

# SUSTAINABILITY IN THE FUNDAMENTAL CHARTS, WITH A FOCUS ON ITALY<sup>1</sup>

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**Abstract (It):** Il contributo è finalizzato ad offrire una rapida panoramica sui processi di costituzionalizzazione del principio di sostenibilità. A questo proposito, dopo un primo inquadramento generale del principio, e dopo un rapido esame casistico dei riferimenti contenuti in alcuni importanti testi costituzionali, l'analisi si rivolge alla costituzionalizzazione del principio in Italia, avvenuta prima con la l. cost. n. 1/2012 (di revisione degli artt. 81 e 97 Cost.) e, successivamente, con la l. cost. n. 1/2022, con la quale è stato aggiunto il nuovo terzo comma dell'art. 9 Cost.

**Abstract (En):** *The contribution is aimed at offering a quick overview of the processes of constitutionalization of the principle of sustainability. In this regard, after an initial general framework of the principle, and after a quick case study of the references contained in some important constitutional texts, the analysis turns to the constitutionalization of the principle in Italy, which first occurred with the modification of the articles 81 and 97 of the Constitution and, subsequently, with the addition of the new third paragraph of the art. 9 of the Constitution.*

**SOMMARIO:** 1. Introduction. 2. On the concept of sustainability. 3. Some examples of sustainability and future generations clauses. 4. Sustainability in the Italian Constitution. 5. Sustainability between principles and rules.

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<sup>1</sup> Forthcoming in A. Bartolacelli (ed.), *The Prism of Sustainability*, Editoriale Scientifica, Naples. Part of the studies that led to this report were carried out for the purpose of the publication of D. PORENA, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale*, Torino, 2018; D. PORENA, «Anche nell'interesse delle generazioni future». *Il problema dei rapporti intergenerazionali all'indomani della revisione dell'art. 9 della Costituzione*, in *Federalismi.it*, n. 15/2022, pp. 121-143; D. PORENA, *On the concept of sustainability and future generations. A brief constitutional overview*, in *Revista Brasileira de Direito*, Vol. 18, n. 1, 2022.

## 1. Introduction

The title of my report entails an explanation on how the concept of sustainability has been implemented in the last 30-40 years in the various constitutions and especially in the Italian Constitution.

However, before making a brief comparison that comprises the most significant examples that regard this matter, we need to spend a few minutes on the concept itself of sustainability<sup>2</sup>. This we must do in order to grasp its exact scope and also to be able to understand its relationships with the related legal issues, aimed at the protection of future generations.

After having examined the context of the constitutions of other States through some significant examples, I will examine, more in detail, the issue of sustainability in the Italian constitution, also in light of its recent revision.

Finally, I will try to draw some conclusions on the ways in which the principle of sustainability is affirmed, in general, within the context of the most recent constitutional trends.

## 2. On the concept of sustainability

As is well known, the first definition of the concept of sustainability dates back to 1987 and owes its conception to the Brundtland Report.

More specifically, it is the document entitled “Our common future” that proposes the definition, according to which development is deemed sustainable only when it satisfies the needs of present generations without compromising similar needs of future generations<sup>3</sup>.

The concept of sustainability was therefore born within the framework of international environmental law<sup>4</sup>.

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2 In particular, on the principle of sustainable development see, among others B. BOCZEC, *International Law*. Lanham, Maryland, 2005, p. 219; M. CAFAGNO, *Principi e strumenti di tutela dell'ambiente*. Torino, 2007, p. 61; B. CARAVITA, *Diritto dell'ambiente*, Bologna, 2005, p. 75; P. DELL'ANNO, *Principi del diritto ambientale europeo e nazionale*, Milano, 2004, p. 75; P. DIMAN, I principi della tutela ambientale, in G. DI PLINIO, *Principi di diritto ambientale*. Milano, 2008; p. 53; L. KRAMER, *Manuale di diritto comunitario dell'ambiente*, Milano, 2002, p. 71; V. PEPE, *Lo sviluppo sostenibile tra governo dell'economia e profili costituzionali*, Piacenza, 2002; M. POLITI, *Tutela dell'ambiente e «sviluppo sostenibile». Profili e prospettive di evoluzione nel diritto internazionale alla luce della Conferenza di Rio de Janeiro*, in G. BARILE, *Scritti in memoria di P. Barile*. Padova, 1995, p. 464; D. PORENA, *La protezione dell'Ambiente tra Costituzione italiana e Costituzione globale*, Torino, 2009; D. PORENA, *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale*, Torino, 2018; F. SALVIA, *Ambiente e sviluppo sostenibile*, in *Rivista giuridica dell'ambiente*, 1998, p. 235.

