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Environmental Constitutionalism: a comparative study of Canada and Italy.

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INTRODUCTION

Geologists divide time according to marked shifts in the Earth's state. Recent global environmental changes suggest that the Earth might have entered a new human-dominated geological epoch, denominated the Anthropocene. It is agreed that human activity - even if geologically recent - has had and continues to have a profound influence on the global environment. Lewis and Maslin point out that "human activity has clearly altered the land surface, oceans and atmosphere, and re-ordered life on Earth."[1] In particular, in the 1950s the so-called "Great Acceleration" began, that is to say the unprecedented increase in industrial, transport and economic activity that occurred after the Second World War and never stopped. Given the magnitude, variety and longevity of human-induced changes, which include land surface transformation and changing in the composition of the atmosphere, many scientists prefer not to refer to the present with the expression "Holocene Epoch" (as it is still currently formally defined), but with "Anthropocene Epoch" instead.

The Anthropocene Working Group (AWG), a group currently composed of 35 geologists, has been working since 2009 to include the Anthropocene in the Earth's official timeline. The group determined in 2016 that human-caused changes to the Earth were so impactful that the establishment of a new geological time unit was justified and needed. They concluded that the Anthropocene epoch started together with the Great Acceleration and following the start of the era of nuclear weapons tests, the geochemical traces of which can still be found around the world. Since 2019, the researchers have considered twelve sites that could provide what geologists call a "golden spike" or "Global boundary Stratotype Section and Point" (GSSP), meaning the place where the abrupt and global changes marking the start of the new age are best recorded in geological strata. Nine sites were put to a vote and, after several rounds of voting,

[1] Simon L. Lewis & Mark A. Maslin, "Defining the Anthropocene", *Nature* (2015), Vol. 519, 172, DOI: 10.1038/nature14258

Crawford Lake in Ontario, Canada, was announced as the geological site that best captures the geological impact of the Anthropocene. In the sedimentary layers at the bottom of Crawford Lake numerous human-made markers were found, such as artificial radionuclides, combustion particles, changed biotic populations, or organic pollutants. These markers are proof of the endurance and magnitude of human-caused planetary change. The history of the lake is emblematic as well. In a way, it can be considered as a symbol of the historical socio-economic dynamics that fuelled the development of the Anthropocene. In fact, the layers of Crawford Lake's are a sort of geological record that covers centuries of history. It is a history made of notable changes to the local environment: it starts with small and almost irrelevant botanical impacts of indigenous agriculture practiced from the 13th to the 15th centuries, and it continues with the logging and milling that took place with the arrival of European colonial settlers in the 19th century. Then, in the mid-20th century perhaps the most fundamental change occurred: "rapid industrial expansion in the region indicative of global trends, and coinciding with early fallout from atomic and thermonuclear weapons testing."[2] Professor Francine McCarthy, a geologist at Brock University, Canada, and AWG member told The Guardian that:[3]

> "There is compelling evidence globally of a massive shift, a tipping point, in the Earth's system. […] Crawford Lake is so special because it allows us to see at annual resolution the changes in Earth history."

Canada was also the centre of recent dramatic environmental disasters. In 2023 catastrophic wildfires swept across the Canadian Provinces of Alberta, British Columbia, Nova Scotia, Ontario, and Québec. The same occurred in the Italian Regions of Sicily, Sardinia, Campania,

[2] Max Planck Institute of Geoanthropology, "Anthropocene Working Group proposes Crawford Lake as GSSP candidate site of theAnthropocene series", 12/07/2023, https://www.shh.mpg.de/2347073/anthropocene-working-group-crawford-lake-candidate-anthropocene-site

[3] Damian Carrington, "Canadian lake chosen to represent start of Anthropocene", *The Guardian*, 11/07/2023, https://www.theguardian.com/environment/2023/jul/11/nuclear-bomb-fallout-site-chosen-to-define-start-of-anthropocene

and Calabria. In the meanwhile, the Region of Emilia-Romagna had to face a tragic and never-seen-before flooding which was identified as the third costliest economic loss event in the first half of this year as claimed in the Global Catastrophe Report produced by AON.[4]

The climate and ecological crisis has indeed reached worrying peaks: according to scientists at NASA's Goddard Institute for Space Studies, July 2023 was the hottest month ever recorded in the global temperature record.[5] According to the World Weather Attribution, without human induced climate change these extreme heat events would have been extremely rare.[6] Now, the climate crisis is rightfully considered to be one of the most urgent challenges for humankind for evident reasons. Not by chance, the United Nations Secretary-General António Guterres stated:[7]

> "The era of global warming has ended; the era of global boiling has arrived. Leaders must lead. No more hesitancy. No more excuses. No more waiting for others to move first. There is simply no more time for that. It is still possible to limit global temperature rise to 1.5 degrees Celsius and avoid the very worst of climate change. But only with dramatic, immediate climate action."

At the same time, constitutions are considered to be some of the most important documents in the world. The former Chief Justice of South Africa, Ismail Mohammed, said:[8]

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[4] AON, *Global Catastrophe Report: First Half of 2023*, https://www.aon.com/getmedia/760ea02e-ce76-4348-800a-cb8d99ca2a8f/20230720-1h-2023-global-cat-recap.pdf

[5] Jackie McGuinness & Katherine Rohloff, "NASA Clocks July 2023 as Hottest Month on Record Ever Since 1880", *NASA*, 14/08/2023, https://www.nasa.gov/press-release/nasa-clocks-july-2023-as-hottest-month-on-record-ever-since-1880

[6] World Weather Attribution, "Extreme heat in North America, Europe and China in July 2023 made much more likely by climate change", 25/07/2023, https://www.worldweatherattribution.org/extreme-heat-in-north-america-europe-and-china-in-july-2023-made-much-more-likely-by-climate-change/

[7] United Nations Secretary-General, https://www.un.org/sg/en?_gl=1%2A1n2h4x6%2A_ga%2AMjcyODA2ODYxLjE2OTI5ODEwMzA.%2A_ga_TK9BQL5X7Z%2AMTY5Mjk4MTAyOS4xLjEuMTY5Mjk4MTA4OC4wLjAuMA.

[8] Johan Hatchard, "Some Lessons on Constitution-Making from Zimbabwe", *Journal of African Law* (2001), Vol. 45, No. 2, 210, https://doi.org/10.1017/S0221855301001705

"The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed, it is a 'mirror of the national soul', the identification of the ideals and aspirations of a nation, the articulation of the values binding its people and disciplining its government."

If we consider a constitution as a "mirror of the national soul", then it is clear that it should include the fight for climate justice as well. In fact, it is not only notable figures from international organisations like the United Nations that spend their voices for the protection of the environment. Common people and movements all around the world have shown increasing interest and preoccupation for the future to come as well.

On the 20th of August 2023, in Ecuador, a referendum on oil drilling in the Yasuní biodiverse Amazonian national park was held. With 58.9% votes cast in favour of the referendum question, the indeterminate halt to oil drilling in this area won.[9] This was an historic referendum, with Ecuador becoming one of the very first countries in the world to set limits on resource extraction through a democratic vote. In a second referendum held on the same day, the citizens of Quito were also called to vote to block gold mining in the Chocó Andino, a sensitive highland biosphere near the capital city. The halt won with an even larger margin of about 68% to 31%.[10] These examples are proof of an increasing sensibility of the population towards this topic. Leonidas Iza, President of CONAIE, the Confederation of Indigenous Nationalities of Ecuador, commented the result saying: "This victory shows that we humans are taking action to save our planet during these times of climate crisis." Iza had already

[9] International Foundation for Electoral Systems (IFE), "Election Guide", https://www.electionguide.org/elections/id/4184/

[10] Dan Collyns, "Ecuadorians vote to halt oil drilling in biodiverse Amazonian national park", *The Guardian*, 21/08/2023, https://www.theguardian.com/world/2023/aug/21/ecuador-votes-to-halt-oil-drilling-in-amazonian-biodiversity-hotspot

commented previous referenda on the matter in the country underlining the will of the People:[11]

"The owner of this fight is the majority of the Ecuadorian People. We owe this triumph to the fight of the majority of the Ecuadorian People, to the fight in the streets that is now translated into these results. This means that in this democratic system, we mobilise with attention towards the Constitution of the Republic."

Pedro Bermeo, founding member of Yasunidos, an environmental activist group that collected hundreds of thousands of signatures petitioning the referendum, said that such vote showed that the "greatest national consensus at this time is in the defence of nature, the defence of Indigenous peoples and nationalities, the defence of life."[12]

In this context, a link between the climate and ecological crisis and the drafting of constitution seems self-explanatory and logical. But, in practice, how can and do these two worlds collide? Environmental Constitutionalism is the answer to this question. Each country differs in its approach towards the codification of environmental issues in its constitutional framework. Different internal and external elements may influence this process, as well as different perspectives which are the result of different historical, political, and cultural circumstances. Given the peculiarity of every country, in my work I will look at two particular cases: Canada and Italy.

The thesis' arguments will be addressed in three main chapters. The first chapter - entitled "History of (Environmental) Constitutionalism" - will outline an historical and theoretical context by looking at the main characteristics and at the history of Constitutionalism and

[11] CONAIE, "Leonidas Iza sobre la consulta popular" (video), 2023, my translation https://www.facebook.com/watch/?v=706201567713205

[12] Dan Collyns, "Ecuadorians vote to halt oil drilling"

Environmental Constitutionalism. After recurring the main and debated features of Constitutionalism and some of the most important steps in its modern history, subsections 1.1 and 1.2 will be dedicated to the notion of environmental rights, to their interconnection with other rights, and to the different methods of codification within constitutions. The second chapter will focus on the Canadian case. Three subsections will be identified. The first one will outline pre-modern Constitutionalism in the country by taking into consideration Indigenous Constitutionalism and its unique approach towards the protection of nature. Subsection 2.2 will look at the process of European colonisation, the first Constitution Act adopted under British control in 1867, and most recent developments. Whereas Subsection 2.3 will focus on Québec's special status as a Province that 'exploits' environmental issues for purposes of secession and self-constitutionalisation. Finally, the third chapter will propose a deep analysis of the Italian case. Three other subsections will be outlined. 3.1 will sketch Italian Constitutionalism before the constitution adopted in the aftermath of World War II and, in particular, its national antecedent, that is to say the Albertine Statute. Subsection 3.2, on the other hand, will analyse the current Italian constitution and its latest developments, including the groundbreaking constitutional reform of 2022. In conclusion, subsection 3.3 will take into consideration the role of the European Union in the dissemination of a deeper ecological conscience that may have influence on national and international constitutional frameworks.

My approach for the writing of this thesis will be mainly qualitative and interpretative. As a matter of fact, I will start by providing the historical and theoretical introduction to Constitutionalism and Environmental Constitutionalism mainly through the support of articles and papers published in academic journals, as well as books and handbooks written by scholars and experts. Online sources from official websites (like the Stanford Encyclopedia of Philosophy) will also be employed for this purpose. Then, I will focus on the small-n

comparative case study between Canada and Italy. These two countries have been chosen for several reasons. Firstly, they will allow us to notice how differently environmental issues are perceived from a North-American point of view and from a European one. Secondly, Italy and Canada have been chosen for my direct connection with these countries, being the first my country of origins and the second the place where I have lived during four months for an internship. For the analysis of these two case studies I will employ academic papers and researches on the subject, notably for retracing the history of Canadian and Italian Constitutionalism. In this case as well, online sources will turn out to be particularly precious (for instance the official website of the Canadian Government or the Centre for Constitutional Studies). However, without any doubt, the most important sources will be primary ones such as official documents (acts, accords, charters, constitutions, declarations, etc.), transcriptions of speeches and press remarks of Prime Ministers or influential figures, and judicial cases from the Supreme Court of Canada, the International Court of Justice (ICJ), the Italian Constitutional Court, and the European Court of Justice (ECJ), that I will contextualise and interpret in an environmental perspective. Most of these sources are available online on the official portals of governments (Government of Canada and of Québec), institutions (Palazzo Chigi, Quirinale), courts (ICJ, ECJ), or international organisations (United Nations, European Union). Therefore, a great amount of time will be dedicated to the direct analysis and interpretation of these primary sources. Moreover, part of the writing of this thesis took place during my staying in Canada, which allowed me to fully immerse myself in the Canadian mindset. In particular, at the Consulate General of Italy in Montréal where I worked, I had the opportunity to participate in an informative meeting about citizenship in Canada which allowed me to acquire useful knowledge regarding British colonisation in this territory. My staying in Montréal also allowed me to grasp and better understand the internal dynamics of conflict between the Federal Government and

the Provincial Government of Québec that inevitably has consequences in this field as well. Therefore, it is clear that my main research method will be based on data gathering and data analysis, as well as on ethnographic techniques.

CHAPTER I
History of (Environmental) Constitutionalism

Constitutions are not fixed and monolithic documents. On the contrary, they evolve and adapt themselves to different times and new-emerging actors, challenges and necessities. This dynamic attitude of constitutions is more evident than ever if we take into consideration the quite recent phenomenon known as Environmental Constitutionalism. In fact, if modern constitutions date back to the end of the 18th century, the presence of environmental issues in the former becomes relevant in the 20th century only, and it gained momentum especially in the last couple of decades which have been widely characterised by public concern and political debate around the climate and ecological crisis that humankind is now facing. However, in order to fully understand Environmental Constitutionalism, it is equally important to look back at the very origins of Constitutionalism itself and to grasp its founding and recurring elements, as well as debated characteristics.

According to the Stanford Encyclopedia of Philosophy, Constitutionalism is the "idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations."[13] The same conclusion is conveyed by Professor Charles Howard McIlwain in "Constitutionalism: Ancient and Modern", where he states that "the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law."[14] Besides from the almost unanimous idea of limitation of power, Constitutionalism is indeed an ambiguous and contested political concept that hides different layers of meanings. Moreover, some of its features are often at the centre of a heated

[13] Wil Waluchow & Dimitrios Kyritsis, "Constitutionalism", *The Stanford Encyclopedia of Philosophy*, 2023, https://plato.stanford.edu/archives/sum2023/entries/constitutionalism

[14] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Indianapolis: Liberty Fund, 2007), 21, https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2145/McIlwain_7850_LFeBk.pdf

academic debate. In this context, the Stanford Encyclopedia of Philosophy identifies two senses of Constitutionalism: a minimal sense, and a rich one. “In some minimal sense of the term, a constitution consists of a set of norms (rules, principles or values) creating, structuring, and possibly defining the limits of, government power or authority. Understood in this way, all states have constitutions and all states are constitutional states. Anything recognisable as a state must have some means of constituting and specifying the limits (or lack thereof) placed upon the three basic forms of government power: legislative power (making new laws), executive power (implementing laws) and judicial power (adjudicating disputes under laws).” However, when talking about Constitutionalism, scholars usually refer to the rich sense, which consists in the idea that such “norms should impose significant limits on those powers. Often these limitations are in the form of civil rights against government, rights to things like free expression, association, equality and due process of law.”[15] For the purpose of this thesis, mainly a rich perspective will be adopted, with particular attention towards the notion of rights for the limitation of power. As a matter of fact, the phenomenon of Environmental Constitutionalism usually makes reference to the introduction of environmental rights in constitutions. Still, the notion of environmental rights - just like the one of Constitutionalism itself - is open to debate, hiding different ways of facing and, especially, conceiving and framing the climate and ecological crisis. I will focus on this aspect of Environmental Constitutionalism later on, in the following sections of this chapter.

Another fundamental issue concerning the concept of Constitutionalism is whether it necessarily refers to written documents only, or not. Some scholars believe that constitutional norms do not exist unless they are in some way codified in a written document. A representative of this approach is Thomas Paine, who affirmed in his

[15] Waluchow & Kyritsis, “Constitutionalism”

famous work “Rights of Man” that “the continual use of the word Constitution in the English Parliament shows there is none; and that the whole is merely a form of government without a Constitution, and constituting itself with what powers it pleases.”[16] It can be deducted that, in his view, a constitution cannot be consider as such unless it is written. On the contrary, a wide majority of scholars accept that constitutional norms might be unwritten as well.[17] In fact, Constitutionalism can also manifest itself through general laws and conventions of a particular country which are recognised as its constitutional framework even if orally transmitted. For instance, the United Kingdom famously does not have a codified constitution, but it is agreed today that its laws entrench numerous constitutional principles and reflect the characteristics of Constitutionalism. It will also be the case of Canada, whose constitution is partly unwritten.

Whether they are written or not, constitutions still pose questions of interpretation for which two main approaches have been adopted throughout history. So-called “fixed” views put forward the idea that we must always take into consideration what the original authors had in mind and what *their* values and ideas were. Those who support these views - also known as “originalists” - believe that only through this approach constitutions can serve as a politically neutral and stable framework. On the contrary, Living Constitutionalism considers constitutions as living and evolving entities that can and should be contextualised in ever-changing historical, social, cultural, economic and political circumstances.[18] It is clear that the latter is the approach that is adopted when tackling Environmental Constitutionalism. In this context, it is equally important to highlight the fact that another important feature of Constitutionalism is that the norms imposing limits upon government power must be, in some way and to some degree, entrenched, either legally or by way of constitutional

[16] Thomas Paine, *Rights of Man* (1792), 86, https://pinkmonkey.com/dl/library1/right.pdf

[17] Waluchow & Kyritsis, “Constitutionalism”

[18] Ibid

convention. In other words, the institutions and figures whose powers are constitutionally limited, must not be constitutionally able to change or expunge those limits at their pleasure. This is the reason why, for amending a constitution, usually constitutional assemblies, super-majority votes, or referendums are required, or - in the case of a federal system - even the agreement of a predetermined number or percentage of governments or regional units.[19] Of course, this characteristic of constitutions is a *conditio sine qua non* for them to exist, since there cannot be any limitation to government institutions if the latter have the possibility to change those very limits whenever and however they want. The entrenched nature of constitutions makes it difficult to modify these texts with minimal efforts, guaranteeing stability and continuity. Entrenchment is particularly relevant when it comes to the debate between Originalism and Living Constitutionalism. In fact, entrenchment is indeed convenient for originalists and, without any doubt, justifiable for provisions dealing with matters like the length of term of a Senator or which branch of government is responsible for regulating a particular field. Yet, it could represent an obstacle for more abstract and moral issues that have to face the tricks of time. A natural question comes to mind and is the subject of a continuous debate: is it acceptable to have entrenched constitutional impediments adopted by one group of people - the "people-then" - that have consequences on a second group of people - the "people-now" - who might find themselves in completely different circumstances and even adopt totally different moral views? This is the so-called "intergenerational problem" which is used by living constitutionalists for supporting their idea that constitutions indeed can and must transform and adapt themselves to ever-changing contexts without losing their identity or legitimacy. In fact, according to living constitutionalists, a constitutional provision is mainly based on the rights or political morality they are expression of,

[19] Ibid

rather than what they actually required when they were adopted in the first place. In this view, more abstract moral terms, instead of concrete, non-moral ones are adopted. For instance, “cruel and unusual punishment” is preferred to “public hanging” or “drawing and quartering.” It is future generations who will have to substitute their - in all likelihood - different and concrete understandings for those of the authors or those who lived at the time of the writing of the constitution. Why so? The Stanford Encyclopedia of Philosophy proposes four crucial facts in this regard: first, it is important that “governments do not violate certain important rights of political morality.” Second, constitutional authors may not always agree fully on what conditions are concretely necessary for the respect of those rights. Third, constitutional authors cannot foresee the future nor the numerous scenarios and cases in which these important rights will have to be guaranteed. Finally, even when they do agree on what those rights concretely require at the moment of their adoption, they may pose to themselves the same intergenerational problem cited before, therefore they may not feel comfortable with adopting binding norms for future generations who will live in very different times and contexts. As a result, while “concrete understandings of the entrenched constitutional-rights provisions evolve, the results warranted by these provisions can legitimately change right along with them.” Moreover, in order to defend themselves from the accusations of infidelity towards the constitution, living constitutionalists underline the fact that these changes might occur without the constitution having to be changed.[20] Even if many scholars support this approach, Living Constitutionalism is subject to several objections as well. First, it is argued that this theory makes all talk of constitutional interpretation completely senseless since it would transform the latter in actual constitutional creation or construction disguised as interpretation. Others, underline the fact that

[20] Ibid

Living Constitutionalism empties the constitution of its role of guidance since it is put at the mercy of the unconstrained views of so-called interpreters, making individuals less willing to be guided by a it. Furthermore, some affirm that this approach towards Constitutionalism violates the separation of powers doctrine, leaving too much powers in the hands of courts populated by individuals who were appointed and not elected. Basically, democratically unaccountable judges would end up deciding the limits of government, a task for which they are unqualified and which should be reserved for individuals that have obtained the democratic authority to do so (for instance, constitutional authors). Obviously, living constitutionalists have defended themselves from these accusations with a series of responses. They strongly defended the fact that this theory does not result in any way in the arbitrary exercise of judicial power. For instance, David A. Strauss and Wilfrid J. Waluchow suggested that the continuous interpretation of a constitution's abstract rights provisions is a process similar to the one by which judges develop equally abstract, common-law notions (like the notions of negligence and reasonable use of force).[21] Strauss, in his book "The Living Constitution", states that:[22]

> "Our [of the US, A/N] constitutional system — I'll maintain— has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself. A common law constitution is a 'living' constitution, but it is also one that can protect fundamental principles against transient public opinion. And it is not one that judges (or anyone else) can simply manipulate to fit their own ideas."

In short: from a minimal sense to a rich sense, from a written form to an unwritten form, from an originalist approach to a living approach - Constitutionalism indeed is a debated and nuanced concept, the outcome of an equally long and eventful history.

