical towards individuals who are unborn, future and, hence, without identity.

The problem of identity, or rather, of the absence of an identity exactly defined of those who are not yet born seems to take on an overwhelming dimension.

In fact, not knowing the identity of the individuals who will form future generations, we also ignore what their preferences will be: more precisely, we do not know which assets or which goods of life future generations will appreciate as such and therefore, which ones they will want to make the object of rights<sup>11</sup>.

In other words, speaking today of the rights of future generations means reasoning within our categories, with what we believe, *today*, should be the object of rights.

What would happen if the future generations were to look at something else, no longer having any interest in what we now believe should be the object of rights? What would happen if today authentic rights were to be assigned to future generations and if these men and women of the future, tomorrow, were to have a different concept of well-being than the one we have today?

Therefore, if the concept of sustainability applied to the well-being of future generations were to assume a legal value - or even a real post-modern paradigm called to innervate the complex of legal systems<sup>12</sup> - the investigation of an ethical type must necessarily precede that of a legal type. In fact, in this field, juridical and constitutional investigation is deeply intertwined with the development of philosophical-juridical thought and, in particular, the theory of justice offers significant arguments for constitutionalist reflection.

The very concept of sovereignty, in which resides the idea according to which no generation can commit the next one to respect its own laws<sup>13</sup> is, for example, a

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11 In this regard, reference is made to the theses proposed by WALZER, Michael. *Spheres of Justice. A Defense of Pluralism and Equality*. New York: Basic Books, 1983. p. 6 ss. where the Author notes that «people conceive and create goods, which they distribute among themselves. Here, the conception and creation precede and control the distribution. Goods don't just appear in the hands of distributive agents who do with them as they like or give them out in accordance with some general principle. Rather, goods with their meanings – because of their meanings – are the crucial medium of social relations; they come into people's minds before they come into their hands; distributions are patterned in accordance with shared conceptions of what the goods are and what they are for».

12 See. CRUZ, Paulo Márcio; BODNAR, Zenildo. *Globalização, Transnacionalidade e sustentabilidade*. Itajaí: Univali, 2012. p. 41 and CRUZ, Paulo Márcio; BODNAR, Zenildo. O novo paradigma do direito na pós modernidade. *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, Porto Alegre, n. 1, v. 3, p. 75-83, 2011. who argue that «a partir desse contexto de insuficiência da liberdade, enquanto paradigma do direito moderno para enfrentamento dos novos riscos globais, o que se propõe é análise da sustentabilidade enquanto novo paradigma indutor do direito na pós-modernidade em coabitação com a liberdade».

13 A people always has the right to review, reform and change their Constitution. A generation cannot

primary argument. The intergenerational transmission of collective identities and responsibilities is another topic<sup>14</sup>. The very idea of *people*, understood in an ideal sense, as a community aimed at perpetrating itself in the succession between generations<sup>15</sup>, marks a further element of reflection in the direction according to which collectivities must, on the juridical level, be thought of in the context of an intergenerational logic.

### 3 Sustainability and future generation as a new constitutional and post-modern paradigm

On the legal and, more precisely, on the constitutional level, it is clear that if the principle of sustainability and the related concern for future generations came to assume a paradigmatic consistency, the consequences would be anything but negligible.

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subject future generations to its laws: this is how art. 28 of the Declaration of Human and Citizen Rights, which preceded the Constitutional Act, decreed by the French National Convention on 24 June 1793.