3 The document “Our Common Future” was drawn up by the World Commission on Environment and Development, chaired by Gro Harlem Brundtland and published on March 20, 1987. The document elaborates on the definition of sustainable development that has become a standard, also offering a description of its main components. For example, the document proposes the idea that sustainable development is closely connected to population growth and that, therefore, the goal is more easily achievable when demographic quantities stabilize at levels that are consistent with the productive capacity of the ecosystem.

4 The principle of sustainability, as well as the related duty to protect future generations, is now widespread, being present in a plurality of international law acts. In particular, the principle in question has now established itself in all of its various dimensions: political, social, economic and environmental. The constant reference to the principle of sustainability is a factor that appears to be decisive in attributing a customary quality to it, in the framework of internal relations within the international community. On this aspect, see L. PINESCHI, *Tutela dell'ambiente e assistenza allo sviluppo: Dalla Conferenza di Stoccolma (1972) alla Conferenza di Rio (1992)*,

However, over the years, the concept of sustainability has demonstrated a considerable expansive potential. In particular nowadays, its economic and social dimensions have found progressive affirmation, alongside the environmental dimension of sustainability<sup>5</sup>.

In practical terms, the issue of sustainability has come to impact the organization and functioning of most of the social infrastructures set up by legal systems: from health care systems<sup>6</sup> to social security systems<sup>7</sup>, from public finances<sup>8</sup> to the planning of economic development<sup>9</sup>.

In all the large systemic sectors required to ensure prospects of durability, in recent years the need to guarantee their sustainability has also emerged.

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in *Rivista giuridica dell'ambiente*, 1994, p. 145, according to which the principles affirmed at the Stockholm Conference «hanno acquisito carattere di norme consuetudinarie di diritto internazionale». See also R. BIFULCO, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, Milano, 2008, p. 113. For G. ZICCARDI CAPALDO, *Diritto globale: il nuovo diritto internazionale*, Milano, 2010, p. 57, «uno dei modi di formazione delle norme consuetudinarie consiste nella trasformazione di norme originariamente pattizie in norme generali. In tal caso, la *diuturnitas*, piuttosto che dai comportamenti degli Stati, si ricava da accordi internazionali che uniformemente (nel tempo) regolano una certa materia».

5 As known, the principle of sustainability was born in the field of environmental juridical elaboration. However, over time, it has extended its range of action to include economic and social factors. On an economic level, sustainability aims to guarantee, among other things, the best living conditions by promoting the stability of social systems and of the labor market. On a social level, the principle of sustainability is aimed at providing each and every individual with the best conditions for an effective participation in the community and, therefore, is aimed at providing safety, education, healthcare and democratic participation. With regard to the environmental sphere, the principle of sustainability is mainly oriented towards guaranteeing the protection of future generations through the conservation of natural resources. On this aspect, see M. MONTINI, *Profili di diritto internazionale*, in P. Dell'Anno – E. Picozza, *Trattato di diritto dell'ambiente*, Vol. 1, Padova, 2012, p. 40: the concept of sustainable development has been reviewed and integrated «dalle disposizioni contenute nella Dichiarazione politica del vertice di Johannesburg, nel 2002. In tale contesto, venne infatti ribadito e sottolineato che il principio dello sviluppo sostenibile si basa su tre pilastri interdipendenti che si supportano vicendevolmente, costituiti dallo sviluppo economico, dallo sviluppo sociale e dalla protezione ambientale. Tale concezione tripartita dello sviluppo sostenibile tende a superare la tradizionale dicotomia tra ambiente e sviluppo, recuperando una maggiore centralità per le esigenze sociali, accanto a quelle ambientali ed economiche». As noted by A. SASSU, *Sviluppo economico e tecnologie per un futuro sostenibile*, in AA.VV., *Economia, ambiente e sviluppo sostenibile*, Milano, 2015, p. 106, by social sustainability we mean «la capacità di assicurare il benessere umano nelle diverse dimensioni della sicurezza, della salute e dell'istruzione. Include l'equità, la partecipazione, l'identità culturale e la stabilità istituzionale».