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[21] Ibid

[22] David A. Strauss, *The Living Constitution* (Oxford University Press, 2010), 3

An important step in the history of Constitutionalism and in the passage from Constitutionalism to actual modern constitutions was - without any doubt - made in the 18th century. Historian Max Weber identified some basic characteristics of the State for the 16th and 17th century (namely: unitary territory; State People; unitary State power; monopoly on internal force; monopoly on external force)[23], but in the 18th century new ones started to emerge. These characteristics include: the prominence of the rule of law over the rule of men; the prominence of democracy; and the transformation of the Modern State into the State-Nation. The rule of law consists of monopoly on law, monopoly on justice, and State actions resulted by well-defined, verifiable and appealable rules which must be written through constitutions and codes. Attempts at democracy (which occurred in many parts of the world like in Corsica, the US, Haiti, the Republics of Latin America, etc.) consisted of the predominance of popular sovereignty, the respect of human rights, the separation of powers, and the introduction of parliamentary systems and general elections (which must be - for definition - free, egalitarian and secret). Finally, the transformation of the Modern State into the State-Nation is one of the main historical processes of the 18th century which led to the creation of a new form of State based on a deep form of unity, with a greater involvement of the People. Steven Grosby affirms that a Nation "is a form of self-consciousness, where the 'self' is the awareness of each of many individuals that he or she shares properties with those other individuals." On one hand, Grosby underlines the importance of a shared "property" in order to make this feeling develop. Territorial location becomes a must-have condition for a Nation to exists; "being 'native' to the land, whether by virtue of having been born in the land or having resided in it for a considerable length of time" is fundamental. On the other hand, other elements like language and religion are also considered as founding pillars of a

[23] Karl Dusza, "Max Weber's Conception of the State", *International Journal of Politics, Culture, and Society* (1989), Vol. 3, No. 1, 75-76, https://www.jstor.org/stable/20006938

Nation.[24] Not by chance, the latin word "natio" meant "place of origin" in the first place, and, eventually, through its identification with patriotic values - which were sacred to Greeks, Romans, Jews, and other ancient peoples - the term Nation started acquiring religious and emotional connotations as well.[25] Later on, this term will be employed for referring to a group of people united not only by a common origin, but also by a common language. According to Johann Gottfried Herder, Nations were "constituted by common bonds of language, which drew legitimating force not from acts of consent but from nature and historical evolution."[26] From now on, both natural factors (common origins), and cultural factors (shared values, religion, language, history, literature, art) will play a key role in the formation of a Nation. In this context, constitutions worked as a tool for turning the national community into a concrete political community. As a matter of fact, a constitution is a way in which the representatives of a Nation "act intentionally in the world." Then, "the national state, through its exercise of legitimate power throughout the territory, legally regulates the relations between what are now not merely members of the nation but are also citizens of the national state."[27] Consequently, it can be said that constitutions are not only legally binding documents, but they are also symbols. In many cases, they are believed to be elements which 'make' Nations. Not only do they create a national political community, but they also sort of project a public image of the Nation and of how it should be, in this sense they are ideal documents which transpose this image abroad as well. This is the reason why they are publicly displayed. We might argue that this last feature of Constitutionalism is also at the basis of the recent tendency of Environmental Constitutionalism: more and more people

[24] Steven Grosby, *Nations and Nationalism in World History* (New York: Routledge Taylor & Francis, 2022), 29

[25] Erica Benner, "Nationalism: Intellectual Origins" in John Breully (ed.), *The Oxford Handbook of the History of Nationalism* (Oxford University Press, 2016), 177-178

[26] Ibid, 182

[27] Grosby, *Nations and Nationalism in World History*, 29

recognise themselves in ecological ideas and lifestyles, in the fight for environmental justice (let's just think about the green wave visible both in the civil society and in local and international politics), therefore constitutions should reflect these values of the People if we do consider them as a mirror of the Nation. I do believe that this is proof of the fact that environmental concern is imposing itself as a constituent component of several Nations around the world. Max Weber wrote that Nations are 'artificially' invented, stating that the ethnic-national identity is an "artificial product [Kunstprodukt] of the political community [politischen Gemeinschaft]."[28] We decide what makes a Nation, what is a compelling priority, and the climate and ecological crisis definitely is.

Continuing with the history of Constitutionalism, it is certainly fundamental to cite the case of the Corsican constitution. Corsica, starting from the 15th century, has been subject to a repressive Genoese control which slowly cancelled all of its political traditions and freedoms. After years of domination, the Corsican people started to rebel and in 1730 they appointed two generals and a long, armed and civil revolution - which would last almost 40 years - began. In 1755 this revolution will be led by an almost heroic figure: Pasquale Paoli, who had been living in exile in Naples until then.[29] That same year, Paoli outlined the new political structure of the country through the drafting of a final declaration which is now credited to be the first constitution written according to the Enlightenment principles, as well as the first democratic constitution ever. Some would argue that this was a failed attempt of constitutional project since, after being sold by the Republic of Genoa to France in 1767, the Corsican experiment forcibly saw an end. Yet, Corsica's case - even if it did not see a concrete follow-up - played a key role in the development of

[28] Sung Ho Kim, "Max Weber's Liberal Nationalism", *History of Political Thought* (2002), Vol. 23, No. 3, 439, https://www.jstor.org/stable/26219877

[29] Antonio Trampus, *Il diritto alla felicità: Storia di un'idea* (Laterza, 2008), 183

constitutions. It was a real political laboratory in the 18th century, very soon becoming an image and a myth as the cradle of Constitutionalism both in Europe and in the Americas. All the following constitutions will have the Corsican one as a model. This was possible also because it was part of a strong public and academic debate through the involvement of notable intellectual figures, starting with Jean-Jacques Rousseau who praised Corsica as a "country capable of legislation."[30] In 1764, the Corsican government even asked Rousseau to help them drafting an updated version of their constitution, leading to the writing of "Projet de constitution pour la Corse" (Constitutional project for Corsica, 1765), which was not published in his lifetime because of the turn of events. The myth of Corsica was very much debated in England as well. James Boswell - a Radical and a Mason - visited Corsica in 1765, and in 1766 started campaigning for it on gazettes, publishing in 1768 "An Account of Corsica." Boswell considered Corsica as a symbol of the revival of the republican tradition, writing that Paoli "new-modelled the government, upon the […] principles of democratical rule, which was always his favourite idea."[31] Paoli's constitution started with a preamble on natural rights and freedoms, inventing a sort of textual model that will be employed in many other texts, especially in the constitution of the United States. In such preamble, the Corsican constitution reads as follows:[32]

"The General Diet of the People of Corsica, legitimately Master of itself, convoked according to the form [established by] the General [Paoli] in the city of Corte, the 16, 17, 18 November 1755. Having reconquered its Liberty, wishing to give durable and constant form to its government,

[30] Jean-Jacques Rousseau, "Du contrat social, ou principes du droit politique" in *Collection complète des oeuvres* (Geneva: 1780-1789), www.rousseauonline.ch

[31] James Boswell, *An Account of Corsica* (London: 1768), 160, https://archive.org/details/accountofcorsica00bosw/page/160/mode/2up

[32] Dorothy Carrington, "The Corsican constitution of Pasquale Paoli (1755-1769)", *The English Historical Review* (1973), No. 348, 482, http://www.jstor.org/stable/564654

reducing it to a constitution from which the Felicity of the Nation will derive. [The Diet] has decreed and decrees."

In this extract, it is clear how the Corsican constitution established that sovereignty belonged to the Corsican people. The most innovative aspect of the Corsican Diet indeed was that its members were elected through universal male suffrage. Consequently, during most of Paoli's regime, every adult male had the right to vote in elections to the Diet, or to stand for election. The Corsican Diet definitely was an unusual and very powerful institution for those times. The majority of great European nations - among which France, Russia, Prussia, and Spain - did not have a representative legislature like Corsica.[33] As it can be read in the extract, the constitution also affirmed that its main aim was to ensure a new form of government capable of guaranteeing the "Felicity of the Nation." Not by chance, the term "happiness" will later be famously employed in the Declaration of Independence of the United States of 1776:[34]

"We hold these truths to be sacred & undeniable; that all men are created equal & independent, that from that equal creation they derive rights inherent & inalienable, among which are the preservation of life, & liberty, & the pursuit of happiness"

The interpretation of the term "happiness" perfectly fits the evolutionary character of constitutions which is at the basis of this thesis. In fact, what makes the happiness of men and how it can and should be achieved certainly changed throughout time, and it is still changing today. The debate around happiness has extremely old origins, but it became particularly relevant during the Enlightenment. Different views led to different considerations of the idea of control of our instincts through the employment of reason. According to Rousseau, for instance, lost happiness was caused by the loss of the

[33] Ibid, 495

[34] The Declaration of Independence of the United States (1776), https://docs.house.gov/meetings/GO/GO00/20220929/115171/HHRG-117-GO00-20220929-SD010.pdf

state of nature of man, writing that "what makes human misery is the contradiction between our condition and our inclinations, between our nature and our social institutions, between the man and the citizen. If you will manage to eliminate this duplicity, then you will make man as happy as he can be."[35] However, one of the first major steps towards a more contemporary interpretation of the concept of happiness of the Nation was made by Gaetano Filangieri. Filangieri was a leading exponent of the Neapolitan Enlightenment. His name famously resonated abroad and he also engaged in an epistolary relationship with Benjamin Franklin during the years of the United States Declaration of Independence.[36] Filangieri wrote an essay entitled "La morale pubblica" (Public Morality) in which he states that:[37]

> "Since the purpose of morality is happiness, the purpose of public morality will be the happiness of the peoples. In every Nation, we must look for the means for obtaining it, whether inside or outside of it. […] Internal happiness of a Nation cannot but be the result of good legislation. Therefore, in the first part, I will give all the rules for creating a legislation adaptable to our times and perfect in all of its parts."

Filangieri's notion of public happiness or, like he called it: "happiness of the peoples", consisted in the positive interaction between government action and popular response. With the aim of sketching the obstacles to the pursuit of this public happiness and proposing the necessary reforms for its attainment, Filangieri produced his most famous and 'universal' work, since it was conceived as a text valid for all realms and all times: "Scienza della legislazione" (Science of Legislation).[38] In this work, which was published in 1780, "happiness,

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[35] Jean-Jacques Rousseau, *Scritti politici* (Torino: 1970), 9-72, my translation

[36] Maria Silvia Balzano, Gaetano Vecchione & Vera Zamagni, *Contemporary of every age: Gaetano Filangieri between public happiness and institutional economics* (Munich Personal RePEc Archive, 2018), 2, https://mpra.ub.uni-muenchen.de/84538/

[37] Gaetano Filangieri, "La morale pubblica" in Gerardo Ruggiero, *Gaetano Filangieri, un uomo, una famiglia, un amore nella Napoli del Settecento* (Napoli, 1999), 87, my translation

[38] Balzano, Vecchione & Zamagni, *Gaetano Filangieri between public happiness and institutional economics*, 4

equality, freedom, republicanism and human rights are reread through the enthusiasm for the political experiment which was having place in the American continent."[39] Science of legislation is a revolutionary piece of work since, for the first time, it moves the debate around happiness from old notions of ethical and philosophical limitations, to the political sphere, giving a precious contribution to the development of modernity. Not by chance, it saw an extraordinary and planetary success: it was translated in numerous languages and it was even recently employed as a point of reference for a constitutional reform in Mexico.[40] Filangieri wrote in the introduction:[41]

"The scene has changed, and the rulers have begun to realize that more respect is due the lives and tranquillity of men; that there is another way, independent of force and arms, to arrive at greatness; that good laws are the sole support of national happiness; that the goodness of the laws is inseparable from their uniformity; and that this uniformity cannot be found in laws which have been made over the space of twenty-two centuries by different legislators and for different nation."

Therefore, according to Filangieri, it is legislation that must lead the human being towards happiness. The laws are made, of course, by men for men. Consequently, the legislator must be adequately trained in order to make good laws and to educate the citizen to respect these laws. This is the only way for fully understanding and embracing democracy, equality, popular sovereignty and happiness. Thanks to the work of Filangieri, happiness - in the European culture - finally stops from being an imaginary purpose or a providential object, but it fully becomes a human right, inserting it in the wider debate around modern Constitutionalism. One particular quote from the Science of Legislation sticks out to me: "a happy moment, a victory of one day

[39] Trampus, *Il diritto alla felicità*, 197

[40] Ibid, 198

[41] Marcello Maestro, "Gaetano Filangieri and His Science of Legislation", *Transactions of the American Philosophical Society* (1976), Vol. 66, No. 6, 12, https://doi.org/10.2307/1006297

can offset the losses of several years, but a political mistake, a legislative mistake can produce unhappiness for a century and may preclude future development for centuries to come." I find this particularly relevant for Environmental Constitutionalism. With great innovation, it anticipates the concept of justice for future generations, while reiterating one basic idea: legislation is fundamental for reaching happiness in our society. The pursuit of happiness, just like other rights, cannot be fully fulfilled without the right support from politics and policies, but also - and especially - from the documents that sustain a State, namely constitutions.

I do believe that today, when talking about the happiness of the Nation, it is almost inevitable to also talk about the protection of the environment as well. Floods, droughts, fires and many other environmental disasters caused by climate change are making it impossible, for a big part of the population on the globe, to be happy. Many people did loose their houses - if not their lives - because of these dramatic events. The term "environmental refugee" has indeed been coined for a reason. According to the International Organisation of Migration:[42]

> "Environmental migrants are persons or groups of persons, who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or chose to do so, either temporarily or permanently, and who move either within their country or abroad"

In 2020, the United Nations Human Rights Committee ruled that refugees fleeing the effects of the climate crisis cannot be forced to return home by their adoptive countries.[43] The UN High Commissioner for Refugees, Filippo Grandi, later confirmed that this

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[42] Alice Sironi, Céline Bauloz & Emmanuel Milen, "Glossary on Migration", *International Migration Law* (International Organisation for Migration, 2019), No. 34, https://publications.iom.int/books/international-migration-law-ndeg34-glossary-migration

[43] United Nations Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 2728/2016* (Geneva: United Nations Human Rights Committee, 2020), https://digitallibrary.un.org/record/3979204#record-files-collapse-header

ruling means that those displaced by climate change should be treated like proper refugees by recipient countries:[44]

"The ruling says if you have an immediate threat to your life due to climate change, due to the climate emergency, and if you cross the border and go to another country, you should not be sent back because you would be at risk of your life, just like in a war or in a situation of persecution."

Since 2008, around 20 million people per year have been displaced by extreme weather events, many of which were exacerbated by climate change according to the Intergovernmental Panel on Climate Change (IPCC). Even if we manage to contain such changes in the most optimistic scenario, such migration pressures are inevitably going to increase in any case.[45] So, it is clear how environmental issues produce consequences on different spheres of life that are already part of constitutional traditions, like migration. Migration flows - just like the climate crisis - represent an extremely hot and sensitive topic that is on the mouth of every politician, debated in civil societies all around the world, and sometimes defined as a 'burden' for some international organisations that have to manage them while pleasing many different and conflicting interests. Such flows have been at the centre of attention for ages, and we can now find them in different types of constitutions. Let's take my country, Italy, as one among many instances of codification of migrants' rights in national constitutions. Here is Article 10 of the Italian constitution:[46]

"The Italian legal system conforms to the generally recognised principles of international law.

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[44] Human Rights First, *Restoring and Extending Protections in the United States for Displaced Persons Impacted by Climate Change*, https://humanrightsfirst.org/wp-content/uploads/2022/06/HumanRightsFirstOHCHRClimateForcedMigrationSubmission.6.23.2022.pdf

[45] H.O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability*. *Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* (Cambridge, New York: IPCC, Cambridge University Press, 2022), DOI:10.1017/9781009325844.

[46] *Constitution of Italy* (1947), https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf

The legal status of foreigners is regulated by law in conformity with international provisions and treaties.
A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law.
A foreigner may not be extradited for a political offence."

Italy is not an isolated case. According to a study conducted by the WORLD Policy Analysis Center, as of 2020, 22% of world constitutions prohibited discrimination on the basis of citizenship, while 60% guaranteed equal rights, no matter their place of origin. Some constitutions also protect more specific rights for migrants, for instance 17% of constitutions recognise non-citizens' right to education, while 14% guarantee the right to health for non-citizens.[47] In Canada, the Supreme Court found that a health system that provides different standards of healthcare to refugees based on their country of origin violates the right to non-discrimination which is enshrined, among other documents, in Section 15(1) of the Canadian Charter of Rights and Freedoms which reads as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[48] Furthermore, several international treaties protect basic rights for migrants and refugees regardless of their immigration status. The International Organisation of Migration (IOM) also has its own constitution which "provides a framework for the purposes, functions, legal status, finance, membership and other issues necessary for the functioning of the Organization."[49]

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[47] WORLD Policy Analysis Center, *Constitutional Equal Rights of Migrants and Refugees* (2020), https://www.worldpolicycenter.org/sites/default/files/Fact%20Sheet%204%20-%20Constitutional%20Equal%20Rights%20of%20Migrants%20and%20Refugees.pdf

[48] *Canadian Charter of Rights and Freedom* (1982), https://www.canada.ca/content/dam/pch/documents/services/download-order-charter-bill/canadian-charter-rights-freedoms-eng.pdf

[49] International Organisation for Migration, *IOM Constitution*, https://www.iom.int/iom-constitution

So, one basic question poses itself: if migration issues are tackled within national and international constitutions, then why shouldn't the environment be tackled within them as well?

Roderic O'Gorman's comparative study on Environmental Constitutionalism shows that - as of 2017 - on a total of 196 national constitutions, 148 can be considered as part of this recent tendency.[50] According to the South African scholar Louis J. Kotzé, the main and most important characteristic of Environmental Constitutionalism is the expression of some general environmental "care" in the text.[51] Notably, planetary degradation is being tackled within constitutions through the language of human rights.

Human rights today are considered to be naturally inherent to all human beings. Their history is far too long and rich for me to trace in this thesis, but it is certainly fundamental to cite some main steps and theories that are also relevant for our study of Environmental Constitutionalism. It is impossible to start a conversation about human rights without posing ourselves theoretical questions on the nature of being human. In fact, theoretical justifications of human rights inevitably began with an attempt to identify what it is that makes us human agents. Human beings were viewed as "physiological and social agents who require the sufficient protection and promotion of certain interests in order to be human."[52] Therefore, the development of human rights and social institutions is linked to these pre-existing interests. Historically and analytically, the concept of human interests precedes that of human rights. In other words, human rights are rooted in our very nature and they exist in order to promote and protect the

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[50] Roderic O' Gorman, "Environmental Constitutionalism: A Comparative Study", *Transnational Environmental Law* (2017), Vol. 6, No. 3, 435-462, DOI:10.1017/S2047102517000231

[51] Louis J. Kotzé, "Arguing Global Environmental Constitutionalism", *Transnational Environmental Law* (2012), Vol. 1, No. 1, 207-208, DOI: https://doi.org/10.1017/S2047102511000094

[52] Andrew Fagan, "Philosophical foundations of human rights" in Thomas Cushman (ed.), *Handbook of Human Rights* (Routledge Taylor & Francis Group, 2012), 11

interests that constitute us. In this sense, human rights represent the mechanism for identifying and securing our interests. However, the language of human rights has quickly replaced and substituted that of human interests. In many cases, they are now employed as synonymous. In some cases, human rights are still considered to be essential tools for the realisation of our fundamental interests. Moreover, the very concept of human rights owes much to the spirit of the European Enlightenment and to the "ideals of individual liberty, equality, and an attempt to subordinate political power to the will and interests of those subject to its jurisdiction."[53]

An important step was made in the mid-18th century, when Enlightenment thinkers started claiming that natural laws were not the result of man's reason, but rather of man's sensibility. Voltaire, in his "Poème sur la loi naturelle" (Poem on natural law), argued that what drove man towards the recognition of natural laws was "his judge in his heart." In this context, Rousseau's idea was quite influential as well. In fact, even if his minimisation of reason had proved to be too radical and controversial for some, his argument that natural laws were really natural "principles" that determined our sensibility was very much welcomed. The moral importance given to conscience and "sensibilité" was the result of what Dan Edelstein defines as a true "cult of sensibility" that rapidly spread in France and Britain from the late 17th to the early 19th centuries through literature.[54] For explaining how a discourse rooted in literature ended up having consequences on a legal and philosophical tradition like the one of natural laws, Edelstein cites Lynn Hunt's extremely innovative study entitled "Inventing Human Rights: A History." In this piece of work, Hunt highlights the first appearance of the term "human rights" in Rousseau's "Social Contract", writing that:[55]

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[53] Ibid, 20

[54] Dan Edelstein, "Enlightenment Rights Talk", *The Journal of Modern History* (2014), Vol. 86, No. 3., 542, https://www.jstor.org/stable/10.1086/676691

[55] Lynn Hunt, *Inventing Human Rights: A History* (W. W. Norton & Company, 2008), 24

"'Rights of man' gained currency in French after its appearance in Jean-Jacques Rousseau's Social Contract of 1762; even though Rousseau gave the term no definition and even though — or perhaps because — Rousseau used it alongside 'rights of humanity,' 'rights of the citizen,' and 'rights of sovereignty.' Whatever the reason, by June 1763, 'rights of man' had become a common term according to an underground newsletter. […] Although the play does not in fact use the precise phrase 'the rights of man,' but rather the related one, 'rights of our being,' the term had clearly entered intellectual usage, and it was in fact directly associated with the works of Rousseau. Other Enlightenment writers, such as baron d'Holbach, Raynal, and Mercier, then picked it up in the 1770s and 1780s."

Her thesis is based on the idea that "'natural right(s)' had too many possible meanings"[56] in French. Therefore, she does not situate the 'creation' of human rights within the longer history of natural rights theory, but rather "sometime between 1689 and 1776" when "rights that had been viewed most often as the rights of a particular people — freeborn English men, for example — were transformed into human rights, universal natural rights, what the French called *les droits de l'homme*, or 'the rights of man.'"[57] Edelstein, however, underlines the fact that the notion of "universal natural rights" indeed existed well before 1689, as far back as medieval philosophy. Moreover, the extension of such rights to other peoples, like the First Nations of the New World, had been successfully accomplished in the 16th century already. Consequently, to him, this cultural current not only explains the diffusion and transformation of human rights, but also the break and eventual takeover of the jus-naturalist current.[58]

Literature played a key role and had an impact on legal concepts because 18th century novels, especially epistolary ones, trained readers to embrace "a sense of the separation and self-possession of individual bodies, along with the possibility of empathy with

[56] Ibid, 23

[57] Ibid, 21-22

[58] Edelstein, "Enlightenment Rights Talk", 542

others."[59] Meaning that literature taught readers how to feel for other individuals, including those who might have been beneath their own social status. In literature, of course, this act of empathy was addressed towards imaginary beings, but the transposition from the fictional to the real world led to a broader concern for the well-being of real people as well, all of them (condemned criminals included). According to Hunt, this empathetic understanding of another's condition represents a key element in the development of human rights. In conclusion, literature did help in moving the rights talk from being the prerogative of jurists and philosophers to a part of mainstream culture. Its dissemination is even quantitatively visible. Edelstein shows that a search for the uses of "droit naturel" between 1700 and 1789 in the ARTLF-FRANTEXT database makes us come to the conclusion that this expression was employed far more commonly in the second half of the century than in the first. Even if it must be acknowledged that the data sample is quite small, a clear pattern emerges: "between the 1740s and the 1760s, the language of natural right more than quintupled in frequency."[60] The reason why "droit naturel" became such an employed word in the second half of the 18th century is clear as well; it is sufficient to take a look at the authors who employ this expression: Voltaire, Rousseau, d'Holbach, Montesquieu, Mirabeau, Mably, d'Alembert, Helvétius, Raynal, and Condorcet, along with less famous authors such as Bernardin de Saint-Pierre, Delisle de Sales, Marmontel, Marat, and Volney. These writers were all involved in the spread of the culture of sensibility which eventually extended well beyond literature and managed to influence the 18th century perceptions of human nature. Edelstein comes to the conclusion that "by bringing sensibility into the story, Hunt shows how the history of rights, both human and natural, is not merely an intellectual affair but a cultural one as well."[61]

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[59] Hunt, *Inventing Human Rights*, 30

[60] Edelstein, "Enlightenment Rights Talk", 543

[61] Ibid, 544

In “Inventing Human Rights: A History”, Hunt shows the whole point of Living Constitutionalism, in some sense. In fact, she writes:[62]

> “The newfound power of empathy could work against even the longest held prejudices. In 1791, the French revolutionary government granted equal rights to Jews, in 1792, even men without property were enfranchised; and in 1794, the French government officially abolished slavery. Neither autonomy nor empathy were fixed; they were skills that could be learned, and the ‘acceptable’ limitations on rights could be —and were— challenged. Rights cannot be defined once and for all because their emotional basis continues to shift, in part in reaction to declarations of rights. Rights remain open to question because our sense of who has rights and what those rights are constantly changes. The human rights revolution is by definition ongoing.”