- 14 See MACINTYRE, Alasdair. *After Virtue*. New York: Bloomsbury Academic, 1981. p. 204 ss., who argue that «we all approach our own circumstances as bearers of a particular social identity. I am someone's son or daughter, someone's cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation. Hence what is good for me has to be the good for one who inhabits these roles. As such, I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point. This is in part what gives my own life its moral particularity. [...] For the story of my life is always embedded in the story of those communities from which I derive my identity. I am born with a past; and to try to cut myself off that past, in the individualist mode, is to deform my present relationships». According to SANDEL, Michael. *Justice. What's the right thing to do?*, New York: Ferrar Straus Giroux, 2009. p. 225, «unlike natural duties, obligations of solidarity are particular, not universal; they involve moral responsibilities we owe, not to rational beings as such, but to those with whom we share a certain history. But unlike voluntary obligations, they do not depend on an act of consent. [...]. The most elemental example is the special obligation of family members to one another».
- 15 According to ROSSANO, Claudio. *Manuale di diritto pubblico*. Napoles: Jovene, 2012. p. 58, «il popolo è una unità ideale di uomini organizzata politicamente che nella vita sociale si presenta unitariamente. In quanto unità ideale comprende anche le generazioni passate e quelle future e non va confuso con la somma dei singoli individui che ne fanno parte in un dato momento storico, né con il corpo elettorale, che è solo uno strumento mediante il quale si forma e si manifesta formalmente la sua volontà all'esterno in occasione di elezioni e di espressioni di voto nelle di-verse situazioni politiche e amministrative». With reference to the concept of State, ROMANO, Santi. *Scritti minori*. Milan: Giuffrè, 1990. p. 381, observed that «rispetto agli individui che lo compongono e alle comunità che vi si comprendono, è un ente a sé che riduce a unità gli svariati elementi di cui consta, ma non si confonde con nessuno di essi, di fronte ai quali si erge con una personalità propria, dotato di un potere che non ripete se non dalla sua stessa natura e dalla sua forza, che è la forza del diritto. Soltanto così esso [...] si eleva al di sopra degli interessi generali, contemperandoli e armonizzandoli; si pone nella condizione di curarsi non solo delle generazioni presenti, ma anche di quelle future, ricollegando in un'intima e ininterrotta continuità di tempo, di azione, di fini, momenti ed energie diverse, di cui esso è comprensiva espressione».

All the main sectors in which the States are organized live in the perspective of durability<sup>16</sup>. From the organization of welfare - and, in particular, health<sup>17</sup> and social security<sup>18</sup> - to the protection of the environment and the territory; from the organization of public accounting to the structures for the promotion of economic development and the regulation of markets.

In all these vast sectors it is also necessary to think of Tomorrow, so as not to

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- 16 In particular, it is precisely the constitutional texts, as noted by da KIRCHHEIMER, Otto. *Costituzione senza sovrano. Saggi di teoria politica e costituzionale*. Bari: De Donato, 1982. p. 33, that assume the perspective of duration as their own and co-essential character.
- 17 The factors that causes the progressive worsening of the sustainability prospects of the public health system are mainly attributable to the process of gradual aging of the population, to the increasingly advanced technological innovation in the health sector (with the relative increasing costs that it entails), to the variation of epidemiological dynamics with progressive prevalence of chronic-degenerative pathologies and, last but not least, a growing trend of the population towards forms of health and pharmaceutical “consumerism” not always justifiable in terms of curative relapse. The general improvement in the quality of life, as well as the use of innovative solutions, vaccines, machinery and tools, has been matched in recent decades by a growing increase in life expectancy. Obviously, with a symmetrical progression, there has been a strong aging of the population, partly caused by particularly low birth rates, in the western countries, in recent times.
- 18 The Hygiene and Health Commission of the Senate of the Italian Republic approved, on 8 June 2013, the proposal to carry out a survey on the sustainability of the National Health Service with particular reference to the guarantee of the principles of universality, solidarity and equity. Extensive studies are devoted to the problem also in the legal and economic literature. Among these, see CARDONER, Concepció Patxot; BONIN, Holger; ABÍO, Gemma; GIL, Joan. El impacto intergeneracional de la reforma de las pensiones en Espana: un enfoque de Contabilidad Generacional. *Cuadernos Económicos del JCE*, n. 65, v. 2, p. 101-116, 2000. ; BONIN, Holger; GIL, Joan; PATXOT, Concepció. Beyond the Toledo Agreement: The Intergenerational Impact of the Spanish Pension Reform. *Spanish Economie Review*, Alemanha, v. 3, p. 111-130, 2001. COSTA-FONT, Joan; PATXOT, Concepció. The Intergenerational Impact of Long-term Care Financing Alternatives in Spain. *The Geneva Papers of Risk and Insurance: Issues and Practice*, Oxford, n. 4, v. 29, p. 599-619, 2004. p. 599. HAGIST, Chistian; KLUSEN, Nobert; PIATE, Andreas; RAFFELHUSCHEN, Bernd. Social Health insurance – the Major Driver of Unsustainable Fiscal policy? *Cesifo*, Institute for Public Finance, University of Freiburg, n. 133, 2005; MAHAL, Ajay; BERMAN, Peter; NANDAKUMAR, A.K. Health Expenditures and the Elderly: A Survey of Issues in Forecasting, Methods Used, and Relevance for Developing Countries. Research Paper. *The global burden of disease 2000 in ageing populalions, Harvard Burden of Disease Uni*, n. 1.23, 2003.; NEILL, C.; GROOM, L.; AVERY, A.J.; BOOT, D.; THORNHILL, K., Age and proximily to dealh as prediclors of GP care costs: Results from a study of nursing home palients. *Health Economics*, n. 9, p. 733, 2001. CARDONER, Concepció; TRANSFI, Joan Gil. La revisión de la ley de reforma del sistema de la seguridad social: una aproximación de conlabilidad generacional. *Hacienda Pública Espanola*, Barcelona, 2000. YANG, Zhou; NORTON, Edward;. STEAMS, Sally. Longevity and Health Care Expenditures: The Real Reasons Older People Spend More. *The Journals of Gerontololy*, Series B, Psychological Sciences and Social Sciences, Oxford, n. 58, p. 2, 2003. ZWEIFEL, Peter; FELDER, Stefan; WERBLOW, Andreas. Population Ageing and Health Care Expenditure: New Evidence on the Red Herring, *The Geneva Papers of Risk and Insurance – Issues and Practice*, Genebra, n. 29, p. 625 – 652, 2004.