6 There are many factors contributing to the progressive weakening of the outlook related to the sustainability of healthcare systems. Among others, the progressive aging of the population as well as the goals progressively achieved by technological innovation, the related increase in the costs of services and, again, the progressive prevalence of chronic-degenerative pathologies in the variation of epidemiological dynamics. The strong innovations introduced in healthcare systems has contributed, over time, to the desirable goal of increasing life expectancy. Obviously, this has been matched by the significant aging of the population which, in Western countries, is also partly caused by lower birth rates.

7 On 8 June 2013, the Hygiene and Health Commission of the Italian Senate approved the proposal to carry out a survey on the sustainability of the National Health Service: this, with particular reference to the principles of universality, solidarity and equity that characterize it. The economic and juridical doctrine has devoted extensive in-depth analysis to this topic. Among these, see G. ABIO-H. BORIITI-C. PATXOT, *El impaccio intergeneracional de la reforma de las pensiones en Espana: un enfoque de Contabilidad Generacional*, in *Cuadernos Económicos del JCE*, n.65, 1999, p. 101-116; H. BONIN, J. GIL, C. PATXOT, *Beyond the Toledo Agreement: The Intergenerational Impact of the Spanish Pension Reform*, in *Spanish Economic Review*, Alemana, v. 3, p. 111-130; 2001; J. COSTA-FONT, C. PATXOT, *The Intergenerational Impact of Long-term Care Financing Alternatives in Spain*, in *The Geneva Papers of Risk and Insurance: Issues and Practice*, Oxford,

The already mentioned expansive capacity of the principle, widely traceable in numerous constitutional texts, has led the legal doctrine to identify the concept of sustainability as a post-national paradigm, capable of republicanizing globalization<sup>10</sup>.

Again, also in order to keep this reasoning even more up to date, the word sustainability is among the most mentioned in the context of the Next Generation Eu program<sup>11</sup>.

In conclusion, the ethical force encompassed within the concept of sustainability – that is connected, essentially, to that of preservation for future generations - seems to have affirmed itself in more generalized and progressively higher terms.

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n. 4, v. 29, p. 599-619, 2004, p. 599. C. HAGIST-N. KLUSEN-A. PIATE-B. RAFFELHUSCHEN, *Social Health Insurance – the Major Driver of Unsustainable Fiscal Policy?*, in *CESifo, Working Paper*, n. 1574, 2005, pp.1-46; H. V. KIL-DEMOES-T. CHRISTIANSEN-D. GYRD-HANSEN-I.S. KRISTIANSEN-M. ANDERSEN, *The Impact of Population Ageing on Future Danish Drug Expenditure*, in *Health Policy*, 2006, 75, p. 298; A. MAHAL-P. BERMAN, *Health Expenditures and the Elderly: A Survey of Issues in Forecasting, Methods Used, and Relevance for Developing Countries*, *Research Paper*, in *The global burden of disease 2000 in ageing populations Project. Harvard Burden of Disease Univ.*, n. 1, 2003, pp.1-40; C. NEILL, L. GROOM, A. J. AVERY, D. BOOT, K. THORNHILL, *Age and proximity to death as predictors of GP care costs: Results from a study of nursing home patients*, in *Health Economics*, n. 9, p. 733, 2001; C. CARDONER, J. G. TRANSFI, *La revisión de la ley de reforma del sistema de la seguridad social: una aproximación de contabilidad generacional*. in *Hacienda Pública Española*, Barcelona, 2000; Z. YANG, E. NORTON, S. STEAMS, *Longevity and Health Care Expenditures: The Real Reasons Older People Spend More*, in *The Journals of Gerontology, Series B, Psychological Sciences and Social Sciences*, Oxford, n. 58, p. 2, 2003. P. ZWEIFEL, S. FELDER, A. WERBLOW, *Population Ageing and Health Care Expenditure: New Evidence on the Red Herring*, in *The Geneva Papers of Risk and Insurance – Issues and Practice*, Geneva, n. 29, p. 625 – 652, 2004.