If we share with Hunt this notion of “invention” of human rights, it can be argued that this process never stops and it continues even today with environmental rights, which makes us talk about human rights as a continuous work in progress, as an “ongoing” revolution. Indeed, the “emotional basis” identified by Hunt is what I was referring to when I put forward the idea that environmental concern is imposing itself as a constituent component of several Nations. Environmental “care” - which is at the basis of Environmental Constitutionalism as we will see in the following sections - is driven by an emotional basis of fear and anxiety for the future, which makes the invention of new human rights if not obligatory, necessary.

Human rights entail both rights and obligations. It is mainly States that assume obligations and duties under international law to respect, to protect and to fulfil them. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. Governments can respect human rights in several ways. First of all, avoiding the limitation of individual freedom, unless it is absolutely necessary for the well-being of society. Moreover, they can offer support and ways for seeking legal remedies in the case of a

[62] Hunt, *Inventing Human Rights*, 28-29

violation of such rights through domestic and international courts. They can also ratify and implement human rights treaties. All States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties. Moreover, some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and civilisations. But States can also create constitutional guarantees of human rights. The obligation to protect, on the other hand, requires States to actually protect individuals and groups against human rights abuses from private actors. In order to protect individuals from these abuses, governments can pass laws, prosecute or pursue civil actions (also through the cooperation with the international community), and put efforts into the education of the population. Whereas the obligation to fulfil means that States "must take positive action to facilitate the enjoyment of basic human rights."[63] This aspect is fundamental for the analysis of environmental rights within constitutions, since - in order for them not to be simple ink on a page - they need be enforced effectively also through positive actions. Before looking at the different types of environmental rights, it is necessary to briefly cite some specific characters of human rights. There are five basic tenets underlying human rights. Human rights are:

- Universal: "all people are born free and equal in dignity and rights." The principle of universality is the cornerstone of international human rights law. It was first emphasised in the Universal Declaration on Human Rights in 1948, and then reiterated in the 1993 Vienna World Conference on Human Rights. In an idealised future, something that goes beyond boundaries and civilisation like climate change, will be tackled in the same way. For now, however, we must settle for little national steps towards environmental protection through a constitutional framework (if we

[63] The Advocates For Human Rights, *Human Rights Tools for a Changing World: A step-by-step guide to human rights fact-finding, documentation, and advocacy* (2015), 8, https://www.theadvocatesforhumanrights.org/Publications/change

do not consider some multilateral exceptions, like the Stockholm Declaration);

- Inalienable: they should not be taken away or transferred, except in specific and emergency situations and according to due process. Theoretically, people still have human rights even when their governments violate them;
- Interconnected*:* the improvement of one right facilitates the advancement of the others. Likewise, the deprivation of one right adversely affects the others. This is particularly relevant for Environmental Constitutionalism, in fact in the following section we will notice how environmental rights interconnect with many other rights. A clear example of this is given by the Universal Declaration of Human Rights (UDHR). The UDHR, together with the subsequent conventions, constitutes the constitutional and legal basis for legislation on human rights at the international level and at Article 25 states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."[64] In this case, in order to guarantee an adequate standard of living, numerous rights (from food to healthcare) are cited;
- Indivisible: no right can be treated "in isolation";
- Non-discriminatory: "human rights should be respected without distinction, exclusion, restriction, or preference based on race, color, age, national or ethnic origin, language, religion, sex, or any other status, which has the purpose or effect of impairing the enjoyment of human rights and fundamental freedoms."[65]

[64] United Nations, *Universal Declaration of Human Rights* (Paris: United Nations, 1948), https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf

[65] The Advocates For Human Rights, *Human Rights Tools for a Changing World*, 7

1.1 Environmental rights: rights of nature, intersectionality and intersection

The concept of "environmental rights", according to Luis Rodriguez-Rivera, comprises three different elements: environmental procedural rights, the right of environment and the right to environment.[66] Environmental procedural rights include those rights associated with participation in decision making, access to information and access to justice.

The right of environment is considered to be the most radical environmental right by some authors and, indeed, it is the less recognised, since it envisages a sort of 'personification' of the environment which is entitled to its own rights and, consequently, to protection on that basis. As of 2017, only one country could boast the right of environment in its constitution, that is to say Ecuador. In fact, Ecuador inserted a chapter on nature following a constitutional revision in 2008. It comes with no surprise the fact that this particular development took place in a Latin American country, where nature actually is identified as a person through the religious worshipping of the Pacha Mama. Article 71 of the Ecuadorian Constitution reads the following:[67]

> "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes"

Moreover, when nature is identified with a person, it usually is identified with a woman: from the Pacha Mama worshipped by the Inca civilisation to the universal notion of Mother Nature. Historically, women and nature have been associated one to the other for their being fertile. If, at the beginning, this was seen as an aspect to cherish

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[66] Luis Rodriguez-Rivera, "Is the Human Right to Environment Recognized under International Law? It Depends on the Source", *Colorado Journal of International Environmental Law & Policy* (2001), Vol. 12, No. 3, 1-45, DOI: https://doi.org/10.1017/S2047102517000231

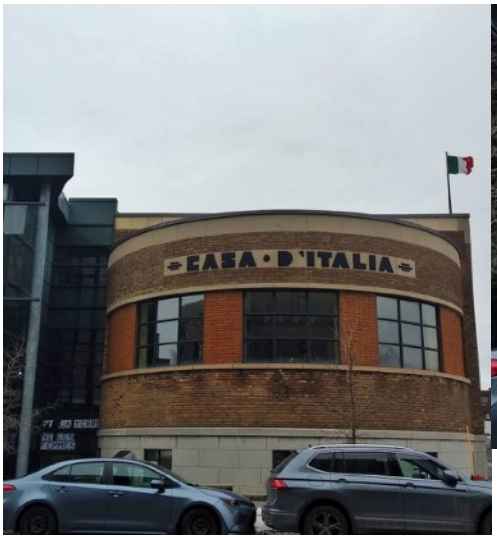
[67] *Constitution of Ecuador* (2008), https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html

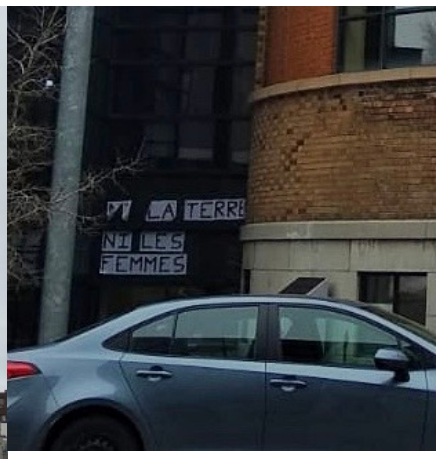
and respect (let's think about the Venus of Willendorf), then it quickly became a reason for diminishing and dominating both of them. Ecofeminist scholars and activists do underline, in fact, that it exists a link between the oppression of women and the destruction of the planet, namely the patriarchal imaginary.[68] But why is this relevant for Environmental Constitutionalism? Because it is proof of the fact that, when dealing with the climate and ecological crisis, it is necessary to adopt an intersectional point of view; therefore understanding that, in order to adopt environmental provisions and policies actually capable of making the difference, the entire hereto-patriarchal and capitalistic system that we are feeding right now has to be changed. And what better place to intertwine these challenges than constitutions, where every basic aspect of life is covered and where the rights of every individual are (or should be) enlisted?

While in Montréal for my internship, I went on a visit to "Casa d'Italia" (House of Italy), an historical reference point for the Italian community in the city which was founded in 1936. There, I ran across a banner with written "Ni la terre ni les femmes" (Not the earth nor the women) on it. This motto, which originated once again - and not by chance - in Latin America ("Ni la tierra ni las mujeres"), quickly spread all around the world. I think it is not a coincidence the fact that this statement was made outside of a building constructed during the fascist era which does not hide its fascist roots, especially in its architecture (as it can be seen in the pictures down below). The fascist ideology used to reduce the role of women to pure motherhood and wifehood. In this sense, even if it would be an anachronism to say so, it was anti-feminist. Fascism definitely was imperialist as well, in that it considered the land as something to conquer only for the glory of the Nation.[69] Now, the Italian constitution is antifascist in its core. Today, as we will see in the following chapters of this thesis, it is also

[68] Mattia Frasca, *L'écoféminisme: une histoire d'oppression patriarcale de Françoise d'Eaubonne à Greta Thunberg* (2021)

[69] Kevin Passmore, *Fascism: A Very Short Introduction* (Oxford Paperbacks, 2002), 31





explicitly pro-environment. These two constitutional elements are deeply interconnected, especially when adopting the point of view of the right *of* environment, since the earth becomes the body of a woman that should not be possessed by any man. Intersectionality becomes a fundamental notion when talking about climate justice, thus when talking about Environmental Constitutionalism as well.
In an open letter to the EU and to global leaders - signed by thousands of activists, scientists, representatives of civil society and influencers - the Swedish activist Greta Thunberg wrote:

> "There is one other thing that has become clearer than ever: climate and environmental justice can not be achieved as long as we continue to ignore and look away from the social and racial injustices and oppression that have laid the foundations of our modern world. The fight for justice and equity is universal. Whether it is the fight for social, racial, climate or environmental justice, gender equality, democracy, human-, indigenous peoples'- LGBTQ- and animal rights, freedom of speech and press, or the fight for a balanced, wellbeing, functioning life supporting system. If we don't have equality, we have nothing. We don't have to choose, and divide ourselves over which crisis or issue we should prioritise, because it is all interconnected."[70]

All of these aspects will have to be taken into consideration when tackling the codification of environmental rights into constitutions. I am thinking, for instance, about indigenous peoples' status and

[70] Greta Thunberg, *Open letter and demands to world leaders*, 2020, https://climateemergencyeu.org

protection. This will be further analysed in the second chapter dedicated to the Canadian case, since they represent an extremely important - yet often invisible - reality that is firsthand facing the detrimental effects of climate change. As a matter of fact, according to a report made by Katharina Rall for Human Rights Watch:[71]

> "Climate change is pushing increasingly dangerous levels of food poverty in First Nations. […] By flouting its emissions-reduction commitments, Canada is contributing to the global climate crisis that, within its borders, is being felt most acutely by Indigenous people who live off the land."

Rall's report is the outcome of a research Human Rights Watch conducted in Northern Ontario, Northwestern British Columbia, and Northern Yukon between June 2018 and December 2019. In the three geographic locations studied, indigenous populations reported drastic reductions in the quantity of food they are able to harvest, as well as increased difficulty and danger in harvesting it. Across Canada, indigenous families are at serious risk of being "food insecure", as defined by the United Nations Food and Agriculture Organisation (FAO). Meaning that they are not able to access food capable of meeting their dietary needs and food preferences. These changes were mainly caused by climate change impacts on wildlife habitat, including changing ice and permafrost conditions, more and increasingly intense wildfires, warming water temperatures, changes in precipitation and water levels, and unpredictable weather. It can be argued that their right to food is being denied because of this. The right to food was first recognised as a fundamental human right in 1948 thanks to the UDHR. Since then, Canada has signed several national and international agreements promoting this right. Further guidance was given by the FAO in 2004 through the Voluntary Guidelines to support the Progressive Realisation of the Right to

[71] Katharina Rall, *"My Fear is Losing Everything". The Climate Crisis and First Nations' Right to Food in Canada* (Human Rights Watch, 2020), https://www.hrw.org/report/2020/10/21/my-fear-losing-everything/climate-crisis-and-first-nations-right-food-canada

Food. The FAO, on the "right to adequate food and the achievement of food security" affirms that:[72]

> "The aim is to guarantee the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals; physical and economic accessibility for everyone, including vulnerable groups, to adequate food, free from unsafe substances and acceptable within a given culture; or the means of its procurement."

However, as already anticipated, we will focus on this in the chapter dedicated to the Canadian case. For now, it is fundamental to underline that the more we become aware of the intersection of fights, the clearer it becomes that we need environmental provisions in a framework of interconnection with other rights. This is evident even while adopting a less radical perspective than the one of the right of environment.

In fact, continuing on with the different kinds of environmental rights, we have the right to environment. The right to environment may be regarded as the most easily negotiable and applicable right since it refers to each and every individual - just like a 'traditional' human right - who is entitled to live in a safe environment. In this case, the environment is seen through an anthropocentric lens and, precisely because of that, this type of right is less controversial and already widely recognised. The right to environment is, in fact, present - at the international level - in Principle 1 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), which states that: "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being"[73] and it is implicitly guaranteed in numerous national constitutions through an

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[72] Food and Agriculture Organisation of the United Nations, *Voluntary Guidelines to support the Progressive Realisation of the Right to Food*, (Rome: FAO, 2005), https://www.fao.org/3/y7937e/y7937e.pdf

[73] United Nations, *Declaration of the United Nations Conference on the Human Environment* (Stockholm: United Nations, 1972), https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/PDF/NL730005.pdf?OpenElement

interconnection with other rights, such as: the right to health, to property, to water and - as we very well know - to food. The link between environment and health is quite recurring. The Belgian constitution cites the "right to the protection of a healthy environment"[74], whereas the Charter for the Environment of France (which was integrated in its constitution in 2004) envisages - in its very first article - the right "to live in a balanced environment which shows due respect for health."[75] The constitutions in Azerbaijan (Art. 39), Belarus (Art. 44) and Armenia (Art. 31) recognise the right to private property but only if respectful of the environment. In this case, we could consider environmental concerns as a valid justification for the limitation of some specific human rights. This is visible in the constitution of Madagascar as well, which declares that the State guarantees freedom of enterprise "within the limit of the respect for the general interest, the public order, morality and the environment."[76] Finally, the right to water is described as a "vital natural resource" and as "fundamental human right"[77] in Article 47 of the Uruguayan constitution which was revised through a popular referendum in 2004. As Christopher G. Weeramantry, former Judge of the International Court of Justice, has explained:[78]

"The protection of the environment is a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments."

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[74] *Constitution of Belgium* (1831), Article 23, https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf

[75] *Charter for the Environment of France* (2004), Article 1, https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/charter_environnement.pdf

[76] *Constitution of Madagascar* (2010), Article 37, https://faolex.fao.org/docs/pdf/mad128141.pdf

[77] *Constitution of Uruguay* (2004), Article 47, https://cjad.nottingham.ac.uk/documents/implementations/pdf/Uruguay-Constitution_amend_2004_EN.pdf

[78] Christopher Gregory Weermantry, *Separate Opinion on the Gabcikovo-Nagymaros Project (Hungary/Slovakia) case* (ICJ, 1997), 88-89, https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-03-EN.pdf

If one accepts the premise that "the raison d'être of the modern state is to promote the interests of its citizens"[79], then this evidence strongly supports recognition of an independent constitutional right to environment.[80]

1.2 Methods of codification

Of course, the codification of environmental issues and rights in constitutions differs from country to country and it is influenced by the context in which this change is happening. O' Gorman identifies three broad categories of context of constitutional change particularly relevant for Environmental Constitutionalism: crisis change, regime change and non-crisis change.[81] Moments of crisis have been exploited throughout history as opportunities for carrying out constitutional reform processes. 97 of the 148 constitutions taken into consideration in his study, introduced environmental provisions following a crisis-change situation. After the Second World War, three key phases originated this development: the decolonisation between the 1950s and the 1970s, the end of European military dictatorship in the 1980s, and the break-up of the Soviet Union in the 1990s. Moreover, internal crises may play a key role as well, allowing constitutional reforms in this sense, even when environmental concern was not the original reason for discontent. It is the case of India, where a series of amendments made to the constitution in 1976 included environmental protection (Art. 48A) despite the main goal of the reform was to increase the separation of powers, with no reference to the former. Twenty-five constitutions (including China's and Vietnam's) introduced environmental provisions following a regime

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[79] Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?", *Lord Cooke of Thorndon Lecture* (2006), 151, https://www.wgtn.ac.nz/public-law/publications/nz-journal-of-public-and-international-law/previous-issues/volume-4-issue-2-december-2006/mclachlin.pdf

[80] Lynda M. Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution", *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 71* (2015), http://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/20

[81] O' Gorman, "Environmental Constitutionalism: A Comparative Study", 441

consolidation. This is proof of the fact that Constitutionalism and Environmental Constitutionalism are not reserved for democratic States only. Finally, twenty-six States did so in a non-crisis situation. However, it is clear that the most recent attempts of introduction of environmental provisions in national constitutions do not belong to neither of these three contexts. I might want to add a new category that I would like to denominate bottom-up change. In the last years, institutional responses to environmental issues have been the result of widespread social manifestations and public discontent asking for stronger political action in order to save our planet, especially from younger generations. Greta Thunberg's movement Fridays For Future is, without any doubt, the most evident instance of this type of change. The Swedish activist, not by chance, was also received by French President Emmanuel Macron who then attempted (and failed) to add "environmental protection" in Article 1 of the constitution, in all likelihood because of these very pressures and for improving his reputation among the youngest voters. Emmanuel Macron was not the only leader to meet Greta Thunberg: the Italian Prime Minister Mario Draghi did so at the Pre-COP26 Summit in Milan in 2021[82], whereas the Canadian Prime Minister Justin Trudeau met her in 2019 in Montréal. After said meeting, in a news conference announcing a proposal to plant trees to combat climate change, Trudeau called Greta Thunberg a "remarkable" young person who is driving the conversation forward.[83] Proof, once again, of the fact that political discourse - in most cases - must be triggered by a bottom-up spark.

This last category of context of constitutional change can be considered as part of a wider framework that O' Gorman defines as "external factors influencing constitutional change."[84] Many different

[82] Josephin Joly, "Italy PM Mario Draghi reacts to Greta Thunberg's 'blah, blah, blah' speech", *EuroNews*, 01/10/2021, https://www.euronews.com/green/2021/09/30/italy-pm-mario-draghi-reacts-to-greta-thunberg-s-blah-blah-blah-broadside

[83] Kathleen Harris, "Greta Thunberg meets Trudeau, tells him he's not doing enough to fight climate change", *CBC News*, 29/09/2019, https://www.cbc.ca/news/politics/trudeau-greta-thunberg-climate-change-action-1.5299674#

[84] O' Gorman, "Environmental Constitutionalism: A Comparative Study", 444

channels played a role in the quick spread of Environmental Constitutionalism across the globe: from new political ideas and social movements to legal concepts. In particular, O' Gorman identifies four channels of transnational influence:

1. Coercion
2. Competition
3. Learning/persuasion
4. Acculturation/emulation

Coercion consists of strong States - superpowers in the first place - that exploit their influential position in the international arena for imposing specific policies, as well as specific constitutional arrangements, on less 'developed' countries. For the purpose of this thesis, it is also important to highlight how coercion is part of the activity of international organisations for what concerns the development of new constitutional provisions. The European Union certainly is an example of this and it will be essential for the analysis of the Italian case. The former, in fact, may require Member States to adopt certain constitutional amendments with the aim of harmonising national constitutions and making them compatible with obligations that derive from EU treaties. It is also true that such treaties, in practice, work as constitutional documents. In this sense, it can be argued that international organisations play an active role in the process of Constitutionalism, even if they do not have proper constitutions. The project of an actual constitution for the European Union has indeed been blocked in 2005 by two referenda held in France and in The Netherlands. However, this result did not diminish the role and power of the constitutive treaties (i.e. the Treaty on the European Union and the Treaty on the Functioning of the European Union) that keep having a sort of constitutional character and value. In fact, constitutions concern different levels of organisations, from sovereign countries to companies and unincorporated associations. A treaty which establishes an international organisation is also its constitution, in that it would define how that organisation is

constituted. Even the European Court of Justice recognised the constitutional feature of the treaties of the European Union (for the first time in the landmark case known as "Les Verts v European Parliament" 1986[85], then again through Opinion 1/91[86]). In the context of Environmental Constitutionalism, it is worthy mentioning the European Green Deal as well. The Green Deal definitely is not a constitutive treaty; however, I would consider it as a sort of constitution of the European Union in the sustainability sphere for it sketches the general direction of the organisation - and, therefore, of all the Member States - in a binding way. The European Green Deal was officially approved in 2020 and consists of a set of policy initiatives with the aim of making Europe the first carbon neutral continent by 2050.[87] The President of the European Commission, Ursula Von Der Leyen, on the occasion of the adoption of the European Green Deal on the 11th of December 2019 stated:[88]

"We do not have all the answers yet. Today is the start of a journey. But this is Europe's 'man on the moon' moment. The European Green Deal is very ambitious, but it will also be very careful in assessing the impact and every single step we are taking.
The European Green Deal is an invitation for all to participate.
European citizens are changing their lifestyle to help protect the climate and the planet. Therefore, our European Green Deal tells them that Europe is at their side. The European Green Deal is something – I am convinced – we owe to our children because we do not own this planet. We just do have for certain time the responsibility and now it is time to act."

In this way, such Deal also works as an external representation of the engagement of the organisation in this field. It can be employed as a

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[85] European Court of Justice, *Judgement of Case 294/83* (1986), 1365, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61983CJ0294

[86] European Court of Justice, *Opinion 1/91* (1991), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61991CV0001

[87] European Commission, *A European Green Deal*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en

[88] Ursula von der Leyen, "Press remarks by President von der Leyen on the occasion of the adoption of the European Green Deal Communication", 2019, https://ec.europa.eu/commission/presscorner/detail/en/speech_19_6749

manifesto for showing to the world that the European Union indeed wants to fight (it can be discussed if effectively or not) against the climate and ecological crisis. And, in this sense, it works as a form of coercion as well. Here in Montréal, my internship supervisor is the Consul General of Italy Silvia Costantini. Miss Costantini is not only Consul General, but also Permanent Representative of Italy to the International Civil Aviation Organisation (ICAO) and, while explaining to me and the other interns how the latter works, she also explicitly underlined the fact that the European Union gives very specific and rigid guidelines to the Permanent Representatives of the Member States to follow when it comes to environmental standards to discuss and to adopt in the Council of ICAO. However, if coercion is more than evident when analysing the work of international organisations (not only in the EU, but also in the World Trade Organisation, International Monetary Fund, World Bank etc.), this form of influence is less evident in the activity of single States. In fact, a State does not see any explicit advantage in imposing a constitutional reform to another State just for introducing environmental provisions. As we know, the benefits that derive from taking action against the climate and ecological crisis are mostly long-termed and leaders all around the world aim at short-termed results for propaganda purposes in order to get re-elected. This is the reason why I strongly believe that Environmental Constitutionalism will eventually continue to develop itself mainly because of public discontent. Only in this way people in power will feel the urge to amend the most important document of their countries, to which they before all must swear loyalty.

Competition refers to the "rivalry between States for material benefits such as foreign capital or export markets."[89] Still, even if economists underline that competition can lead to higher environmental standards, O' Gorman's research did not find any relevant examples of competitive factors driving Environmental Constitutionalisation.