compromise natural resources, not to accumulate overwhelming debt exposures<sup>19</sup>, in order to maintain a balance between the active population, which bears the task of paying pensions, and the retired population, so as to keep the health system in financial equilibrium and so on.

In this context, many, if not all, of the “issues of sustainability” can arise.

Thus, the principle of sustainability, where it to be fully absorbed within the lexicon of the constitutions, would veritably end up taking on a paradigmatic character.

However, many uncertainties mentioned above remain to be resolved.

As mentioned, the legal logic is very cautious in approaching the reasoning on future generations according to the mechanics of “rights”.

In particular, the idea of identifying real legal situations of a collective type in favor of the unborn community requires an argumentative pathway capable of supporting not only the evolution of legal literature but also those of other areas of knowledge and, particularly, of philosophy.

From this point of view, philosophical-juridical and sociological research offer elements and argumentative pathways that appear convincing in the perspective of the juridicalization of the position of future generations.

The effort to detach the concept of “duty” from that of “right” - traditionally conceived, the latter, as a correlative to the former - seems to identify a right perspective aimed at engaging present generations in the correct attitude towards future ones.

However, this first hypothesis needs to be contextualized within a broader argumentative pathway.

Although the logic of rights may appear rhetorical when used to define the position of future generations, the reduction of their legal position to the concept of a mere “expectation” - inevitably conditioned by the concrete socio-economic conditions of the future - appears completely unsatisfactory.

Returning then to the mechanics of rights, it is perhaps possible to find elements for reflection capable of facilitating a correct reasoning as far as regards future generations<sup>20</sup>.

19 See BIFULCO, Raffaele; D'ALIOIA, Antonio. Le generazioni future come nuovo paradigma del diritto costituzionale. In BIFULCO-A, Raffaele; D'ALIOIA, Antonio. *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*. Napoli: Jovene, 2008. who argue that «un debito eccessivo ed incontrollato, nel momento in cui scarica irresponsabilmente oneri economici sulle generazioni successive, sottraendo alla loro discrezionalità decisionale enormi flussi finanziari [...], finisce col rappresentare una sorta di tassazione iniqua, perché “without representation” [...], e perché sganciata da qualsiasi presupposto di responsabilità».

20 In this regard, see the reconstruction offered by WEISS, Edith Brown. *In fairness to Future Generations: International Law Common Patrimony, and Intergenerational Equality*. New York: Dobbs Ferry, 1989. p. 15 ff., according to which the legal position which could, in hypothesis, pay future generations would be not dissimilar from that which characterizes the rights of minorities: «rights to the natural patrimony are generational rights that may be viewed as group

## 4 Conclusions: fundamental rights as the way to “legalize” the position of future generations

In particular, it now seems possible to affirm that, on the level of *fundamental rights*, modern constitutionalism is no longer willing to abandon the idea that these rights represent the true paradigm of contemporary societies as well as the heritage consolidated by the stage that legal civilization has reached over the centuries.

The essential needs and the related fundamental rights - universal, inviolable, inalienable and, unquestionably, intergenerational - constitute precisely that legal heritage that the second post-war constitutionalism has achieved. This is the fruit of the centuries-old contribution offered by modern and rationalistic natural law, which does not stop in front of a fact, in itself arbitrary, such as that of birth in one generation rather than in another.

The intergenerational projection of fundamental rights - connected to the essential needs of individuals and empirically attributable to the needs of an abstract conception of man - overcomes the dilemma of the non-identity of future generations: the very reversibility of choices - often invoked as a factor of indispensable legal civilization - meets the only limit represented by fundamental rights as an essential condition at the basis of the survival of each individual and each legal system.