8 On this topic, see L. BARTOLUCCI, *La sostenibilità del debito pubblico in Costituzione. Procedure euro-nazionali di bilancio e responsabilità verso le generazioni future*, Padova, 2020.

9 It is common knowledge that the principle of sustainability was originally conceptualized within the context of economic development prospects. In this regard, it is specifically within the relationship between environment and economic development that we are witnessing one of the most classic constitutional balancing operations. On this matter, see L. CASSETTI, *Riformare l'art. 41 della Costituzione: alla ricerca di "nuovi" equilibri tra iniziativa economica privata e ambiente?* in *Federalismi.it*, n. 4/2022, p. 200, which underlines how, well before the revision of the art. 41, paragraphs 2 and 3 of the Constitution, were already available «esempi nella giurisprudenza costituzionale di applicazioni concrete del bilanciamento tra interventi pubblici di regolazione/programmazione pubblica (...) e protezione dell'ambiente».

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

11 Furthermore, art. 2 of the Treaty on European Union, as amended by the Amsterdam Treaty, states that «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance». More recently, the principle of sustainable development was enunciated in the European Landscape Convention (Florence, 2004). This Convention, in art. 1 and art. 5, states that in relation to the social, economic and environmental development processes that are the cause of landscape transformations, all interventions aimed at these transformations must be adopted in accordance with the principle of sustainable development. On this topic, see D. SORACE, *Paesaggio e paesaggi della Convenzione europea*, in G. F. CARTEI, *Convenzione europea del paesaggio e governo del territorio*,

Going back, for a moment, to the definition offered by the already mentioned Brundtland Report, the intergenerational projection assumed by the concept of sustainability seems to emerge very clearly.

It appears to me that the principle of sustainability represents a practical application of the philosophical-legal concern for future generations<sup>12</sup>.

Rights and interests of future generations or, looking from another perspective, responsibility towards future generations represent, in fact, the fundamental values within which a debate on the concept of sustainability may take place<sup>13</sup>.

Therefore, the comparison between the different constitutional systems, to be complete, must not only include the clauses on sustainability, but also the rules and principles that are set out with reference to future generations.

In fact, the broadening of the debate on the principle of sustainability from only environmental issues to social and economic ones, has the potential to incorporate most of the directions in which future generations will realize themselves.

Therefore, the debate on future generations is increasingly equivalent to that on sustainability. We will now try to make a quick comparison between some examples of sustainability and future generations clauses included in different constitutions.

### 3. Some examples of sustainability and future generations clauses

The abundance of references mentioned in the different constitutional texts, as well as the short space at our disposal, requires me to select, among the numerous examples, those that I deem most significant.

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Bologna, 2008, p. 22-23. On the principle of sustainability in the context of the European integration process, see M. FRANCAVIGLIA, *Le ricadute costituzionali del principio di sostenibilità a dieci anni dal Trattato di Lisbona. Spunti ricostruttivi alla luce della giurisprudenza europea e costituzionale*, in *Federalismi.it*, n. 19/2020.