[89] O' Gorman, "Environmental Constitutionalism: A Comparative Study", 445

Learning, as it can be deducted by its name, is a process of imitation which follows the realisation of the benefits that come from updating the constitutions. Persuasion, on the other hand, sees "the applied use of knowledge in argument to bring about a change of mind." Therefore, it is characterised by a clear conviction of the importance and necessity of updating a constitutional approach. The NGOs are without any doubt the main actors that employ this kind of transnational influence. O' Gorman gives the example of Ecuador. In fact, in 2008, the Community Environmental Legal Defence Fund (CELDF), an American environmental law NGO, helped the Ecuadorian Constitutional Assembly in the drafting of new environmental provisions. NGOs, as non-intergovernmental organisations, do not represent the interests of States and, precisely because of that, they can be the main drivers of an unbiased approach towards environmental issues. As a matter of fact, it was the CELDF that put forward innovative and effective ways of codifying environmental provisions in the constitution, namely: through an eco-centric point of view and through an intersectional lens, in this case with particular concern towards the rights of indigenous communities.
Acculturation is the acceptance of external ideas not on the basis of cost or benefit, as in the case of coercion and competition respectively, but rather because of the potential for social rewards. In this case, countries are not forced into change, on the contrary, it is an internal view about what "donor" nations or international organisations desire. It has been argued that acculturation occurs when States adopt environmental standards or legislation, even if they are not experiencing the specific environmental problems the provisions were designed to address. Someone would affirm that this is proof of the fact that environmental protection has become a "world cultural institution" which is first of all driven by the State, and not by a bottom-up approach.[90] As already explained in the previous pages of this thesis, I do not agree with this point of view. However, just like it

[90] Ibid, 444-449

is true that States have been and will continue to be key actors in the international arena, it is also true that there have been cases of emulation on the basis of acculturation. The African Charter on Human and Peoples' Rights, signed in 1981 and in force since 1986, is an example of this. The Charter states in Article 24 that: "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development."[91] Right after the adoption of this Charter, during the early 1990s, across sub-Saharan Africa, there has been a rapid spread of Environmental Constitutionalism.

O' Gorman's work in identifying these channels of influence, as well as the different types of contexts of constitutional change, is remarkable and impressive. Still, I would argue that it is almost impossible to cite all the different elements and actors that play a role in the process of amendment of a constitution, especially in an environmental perspective. Today more than ever, we witness new phenomena that escape our comprehension. New technologies, new media, new ways of living are inevitably changing this world and will inevitably change our approach towards politics and towards constitutions as well. I do believe that constitutions, in their being 'elastic', are the perfect instruments for keeping order while looking at the future, while evolving. They have shown this before (let's think about the recognition of same-sex marriages in many countries) and they are showing it today through environmental protection. It is quite symbolic and 'funny' if one thinks about it: some of the most old documents in the world that are still valid today are probably going to be our cornerstones even in the distant future, and now they are being modified for saving that same future.

[91] Organisation of African Unity, *African Charter on Human and Peoples' Rights* (1981), https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf

CHAPTER II

The Canadian case

While writing this thesis, I find myself in Canada for a curricular internship at the Consulate General of Italy in Montréal. Consequently, it has been easier for me to adopt a Canadian perspective on the matter. In fact, Canada has been chosen as a case study - together with Italy - precisely because I firmly believe that a complete immersion in the place of origins of constitutions could be particularly useful for adopting the right, 'native' perspective on environmental issues. For the writing of this chapter I will employ different kind of sources. For tracing the history of Constitutionalism in the country I will mainly make use of articles and papers in academic journals, as well as handbooks (like the one edited by the Oxford University) and books. However, for an active look at Environmental Constitutionalism in Canada, the most relevant sources will be primary ones, such as the Constitution Acts, the Charters of Rights, federal and provincial Bills, and case laws of the Supreme Court of Canada. These primary sources are available on the pertaining official websites and the links can be found in the footnotes. The same approach will be adopted for focusing on the Quebéc's case: academic papers together with the transcriptions of speeches of former Prime Ministers like Paul Gérin-Lajoie and René Lévesque will be used for laying out the historical background that explains the peculiarity of this Province, while the analysis of primary sources like the Canada-Wide Accord On Environmental Harmonization will allow us to make more personal considerations on the matter.

Canada's constitution is partly written and partly unwritten. For what concerns the codified parts of Canada's constitution, it is necessary to start by citing the colonial past of this country and, in particular, the Constitution Act of 1867. However, before doing so, in order to avoid

a limited euro-centric perspective on Constitutionalism and Environmental Constitutionalism in Canada, it is equally important to look back at what is called Indigenous Constitutionalism, which characterised this vast territory way before the European arrival.

2.1 Indigenous Constitutionalism

Of course, the very concept of Constitutionalism started to develop in Europe in the 17th and 18th centuries. However, if we consider Constitutionalism as the basis for the limitation of powers and as the foundation that gives structure to any society, then this concept can be applied to older contexts as well. This is the reason why many scholars talk about Indigenous Constitutionalism.

Indigenous peoples "constituted" their societies in different ways: through Confederacies, Leagues, Chieftainships, Tribes, Bands, House-structures, extended kin-based groupings, etc. They used to regulate their affairs and address their disputes through a vast set of laws, customs, practices and traditions. Indigenous constitutional law prior to European colonisation was complex, fluid and mutable over time. In fact, indigenous constitutional arrangements were and continue to be subject to a continuous transformation which is the result of different political, economic, and social considerations across the continent. It can be said that "indigenous legal orders renew themselves even in the present day."[92] I would argue that this is a clear example of a living approach towards constitutions, which is opposed - as we have seen in the first chapter - to Originalism, and strongly believes in the importance of adapting these founding pillars to new situations and new moral values in order for them to stay relevant in a world that is quickly changing.

Indigenous' rights and environmental rights often are parallel roadways. As we know, increasing food poverty and food risk as a

[92] John Borrows, "Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017), 13-14

result of climate change are harshly hitting the First Nations and their territories, probably more than anybody else. Moreover, indigenous peoples, because of their strict bond with natural resources - both from an economic and religious point of view - were conscious from the very beginning of the necessity of protecting the environment, much before westerner cultures and contemporary constitutions as considered and analysed in O' Gorman's study.

Some historic examples of Indigenous Constitutionalism show how nature was considered as a key element to protect, bringing forward that environmental "care" that will be missing in the following and most notorious examples of constitutional documents of Canada and even in many contemporary constitutions around the world.

One first relevant example of Indigenous Constitutionalism is the one of the Inuit. Although there is a tendency to underestimate the systems of self-organisation of the First Nations, diminishing them to 'prehistoric' and 'rudimentary', the Inuit actually developed a sophisticated and holistic system of legal mechanisms that played the same function as law in western cultures.[93] According to Susan Inuaraq, the Inuit had (or have) their own legal system as most societies and "[...] a very unique system of justice."[94] Historically, indigenous law has been *lex non scripta*, since it derives from customs and traditional beliefs and rituals. Inuit constitutional law is no exception, in fact it was not codified in a written form. Inuit laws mainly consisted of unwritten rules like legends, myths and stories that were transmitted from one generation to another through figures like shamans, elderlies and leaders. Still, this does not reduce their fundamental and constitutional role since they gave structure to governance, life-regulation, and decision-making, serving as a limitation to authority just like any other constitution. More importantly, Inuit's societal moral code was mainly based on spiritual

[93] Natalia Loukacheva, "Indigenous Inuit Law, 'Western' Law and Northern Issues", *Arctic Review on Law and Politics* (2012), Vol. 3, 202, https://core.ac.uk/download/228446837.pdf

[94] Susan Inuaraq, "Traditional Justice among the Inuit" in Anne-Victoire Charrin, Jean-Michel Lacroix & Michèle Therrien (eds.), *Peoples des Grands Nords Traditions et Transitions* (Paris: Sorbonne Press, 1995), 261

rituals and religious beliefs, among which it is important to underline Animism. Animism is at the roots of Inuit legal thinking and it consists of considering the natural world as sacred. In fact, the Inuit "view people and animals as equal creatures and ascribe human characteristics to animals. They believe that both humans and animals have a soul (inua), character, and the capacity to think (isuma). Consequently, 'every object, every rock, every animal indeed even conceptions such as sleep and food are living.'"[95] Moreover, one peculiarity of Inuit constitutional law was the primacy of the sacred nature of breath in a life-and-death environment. In this perspective, the "world's breath" (sila) was seen as a life-force capable of giving order and unifying existence in the arctic and, consequently, it was constitutional in a broad legal sense. As it can be imagined, this attention towards non-human elements which characterised the Inuit legal order automatically turned into societal rules and procedures meant to preserve and respect the environment and the bio-world. As a matter of fact, they gave a "special place to forces such as the weather, the decisions of animals, or the role of incorporeal living in legal affairs."[96] Close connection with the land, wildlife and more in general with the natural environment represented the core of the rules that the Inuit community gave itself. This is a real ecocentric approach where "communal rights and duties prevail over individual rights and property."[97] It is not about having respect for nature for safeguarding our own properties or lives (as we tend to think today), but rather having respect for nature because everything is owned by nature itself. In fact, historically, in the Arctic, disputes over personal property or land were not common at all. On the contrary, rights to land were recognised only in connection with land use and they were applicable as long as this continued. Property law consisted in the transfer of

[95] Loukacheva, "Indigenous Inuit Law", 203

[96] Borrows, "Indigenous Constitutionalism: Pre-existing Legal Genealogies in Canada", 16

[97] Ibid

possession in order to keep the cohesion of the community and to facilitate its survival. Therefore, communal wealth and stability were at the centre of Inuit law. The preservation of the environment and of the community were paramount, while individualistic interests did not exist. Even today, despite the growing need for the economic benefits that might derive from land and resource use, the Inuit value the non-commercial character and spiritual value of the land, putting the latter at the first place. Moreover, "according to many indigenous views, the natural world is divine and sacred, thus, one cannot damage the land, animals and other resources environmentally friendly. You respect nature as much you respect yourself, natural environment should be preserved – this also intersects with an idea of inter-generational equity."[98] In this sense, North American First Nations share one fundamental point of intersection with South American ones, that is the divine conception of nature. As invoked in the first chapter of this thesis, today only one modern constitution in the world can boast the right *of* environment, that is Ecuador's. Ecuador embraced its religious but also indigenous origins through the recognition of the Pachamama (the Earth Mother goddess) in its constitution. Maybe Canada will one day do the same. However, for now, for what concerns environmental rights in the country, we must look at documents that are the result of the process of colonisation and of a completely different approach towards life.

Indigenous Constitutionalism is a very broad topic that cannot be fully developed in this thesis. However, another example is worthy of mentioning: the one of the Mikmaq. Mikmaq people live on Canada's east coast, meaning what is now part of the Provinces of Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, and Québec. The Mikmaq were a maritime power on the north-eastern edge of the continent, they occupied a wide portion of territory in this area where they welcomed or pushed back fishermen from Europe

[98] Ibid

long before Canada was formed, probably a thousand years before the creation of this country as we know it today. The constitutional order of the Mikmaq derived from their relationship with the earth as well. In fact, the earth - in Mikmaq language - is regarded as a living being. This perspective encouraged an "earth-centred Constitutionalism." The word which described (and describes) Mikmaq laws for caring the earth is "netukulimk." Netukulimk makes reference to a set of customary legal practices focused on Mikmaq obligations for what concerns land and resource use. Such practices included detailed rules and processes for teaching how to adopt a sustainable behaviour. Once again, the indigenous people of Canada anticipated what is defined by Rodriguez as the right of environment, refusing an anthropocentric point of view.

Mikmaq people argue that they exercised their jurisdictional authority through a Grand Council structure, named "Santé Mawíomi." The Grand Council operated under the supervision of a Grand Chief (Sakamaw) and a Grand Captain (Kji-Keptin). Moreover, they organised themselves through a confederacy system (Awitkatultik*)* that divided the territory across the Maritimes in seven districts (Sakamowati). Their names were: Kespukwitk, Sipekne'katik, Eskikewa'kik, Unama'kik, Epekwitk Aqq Piktuk, Siknikt, and Kespek. Canadian courts have not accepted this view. Still, despite their ambiguous treatment by Canadian courts, indigenous peoples' constitutional orders were a concrete reality essential for the regulation of this land thousands of years prior to European arrival.

Europeans were biased and partial in their description and consideration of the First Nations. Considering them as primitive beings, they did not believe in the possibility of indigenous people to exercise law and governance powers: "As Indigenous governance structures did not have kings, parliaments, or written laws they were not regarded as having anything like a constitution. Of course British

constitutionalism was unwritten."[99] Even more: the future Constitution Act of Canada will be founded on the very British constitution as we will see in the following section.

2.2 European colonisation and the Constitution Acts

European exploration in North America began in 1497 with the expedition of John Cabot, an Italian immigrant to England, who was the first to map Canada's Atlantic shore, setting foot on Newfoundland or Cape Breton Island in 1497 and claiming the "New Founde Land" for England. English settlement, however, did not begin until 1610. In the meanwhile, between 1534 and 1542, Jacques Cartier made three trips across the Atlantic, claiming the land for King Francis I of France. By the 1550s, the name of Canada began appearing on maps, probably as a consequence of Cartier hearing two captured guides speaking the Iroquoian word "kanata", which means "village." The colony of New France was officially claimed in 1534 with permanent settlements starting in 1608. However, from the early 1600s, English colonies along the Atlantic seaboard eventually became richer and more populous than New France. In the 1700s France and Great Britain started a dispute for control over North America. In 1759, the British defeated the French in the Battle of the Plains of Abraham at Québec City. Finally, France ceded nearly all its North American possessions to the United Kingdom in 1763 after the Treaty of Paris which resolved the Seven Years' War, marking the end of France's empire in America.[100] Therefore, Canada was under British rule when we notice the first instances of constitutional documents that are still enforced today. In particular, in 1867 the British North America Act - now known as Constitution Act - was adopted. As its name suggests, the British North America Act was passed by the British Parliament and created the Dominion of Canada which was initially composed of

[99] Ibid, 20

[100] Government of Canada, *Discover Canada - Canada's History*, 2015, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/discover-canada/read-online/canadas-history.html

four Provinces: Canada West (former Upper Canada, now Ontario), Canada East (former Lower Canada, now Québec), Nova Scotia, and New Brunswick. This Act explicitly states that the Canadian constitution is based on the constitution of the United Kingdom, which contains unwritten principles and conventions. In fact, in the preamble of the Constitution Act, it can be read: "[…] with a Constitution similar in Principle to that of the United Kingdom."[101]

The Constitution Act of 1867 describes the basic structure of Canada's Government. While doing so, it creates provincial legislatures, the Senate, and the courts. Moreover, it describes how the Federal and Provincial Governments divide their powers. This distribution of legislative powers is set out in three main sections: Section 91 is dedicated to federal jurisdiction, whereas Sections 92 and 93 to provincial jurisdiction. For instance, Section 91 gives full power to make laws about crime to the Federal Government. While Section 93 leaves the field of education in the hands of Provincial Governments exclusively.[102] However, the very essence of Constitutionalism in Canada is embodied in Section 52(1) of the Constitution Act, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[103]

The written, but also (and especially) the unwritten elements of the Canadian constitution are to be interpreted by the previously cited courts. The Supreme Court of Canada, in Reference re Secession of Québec, has stated:[104]

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[101] *Constitution Act* (1867), https://laws-lois.justice.gc.ca/pdf/const_e.pdf

[102] The Constitution, *Centre for Constitutional Studies*, https://www.constitutionalstudies.ca/the-constitution/

[103] *Constitution Act* (1867)

[104] Supreme Court Judgements, *Reference re Secession of Quebec* (1998), para. 49, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do

"Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. […] Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."

Therefore, such "assumptions" have to be considered as actual parts of the constitution even though they are not codified in the text. In other words, the unwritten principles have always been there, and the courts are merely describing them. Among the historic principles that the Supreme Court identified we find: federalism, democracy and - more importantly - the Constitutionalism principle and the rule of law principle. Simply put, the Constitutionalism principle requires that all government action comply with the constitution. The rule of law principle requires that all government action must comply with the law, including the constitution.

The problem when it comes to Environmental Constitutionalism is that, even if the Constitution Act sets out many specific areas of jurisdiction, it does not explicitly dictate who has the power to create environmental laws. In fact, as it can be imagined considering the period of time in which it was adopted, the original Constitution of 1867 does not make explicit reference to the environment and pollution as subject matters.[105] Therefore, it does not assign this particular field to one level of government or the other. As a result, Canadian courts have concluded that this power is shared between the two levels of government: federal and provincial. Meaning that, as

[105] Roger Cotton & John S. Zimmer, "Canadian Environmental Law: An Overview", *Canada-United States Law Journal* (1992), Vol. 18, https://scholarlycommons.law.case.edu/cuslj/vol18/iss/10

environmental issues have emerged over the last decades, the original constitutional framework has been interpreted in order to assign authority over these new issues either to the Parliament, to provincial legislatures or both. This is without any doubt an instance of how constitutions are indeed living documents. In fact, the Canadian constitution has been defined as a "living tree" even if parts of it are centuries old, since its meaning can evolve over time together with society.[106] In particular, the Supreme Court of Canada, in Reference re Securities Act, has stated that "the constitution must be viewed as a 'living tree capable of growth and expansion within its natural limits.'"[107] Even in the previously cited Reference re Secession of Quebec, the Court - while underlying the importance of unwritten principles - employed this metaphor:[108]

> "The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree.'"

This figure of speech has endured as the preferred approach in constitutional interpretation, ensuring 'that Confederation can be adapted to new social realities.'"[109] This is the evolutive approach that must be adopted for the analysis of Environmental Constitutionalism.

In order to establish which level of government has jurisdiction over a specific environmental issue, we must look at the subject matters listed in the constitution and decide which one best describes the essence of that regulation and whether the authority for that regulation has been assigned to the Parliament or to provincial legislatures.

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[106] The Constitution, *Centre for Constitutional Studies*

[107] Supreme Court Judgments, *Reference re Securities Act* (2011), para. 56, https://scc-csc.lexum.com/scc-csc/scc-csc/en/7984/1/document.do

[108] *Reference re Secession of Quebec*, para. 52

[109] *Reference re Securities Act*, para. 56

Therefore, a government is able to enact environmental law if it falls under one of the powers enlisted in Section 91 of the Constitution Act of 1867. For example, federal environmental laws are often enacted under the Parliament's jurisdiction to legislate criminal law (Section 91(27)), fisheries - both marine and freshwater (91(12)), navigation and shipping (91(10)), Indians and lands reserved for the Indians (91(24)), public property (91(1A)), and more generally for the Peace, Order and Good Government (POGG) of Canada.[110] The POGG power allows the Federal Government to legislate in cases of national emergency. In addition, the Supreme Court has also noted that the federal taxing power of Section 91(13) can be exploited by the Federal Government in order to discourage polluting activities through higher taxes.[111] Furthermore, the opening words of Section 91 pave the way for a "federal residual power" that many legal decisions have interpreted to mean that what is not explicitly listed in the Constitution Act would automatically fall under federal jurisdiction (examples of this are marine pollution and interprovincial water pollution). Section 132 is quite relevant as well in this context since it provides federal jurisdiction over two environmental issues more: boundary waters and migratory birds. In fact, Section 132 transfers to the Parliament and to the Federal Government the necessary powers for respecting Canadian obligations towards third countries that are the result of treaties signed by the British Empire when it still existed.[112]

Provincial environmental laws, on the contrary, are generally founded on the provincial right to legislate property and civil rights (Section 92(13)) which is linked to the regulation of most types of business and industrial activities, management of provincial Crown lands (92(5)), municipal institutions in the Province (92(8)), and on matters of a

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[110] *Constitution Act* (1867)

[111] Cotton & Zimmer, *Canadian Environmental Law: An Overview*, 63-65

[112] Penny Becklumb, *Federal and Provincial Jurisdiction to Regulate Environmental Issues* (Ottawa: Library of Parliament, 2020), 2, https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2013-86-e.pdf

purely local or private nature (92(16)).[113] Consequently, a Province may regulate "land use and most aspects of mining, manufacturing and other business including the regulation of emission that could pollute the environment."[114] For instance, quite recently in 2020, in Reference re Environmental Management Act, the Supreme Court concluded that British Columbia was in the rightful position for validly enacting a provincial law prohibiting the emission of contaminants:[115]

"Provincial authority over the people, property and resources within the Province grounds provincial authority to regulate in relation to dangerous substances that can cause harm to those interests if released. Legislation about protecting from, responding to and compensating for such harm is not in pith and substance about the management and operation of the polluting enterprise. Instead, there is a clear provincial aspect to the matter. As a result, the province can enact such legislation, even if applies to federally-regulated entities"

In both cases, whether it is federal or provincial jurisdiction, it can be noted how there is no explicit codification of environmental rights in the Constitution Act, but rather 'tricks' for regulating environmental issues that are interpreted by courts, since until 1982 the only environmental right that could be found in the Canadian constitution was the right to regulate.[116] Moreover - differently from indigenous cultures - nature is not recognised as an entity to defend *per se*, but it is protected as a consequence of a regulation in favour of human activities, interests and/or rights. In the case of provincial environmental laws the interconnection with other rights (civil, in particular) is quite clear, and it will eventually become even more

[113] *Constitution Act* (1867)

[114] Peter W. Hogg, *Constitutional Law of Canada* (Carswell, 1985), 599

[115] Supreme Court Judgements, *Reference re Environmental Management Act* (2020), 40

[116] Lynda M. Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution"

evident with the Constitution Act of 1982 and the Canadian Charter of Rights and Freedoms.

The Constitution Act of 1982 was a relevant and historic addition to the Canadian constitution. Until 1982, the British Parliament had the power to control Canada's constitution. However, the Federal and Provincial Governments in 1982 patriated the Constitution. This means that the British Parliament gave Canada full control over its constitution. Through the patriation of the constitution, it can be said that Canada finally became fully independent from the United Kingdom. Still, the Constitution Act of 1867 remains in full force and King Charles III is still Canada's Head of State as Canada remains a Commonwealth realm and a Constitutional Monarchy as of today. Not by chance, Canada still maintains two anthems, one national anthem "O Canada" and one Royal anthem "God save the King." Canadian passports as well are still issued in the name of the Queen/King and Canadians still have access to British consular services abroad when no Canadian Consulate is available.

The Constitution Act of 1982 is made up of several parts, including the arguably most important one: the Canadian Charter of Rights and Freedoms. The latter protects certain rights and freedoms of Canadian citizens, including aboriginal people. The Supreme Court of Canada has noted several times that:[117]

> "With the adoption of the Charter [of Rights and Freedoms], the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."

[117] *Reference re Secession of Quebec*, para. 72

When studying Environmental Constitutionalism, numerous scholars have highlighted the importance of the Constitution of 1982 and its Charter, for environmental rights can arise both from the rights of the citizens and the rights of indigenous people. In fact, part two of the Constitution Act is dedicated to the "rights of the aboriginal people of Canada", in particular Section 35(1) reads that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed", then specifying in Section 35(3) that "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."[118] These words, which are supposed to be guaranteed even by the Charter of Rights and Freedoms through Section 25, refer to "the rights to hunt, to fish and trap, to carry out integral spiritual spiritual and cultural practices, and to self-govern (among others)"[119] whose recognition is undoubtedly useless if it is not adequately accompanied by the protection of the environment which is essential for the realisation of such activities. Several cases (Tsawout Indian Band v. Saanichton Marina Ltd., Halfway River First Nation v. British Columbia, and Mikisew Cree First Nation v. Canada among others) have given juridical support to this interconnection and interconnectedness, arguing that environmental degradation can result in a violation of the constitution for what concerns aboriginal resource rights.