The fundamental rights - such as life, freedom, health and so on - represent empirical evidence coessential, at all times, to the nature of every individual. In classical philosophy, in medieval philosophy as well as in modern and contemporary philosophy, the idea of an eternal and immutable “right by nature” has always existed. In other words, philosophical-juridical thought has always been oriented towards affirming the existence of rights that are not *granted* by organized societies but which are *recognized* by them. Consequently, it can be inferred that these types of rights certainly cannot be reserved only for living generations but, as they are eternal and immutable, they must be guaranteed also in favor of future generations.

Fundamental rights, closely linked to the principle of equality, therefore represent a parameter to which constitutional justice must address its assessments and balance tests not only from an *intra*-generational point of view but also from an *inter*-generational one.

From this perspective, the idea of an intergenerational sustainability of the “systemic” choices to which the legal systems are called, over the course of time, takes shape.

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rights in the intergenerational context and as having elements of individual rights when they exist intergenerationally in the present generation. Rights to cultural patrimony may be group or community rights both in the intergenerational and intragenerational setting, since they normally depend on others for their enjoyment».

In this sense, principles of sustainability have to innervate choices that are not limited exclusively to the preservation and conservation of environmental conditions but which must also be extended to the fundamental social, economic and cultural structures of each legal system.

Therefore, it looks plausible to speak of sustainability as a principle operating on a vast spectrum and capable, moreover, of inspiring an intergenerational redistributive logic of costs and benefits.

The close connection between the principle of sustainability and fundamental rights undoubtedly emerges from the point of view of the conservation of conditions of environmental health. However, and no less, it relies on that of social and health assistance or on that of social security and on the conditions of financial sustainability, in the long term, of the respective state apparatuses.

Otherwise, it would deny the same “claim to durability” of the constitutional texts and it would affirm the paradoxical outcome of prefiguring an unacceptable alternation between generations of “masters” and generations of “slaves”.

The legal systems are therefore increasingly called upon to draw up a sort of “multi-generational budget”: otherwise, future generations would only be left with the role of mere spectators of the choices made today.

It is in this direction that the duties towards future generations and, within the limits of the fundamental legal positions, *their rights* must represent - not only on the ethical level but also on the constitutional level - a fundamental parameter capable of inspiring the choices of the legislators.

Western constitutional justice systems have long tested a set of tools that are undoubtedly capable of supporting the intergenerational perspective.

In particular, the balancing tests between values and constitutional principles potentially conflicting represent, perhaps, the most congenial terrain in which to weigh the position of future generations and the expansive vocation of fundamental rights.

As is well known, the generational recognition of fundamental rights has historically been conditioned by the threats that have gradually arisen with respect to their peaceful enjoyment<sup>21</sup>.

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21 In this regard BOBBIO, Norberto. *L'età dei diritti*, Turin. Turin: Einaudi, 1997. argues that «dal punto di vista teorico ho sempre sostenuto, e continuo a sostenere, che i diritti dell'uomo, per fondamentali che siano, sono diritti storici, cioè nati in certe circostanze, contrassegnate da lotte per la difesa di nuove libertà contro vecchi poteri, gradualmente, non tutti in una volta e non una volta per sempre. [...] La libertà religiosa è un effetto delle guerre di religione, le libertà civili, delle lotte dei parlamenti contro i sovrani assoluti, la libertà politica e quelle sociali, della nascita, crescita, e maturità del movimento dei lavoratori salariati, dei contadini con poca terra o nullatenenti, dei poveri che chiedono ai pubblici poteri non solo il riconoscimento della libertà personale e delle libertà negative, ma anche la protezione del lavoro contro la disoccupazione, e i primi rudimenti di istruzione contro l'analfabetismo, e via via l'assistenza per la invalidità e la vecchiaia, tutti i bisogni cui i proprietari agiati potevano provvedere da sé», BOBBIO, Norberto. *L'età dei diritti*, Turin. Turin: Einaudi, 1997.

One wonders, therefore, whether today - in an era of progressive deterioration of socio-demographic and environmental conditions - the time has not come to question the future of future generations and the birth of a *fourth generation* of fundamental rights in which to include also the position of these.

In a nutshell, it seems that the time has come to conceptualize, also on a legal level, the position of future generations: both from the point of view of a generalized duty of protection placed on the head of constitutional systems - through the enunciation of the principle of sustainability in a broad sense - and from the perspective of rights, through the recognition of the properly intergenerational nature of fundamental rights.

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