12 On the idea that the principle of sustainable development works in two perspectives, both inter-generational and intra-generational, see P. DELL'ANNO, *Principi del diritto ambientale europeo e nazionale*. Milano, 2004, p. 74; of the same opinion E. FRUMENTO, *Lo stato ambientale e le generazioni future: per una tutela del diritto fondamentale dell'ambiente*, in *AmbienteDiritto.it*. In addition, see also M. GESTRI, *M. Ambiente (dir. int.)*, in S. CASSESE, *Diz. dir. pubbl.* Milano, 2006, p. 220.

13 Among the most debated problems in legal philosophy is whether or not and how to “legalize” the relationship between already existing individuals and future ones. This, in particular, considering that the latter are devoid not only of legal subjectivity but also of identity. The theme is addressed, in particular, by D. PARFIT, *Reasons and Persons*. Oxford, 1984. p. 351: «if we choose High rather than Low Consumption, the standard of living will be higher over the next century (...). Given the effects of (...) such policies on the details of our lives, different marriages would increasingly be made. More simply, even the same marriages, the children would increasingly be conceived at different times (...) this would in fact to make them different children. (...) Return next to the moral question. If we chose high consumption, the quality of live will be lower more then a century from now. But the particular people who will then live would never have existed if instead we have chosen low consumption. Is our choice on high consumption worse for this people? Only if it is against their interest to have been born (...) we can suppose that it would not go as far as this. We can conclude that if we choose high consumption, our choice will be worse for no one». See also G. KEIJZERS, *Business, Government and Sustainable Development*, London, 2005, p. 57, who argues that «when the planet is plundered and thus provides future generations with an existence that is extraordinarily sparing, but which they nevertheless consider worth living, then, in Parfit’s opinion, no harm, according to utilitarian reasoning has been done. The alternative is that they would not exist at all – an alternative that they would not prefer».

A very challenging reference to the theme of future generations is contained in art. 11 of the Japanese Constitution, which states the principle according to which «the fundamental human rights, guaranteed to the people by this Constitution, are recognized to both the people and future generations as eternal and inviolable rights»<sup>14</sup>.

A very articulated development devoted to the concept of sustainability and future generations is included in art. 27 of the 1976 Constitution of Cuba, which states that «the state protects the environment and natural resources of the country. It recognizes their close connection with a sustainable economic and social development, to make human life more rational and to ensure the survival, well-being and security of current and future generations».

The French *Charte de l'environnement* identifies, among the purposes of its provisions, that «to ensure sustainable development, choices made to meet the needs of the present must not compromise the ability of future generations to satisfy their own needs»<sup>15</sup>.

The principle enunciated by art. 20a of the *Grundgesetz* must also be mentioned.

It states that «it is the duty of the State, also with regard to its responsibilities toward future generations, to protect the natural foundations of life»<sup>16</sup>.

The Constitution of the United States, as is very well known, does not contain direct sustainability clauses, however the "We the people" contained in the Preamble somehow includes the goal of promoting the general well-being as well as safeguarding the benefits of freedom, for us and for posterity<sup>17</sup>.

More technical references to the principle of sustainability also appear in a significant number of constitutions.

According to a research carried out by Tania Groppi, in 2016 there were already 54 constitutions that contained the words "sustainability" or "sustainable"<sup>18</sup>.

Among these and to ensure a full breadth of perspective, we must also mention the Belgian constitution, whose art. 7 bis refers to a «sustainable development in its social, economic and environmental aspects».

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14 Following to the urgency of the need to proclaim the beginning of a new era, after the end of the Second World War, the principle assumed a particular relevance and scope. In particular, it not only makes a significant reference to future generations, but also has the merit of affirming the eternal, universal and inviolable significance of fundamental rights.

15 In general, from the reference to humanity as a whole to the conditions for the evolution of mankind, from sustainability to the needs of future generations, the entire lexicon of the intergenerational theme has been acquired - through the *Charte de l'environnement* - within the "block" of French constitutionality.