Moreover, limited access to traditional food sources and decreased ability of First Nations to safely spend time on the land is a threat not only to the communities' right to food, but also to their right to culture, since it could compromise their ability to engage in related cultural practices and ultimately maintain their cultural identities. In fact, climate change, through unpredictable weather and animal patters, is challenging First Nations' "indigenous knowledge", which is a land-based knowledge system that communities employ in order

[118] *Constitution Act* (1982)

[119] Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution", 526

to pass information about harvesting techniques and other cultural knowledge from one generation to the other.[120] Still, while climate change is already exacerbating historic inequalities experienced by First Nations, most existing policies fail to monitor – let alone address – current human rights impacts in these settings. Canada is not doing enough for fighting climate change and its consequences on First Nations. For instance, Canada's Federal Government does not have a plan in place to address one main issue that we already previously cited: climate-forced displacement, in this case, of indigenous peoples. Threatened by the effects of climate change, such as coastal erosion and rising sea levels, indigenous people are being forced more than anybody else to relocate their communities. The Lennox Island Mikmaq First Nation located in Prince Edward Island, for instance, is trying to adapt to rising sea levels and potential land loss,[121] but an unfortunate future where they will have to relocate is not that far way. This indifference is in contrast with the Constitution Act, as well as with official discourses and speeches. The Canadian Government itself - as stated on their official website - "recognises that Indigenous climate leadership must be a cornerstone of Canada's climate actions and is partnering with First Nations, Inuit and Métis to set an agenda for climate action and a framework for collaboration."[122]

It must also be noted that aboriginal environmental entitlements not only refer to the negative right to be free from State-sponsored environmental harm that would otherwise undermine their activities, but also to the broader right to a healthy environment through the conservation of the subject lands.[123]

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[120] *Summary and Recommendations: "My Fear is Losing Everything." The Climate Crisis and First Nations' Right to Food in Canada* (Human Rights Watch, 2020), https://www.hrw.org/sites/default/files/media_2021/02/EHRCanada1020_brochure_LOWRES_WEBSPREADS.pdf

[121] Leela Viswanathan, "Climate-forced indigenous migration: humanizing the impact of climate change"*, Indigenous Climate Hub*, https://indigenousclimatehub.ca/2021/02/climage-forced-indigenous-migration

[122] Government of Canada, "Canada's Climate Actions for a Healthy Environment and a Healthy Economy", https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/actions-healthy-environment-economy.html

[123] Ibid, 535

Consequently, Canada does not explicitly recognise the right to environment in its constitution, but it can be argued that it does so in indirect ways, one of these being the rights of the First Nations enshrined in the Constitution Act of 1982 (even if the respect, protection and fulfilment of those is debatable). In fact, jurist Beverley McLachlin has also noted that there are "unwritten principles without which the law would become contradictory and self-defeating", and environmental protection would be one of those.[124] McLachlin also wrote that: "[U]nwritten constitutional principles refer to unwritten norms that are essential to a nation's history, identity, values and legal system." In this sense, Constitutionalism is seen as the mirror of a Nation's soul as well.

The Supreme Court of Canada has not yet officially recognised the protection of the environment as an unwritten constitutional principle, but it has described environmental protection in terms that are equivalent to constitutional protection. In particular, in British Columbia v. Canadian Forest Products Ltd, the Court stated that:[125]

"As the Court observed in R. v. Hydro-Québec [1997] 3 S.C.R. 213, at para. 85, legal measures to protect the environment 'relate to a public purpose of superordinate importance.' […] In Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, 'stewardship of the natural environment' was described as a fundamental value (para. 55 (emphasis deleted)). Still more recently, in 114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, 2001 SCC 40, the Court reiterated, at para. 1: […] Our common future, that of every Canadian community, depends on a healthy environment […] This Court has recognized that '(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment […] environmental protection [has] emerged as a fundamental value in Canadian society'"

[124] McLachlin, "Unwritten Constitutional Principles", 163

[125] Supreme Court Judgements, *British Columbia v. Canadian Forest Products Ltd* (2004), https://www.canlii.org/en/ca/scc/doc/2004/2004scc38/2004scc38.pdf

Environmental protection has emerged as a fundamental value in Canadian society. In fact, it is not only linked to aboriginal rights, but more generally to some human rights enshrined in the famous Canadian Charter of Rights and Freedom. The Canadian Charter of Rights and Freedom was a fundamental addition to the Canadian constitution and "sets out those rights and freedoms that Canadians believe are necessary in a free and democratic society."[126] Arguably, the most evident home for environmental rights in the Charter is Section 7 which reads:[127]

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Consequently, in the Canadian case - as in many other constitutions - the right to life is the instrument exploited for recognising environmental harm and for indirectly codifying the protection of the environment. Indeed, this right cannot be fully guaranteed if the environment is hostile to the human being.

The Charter has been interpreted in this sense not only by Canadian courts, but by core international human rights body as well, in particular by the United Nations Human Rights Committee in EHP v. Canada. In that case, a citizens' group in Port Hope (Ontario) alleged that the storage of nuclear waste threatened residents' right to life, and the Committee found that a valid *prima facie* claim had been put forward. In particular, the Committee noted that:[128]

"Since Canada submitted its response to the communication of the author, the Canadian Charter of Rights and Freedoms has come into force on 17 April 1982. […] Section 7 of the Charter states that 'everyone has the right

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[126] Government of Canada, "Guide to the Canadian Charter of Rights and Freedoms", https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html#a2e

[127] *Canadian Charter of Rights and Freedom*

[128] United Nations Human Rights Committee, *EHP v. Canada* (1982), Communication No. 67, https://www.globalhealthrights.org/wp-content/uploads/2013/02/UNHRC-1984-E.-H.-P.-v.-Canada.pdf

to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice.' […] If the author believes that the Government or an agency thereof, such as the Atomic Energy Control Board, is denying her the right to life in a manner contrary to the provisions of section 7, she can ask the Courts to remedy this situation"

Even more undeniable is the judgement of the Supreme Court on Ontario v. Canadian Pacific Ltd., where the majority of the Court specifically recognised environmental rights, adopting the following passage from the Law Reform Commission of Canada's report, Crimes Against the Environment:[129]

"[…] A fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment. […] To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as quality of life, and stewardship of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the sanctity of life, the inviolability and integrity of persons, and the protection of human life and health. It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health."

As Lynda Collins writes in "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution": "this robust body of dicta from the Supreme Court of Canada suggests that environmental protection is indeed a higher-order legal value deserving of constitutional protection."[130]

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[129] Supreme Court Judgements, *Ontario v. Canadian Pacific Ltd.* (1955), para. 55, https://scc-csc.lexum.com/scc-csc/scc-csc/en/1280/1/document.do

[130] Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution", 536

Therefore, Canada's case is one typical example of codification of environmental rights through the interconnection with other rights. Indeed physical self-preservation is a fundamental imperative for all human beings, both individually and collectively. If the Canadian constitution guarantees rights that depend on the protection of the biophysical environment, then the principle of environmental protection must be so fundamental as to be both implicit and obvious. Collins compares it to the principle of democracy, since they are both basic and underlying structures that support other provisions written in the constitution which would not have sense to exist otherwise.

The word "environment", however, still does not find its place not even one single time in the Canadian constitution. I would argue that Canada's issue, at this point, is more of a cultural rather than a political one. Taking distance from their indigenous past and from the notion of the earth and nature as living beings to cherish, they have framed the protection of the environment under different (or no) lenses.

Yet, numerous efforts - through the adoption of Acts *ad hoc* - have been made for the enforcement of environmental rights outside of the traditional constitutional framework of Canada.

In this context, we must mention the Canadian Environmental Protection Act (CEPA) which is Canada's primary environmental regulatory statute. The CEPA was adopted in 1999 and it establishes the federal authority to regulate a broad range of environmental concerns, ranging from toxic substances to environmental emergencies. It was not amended from the year of its adoption until this very year. On the 13th of June 2023, the long-in-the-making amendments to the Canadian Environmental Protection Act were passed by the Senate and received royal assent. Bill S-5, also known as the Strengthening Environmental Protection for a Healthier Canada Act, made the first substantial amendments to the CEPA ever. The most important amendment lies in the fact that the CEPA now

recognises that Canadians have a "right to a healthy environment as provided under this Act."[131]

The evident climate and ecological crisis, but also the even greater demand for climate justice from the public opinion may have played a role in these groundbreaking changes. Not by chance, environmental groups have long asked the Canadian Government to recognise the right to a healthy environment, citing as instances other provincial and territorial legislations, among which Ontario's Environmental Bill of Rights and Québec's Charter of Human Rights and Freedoms. In fact, the preamble to Ontario's Environmental Bill of Rights - which came into force in 1994 - reads that: "The people of Ontario recognize the inherent value of the natural environment. The people of Ontario have a right to a healthful environment. The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations."[132] However, it must be noted that this Bill does not actually create a standalone substantive right to a healthy environment, neither it prescribes particular standards for environmental protection.[133] Instead, "it creates new procedural rights that provide for public participation and government accountability in environmental decision-making."[134] In fact, the main Sections of Ontario's Environmental Bill include: Public participation in government decision-making (Part II); Application for review (Part IV); Application for investigation (Part V); Right to sue (Part VI), etc.[135] Therefore, it can be framed in the category of environmental procedural rights as identified by Rodriguez, rather than in the actual

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[131] Government of Canada, *Canadian Environmental Protection Act* (1999), https://laws-lois.justice.gc.ca/eng/acts/c-15.31/page-1.html#docCont

[132] Government of Ontario, *Environmental Bill of Rights* (1993), https://www.ontario.ca/laws/statute/93e28

[133] Richard J. King, Jennifer Fairfax, Ankita Gupta & A.J. Davidson, *Canada recognizes a right to a healthy environment and changes its process for assessing toxic substances* (2023), OSLER, https://www.osler.com/PDFs/Resource/en-ca/Canada-recognizes-a-right-to-a-healthy-environment.pdf

[134] Ibid

[135] *Environmental Bill of Rights*

right to environment. Québec's Charter of Rights and Freedoms on the other hand, in Section 46(1), actually recognises that "Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law."[136] The Canadian Charter of Rights and Freedoms, as we have previously noted, does not provide for a specific right to a healthy environment like the latter.

Today, after the passage of Bill S-5, the CEPA's preamble will also recognise the "right to a healthy environment as provided under this Act." Subsection 2(1) has also been amended to require the Government of Canada to protect that right "as provided under this Act, subject to any reasonable limits" and to exercise its powers in a manner that "protects the environment and human health, including the health of vulnerable populations", which are defined for the first time in the CEPA as "a group of individuals within the Canadian population who, due to a greater susceptibility or greater exposure, may be at an increased risk of experiencing adverse health effects from exposure to substances." First Nations definitely fall under this definition. In fact, in the same preamble, it is stated that "[…] the Government of Canada recognizes the importance of endeavouring, in cooperation with provinces, territories and aboriginal peoples, to achieve the highest level of environmental quality for all Canadians and ultimately contribute to sustainable development." Bill S-5 also adds a new subsection, number 5.1(1), that will require the Federal Ministers of Environment and Health to "develop an implementation framework to set out how the right to a healthy environment will be considered in the administration of this Act." This framework will elaborate on:

- The principles to be taken into consideration for the administration of the CEPA, "such as principles of environmental justice — including the avoidance of adverse effects that disproportionately

[136] Government of Québec, *Québec's Charter of Rights and Freedoms* (1975), https://www.legisquebec.gouv.qc.ca/en/document/cs/c-12#:~

affect vulnerable populations — the principle of non-regression and the principle of intergenerational equity, according to which it is important to meet the needs of the present generation without compromising the ability of future generations to meet their own needs";

- Researches, studies and monitoring activities to support the protection of the right to a healthy environment;
- The relevant "social, health, scientific and economic factors" taken into account in interpreting the right to a healthy environment and determining "the reasonable limits to which it is subject";[137]
- Mechanisms to support the protection of this new right.

However - according to King, Fairfax, Gupta, and Davidson - the impact of the recognition of the right to a healthy environment in the CEPA is still unclear. They identify two main reasons for this. First of all, the language of Bill S-5 is too vague, leaving significant discretion to the federal executive and to judicial interpretation (like in the case of "reasonable limits"). Moreover, it lacks an enforcement mechanism, since its preamble merely sets out its purpose but it is, all alone, unenforceable. Secondly, no mechanism for putting remedy to the alleged violation of a right is mentioned. As a matter of fact, Bill S-5 does not amend Section 22 which is dedicated to the "environmental protection action" which allows individuals to appeal to a court under limited and specific circumstances, and it does not provide an alternative remedy to enforce the new recognised right to a healthy environment neither.[138]

Although the CEPA presents strong weaknesses, it is an important example of codification of the right to the environment at the federal level. I do believe that the CEPA case is an instance of bottom-up influence that, perhaps (hopefully), may have long-term effects even for the amendment of the Constitution Act and the consequent

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[137] *Canadian Environmental Protection Act*

[138] King, Fairfax, Gupta & Davidson, *Canada recognizes a right to a healthy environment and changes its process for assessing toxic substances*

introduction of this right in the real constitutional framework of Canada.

It is the Constitution Act of 1982 that describes the rules for changing the constitution. Many would argue that today an amendment is needed for explicitly introducing at least the right to environment in the constitution of Canada. This is made necessary not only because it would facilitate and fasten action against climate change, without having to resort to judicial cases and courts' interpretations; but also because the constitution is the "most important law we have in Canada."[139] In 2023, I personally believe that the fight against this crisis cannot be absent from the most important document a State has.

Obviously, as a result of entrenchment, amendment rules make it hard to make changes to the Constitution Acts because most Provinces need to agree on the most important ones, and it is common knowledge the fact that Provinces often disagree on a wide range of topics. This represents an issue for Environmental Constitutionalism as well. In fact, historically, Canadian Provinces have not been characterised by friendly relationships, especially when taking into consideration the separatist movement within Québec. Even today, Québec's Province distinguishes itself for a strong independentist sentiment. I will argue that this may be considered as a factor capable of triggering a crisis-change situation that leads to Environmental Constitutionalism and, at the same time, to counter-productive stances. The environmental "concern", in this case, becomes an instrumental tool for showing 'superiority', but also for 'distinguishing' oneself from the others, rather than a genuine interest in the preservation of the earth. Therefore, it becomes an external representation tool that can be innovative at times, but also detrimental if pushed by egoistic and not objective ideals.

[139] Ibid

Provinces in Canada - since they are part of a federal system - can boast an internal structure quite similar to the one of a country with their own 'national' Assemblies, their own Ministries, Prime Ministers, etc. However, without any doubt, Québec is *the* Province that looks the most for building a self-narrative which is far away from the federal one, historically seeking for actual independence from Canada for several reasons. Looking at the Québecois case is important for being conscious of the controversial nature of the Canadian constitution and of alternative ways of codifying environmental protection in Canada.

2.3 Québec's special status

The territory that we know today as Québec had a population of roughly 65000 people at the time of the British conquest in 1760. They were descendants of the 10000 French colonists who settled in this region in the 17th and 18th centuries and, according to the Report of the Royal Commission of Inquiry on Constitutional Problems, they had actually formed "a national community and a homogeneous sociological entity clearly characterized by its culture." Yet, the Canadian constitution does not recognise the existence of the Québec people in any part of its text.[140]

Québec's case is indeed peculiar. This Province was officially created before the dominion of Canada as a result of the Royal Proclamation of 1763, following the conquest of 1760 and the subsequent ceding of New France to Britain at the end of the Seven Years' war. Under this new regime French criminal and civil law were abolished, but the latter was soon restored in 1774 - because of the demands of the people - thanks to the so-called Québec Act. The Québec Act, among other things, guaranteed religious freedom to the Catholics and allowed them to hold public office (which was not possible in Britain

[140] Government of Québec, *Québec's political and constitutional status: an overview* (Secrétariat aux affaires intergouvernementales canadiennes, Ministère du Conseil exécutif, 1999), 6, https://www.sqrc.gouv.qc.ca/documents/institutions-constitution/statut-politique-qc-en.pdf

at that time). Some scholars - like political scientist Gérard Bergeron in "Pratique de l'État au Québec" (Practice of State in Québec) - highlight the importance of this Act as the first example of a modern constitutional document of Canada, preceding the Constitution Acts adopted in the aftermath of the creation of the federation.

The Québec Act will eventually be followed by a true Constitution Act in 1791. The Constitution Act of 1791 was adopted following the needs of the Loyalists who had fled the American Revolution and did not fit in the atypical environment of Québec.[141] Consequently, it divided this Province into Upper Canada (later Ontario) which was mainly Loyalist, Protestant and anglophone, and Lower Canada (later Québec), heavily Catholic and francophone.[142] Each new Province elected an autonomous Assembly, however there still was a concentration of powers in the Executive Council which acted under the authority of a Governor who was appointed by the British Government itself. The absence of genuine power in the hands of the elected Assemblies led to high levels of discontent and frustration in the population, especially in Lower Canada. Yet, the Constitution Act of 1791 truly was a revolutionary document, since it can be said that "the pre-federation regime implemented by this constitutional change nonetheless confirmed French Canada's distinctive character in the British colonies and fostered the development of Québec parliamentarism."[143] In 1831, Alexis de Tocqueville even wrote in relation to the French-speaking population living in Lower Canada:[144]

"Lower Canada (luckily for the French race) forms its own State. In fact, in Lower Canada, the French population is to the English population in the proportion of ten to one. It is compact. It has its own government, its own

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[141] Ibid, 7-8

[142] Government of Canada, *Discover Canada - Canada's History*

[143] Government of Québec, *Québec's political and constitutional status: an overview*, 8

[144] Alexis de Tocqueville, *Tocqueville au bas-Canada: Écrits datant de 1831 à 1859 Datant de son voyage en Amérique et après son retour en Europe* (Montréal: Les Éditions du Jour, 1973), 72, http://classiques.uqac.ca/classiques/De_tocqueville_alexis/au_bas_canada/tocqueville_au_bas_canada.pdf, my translation

Parliament. It really forms a different national body. In the Parliament, which is composed of 84 members, there are 64 French and 20 English."

So, Lower Canada had its own language, religion and customs, as Tocqueville noted, but it already had its own laws and institutions as well. It was a completely different reality from the rest of the territory.

Following the rebellions of 1837 and 1838, and in order to avoid the subjugation of the anglophone population of Lower Canada to the francophone one, Lord Durham in the famous Durham Report, suggested the fusion of Upper and Lower Canada to become one single political entity, the Province of Canada, ruled under a single legislature, and to introduce a responsible government. In February 1841 the Act of Union came into force. Two nations made up United Canada, the one French-speaking and mainly Catholic, and the other English-speaking and mainly Protestant. Useless to say that this transformation was not positively welcomed by French Canada since it lost its own parliamentary institutions. Moreover, French Canadians became a minority in the institutional framework of United Canada, while still representing the majority of the population. English was also made the only official language of government institutions. For the first time in a constitutional text, French was officially banned. However, these provisions were later abrogated by the British Parliament in 1848.[145]

The final step of this tortuous path was the establishment of the federation and the creation of Canada as we know it today with the Constitution Act of 1867. However, this solution did not fully satisfy the Québecois people. In fact, in Québec, the federation had been agreed because it was viewed - in some political and constitutional way - as a sort of pact between two founding peoples. Which was not the case. This dualistic conception of the country was at the basis of the political idea and of the desires of this Province, meaning being considered as a full-fledged partner and participant in the development

[145] Government of Québec, *Québec's political and constitutional status: an overview*, 10

of the new country. However, not only the Federal Government, but all the rest of Canada was against this conception.[146]

In 1884, Québec Prime Minister Honoré Mercier, in order to denounce the frequent infringements of the Federal Government on the Provinces' prerogatives, made use of this notion of "pact" stating that:[147]

> "The existence of the provinces preceded that of the Dominion and it is from the provinces that the latter received its powers. The provinces had responsible government in 1867: they had their own legislatures, laws and the autonomy inherent in a colony. The provinces delegated, in the general interest, a portion of their powers. Those powers that they did not delegate they kept and still possess. They are sovereign within the limits of their jurisdiction and any attack on this sovereignty is a violation of the federal pact."

In 1956, the Royal Commission of Inquiry on Constitutional Problems set up by the Québec Government noted that the long history that culminated in the federation showed that:[148]

> "[T]he French Canadians only gave this necessary support [in favour of Confederation] on two clear conditions — that the union should be federative and that, in this union, they should be recognized as a distinct national group and that they should be placed on the same footing as the other ethnic group."

In the 1960s Québec experienced a time of rapid change known as "Quiet Revolution." This expression was first used by an anonymous writer in "The globe and Mail." It was a period of important reforms, with a greater development of provincial institutions and an increased role of the latter in the economic, social and cultural life. As a consequence, "the Catholic Church's role in society diminished,

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[146] Ibid, 13

[147] J.O. Pelland, *Biographie, discours, conférences, etc. de l'hon. Honoré Mercier* (Montréal: 1890), 399, https://archive.org/details/biographiediscou00mercuoft/page/398/mode/2up

[148] Government of Québec, *Québec's political and constitutional status: an overview*, 12

prosperity for French-speaking Québécois grew, and a nationalist consciousness expanded."[149] For the first time, francophones were allowed to work entirely in French and to fully develop their technical, scientific, and managerial skills. This process of francisation occurred in many different fields: from the one of education, to social welfare, and health services.[150] In fact, during the Quiet Revolution, Québec showed a strong will to assume responsibility for sectors of key importance to its cultural, social and economic development. Moreover, Québec's determination to assert itself was evident even at the international level with the development of a network of foreign delegations and a policy of direct international initiatives promoted by the then Minister of Education, Paul Gérin-Lajoie.[151] The Québec Government also aimed to reinforce diplomatic ties. In 1961, it opened the Maisons du Québec in Paris, London and New York. However, the Federal Government intervened when Québec tried to sign cultural and educational agreements with France, underlining that there can be only one interlocutor with foreign countries.[152] For my personal experience, I can say that even today the Québec Government treats the Consuls General in Montréal as Ambassadors, as if it were a real capital city.

When explaining the international policy of the Quiet Revolution, Minister Gérin-Lajoie noted that:

> "Québec is not sovereign in all domains: it is a member of a federation. But, from a political point of view, it constitutes a State. It possesses all the characteristics of a State: territory, population and autonomous government. Beyond this, it is the political expression of a people distinguished, in a number of ways, from the English-language communities inhabiting North America. Quebec has its own vocation on this continent. As the most populous of French-language communities, outside France, French Canada

[149] René Durocher, "Quiet Revolution", *The Canadian Encyclopaedia*, 2013, https://www.thecanadianencyclopedia.ca/en/article/quiet-revolution

[150] Ibid

[151] Government of Québec, *Québec's political and constitutional status: an overview*, 15

[152] Durocher, "Quiet Revolution"

belongs to a cultural universe having its axis in Europe and not in America. By virtue of this fact, Quebec is more than a simple, federated state among other federated states. It is the political instrument of a cultural group, distinct and unique in all of North America."[153]

The maîtres chez nous ("masters in our own house") philosophy that permeated the Provincial Government and its reforms was destined to have an influence on federal-provincial relations. The issue of special status arose when Québec became the only Province to opt out of some thirty joint programs that the other Provinces stayed with.

In 1976, with the coming to power in Québec of the Government of René Lévesque, the debate took a new dimension. In fact, René Lévesque proposed a referendum on sovereignty-association, a proposal that called for a new Québec-Canada agreement outside the federal framework. As a first step, the Québec National Assembly adopted, in 1978, the Referendum Act, which established a Québec referendum process. On the 20th of May 1980, the referendum on the question of sovereignty-association was held. 59.56% of the valid ballots were cast in favour of the No side, while 40.44% in favour of the Yes side.[154] After the results, Québec Prime Minister René Lévesque concluded:[155]

"The clear recognition of this right [to self-determination] is the most valuable accomplishment of the Québec referendum. Regardless of the outcome, it is now undisputed and indisputable that Québec constitutes a distinct national community which can by itself, without outside interference, choose its constitutional status. Quebecers can decide to remain within Canadian federalism, just as they can decide, democratically, to leave, should they consider this system no longer able to meet their aspirations and their needs. This right —control over its own national destiny— is the most fundamental right enjoyed by the Québec people."