16 The principle in question makes a significant reference to posterity but it does not limit its range of action to the environmental dimension. There is no doubt that environmental issues find accommodation within the "natural foundations of life". However, the principle seems to include, among others, the right to health, the protection of conception as well as the set of fundamental juridical positions connected to existence.

17 The Preamble of the American Constitution, and its inclination towards natural law, makes a clear reference to posterity. In fact, the general aims of the constitutional pact are specifically assured to the latter. In general, the Preamble shows a marked tendency in favor of a distinctly "timeless dimension" of fundamental rights. Again, the reference to posterity strengthens the claim to durability of the Constitution: this, also by "entrenching" future generations behind the defenses erected by the Constitution.

18 See T. GROPPI, *Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro*, in *Diritto pubblico comparato ed europeo*, 1, 2016.

Moreover, the Portuguese Constitution makes a direct reference to the principle of sustainable development in art. 66, according to which the State is burdened with a series of duties aimed at «guaranteeing the right to the environment, within the context of sustainable development».

The reference to sustainability, with reference to public finances, is also contained, among others, in the Spanish Constitution: art. 135 contains a reference to the economic and social sustainability of the State<sup>19</sup> and, as we will see more in detail shortly, in articles 81 and 97 of the Italian Constitution.

As mentioned before, there are nowadays dozens of constitutions that include the concept of sustainability in its various forms, so that it would be impossible and in this short time to present with an exhaustive list.

#### 4. Sustainability in the Italian Constitution

The title of my report also includes, as anticipated, a focus on the main related instances included in the Italian Constitution.

In this regard, the principle of sustainability appeared for the first time with the constitutional reform of 2012<sup>20</sup>.

The progressive and serious deterioration of macroeconomic conditions, recorded in recent years not only in Italy, has emphasized the weak prospects that national finances possess in terms of sustainability<sup>21</sup>. In particular, the economic crisis has greatly contributed

<sup>19</sup> In particular, paragraph 4 of the art. 135 provides that «The limits of the structural deficit and of the volume of public debt can be exceeded only in the event of natural catastrophes, economic recession or extraordinary emergency situations which escape the control of the State and which seriously jeopardize the financial situation or the economic or social sustainability of the state, declared by an absolute majority vote of the members of the Congress of Deputies».

<sup>20</sup> On the constitutional reform of 2012, among others, see M. BERGO, *Pareggio di bilancio "all'italiana": qualche riflessione a margine della legge 24 dicembre 2012, n. 243 attuativa della riforma costituzionale più silenziosa degli ultimi tempi*, in [www.federalismi.it](http://www.federalismi.it), 2013; R. BIFULCO, *Jefferson, Madison e il momento costituzionale dell'Unione. A proposito della riforma costituzionale sull'equilibrio di bilancio*, in [www.rivistaaic.it](http://www.rivistaaic.it), n. 2/2012; A. BRANCASI, *La nuova regola costituzionale del pareggio di bilancio: effetti sui rapporti Parlamento-Governo e sugli indirizzi delle politiche sociali. Il caso italiano*, in *Rivista telematica dell'Associazione "Gruppo di Pisa"*, 2012; P. CANAPARO, *La legge costituzionale n. 1 del 2012: la riforma dell'articolo 81, il pareggio di bilancio ed il nuovo impianto costituzionale in materia di finanza pubblica*, in [www.federalismi.it](http://www.federalismi.it), 2012; M. CECCHETTI, *Legge costituzionale n. 1 del 2012 e Titolo V della seconda parte della Costituzione: profili di controriforma dell'autonomia regionale e locale*, in [www.federalismi.it](http://www.federalismi.it), 2012; T. F. GIUPPONI, *Il principio costituzionale dell'equilibrio di bilancio e la sua attuazione*, in *Le Regioni*, n. 1, 2014; N. LUPO, *La revisione costituzionale della disciplina di bilancio e il sistema delle fonti*, in *Il Filangieri, Quaderno 2011*, 2012; N. LUPO, *Costituzione europea, pareggio di bilancio ed equità tra le generazioni. Notazioni sparse*, in [www.amministrazioneincammino.luiss.it](http://www.amministrazioneincammino.luiss.it), 25.10.2011; D. MORGANTE, *La costituzionalizzazione del pareggio di bilancio*, in [www.federalismi.it](http://www.federalismi.it), 2012; A. MORRONE, *Pareggio di bilancio e stato costituzionale*, in [www.rivistaaic.it](http://www.rivistaaic.it), 2014; G. M. SALERNO, *Equilibrio di bilancio, coordinamento finanziario e autonomie territoriali*, in *Costituzione e pareggio di bilancio, Il Filangieri, Quaderno 2011*, 2012; C. TUCCIARELLI, *Pareggio di bilancio e federalismo fiscale*, in *Quaderni costituzionali*, 2012.

<sup>21</sup> See R. BIFULCO, A. D'ALOIA, *Le generazioni future come nuovo paradigma del diritto costituzionale*. in R. BIFULCO, A. D'ALOIA, *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*, Napoli, 2008, who argue that «un debito eccessivo ed incontrollato, nel momento in cui scarica irresponsabilmente oneri economici sulle generazioni successive, sottraendo alla loro discrezionalità decisionale enormi flussi finanziari (...), finisce col rappresentare una sorta di tassazione iniqua,

to both the internal and international debate on the specificities, in terms of sustainability, of the public financial situation.

Based on the provisions of the new art. 81 of the Italian Constitution, the content of the budget law, the fundamental rules and the criteria aimed at ensuring the sustainability of the debt of public administrations, must be established by law and approved by an absolute majority of the members of each Chamber.

Art. 97 of the Constitution, on the other hand, establishes, in its re-edited first paragraph, that all public administrations, in line with the European Union legal system, must ensure the balance between budgets and the sustainability of the public debt.

As is known, these provisions constitute the transposition of the commitments undertaken with the signing of the “Treaty on stability, coordination and governance in the economic and monetary union” (so-called Fiscal Compact), especially in art. 3 that states the obligation, for signatory countries, to balance their budgets.

The scope of these recent innovations, in their systematic and combined meaning, consequently calls for the need for the financial performance of public administrations to be assessed also in terms of future sustainability.

The close correlation between the principle of financial sustainability of public spending and that of the protection of the interests of future generations has likewise recently found confirmation in the jurisprudence of the Constitutional Court.

The implementation of the new principles - the Court observed – and, more specifically, with reference to the sustainability of the public debt, implies a responsibility which, in implementation of the “founding” principles of solidarity and equality, is not only a duty that must be carried out by institutions but also by each and every citizen, thereby including future generations<sup>22</sup>.

The concept of sustainability has now been relocated, in the Italian Constitution, to its theoretical place of origin, that is to say environmental protection. Specifically, thanks to the

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perché “without representation” (...), e perché sganciata da qualsiasi presupposto di responsabilità».