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[153] Paul Gérin-Lajoie, *Speech to the Members of the Montréal Consular Corps* (Montréal, 1965), https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part2/PaulGuerinLajoie1965_en.pdf

[154] Government of Québec, *Québec's political and constitutional status: an overview*, 19

[155] René Lévesque, *Statement made at the Meeting of the First Ministers in Ottawa* (1980), https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part2/ReneLevesques1980_en.pdf

Yet, at the federal level, different points of view prevailed. The following Constitution Act of 1982 was far from recognising the existence of Québec people as a "distinct national community which can by itself […] choose its constitutional status." On the contrary, it represented a new constitutional vision in which duality and Québec's specific features were not contemplated. As a matter of fact, the unilateral adoption of the Constitution Act of 1982 confirmed the rejection by the Federal Government of the notion of two founding peoples and replaced it with the concept of "one State, one nation." The Report of the Commission on the Political and Constitutional Future of Québec of 1991 reads:[156]

"The Constitution Act, 1982, [...] constitutionalized the principle of the preservation and enhancement of the multicultural heritage of Canadians, thus imposing on Québec a constitutional viewpoint which did not necessarily coincide with its reality within Canada: the latter was defined as a multicultural society, without constitutional recognition of the principle of 'Canadian duality' and of Québec's distinctiveness. The multicultural Canadian society, being predominantly English speaking, can easily become indifferent to Québec's distinct identity and its unique linguistic and cultural position in Canada. […] [F]rom a Constitution based on a political compromise which earned the support of representatives of the French Canadians in 1867, Canada shifted in 1982 to a Constitution adopted despite the opposition of a province where nearly 90 percent of French-speaking Canadians live and which accounts for over one-quarter of Canada's population."

Throughout history, Québec made several proposals of constitutional amendments for overcoming these contrasting visions, but they all failed. One of the key elements of the several constitutional proposals made by Québec was the explicit recognition of the existence of the Québec people. Furthermore, this recognition was to be reflected in a series of other constitutional amendments, among which a reform of the distribution of powers between the two levels of government. Of

[156] Government of Québec, *Québec's political and constitutional status: an overview*, 22

course, the Federal Government did not respond to any of these requests.

A second referendum on Québec's sovereignty was held on the 30th of October 1995. The result was really close this time: 49.42% for the Yes side, and 50.58% for the No side.

Today, the situation still is in a stalemate: there has been no constitutional recognition of the Québec people, even less of its sovereignty. Yet, nationalist movements keep attracting consent in the Province, whose Government continues to take different stances and policies from the central federal authority (when allowed to).

In this context, I would argue that Québec has tried to affirm its special condition and its peculiarity from the rest of Canada even through action and *non*-action for the protection of the environment.

As we know, the Constitution Act does not explicitly state who has competence over environmental protection between the Federal Government and the Provinces. Therefore, there is no single national statute providing a global framework for the protection of the Canadian environment. This is the reason why in January 1998, the Canadian Council of Ministers of the Environment signed the Canada-Wide Accord on Environmental Harmonization. The Canada-Wide Accord on Environmental Harmonization requires governments working in partnership to achieve the highest level of environmental quality for all Canadian citizens. In fact, one of the main objectives of harmonisation is "delineating the respective roles and responsibilities of the Federal, Provincial and Territorial governments within an environmental management partnership by ensuring that specific roles and responsibilities will generally be undertaken by one order of government only."[157] Therefore, under the Accord, each government does not renounce to its existing authorities, but rather agrees to employ them in a "coordinated manner to achieve enhanced

[157] Canadian Council of Ministers of the Environment, *A Canada-Wide Accord On Environmental Harmonization*, 1, https://faolex.fao.org/docs/pdf/can83339.pdf

environmental results."[158] Simply put, each government will assume clearly defined responsibilities in the field of environmental performance and will have to report publicly on its results.

Moreover, in compliance with this accord, in the perspective of employing powers in a coordinated way, governments are to implement sub-agreements on standards and on environmental assessment as well. Among the results obtained by this accord, here are some achievements that deserve mentioning:

- Four bilateral agreements have been signed between Provinces and the Federal Government under the Sub-agreement on Environmental Assessment. Following these agreements, authorisation from both levels of government is necessary for carrying out some environmental assessments;
- In June 2000 Canada-wide standards aimed at protecting the health of Canadians through better air quality have been established;
- A national objective to reduce benzene (which is a carcinogen) has also been set.

Only one Province did not endorse the Accord: Québec. Québec, during the meeting, stated that before signing this accord and its sub-agreements, it still required certain conditions to be met. Among them, Québec asked for amendments that recognise the need to reduce overlap and duplication between jurisdictions. In this way, it blocked efforts for a unified and homogenous approach towards environmental issues, even if it did so while asking for the same thing via constitutional amendment. The Accord itself specifies that it will not change in any way the Canadian constitution, with Principle 9 that reads as it follows: "nothing in this Accord alters the legislative or other authority of the governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada." Or again Principle 11 that reads: "the

[158] *Annual Meeting of the Canadian Council of Ministers of the Environment: Environmental Harmonization Accord Approved by Twelve Jurisdictions* (1998), Canadian Intergovernmental Conference Secretariat, https://scics.ca/en/product-produit/news-release-environmental-harmonization-accord-approved-by-twelve-jurisdictions

environmental measures established and implemented in accordance with this Accord will not prevent a government from introducing more stringent environmental measures to reflect specific circumstances or to protect environments or environmental values located within its jurisdiction."[159] Yet, after having briefly traced the history of this Province, I would argue that these demands are more of a reflection of Québec's will of being recognised as a sovereign and autonomous entity, rather than a genuine interest in the fight against the climate and ecological crisis.

Despite this, Québec has also been quite innovative in this field. The Québec Environment Quality Act (EQA) was adopted in 1972, decades before the Canada-Wide Accord and even before the Constitution Act of 1982. Still, it was ahead of its time for it recognises the right to environment that is missing in the official constitutional texts of Canada. In fact, chapter three of the Québec Environment Quality Act is explicitly dedicated to the "right to a healthy environment and to the protection of living species." Notably, Section 19.1 states that "every person has a right to a healthy environment and to its protection, and to the protection of living species inhabiting in it."[160] This right will also be recalled in the previously cited Québec Charter of Human Rights and Freedoms of 1975.

The Environment Quality Act allows the granting of an injunction to prohibit any act or operation which interferes or might interfere with the fulfilment of this right. Among other things, this act foresees regulations that establish the quantity or concentration of contaminant that can be released into the environment. Further prohibitions apply if the discharge is likely to affect the life, health, safety, welfare or comfort of human beings or to cause damage or otherwise impair the quality of the soil, vegetation, wildlife or property. Moreover, Québec's Environment Minister can demand a characterisation study,

[159] Canadian Council of Ministers of the Environment, *A Canada-Wide Accord On Environmental Harmonization*, 2

[160] Government of Québec, *Environmental Quality Act* (1972), https://www.legisquebec.gouv.qc.ca/en/document/cs/q-2

a program of decontamination or restoration, and a timetable for the execution of the work from the person or corporate body that has released or discharged the contaminant into the environment. Through the EQA an early approval process for activities that could be potentially harmful for the environment was also introduced. Finally, the EQA provides for the environmental assessment of major projects. In other words, it sets out a rigorous process to assess the impacts that major projects may have on communities and on the environment.

The codification of environmental rights, in this case, has followed unconventional routes, finding space in a Provincial Act, rather than in a national or international constitution. However, because of the peculiarities of Québec's case, I would argue that it may still be considered as an instance of Environmental Constitutionalism, or - at least - of what would certainly be Environmental Constitutionalism if Québec were to be independent and to adopt its own constitution.

CHAPTER III

The Italian case

When it comes to Environmental Constitutionalism, the Italian case indeed shares some notable elements with the Canadian one, while still representing a peculiar exception - even at the global level - since its adoption in 1947. As a matter of fact, the Italian constitution is considered to be one of the very first documents of the constitutional wave in the aftermath of the Second World War to have been characterised by some degree of environmental "care", and it even saw some remarkable developments in the last years.

However, before analysing this quite recent example of constitution, it is worth having a brief look at the general history of Italian Constitutionalism. In fact, as Steven Calabresi and Matteo Godi highlight in "Italian Constitutionalism and Its Origins", a precise and well-founded study of Italian constitutional law cannot overlook the preceding legal orders, since there has not been a true breaking point between the pre-unitary legal systems and the new constitutional order. Indeed modern Italian courts continue to respect preexisting legal orders as long as they do not crash with the present constitution, being fully aware of the fact that the post-World War II Constituent Assembly did not start the writing from scratch.[161]

Similarly to the Canadian case, the sources that I will employ for the writing of this chapter are academic texts and books, as well as primary sources. For the historical background that I will be laying out in the first section, academic journals and books written by historians and scholars like Steven G. Calabresi, Matteo Godi, Sabino Cassese, and Maurizio Fioravanti will be extremely useful. For a more dynamic and personal interpretation of the case, primary sources like the actual Albertine Statute, the constitution of 1947, case laws from the Italian Constitutional Court and more will be used. The latter are also

[161] Steven G. Calabresi & Matteo Godi, "Italian Constitutionalism and Its Origins", *The Italian Law Journal* (2020), No. 1, 24, DOI:10.23815/2421-2156.ITALJ

available online and the links can be found in the footnotes. The reference to the original texts will allow us to notice the development and improvements for what concerns Environmental Constitutionalism in Italy. Finally, the European Union's institutions official websites (notably, the one of the European Commission), case laws from the European Court of Justice, and the treaties of the EU (like the Treaty on the European Union and the Treaty on the Functioning of the European Union) will be essential sources for drafting the last section dedicated to the role played by this international organisation, always through a theoretical background given by academics.

3.1 Italian Constitutionalism and the Albertine Statute

After the 1946 referendum through which Italians were called to choose between monarchy and republic, with the latter winning with 54.27% of the votes cast, in 1947 the Italian constitution created a unitary parliamentary republic in Italy. Yet, the history of a unitary Italy is quite short, dating back to the 1860s only. In fact, Italy has been deeply fragmented ever since the fall of the Western Roman Empire in 476 CE. For a large part of the 18th and 19th centuries, it was split into a series of smaller States and city-States. In particular, in the years preceding the Napoleonic invasion of 1796, the current territory of Italy was divided into ten Nations: the Kingdom of Piedmont and Sardinia, the Bisphoric of Trent, the Republic of Venice, the Republic of Genoa, the Duchy of Parma, the Duchy of Modena, the Republic of Lucca, the Grand Duchy of Tuscany, the Papal States, and the Kingdom of Sicily. Moreover, Austria maintained its control over some areas in the northern part of Italy.[162]

Today, the most famous pre-modern Italian constitution is - without any doubt - the Albertine Statute of 1848, which was Italy's first nationwide constitution. However, the Albertine Statute is not the only

[162] Ibid, 26

instance of written Constitutionalism in this territory. In fact, Steven Calabresi and Matteo Godi note that Italy has had at least fifty constitutions, all predating the Statute, among which: the Draft Constitution of Tuscany (1787), the Second Constitution of the Cisalpine Republic (1798), and the Constitution of the Kingdom of Italy (1802).[163]

For many years, it was believed that constitutional principles were not present in Italy until the French Revolution. Many used to argue that the first constitutional movement towards the unification of Italy was triggered by the Napoleonic invasion. However, an earlier example of Constitutionalism in Italy proves differently: the 1787 Draft Constitution of the Grand Duchy of Tuscany. This was the first, concrete attempt at constitutionalisation in the peninsula, and it was the result of the development of new Enlightenment ideas about public law in this territory.

In 1699, Domenico Bandini published "Il Governante Politico Cristiano" (The Christian Political Governor) in which he lays out the foundations for the 18th century theories of the State. The State, in Bandini's view, was regarded as "a juridical and political organisation of society in which the progress and the well-being of the citizens are the fulcrum of the legislative, administrative, and jurisdictional activity, in one word, of the life of the State." Starting from these assumptions, in the second half of the 18th century, Italian constitutional thinkers took the position that the laws of their time were unjust under natural law. Consequently, they asked for a new system of public law. In this context, intellectual Giuseppe Maria Galanti lamented that "few have been the governments that have respected the rights of humankind."[164] In other words, the Italian legal Enlightenment considered the law as a powerful tool to reform the

[163] Ibid, 25

[164] Ibid, 27

status quo. The concept of "reform legislation" was dominating the Italian academic landscape. The same idea will be reprised, as we have already seen, by Gaetano Filangieri in his "Science of Legislation", especially in relation to public happiness. Filangieri's thesis was that the strength of a government lies in institutional solutions that foster lasting trust between citizens and government, while promoting the happiness of the Nation under the rule of law. In his view, the legislator - in many cases a sovereign - has to abide to the principles of the "preservation" and the "tranquility" of the citizens. This must be the "sole and universal object of legislation." In sum, the purpose of the State must be "the maintenance of a good degree of *fides publica* between sovereign, magistracy and citizenry" together with the attainment of both "absolute goodness" (meaning universal laws and principles) and "relative goodness" (which refers to the heterogeneity of Nations and of the citizens subject to the law).[165] All of these discourses allegedly had important consequences on the political sphere and on constitutional thought.

As early as 1779, the Grand Duchy of Tuscany moved towards the codification of its laws. The Grand Duke Leopold II entrusted this task to his Prime Minister, Francesco Maria Gianni, and gave him the power to draft a constitution. The Grand Duchy's Draft Constitution was first completed in 1782 and it was divided into three parts: a Preamble, a Constitution, and Consecutive Ordinances. It can be argued that the Draft Constitution represents "the earliest modern and concrete example of Italian constitutional thought." It is sufficient to read its Preamble to understand why it was this important:[166]

"[…] A Nation cannot easily subsist, nor be governed justly, without a primordial and fundamental law, solemnly accepted by the nation itself, a law that invests the Sovereign with legitimate authority, and that limits its

[165] Balzano, Vecchione & Zamagni, *Gaetano Filangieri between public happiness and institutional economics*, 7

[166] Calabresi & Godi, "Italian Constitutionalism and Its Origins", 30

usage and exercise, a law that determines the Sovereign's and the people's reciprocal duties and respective rights, reserving to the public, that is, to the body of the nation legitimately represented, those faculties which it cannot renounce, not even voluntarily. These faculties are to freely represent, and to propose what is convenient to, the public and to reject everything that might cause detriment to it, freely releasing to the Sovereign the highest executive power.'"

In this extract we can notice some fundamental features and principles of Constitutionalism that will eventually come back in the Italian constitution. Among these, the idea of limitation of powers which already became fundamental even if - in this Draft - "the sovereignty" continued to be represented "by the person of the Grand Duke." In fact, Leopold II believed that the monarch should have exclusive power to decide on the fundamental laws of the State, therefore on matters such as legislation, finances, succession, territorial integrity, peace and war treaties. As a matter of fact, the executive power remained in the hands of Leopold II and his heirs. However, the Duke was still willing to renounce to some of his powers, such as the power to declare war, and the constitution was supposed to create some sort of checks and balances, stating that:

"The voice of the public and the will of the Sovereign will agree upon the most useful resolutions to form a healthy and just Government without allowing the one to be validly contradicted by the other, but both will be contained in the limits that are prescribed in the following Constitution."[167]

The main purpose here is to guarantee a "healthy and just Government" which is of course subject to interpretation and to temporal changes. Moreover, the association of the constitution to the spirit of the Nation starts to assume relevance. In this context, a Nation cannot be "justly" governed if it does not give legitimacy to the primordial and fundamental law of the State, which is its constitution.

[167] Ibid

This Draft was indeed revolutionary in many ways. However, it did not lead to a concrete follow-up, since Leopold II decided that Tuscany was not ready to accept a constitution, partly because of the opposition of the governing administrative body (the Consiglio di Reggenza). Therefore, he opposed to its promulgation. Still, its historical importance for the development of Italian constitutional thought is undeniable. After the Draft Constitution, many other instances of constitutionalisation took place, all leading to one crucial turning point: 1848.

The revolutions of 1848 fuelled the longstanding desires for the unification of Italy and for the adoption of one single national constitution. They marked the peak of 60 years of Italian constitutional thought. Indeed, in this period of time, the efforts for the creation of an Italian constitutional State reached their highest levels, but Italian liberals could not agree on the forms that the unified government should have taken. On one hand, Mazzinians argued for a unitary republic; on the other hand, a federal system headed by the Pope was envisioned. King Carlo Alberto of Savoy - the King of Sardinia and Piedmont - exploited this internal division in order to avoid a democratic revolt that could have led to the creation of a constituent assembly and, on the 4th of March 1848, he promulgated the Albertine Statute. In fact, the text of the Statute is that of a monarchical constitution and not that of a democratic republic. It must also be noted that, since it was the product of a legislature, and not of a constituent assembly, the Albertine Statute was not entrenched as a modern constitution would require today. However, it is still considered to be the first and longest serving constitution of Italy. Over its first decade, the Albertine Statute only applied to the Kingdom of Sardinia and Piedmont, but following the historical events, it soon spread to the rest of the territory. In fact, in 1860 Giuseppe Garibaldi led the Kingdom of the two Sicilies and all of southern Italy to join Piedmont. With the Law no. 4761 of the 17th of

March 1861, under the rule of Vittorio Emanuele II, the Kingdom of Italy was unified and officially proclaimed. In 1866 a war led to the acquisition of Venice and of the Veneto Region; while in 1870 Rome and the Papal State were also annexed to the Kingdom. Consequently, Italy as we know it today, was for the most part (with the exception of the northeastern Regions, which would join only after World War I) unified and regulated under the Albertine Statute, even if it was originally created for the Kingdom of Sardinia and Piedmont only.

The Albertine Statute was composed of 84 articles inspired by the French constitution of 1830 and the Belgian constitution of 1831. Originally, it was supposed to be a rigid constitution. However, it is now agreed that the Albertine Statute was - on the contrary - a flexible document. As Vittoria Barsotti et al point out in their book "Italian Constitutional Justice in Global Context":[168] "lacking an amendment clause, assuming that the Statute could not be thought of as forever unchanging, and recognising that the King had 'irrevocably' ceded his own lawmaking power, the only body capable of modifying it would be the holder of the legislative power." In fact, no formal amendment process capable of derogating from the Statute's provisions was outlined in the Statute itself. Consequently, there was no way of reviewing the constitutionality of an act of the Parliament,[169] even if in the Statute it was explicitly stated - in Article 81 - that "All laws contrary to the present Statute are abrogated."[170] Basically, any law approved by Parliament and signed by the King became the supreme law of the land. Moreover, the Albertine Statute did not envisage any form of judicial review mechanism neither.

The Italian jurist and academic Sabino Cassese points out the "flexibility" of the Albertine Statute, by highlighting the fact that the latter survived three regimes completely different one from the other:

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[168] Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia & Andrea Simoncini, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press, 2016), 6

[169] Calabresi & Godi, "Italian Constitutionalism and Its Origins", 45

[170] *Albertine Statute* (1848), https://www.quirinale.it/allegati_statici/costituzione/Statutoalbertino.pdf

"the parliamentary and oligarchic [regime], the liberal and democratic one, and the fascist one."[171] Indeed, fascism constructed itself around the previous institutional, legislative and constitutional framework, basically exploiting the authoritarian potential of the Albertine Statute. For instance, the Statute did not mention in any parts of its text the freedom of association, which was implicitly recognised, but still neither explicitly accepted or banned. Of course, this allowed the future negation of such liberty.[172] Indeed, in its first couple of years, the fascist regime generally preserved the structure of the Albertine Statute, but it was soon emptied of its meaning through new fascist laws and politics. First of all, the Chamber of Deputies was dissolved and replaced with the Chamber of Fasci and Corporations,; then, all parties were basically outlawed with the exception of the Fascist Party; finally, anti-Semitic laws were promulgated. Broadly speaking, all individual freedoms and rights were brutally suppressed. In all likelihood, all of this would not have been possible if the Albertine Statute had not been flexible as it was. Notably, the fascist laws in a way abrogated what had been considered the core of the Albertine Statute, that is to say Article 3 which stated that: "The legislative power shall be exercised collectively by the King and two Chambers, the Senate and the Chamber of Deputies."[173] This was supposed to be an unchangeable provision of the Statute. However, Law no. 100 of 1926 emptied Article 3 of its meaning by delegating the legislative power to the Council of Ministers (ergo, to the executive):[174]

"'(f)ollowing deliberation of the Council of Ministers and the advice of the Council of State, Royal Decrees may be used to emanate juridical norms necessary to regulate the execution of the laws. […]

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[171] Sabino Cassese, *L'Italia: una società senza Stato?* (Il Mulino, 2012), 180, my translation

[172] Sabino Cassese, *Lo Stato fascista* (Il Mulino, 2010), 84-85

[173] *Albertine Statute*

[174] *Gazzetta Ufficiale del Regno d'Italia* (1926), 426, translated by Matteo Godi, https://www.gazzettaufficiale.it/eli/gu/1926/07/01/150/sg/pdf

(f)ollowing deliberation of the Council of Ministers and the advice of the Council of State, Royal Decrees may be used to emanate norms having the force of law when the Government has been so delegated power by a law and within the limits of that delegation, (and) in extraordinary circumstances, in which reasons of urgent and absolute necessity may so require. The judgment over necessity and urgency is not subject to any other check beyond the political one of Parliament."

In other words - as Calabresi and Godi point out - "what the fascist regime left behind was only a semblance of the 'Constitution and Fundamental Law, perpetual and irrevocable' that the Albertine Statute had embodied for much of the second half of the 19th century."[175]

3.2 The post-war constitution

On the 2nd of June 1946, Italians voted to abolish the monarchy and to elect a Constituent Assembly. According to O' Gorman, the Italian constitution was codified following a moment of crisis. "The creation of a newly independent state is a moment of legal crisis, which requires a new constitution to be drafted. A similar situation arises with the departure of an occupying force."[176] The case of Italy is an instance of both the creation of a new independent State (following the fall of the fascist regime) and the departure of occupying forces (German ones). The Italian constitution indeed was written starting from a common and undeniable value: anti-fascism. Not by chance the 12th Transitory and Final Provision of the constitution reads as it follows:

"It shall be forbidden to reorganize, under any form whatsoever, the dissolved Fascist party.
Notwithstanding Article 48, the law has established, for no more than five years from the implementation of the Constitution, temporary limitations to

[175] Calabresi & Godi, "Italian Constitutionalism and Its Origins", 50

[176] O' Gorman, "Environmental Constitutionalism: A Comparative Study", 441

the right to vote and eligibility for the leaders responsible for the Fascist regime."[177]

The rest of the text is the result of a kind of compromise of Catholic, Marxist, and liberal views, and it includes a solid Bill of Rights entitled "Fundamental Principles." Moreover, it introduces a system of judicial review and checks and balances. Steven Calabresi and Matteo Godi wonder why judicial review and checks and balances became entrenched in Italy only after 1945, despite centuries of constitutional experimentation. They find one possible answer in the "indignation and anger over the terrible wrongs that the fascist regime committed under Mussolini and that the Albertine Statute utterly failed to preempt." Basically, the Italian people - after the fascist experience - realised that they needed a rigid and entrenched constitution in order to protect their fundamental rights, as well as the separation of powers, since they could not always rely on elected legislative and executive bodies. This is the reason why the Italian constitution replaced the flexible Albertine Statute with a rigid document, one which neither the Parliament nor the executive could change or expunge at their pleasure.[178]

Evidently, in 1947, when the Italian constitution was first adopted, it was still too early to make explicit reference to the environment. Knowledge about environmental issues was limited and the civil society did not perceive any kind of risk in this sense. Moreover, there were no instruments for carrying out valid environmental assessments and for monitoring the detrimental effects that pollution produced on human health and quality of life.[179] Therefore, such issues were not

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[177] *Constitution of Italy*

[178] Calabresi & Godi, "Italian Constitutionalism and Its Origins", 52

[179] Giovanni Cordini, Paolo Fois & Sergio Marchisio, *Diritto ambientale: profili internazionali europei e comparati* (Torino: Giappichelli, 2017), 130-131

part of the constituent debate. However, there still are some early examples of Environmental Constitutionalism in it.

Article 44 reads:[180]

"For the purpose of securing the rational capitalization of land and establishing equitable social relationships, the law shall impose obligations on and limitations to the private ownership of land; it sets limitations to the size of holdings depending on the regions and agricultural areas; it shall promote and impose land reclamation, the conversion of large agricultural estates and the reorganization of crop production units; it assists small and medium-sized holdings.
The law shall make provisions in favour of mountainous areas."

Even if there was no consciousness about contemporary themes, such as environmental sustainability and a balanced relationship between human development and the safeguard of the environment, Article 44 shows some degree of attention towards related subjects.[181]

However, arguably the most important Article for what concerns original Environmental Constitutionalism in Italy is to be found among the Fundamental Principles. It is Article 9 which declared that:[182]

"The Republic promotes the development of culture and of scientific and technical research.
It safeguards natural landscape and the historical and artistic heritage of the Nation."

The term "natural landscape" can be considered as a first instance of interest not only towards the citizens of the State, but also towards the environment in which they live.

The judiciary - just like in the Canadian case - played a key role in this context, providing an evolutive interpretation of this Article.

[180] *Constitution of Italy*

[181] Cordini, Fois & Marchisio, *Diritto ambientale*, 131

[182] *Constitution of Italy*

Nevertheless, it is important to underline that this was a step-by-step process. Originally, the environment was not considered as unitary juridical concept. Its protection was rather reduced to a "sum of different and juridically relevant profiles."[183] This is the reason why, it was preferred to highlight the correlation between the environment and other naturalistic interests, like the landscape and the historical and artistic heritage. Moreover, the environment was usually linked to scientific research, urbanist and territorial tools, agriculture and forests, or framed into debates around pollution. With time, things changed. A first important step was made on the 20th of February 1979 with Judgement 120 of the Italian Constitutional Court which "identifies a series of imperative exigences that can justify restriction to free movement of goods, among which the protection of public health."[184] Therefore, in Italy, environmental protection initially was not guaranteed through a codification *ad hoc*, but rather through the interconnection with other rights (such as the right to health and to property), just like many other national cases, including the one of Canada that I have recently analysed. Starting from the 1980s, the environment assumed more and more the connotations of an actual juridical subject. In this context, three main turning-points are being identified:

1. In 1986, the first Italian Ministry of the Environment was created by referring to Article 9;
2. In 2001 the reform of Title V of the Italian Constitution modified Article 117, which is is dedicated to the distribution of legislative power between the State and the Regions. The State was vested with exclusive authority over protection of the environment and the ecosystem, while:[185] "Concurring legislation applies to the following subject matters: […] enhancement of cultural and environmental properties. […] In the subject matters covered by

[183] Roberto Leonardi, *La tutela dell'interesse ambientale, tra procedimenti, dissensi e silenzi* (Giappichelli, 2020), 6

[184] Ibid, 5-7

[185] *Constitution of Italy*

concurring legislation legislative powers are vested in the Regions, except for the determination of the fundamental principles, which are laid down in State legislation";

3. The Consolidated Law on the Environment, adopted with the Legislative Decree no. 152 in 2006, aimed at harmonising a widely fragmented normative body into one unified text.[186]

However, perhaps the most important contributions to this evolution towards the recognition of the environment in the Italian legal and constitutional framework were made immediately after the creation of the Ministry of Environment, in 1987, when the Constitutional Court issued two groundbreaking Judgements: Judgement 210 and 641. Judgement 210 recognised for the first time the safeguard of the environment as a fundamental right both for the individual and for the collectivity as a whole. In particular the Court noted that:[187]

"The environment represents an immaterial and unitary good even if it is made of different components that can constitute - in isolation and separately one from the other - objects of care and safeguard; all of the components are altogether ascribable to one unit."

Judgement 641 linked the safeguard of the landscape to the right to health cited in Article 32 ("The Republic shall safeguard health as a fundamental right of the individual and as a social interest and shall guarantee free medical care to the indigent"[188]), allowing the official recognition of the "constitutional value of the environment." Moreover, in Judgement 641, the constitutional value of the environment was described as "primary and absolute"[189] since it represents "a determinative element of the quality of life."[190]

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[186] Leonardi, *La tutela dell'interesse ambientale*, 7-10

[187] Ibid, 11, my translation

[188] *Constitution of Italy*

[189] Jacqueline Morand-Deviller, "L'environnement dans le constitutions étrangères", *Les Nouveaux Cahier du Conseil Constitutionnel* (2014), No. 43, https://www.conseil- constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/l-environnement-dans-les- constitutions-etrangeres

[190] Cordini, Fois & Marchisio, *Diritto ambientale*, 132

Gian Luca Conti in "La tutela dell'ambiente: prospettive di diritto pubblico della transizione" (Environmental protection: a transitional public law perspective, 2017) observes that:[191]

"At the constitutional level, the primary and absolute value of the environment is unknown to the constitution in a formal sense and it has been affirmed by the jurisprudence of the Constitutional Court through the constructive path of this category whose character is undeniably praetorian, as is praetorian the process through which the Constitutional Court has transformed models of action deriving from EU law which are characterised by high elasticity into constitutional principles. The role of the Constitutional Court has been decisive also for identifying the environment as subject of allocation between the State and the Regions in applying the reform of Title V and in the subsequent evolutions of the regional model. In the environmental case, the Constitutional Court solved the need of constitutional safeguard as well, the affirmation of a value whose constitutional consistency cannot be denied because of the construction of limits imposed by a political majority, that had not been taken into consideration by the Constituent Assembly, and that could not be considered as formally constitutional without its intervention."

Once again the interpretative role of the courts is fundamental for guaranteeing the perpetration of the constitution as a living tree, capable of adapting to new times and new challenges, as well as concepts.

However, what Conti was not expecting, was a revolutionary constitutional reform which actually had place in Italy in 2022. Such reform modified Article 9 and Article 41 of the Italian constitution by introducing the explicit protection of the environment in the first one, and limitations to economic initiatives that are detrimental for the environment in the second. Article 9 now has one comma more which reads:[192]

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[191] Gian Luca Conti, "La tutela dell'ambiente: prospettive di diritto pubblico della transizione", *Quarterly Journal of Environmental Law* (2017), No. 3, 117-118, https://www.rqda.eu/gian-luca-conti-la-tutela-dellambiente-prospettive-di-diritto-pubblico-della-transizione/, my translation

[192] *Constitution of Italy*

"It [= the Republic, A/N] shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals."

As it can be read, in the Italian constitution - differently from Canada - not only the explicit safeguard of the environment has been codified, in what seems to be a mix of the right of environment and to environment; but also the interests of future generations are being cited. It may seem trivial, but it is actually quite innovational and proof of the uniqueness of environmental human rights from all other rights. This uniqueness is given by the fact that environmental human rights transgress temporal boundaries, since they are based on the relationship between living persons and future generations. In this sense, it recalls the intergenerational problem put forward by living constitutionalists. It is almost undeniable the fact that the majority of other rights, including basic human rights such as the right to life, freedom of speech or from torture, etc. do not require to be sustained in the future in order to protect them in the present. Environmental rights are different. In fact, most arguments in support of environmental protection - whether founded on the recognition of rights or not - invoke the needs and troubles of future generations who will have to live in the world that we are leaving to them. Moreover, environmental rights can only be protected in the present if they extend into the future. It is not merely about the citizens to be, but also about the citizens of today. The fulfilment of our environmental human rights lies in the protection of future generations' environmental human rights. For instance, cleaning a polluted river in order to make the water potable may take generations. Therefore, "that result can only be achieved if the rights of future persons are protected *as fully* as current persons." It can be argued that this is a reciprocated kind of benefit: "it is a giving back or return on investment that rebounds reflexively from my protection of the future's rights."[193]

[193] Richard P. Hiskes, "Environmental human rights" in Thomas Cushman (ed.), *Handbook of Human Rights* (Routledge Taylor & Francis Group, 2012), 406-407

However, even if such arguments do carry some "persuasive power", usually they fail to grab the attention of political agendas - even in democracies - since the conservation effort asked for guaranteeing a greener planet to future generations is not considered enough for justifying the sacrifices of the living generations of today. This is the reason why the presence of environmental concerns that invoke inter-generational justice is not that common, and this is the reason why it is positively surprising to find it in the Italian constitution.

Continuing with the 2022 reform, Article 41 now reads:[194]

"Private economic enterprise shall have the right to operate freely.
It cannot be carried out in conflict with social utility or in such a manner as may harm health, the environment, safety, liberty and human dignity.
The law shall determine appropriate programmes and checks to ensure that public and private economic enterprise activity be directed at and coordinated for social and environmental purposes."

Therefore, under new Article 41, private economic initiatives shall not be carried out "in such a way as to damage health and the environment", adding these two limits to those already in force, namely "security, freedom and human dignity." The second amendment concerns the third paragraph, reserving to the law the possibility of directing and coordinating economic activity, both public and private, for purposes that are not only social but, finally, also environmental.

Historian Maurizio Fioravanti in "Costituzionalismo: Percorsi della storia e tendenze attuali" (Constitutionalism: Paths of history and contemporary tendencies) writes that:[195]

[194] *Constitution of Italy*

[195] Maurizio Fioravanti, *Costituzionalismo: Percorsi della storia e tendenze attuali* (Laterza, 2015), chapter 4, my translation

"Post-World War II constitutions are configurable as open texts that, besides from laying out a series of principles in a direct and explicit way, also lay out other principles that are recalled from other sources, which essentially find themselves at the supranational level. Consequently, it is not a coincidence the presence in our constitution of Articles 10 and 11 which situate 'provisions of international law' on a superior level to the one of ordinary law; while the concept of 'sovereignty limitations' within Article 11 was exploited, as it is known, for offering constitutional covering to the primacy of EU law, including the non-application of national law in contrast with it. […]
The tendency of contemporary Constitutionalism to go beyond state and national boundaries found a recent and arduous proving ground at the European level."

Even if the Italian constitution, as we have seen, is without any doubt rigid, differently from its antecedent, I do believe it is also true what Fioravanti affirms, that is to say that it must be viewed as an "open text." Throughout this whole thesis I have underlined several times the importance of adopting a living approach towards Constitutionalism, especially for giving sense to the whole phenomenon of Environmental Constitutionalism. What Fioravanti puts forward, is the idea that constitutions are living documents also because they are subject to extra-national influence. O' Gorman talks about "external factors influencing constitutional change" and, notably, he employs the term "coercion" for referring to the channel of transnational influence that includes both the activity of strong States over less 'developed' ones and the activity of international organisations.[196] Indeed the European Union played a key role in the development of Italian Constitutionalism and in disseminating a deeper ecological consciousness. We will look at this very aspect in the following and last section.

[196] O' Gorman, "Environmental Constitutionalism: A Comparative Study", 444

3.3 The European Union's role

Environmental concern and care started to become subject of debate especially in the 1970s and 1980s, not only in Italy and in Canada, but more generally in the whole world as a result of greater scientific knowledge and increasing information that also led to international action. The European Union is at the same time cause and consequence of this debate.

According to J. H. Jans[197], three main phases can be identified in the European environmental 'journey':

1. From 1958 - with the Treaty of Rome which established the European Economic Community (EEC) - until 1972. In this period of time, even if there was no real consciousness about environmental issues and about environmental policies, some first directives ascribable to this field were adopted, including directive no. 67/584 dedicated to the categorisation, packaging and labelling of dangerous substances, directive no. 70/157 on acoustic pollution, and no. 70/220 on polluting emissions produced by vehicles;
2. The second phase begins in 1972, following the first United Nations Conference on the Human Environment that took place in Stockholm (which gave origins to the already cited Declaration), and ends in 1987. This is the moment in which EU institutions start to develop some form of attention towards environmental issues. In fact, In 1972, at the Paris Summit, Member States declared that:[198] "Economic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at

[197] J. H. Jans, *European Environmental Law* (Groningen, 2000)

[198] "Statement from the Paris Summit", *Bulletin of the European Communities* (Luxembourg: 1972), No 10, 2, https://www.cvce.eu/content/publication/1999/1/1/b1dd3d57-5f31-4796-85c3-cfd2210d6901/publishable_en.pdf

the service of mankind." Consequently, in this phase, we observe the drafting of numerous Environmental Action Programmes that will serve as basis for future normative acts. More explicit directives are also adopted, for instance on the protection of wild birds (no. 80/779), waters destined to human consumption (80/778), air quality (80/779), environmental assessment (85/337), and many more;

3. From 1987 until 1993 the third phase develops. The Single European Act introduced for the first time the explicit competence of the European Union (at that time still Community) in the field of environmental policies through Title VII which is entirely dedicated to the "Environment."[199]

Commas 1 and 2 of Article 130r of the Single European Act state that:[200]

"1. Action by the Community relating to the environment shall have the following objectives:

- to preserve, protect and improve the quality of the environment,
- to contribute towards protecting human health,
- to ensure a prudent and rational utilization of natural resources.

2. Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage as priority should be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies."

Once again, environmental protection is mainly framed through an anthropocentric lens for guaranteeing "human health."

However, in the case of the European Union, another fundamental element inevitably comes into the debate: the economic sphere, especially limitations to the latter for ensuring environmental protection. It must not be forgotten that the EU was originally created

[199] Rosa Rota, "Profili di diritto comunitario dell'ambiente" in Paolo Dell'Anno & Eugenio Picozza, *Trattato di Diritto dell'Ambiente* (CEDAM, 2012), Vol. 1, 153-154, https://art.torvergata.it/retrieve/e291c0d5-4ee3-cddb-e053-3a05fe0aa144/Contributo%20ROTA.pdf%20trattato.pdf

[200] *Single European Act* (1987), Official Journal of the European Communities, No. L169/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11986U/TXT

as an economic community and only throughout time - thanks to a spill-over mechanism - started to acquire competence in other fields. In 1972 the Heads of State and Government of the Member Sates of the enlarged Community had already underlined the fact that economic expansion must take into consideration its effects on the environment. By strategically framing environmental policy as a trade policy issue, an extensive body of environmental legislation was developed, even if a constitutional foundation for environmental policy was *de facto* absent in the EU. In fact - as Christoph Knill, Yves Steinebach and Xavier Fernández-i-Marín underline - it was the Single European Act which gave a first "formal constitutional basis" to the EU's environmental action.[201] Before that, environmental policies mainly developed as a consequence of the single market. In fact, in order to facilitate the free circulation of goods, Member States were constraint to develop environmental regulations since differences in environmental standards could create barriers to free trade.[202]

The Court of Justice of the EU, starting from the 1980s, played a key role in identifying the safeguard of the environment as an essential goal of the Community, overarching economic interests as well. The first revolutionary instance of this was the Cassis de Dijon case of 1979 in which the Court recognised the legitimacy of restrictions to the free circulation of goods if justified by "mandatory requirements" such as the "protection of public health."[203] The protection of the environment will later be explicitly cited as a valid obstacle to the free circulation of goods in two other cases that employed the Cassis de Dijon's judgement as reference (the Waste Oils case of 1985 and the Danish Bottles case of 1988).[204]

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[201] Christoph Knill, Yves Steinebach & Xavier Fernández-i-Marín, "Hypocrisy as a crisis response? Assessing changes in talk, decisions, and actions of the European Commission in EU environmental policy", *Public Administration* (2020), Vol. 92, No. 2, 363, DOI: 10.1111/padm.12542

[202] Emanuela Orlando, *The evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges* (Transworld, 2013), 21

[203] European Court of Justice, *Judgement of Case 120/78*, 662, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61978CJ0120

[204] Cordini, Fois & Marchisio, *Diritto ambientale*, 97

Not by chance, with the Treaty of the European Union (TEU) - also known as Maastricht Treaty - of 1992 environmental policies explicitly become a main purpose of this international organisation in relation to the common market and economic activities. In fact, Article 2 of the TEU states that:[205]

"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment. […]"

The year 2000 represents one main turning point: the safeguard of the environment, as well as sustainable development, were recognised as fundamental values of the EU through their codification in the Charter of Fundamental Rights of the European Union. Notably, through Article 37 which is dedicated to "Environmental protection" and reads as it follows:[206]

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

At the beginning, the Charter was not binding as it simply was a political document. It was later integrated in the Constitutional Treaty signed in Rome in 2004 (but not ratified by all the Members), and in the Lisbon Treaty of 2007 (still the most recent Treaty of the EU up to today). As we know, the project for a European constitution was not successful, yet - as Rosa Roti underlines - the incorporation of the Charter in it is quite a significant element. In fact, it shows the will of the European Union to put human rights at the top of its agenda and

[205] *Treaty on the European Union* (1992), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11992M/TXT

[206] *Charter of Fundamental Rights of the European Union* (2000), Official Journal of the European Communities, No. C 364/1, https://www.europarl.europa.eu/charter/pdf/text_en.pdf

within its constitutional framework, not by chance it is now an essential part of the Lisbon Treaty. Having codified environmental protection in the Charter makes us wonder if - in future eventual attempts at European constitutionalisation - the European Union will also try to take bolder steps towards the introduction of actual environmental rights, such as the right to environment or even of environment.

The Lisbon Treaty - in Articles 4 and 5 - also redefines the fields in which the Union has exclusive or shared competence.[207] After such revision, the environment still remains one policy field in which the EU shares the legislative power with the Member States while respecting the principles of attribution, subsidiarity and proportionality. Moreover, it is highlighted the transversal nature of environmental issues even for what concerns EU action.[208] In particular, Article 11 of the Treaty on the Functioning of the European Union reads that:[209]

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

Moreover, environmental issues become central even for what concerns the external action of the EU. Article 21 of the TEU states that:[210]

"The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
[…]

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[207] *Consolidated Version of the Treaty on the European Union*, Official Journal of the European Union (2012), https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

[208] Roti, "Profili di diritto comunitario dell'ambiente", 158-159

[209] *Consolidated Version of the Treaty on the Functioning of the European Union*, Official Journal of the European Union (2012), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF

[210] *Treaty on the European Union*

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development"

This contributes to the external representation of the European Union as a leader in environmental and climate change negotiations on a global scale.

In the first chapter of this thesis, I argued that the most recent example of European action in the environmental field also proves to be - in some way - a form of external representation. I am talking about the European Green Deal which was proposed by the European Commission in 2019. Through this Deal, all 27 Member States engaged in making Europe the first climate neutral continent by 2050. To get there, they committed to reduce CO2 emissions by at least 55% by 2030, compared to 1990 levels.[211] The European Green Deal represents a significant policy initiative and commitment by the EU to address climate change, environmental sustainability, and other related challenges, even if it must be noted that it does not have formal constitutional status in the same way that the treaties do. However, I argued that this Deal can be considered as a sort of constitution of the European Union in the sustainability sphere for different reasons. Or - if not a proper constitution - at least a fundamental document having remarkable implications for the more general constitutional framework of the European Union. Why so? First of all, it lays out the general direction of the organisation in this field. It does so through the integration of environmental and climate considerations into various aspects of EU policies, including trade, transportation, energy, and agriculture. Therefore, the Green Deal's goals are integrated into various EU policy areas, which is a symptom of the interconnectedness of policy domains that is affirmed in the EU's constitutional framework. Secondly, it sets very specific boundaries, targets and limits. Thirdly, it reflects the EU's determination to

[211] European Commission, *Delivering the European Green Deal*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en

transition towards a more sustainable, low-carbon, and environmentally friendly economy and to present itself as a frontrunner in this transition at the international level. Indeed, on the official website of the European Commission dedicated to the Green Deal, it is written that:[212]

"The European Green Deal has already set a positive example and led major international partners to set their own target dates for climate neutrality.
With investment in renewable energy technologies, we are developing expertise and products that will also benefit the rest of the world.
With the shift to green transport, we will create world leading companies which can serve a growing global market. By working with our international partners, we will reduce emissions together in maritime transport and aviation around the world.
The EU will share these proposals and ideas with its international partners at the UN's COP26 Climate Change Conference in Glasgow in November."

Also adding that one third of the world's public climate finance comes from the EU and its Member States.

Over time, the EU's commitment to the principles and objectives of the European Green Deal could influence the introduction of new legal norms, practices, and priorities within its constitutional framework. In other words, while the European Green Deal is not a constitution itself (formally speaking), it represents a great development for the EU environmental policies and it reflects important values and commitments that may influence (or have influenced) the EU's constitutional framework, as well as national ones.

There is broad consensus in the literature that this development would not have been possible without the strong environmental policy ambitions of the Commission itself. Scholars talk about an "entrepreneurial spirit" of the European Commission in the environmental field.[213] Professor Nils Brunsson, in "The organization

[212] Ibid

[213] Knill, Steinebach & Fernández-i-Marín, "Hypocrisy as a crisis response?", 366

of hypocrisy: talk, decisions and actions in organizations", distinguishes between three different outputs that organisations can produce in order to improve their legitimacy and to obtain support from their entourage. These are: talk, decisions, and actions. According to Knill, Steinebach and Fernández-i-Marín, the European Commission is particularly notorious for its "talk", which - in Brunsson's approach - refers to the production of ideas. Moreover, from a policy entrepreneur perspective, the concept of talk also refers to the activities in which one organisation engages for identifying and framing policy issues. While - theoretically - talk mainly refers to the identification of problems, organisations also take decisions to provide solutions for these problems. The more one organisation or institution is active for finding solutions, the more it can be considered as a policy entrepreneur. In the environmental field, the Commission is considered as an entrepreneur since - through its Environmental Action Programmes, and now with the Green Deal - it has constantly developed new policy concepts and ideas in order to capture the attention of the Member States and transpose it to emerging environmental problems or to overcome the "economy–environment dichotomy." In this context, "it has placed special emphasis on framing trade problems as environmental problems and vice versa."[214] This is more than evident in the European Green Deal which explicitly aims at building "a new economic model."[215]

One might wonder how all of these environmental provisions in the legislation of the European Union produce consequences on domestic systems and on national constitutional frameworks.

Article 4 of the TEU states that:[216]

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[214] Ibid

[215] *Delivering the European Green Deal*

[216] *Treaty on the European Union*

"[…] Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

It is clear that Member States should take positive and negative actions that guarantee the respect of the obligations that arise form the EU treaties and acts. Therefore, they should do whatever it takes to ensure the fulfilment of EU goals even in the environmental field. Moreover, the primacy of EU law and the principle of sincere cooperation are strictly linked to the principle of effectiveness which obliges Member States institutions and courts to ensure that national remedies and procedural rules do not jeopardise the application and enforcement of EU law, or even the creation of jurisdictional remedies in the case of legal vacuums at the national level.[217] It is also true, however, that there is no explicit obligation under EU law to amend national constitutions in order to codify environmental rights, as it is also true that environmental rights *per se* are not present in the treaties of the European Union.

In conclusion, it cannot be stated that the European Union is responsible in a direct way for the process of amendment of the Italian constitution. However, it is undeniable the EU's strong commitment to environmental policies and how the primacy of EU law indirectly obliges Italy to take a certain direction. In this context, EU directives and regulations related to environmental protection and sustainable development have pushed Member States to enhance their commitment to environmental conservation. It can be argued that the EU's emphasis on environmental protection and sustainable

[217] Roti, "Profili di diritto comunitario dell'ambiente", 195

development has prompted Member States, including Italy, to take bolder steps to incorporate these principles into their legal frameworks. In this context, I would also like to highlight that - curiously - the amendment of Articles 9 and 41 of the Italian constitution was approved under one of the most 'euro-friendly' Governments that Italy has had in recent times, that is to say the one guided by Mario Draghi.

Moreover, I may want to argue that the EU exercises a form of implicit influence - or coercion - on its Member States, especially with the purpose of maintaining its positive external representation as an entrepreneur in this field of action. Therefore, while Italy's decision to amend Article 9 in order to include the safeguard of the "environment, biodiversity and ecosystems" in its constitution cannot be officially attributed to the EU, it can be said that the environmental policies and legal requirements of this international organisation have played a role in making environmental issues a priority in Italy and, consequently, object and subject of its constitutional reform.

Finally, as we have seen, the treaties of the European Union can be considered as having constitutional features. In fact, even if the EU cannot boast one single and unique constitution, its foundational treaties collectively serve as the constitutional framework for the organisation and functioning of the EU. As a matter of fact, these treaties establish the fundamental principles, institutions, powers, and procedures that govern the EU and its relation with the Member States, while underlining the fundamental human rights that pertain to their citizens. Therefore, in a broad sense, Italy can count not only on environmental provisions present in its national constitution, but even on the ones of the European Union's treaties, as an active Member State of this international organisation.

CONCLUSION

The aim of this thesis has been to provide an overview of the phenomenon of Environmental Constitutionalism and, more generally, of Constitutionalism, and to offer a detailed analysis of two case studies: Canada and Italy. Therefore, my main research questions have been: how are environmental rights - or, more broadly, the protection of the environment - codified in the constitutions of Canada and Italy? What are the similarities and differences in their approaches towards the constitutional framing of environmental issues?

In the first chapter of this thesis I have laid out the theoretical and historical foundations for understanding Environmental Constitutionalism by looking at the origins and main features of Constitutionalism itself. I have concluded that for the purpose of this thesis, it is important to look at constitutions as foundational documents that are not necessarily written and that should be considered as living and evolving entities that must be interpreted according to different and ever-changing contexts. Only through this perspective, known as Living Constitutionalism, the introduction of environmental rights in constitutions can be justified and understood. In particular, living constitutionalists put forward the so-called "intergenerational problem", asking if it is fair to have constitutionally entrenched provisions adopted by people in the past that will have consequences on present and future generations that must face completely new challenges, such as the climate and ecological crisis. Following this introduction to the general features of Constitutionalism, I have continued by highlighting some important steps in the history of its development. In this context, the Corsican case of 1755 has allowed me to introduce the notion of "Felicity of the Nation", a concept which was the subject of a long debate that perhaps reached one of its climaxes with Gaetano Filangieri's "Science of legislation", in which he identifies public happiness as the main goal of legislation. I have argued that the term "happiness" is subject to

interpretation and to the passing of time, perfectly fitting the evolutionary character of constitutions. To support this idea, I have shown how today environmental disasters and forced displacement because of the latter are making it hard - if not impossible - for many people in the world to be happy. This has allowed me to dedicate part of the first chapter to the more general notion of human rights as well. The latter is essential for understanding Environmental Constitutionalism since planetary degradation is being tackled within constitutions especially through the language of human rights. As we have seen, the concept of "environmental rights", according to Luis Rodriguez-Rivera, comprises: environmental procedural rights, the right of environment and the right to environment.

The second chapter of this thesis has deeply analysed the Canadian case. Some examples of Indigenous Constitutionalism, like the Inuit and the Mikmaq, have shown us that pre-modern and unwritten forms of Constitutionalism in the territory that we now know as Canada were way ahead of their times and could already boast some form of environmental care, notably the right of environment based on an ecocentric perspective. In fact, the natural world used to be consider as sacred and divine, while the earth as a whole was seen as a living being of whom we must take care of. However, the Canadian constitution of today is based on European colonisation and on the Constitution Acts of 1867 and 1987. The British North America Act of 1867 - now known as Constitution Act - created the Dominion of Canada and it still represents the basis of Canadian Constitutionalism. As we have seen, it explains the allocation of powers between the Federal and Provincial Governments, setting out many specific areas of jurisdiction; yet, it does not explicitly state who has the power to create environmental laws. In fact, in the original text of the Constitution Act of 1867, nature or the environment are not cited not even once. However, the Supreme Court of Canada has underlined the importance of adopting an evolutive approach towards this text several times, describing it as "living tree" in Reference re Securities

Act. This is the reason why, today, Canadian courts affirm that this power is shared between the two levels of government and it depends on the interpretation of the subject matters listed in the Constitution Act. Whether it is of federal or provincial jurisdiction, I have come to the conclusion that there is no explicit codification of environmental rights in the Constitution Act of 1867 and it is missing in the Constitution Act of 1982 as well. The latter was an historic addition which led to the patriation of the constitution of Canada. It did not introduce environmental rights in the constitutional framework of this country, but it made an important step towards this direction recognising rights that interconnect with the safeguard of the environment. In fact, I have highlighted how the rights of indigenous people in Section 35(1) of the new Constitution Act and the right to life of Section 7 of the Canadian Charter of Rights and Freedom have been recognised as fundamental cornerstones in this context. Several juridical cases have agreed on the fact that environmental degradation can lead to a violation of aboriginal resource rights. At the same time, the Supreme Court has described environmental protection in terms that are equivalent to constitutional protection, and - in Ontario v. Canadian Pacific Ltd. - it made reference to the "right to a safe environment" as an extension of traditional rights. The "right to a healthy environment" has also been explicitly introduced in the Canadian Environmental Protection Act (CEPA) of 1999, Canada's primary environmental regulatory statute, through an amendment made in 2023. Therefore, my research has showed that Canada is a typical example of codification of environmental rights through the interconnection with other rights. In this sense, I argued that this country is facing a cultural problem, failing to embrace its indigenous past and to frame these issues through a true ecocentric lens. At the same time, I also believe that the CEPA may represent a blueprint of bottom-up influence that could have long-term effects for the amendment of the Constitution Acts. In this context, the Québec's case represents an outsider. Retracing its history, I have highlighted how it

represented a peculiar reality in Canada starting from the 18th century already, mainly because of its different national identity given by the Catholic religion and the French language. I argued that the independentist sentiment that has always characterised this Province (also leading to two divisive referenda) and its will to distinguish itself from the rest of the federation, also translated into counter-productive behaviours as well as into autonomous action in the environmental field. On hand hand, Québec was the only Province that did not sign the Canada-Wide Accord on Environmental Harmonization, while asking for constitutional amendments that would do the same as the Accord: reduce the overlap and duplication between jurisdictions. On the other hand, it is also true that Québec recognised the right to environment way before the CEPA, through the Québec Environment Quality Act of 1972. In this case, the codification of environmental rights has followed unconventional routes, finding space in a Provincial Act, rather than in a national or international constitution. However, because of the peculiarities of Québec's case, I would argue that it may still be considered as an instance of Environmental Constitutionalism, or - at least - of what would certainly be Environmental Constitutionalism if Québec were to be independent and to adopt its own constitution as many still ask today.

The third and last chapter has taken into consideration the Italian case. For understanding the current Italian constitution, I have quickly retraced the history of Italian Constitutionalism. Constitutional principles have been present in the peninsula for centuries and many attempts at constitutionalisation have preceded the post-war constitution of today. The Draft Constitution of Tuscany of 1787, for instance, already introduced the notion of limitation of powers and the association of the constitution to the spirit of the Nation. However, the most famous example of pre-modern Italian constitution is the Albertine Statute. I have highlighted the flexible nature of this Statute which lacked an amendment clause or any form of review of constitutionality. I have also pointed out how the Albertine Statute

survived the fascist regime because of this very flexibility. Not by chance, the constitution of Italy of today - which was the result of antifascist fight - is a rigid and entrenched document that protects the rights of the individual. Even if in 1947, when the Italian constitution was first adopted, it was still too early to make explicit reference to the environment, Article 9 of the Fundamental Principles has been considered as one of the very first instances of Environmental Constitutionalism since it cites the safeguard of the "natural landscape." In fact, in 1986, the first Italian Ministry of the Environment was created by referring to Article 9. I have also shown how the Italian Constitutional Court was the first one to recognise the safeguard of the environment as a fundamental right both for the individual and for the collectivity as a whole, especially for guaranteeing the right to health of Article 32. However, the Italian constitution - differently from the one of Canada - saw a revolutionary improvement in 2022, when a constitutional reform added the safeguard of "the environment, biodiversity and ecosystems, also in the interest of future generations" in Article 9. Article 41 was also modified introducing limitations to economic initiatives that are detrimental for the environment. Finally I have argued that, even if the Constitution of today is rigid because of historical events, it keeps being an "open" text that is subject to extra-national influence. In this context, I underlined the importance of the role of the European Union for disseminating a deeper ecological consciousness and the presence of environmental issues even in European Constitutionalism. Indeed, I have stated that the founding treaties of the EU have constitutional value, even if the project for a constitution of the Union has failed. Originally, but also today, the EU framed environmental issues mainly as trade policy issues. Once again, it was the judiciary that, through the decision of the Court of Justice of the EU, established that the safeguard of the environment is an essential goal of the organisation that overarches economic interests when it threatens public health. With time, environmental policies became more and more relevant in

the activity of the EU. I believe that one of the main reasons for its entrepreneurial attitude in this field is the desire for a positive external representation. In this context, I argued that the recent European Green Deal can be considered as a sort of constitution of the European Union in the sustainability sphere for different reasons. Or - if not a proper constitution - at least a fundamental document having remarkable implications for the more general constitutional framework of the European Union since it sets very specific boundaries and objectives while externally projecting the EU's will to fight against the climate and ecological crisis. I have also argued that, since Member States should take positive and negative actions that guarantee the respect of the obligations that arise form the EU treaties and acts, the EU may play a role in national constitutional amendments for the introduction of environmental issues. In fact, even if it does not directly require so, it can implicitly influence Member States - through a form of coercion - towards this direction, also with the purpose of maintaining the previously cited positive external representation. Moreover, in a broad sense, Italy can count not only on environmental provisions present in its national constitution, but also on the ones of the European Union's treaties, as an active Member State of this international organisation.

Summing up, in both cases the right to environment is guaranteed through the interconnection with the right to health or other rights. However, only in the Italian constitution the environment is explicitly cited together with biodiversity and ecosystems, following the constitutional reform of 2022. The Constitution Acts of Canada were not amended in this sense, lacking efficiency from an environmental perspective even for what concerns the allocation of competences between the federal and the provincial level. The evolutive interpretation of the judiciary played a key role both for the Canadian and the Italian cases with courts often underlining the constitutional value of the environment. I have also noticed the role and influence of non-State actors, both of them in an egoistic way in some sense. On

one hand, the Province of Québec controversially acts in an autonomous way for constructing a self-narrative detached from the federal one even through Environmental Constitutionalism. On the other hand, the European Union is trying to create a unique green consciousness in the old continent, but still mainly for purposes of convenient self-representation.

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RIASSUNTO

Questa tesi propone una panoramica del recente fenomeno noto come costituzionalismo ambientale e, in particolare, l'analisi di due casi studio: il Canada e l'Italia. I due sono stati scelti per il mio diretto rapporto con questi, in quanto uno il mio Paese di origine - l'Italia - e l'altro il Paese dove ho vissuto per quattro mesi per un tirocinio curricolare presso il Consolato Generale d'Italia a Montréal. Per redigere questo lavoro, è stato necessario attingere informazioni da diversi tipi di fonti. Articoli in riviste accademiche, libri e manuali scritti da esperti sono risultati fondamentali per la stesura di una base storica e teorica. Allo stesso tempo, la contestualizzazione e l'interpretazione di fonti primarie sono state essenziali specialmente per l'analisi dei due casi studio. Tra le fonti primarie utilizzate troviamo: documenti ufficiali (quali atti, accordi, carte, costituzioni e dichiarazioni), trascrizioni di discorsi e commenti alla stampa di Primi Ministri o figure influenti, casi giudiziari della Corte Suprema del Canada, della Corte Internazionale di Giustizia, della Corte Costituzionale Italiana e della Corte di Giustizia dell'Unione Europea. Molte di queste fonti sono reperibili online sui siti ufficiali di governi, istituzioni, corti e organizzazioni internazionali.

La tesi è organizzata in tre capitoli. Il primo capitolo delinea un generale contesto storico e teorico prendendo in considerazione le caratteristiche principali e la storia del costituzionalismo e del costituzionalismo ambientale. Particolare attenzione è stata dedicata al concetto di costituzionalismo "vivente", ovvero l'idea che le costituzioni non sono documenti fissi e monolitici, al contrario, evolvono nel tempo e vanno interpretate a seconda dei diversi contesti storici, sociali, culturali ed economici di riferimento. Riconoscere questo continuo cambiamento significa riconoscere l'importanza dell'introduzione di norme a difesa dell'ambiente nelle costituzioni di oggi, un fenomeno che si è sviluppato specialmente negli ultimi decenni come risposta alle nuove sfide poste dalla crisi ecologica e climatica. Non a caso, i sostenitori del costituzionalismo vivente evidenziano il cosiddetto "problema intergenerazionale", chiedendosi se sia giusto e corretto che regole vincolanti adottate nel passato continuino ad avere conseguenze sulle generazioni presenti e future. In tale ottica, risulta fondamentale il caso storico della Corsica, la cui costituzione del 1755 viene

considerata come uno dei primi esempi di costituzione moderna redatta secondo i princìpi dell'illuminismo. In questo testo, scritto in italiano da Pasquale Paoli, si sottolinea come uno dei suoi obiettivi principali sia la "Felicità della Nazione." Ho quindi evidenziato come anche il concetto di "felicità" sia da sempre stato oggetto di intenso dibattito intellettuale (tramite figure di spicco come Gaetano Filangieri) e soggetto di interpretazione. A supporto di questo, è bastato prendere in considerazione i cosiddetti "migranti climatici", una categoria purtroppo sempre più numerosa che comprende quegli individui costretti a lasciare le proprie case a causa di disastri ambientali.

Il secondo capitolo analizza il caso canadese partendo da alcuni esempi di costituzionalismo indigeno. I popoli indigeni di questo territorio, come gli Inuit e i Mikmaq, possono vantare alcune forme di costituzionalismo ambientale che precedono di secoli le costituzioni moderne. Le Prime Nazioni, difatti, si caratterizzano per una concezione sacra e divina del mondo naturale, secondo cui la terra è paragonabile a un essere vivente di cui prendersi cura. Nei loro quadri legali e costituzionali - tramandati in forma orale - perciò, il diritto dell'ambiente è inevitabilmente presente. Tale diritto, però, non viene ancora riconosciuto dall'attuale costituzione canadese che si basa, invece, sul processo di colonizzazione europeo. La costituzione del Canada trova le proprie origini nel *Constitution Act* del 1867, originariamente noto come *British North America Act* che creò il *Dominion* del Canada sotto il controllo britannico. Tale documento viene oggi interpretato dalle corti canadesi secondo un approccio evolutivo, in quanto la Corte Suprema del Canada stessa ha dichiarato che la costituzione è un "albero vivente." In particolare, il *Constitution Act* del 1867 viene interpretato per la distribuzione del potere legislativo per quanto riguarda l'ambito ambientale tra il governo federale e i governi provinciali. Tuttavia, nel testo manca l'effettiva codificazione di diritti ambientali. Il *Constitution Act* del 1982 ha in questo senso giocato un ruolo chiave, garantendo il riconoscimento dell'interconnessione tra la salvaguardia del pianeta e altri diritti umani. In particolare, nel caso canadese, ci si ricollega ai diritti dei popoli indigeni introdotti nella Sezione 35(1) del nuovo testo e al diritto alla vita garantito dalla *Canadian Charter of Rights and Freedom* inglobata nella costituzione stessa. Diversi casi giudiziari hanno poi riconosciuto la protezione dell'ambiente come necessaria sia per evitare una violazione dei

diritti alle risorse delle Prime Nazioni, sia per garantire il diritto a un "ambiente sicuro", come sottolineato nel caso Ontario v. Canadian Pacific Ltd. Il diritto a un "ambiente sano" è infine stato esplicitamente introdotto nel *Canadian Environmental Protection Act* (CEPA) del 1999 attraverso una modifica di quest'anno. È quindi chiaro come il caso canadese sia un tipico esempio di codificazione di diritti ambientali attraverso l'interconnessione con altri diritti più 'tradizionali'. Allo stesso tempo, nel lungo termine, il CEPA potrebbe rappresentare un modello per la modifica dei *Constitution Acts* in una direzione più coraggiosa. L'ultima sezione di questo capitolo si concentra, invece, sullo stato particolare ed eccezionale della Provincia del Québec. Ripercorrendo la sua storia, è chiaro come questa Provincia rappresenti un *outsider* all'interno del Canada sin dal 18esimo secolo a causa di un'identità nazionale a se stante data dalla religione cattolica e dalla lingua francese. Il sentimento indipendentista che ha sempre caratterizzato il Québec (con tanto di due referenda estremamente divisi a riguardo) e il suo desiderio di differenziarsi dal resto della federazione si sono spesso convertiti in azioni da un lato controproducenti e dall'altro autonome anche nel contesto di difesa dell'ambiente. Difatti, il Québec è l'unica Provincia canadese a non aver firmato il *Canada-Wide Accord on Environmental Harmonization*, ma allo stesso tempo ha riconosciuto il diritto all'ambiente in anticipo rispetto al CEPA, tramite il *Québec Environment Quality Act* del 1972.

Il terzo e ultimo capitolo si concentra sul caso italiano. Per comprendere la costituzione italiana, si rende necessario ripercorrere brevemente la storia del costituzionalismo italiano. I princìpi costituzionali sono circolati nella penisola per secoli e molti tentativi di costituzionalizzazione hanno preceduto la costituzione del post-guerra ancora oggi in vigore. Un esempio è quello del progetto costituzionale per la Toscana che, già nel 1787, introdusse il concetto di limitazione dei poteri e associò la costituzione allo spirito della Nazione. Tuttavia, l'antecedente storico nazionale più noto è senza dubbio lo Statuto Albertino. La natura flessibile di questo documento ha fatto sì che sopravvivesse al regime fascista e che vi seguisse la costituzione rigida attuale proprio per evitare che si riproponessero gli errori del passato. Quest'ultima fu adottata nel 1947, quando era evidentemente ancora troppo presto per fare esplicito riferimento all'ambiente. Tuttavia, l'articolo 9 fra i Princìpi Fondamentali viene considerato come uno dei

primi esempi di costituzionalismo ambientale in quanto cita la tutela del "paesaggio e il patrimonio storico e artistico della Nazione." Non a caso, nel 1986, il Ministero dell'Ambiente italiano venne creato facendo riferimento proprio a tale articolo. Inoltre, la Corte Costituzionale Italiana ha anche riconosciuto la tutela dell'ambiente come un diritto fondamentale dell'individuo e della collettività, soprattutto nel rispetto del diritto alla salute garantito dall'articolo 32 della costituzione. Se tale interconnessione ricorda il caso canadese, bisogna sottolineare come l'Italia abbia visto un notevole sviluppo che manca invece nel Paese nordamericano. Difatti, nel 2022, una riforma costituzionale ha aggiunto all'articolo 9 la tutela de "l'ambiente, la biodiversità e gli ecosistemi, anche nell'interesse delle future generazioni." Anche l'articolo 41 è stato modificato, con l'aggiunta di limitazioni a iniziative economiche deleterie per l'ambiente. Infine, l'ultima sezione di questo capitolo, sottolinea come la costituzione italiana sia sì rigida a seguito degli eventi storici, ma anche un testo aperto a influenze sovranazionali. In particolare, mi riferisco al ruolo dell'Unione Europea nel diffondere una più profonda coscienza ecosostenibile nel continente e alla presenza delle sfide ambientali nel costituzionalismo europeo. Va infatti ricordato che, sebbene il progetto di costituzione per l'UE sia di fatto fallito nel 2005, i trattati fondativi di questa organizzazione internazionale hanno valore costituzionale. Originariamente, ma in parte ancora oggi, l'UE inquadrava la crisi climatica ed ecologica all'interno di più ampie dinamiche legate al mercato unico. Fu ancora una volta il potere giudiziario che, attraverso una decisione della Corte di Giustizia del'UE, stabilì che la tutela dell'ambiente è un obiettivo fondamentale dell'organizzazione che va oltre interessi di tipo economico quando la salute pubblica è messa a rischio. Col passare del tempo, le politiche ambientali sono diventate sempre più rilevanti e presenti nell'agenda dell'Unione, molto probabilmente anche per garantire una più positiva rappresentazione esterna. In questo contesto, l'European Green Deal può essere considerato come una sorta di costituzione dell'UE nel settore della sostenibilità. O, per lo meno, come un documento fondamentale che può avere notevoli ripercussioni sul quadro costituzionale europeo in quanto stabilisce dei limiti e degli obiettivi specifici e, allo stesso tempo, proietta esternamente la volontà dell'UE di agire contro il cambiamento climatico. Inoltre, poiché gli Stati Membri devono intraprendere

azioni positive e negative per garantire il rispetto degli obblighi che derivano dai trattati e dagli atti dell'UE, si può affermare che questa organizzazione internazionale potrebbe giocare un ruolo anche a livello domestico per la modifica di costituzioni nazionali introducendo norme a difesa dell'ambiente attraverso un'indiretta forma di coercizione.

In sunto, questa tesi ha osservato che sia nel caso canadese che nel caso italiano il diritto all'ambiente viene garantito attraverso un'interconnessione con altri diritti, tra cui quello alla salute. Tuttavia, solo la costituzione italiana - a seguito della riforma del 2022 - cita esplicitamente l'ambiente, la biodiversità e gli ecosistemi nel suo testo. I *Constitution Acts* canadesi non sono stati modificati in questo senso, e risultano inefficaci anche per la distribuzione delle competenze fra governo federale e governi provinciali in questo settore. L'interpretazione evolutiva del giudiziario ha giocato un ruolo chiave in entrambi i casi per il riconoscimento del valore costituzionale dell'ambiente. Infine, le ultime sezioni dei capitoli due e tre ci hanno permesso di notare il ruolo e l'influenza di attori non-statali, entrambi in modo quasi 'egoistico'. Da un lato, la Provincia del Québec agisce in modo autonomo per costruire una narrativa distinta da quella federale sfruttando anche il costituzionalismo ambientale. Dall'altra, l'Unione Europea sta cercando di costruire una cultura della sostenibilità nel vecchio continente, ma soprattutto per fini di conveniente auto-rappresentazione.