22 Increasing attention to future generations is a trend that has established itself over time within constitutional jurisprudence. See, in particular, Corte cost., sent. n. 88/2014, where the Court stated that the implementation of the principle of public debt sustainability «implica una responsabilità che, in attuazione di quelli «fondanti» di solidarietà e di eguaglianza, non è solo delle istituzioni ma anche di ciascun cittadino nei confronti degli altri, ivi compresi quelli delle generazioni future». More recently, the Constitutional Court (ruling n. 18/2019) observed that «l’equità intergenerazionale comporta, [...] la necessità di non gravare in modo sproporzionato sulle opportunità di crescita delle generazioni future, garantendo loro risorse sufficienti per un equilibrato sviluppo. È evidente che, nel caso della norma in esame, l’indebitamento e il deficit strutturale operano simbioticamente a favore di un pernicioso allargamento della spesa corrente. E, d’altronde, la regola aurea contenuta nell’art. 119, sesto comma, Cost. dimostra come l’indebitamento debba essere finalizzato e riservato unicamente agli investimenti in modo da determinare un tendenziale equilibrio tra la dimensione dei suoi costi e i benefici recati nel tempo alle collettività amministrate». With ruling no. 115/2020, the Constitutional Court has highlighted that the constitutional perimeter drawn by the provisions «consiste nella funzionalità della procedura a ridurre il deficit fino ad azzerarlo nel tempo prescritto. Ciò mediante la scansione del percorso attraverso i risultati conseguiti nei singoli esercizi attinenti al piano e la definizione di una proporzione accettabile dei sacrifici imposti alle future generazioni di amministrati affinché l’oneroso rientro dal disavanzo sia comunque compensato dal traguardo dell’equilibrio, presupposto necessario per la sana amministrazione». Again, with the sentence 228/2021, the Court highlighted that «la dichiarata connotazione dei domini collettivi come «comproprietà intergenerazionale» (art. 1, comma 1, lettera c, della legge n. 168 del 2017) mostra una chiara proiezione diacronica affinché l’ambiente e il paesaggio siano garantiti anche alle future generazioni».



amendment introduced in art. 9 of the Constitution, the Italian Republic is now required to protect "the environment, biodiversity and the ecosystems, also in the interest of future generations"<sup>23</sup>.

As can be inferred, the constitutional legislator has renounced making an express statement on the principle of sustainability, preferring to address the broader concept of future generations instead.

This choice was probably based on the decision to exclude an extensive listing of the set of principles regulating environmental protection from the provision. However, the direct reference to future generations, that the Constitution recognizes as having a real interest<sup>24</sup>, captures the deepest core of the concept of sustainability<sup>25</sup>.

In fact, the principle of sustainability asks for an intergenerational balancing technique between the needs, rights and interests of the different generations as well as requiring each generation to set aside a fair amount of potential opportunities in favor of the following ones.

The safeguarding of the interest of future generations indeed assumes a relationship with present generations. Therefore, it seems to me that the reference to future generations includes the very concept and definition of sustainability.

<sup>23</sup> On the reform of art. 9 of the Italian Constitution, see R. BIFULCO, *Prmissime riflessioni intorno alla l. cost. 1/2022 in materia di tutela dell'ambiente*, in *Federalismi.it*, n. 11/2022; L. CASSETTI, *Riformare l'art. 41 della Costituzione: alla ricerca di "nuovi" equilibri tra iniziativa economica privata e ambiente?*, in *Federalismi.it*, n. 4/2022, pp. 188 e ss.; M. CECCHETTI, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune*, in *Forum di Quaderni Costituzionali*, n. 3/2021, pp. 286 e ss.; Id., *Virtù e limiti della modifica degli articoli 9 e 41 della Costituzione*, in *Corti supreme e salute*, n. 1/2022, pp. 127 e ss.; G. DI PLINIO, *L'insostenibile evanescenza della costituzionalizzazione dell'ambiente*, in *Federalismi.it*, 23 giugno 2021; R. FATTIBENE, *Una lettura ecocentrica del novellato articolo 9 della Costituzione*, in *Nomos*, n. 3/2022; F. FRACCHIA, *L'ambiente nell'art. 9 della Costituzione: un approccio in "negativo"*, in *Il diritto dell'economia*, n. 1/2022, pp. 15 e ss.; T.E. FROSINI, *La Costituzione in senso ambientale. Una critica*, in *Federalismi.it*, 23 giugno 2021; Y. GUERRA – R. MAZZA, *La proposta di modifica degli articoli 9 e 41 Cost.: una prima lettura*, in *Forum di Quaderni Costituzionali*, n. 4/2021, pp. 110 e ss.; R. MONTALDO, *La tutela costituzionale dell'ambiente nella modifica degli artt. 9 e 41 Cost.: una riforma opportuna e necessaria?*, in *Federalismi.it*, n. 13/2022, pp. 187 e ss.; A. MORRONE, *La Costituzione del lavoro e dell'ambiente. Per un nuovo contratto sociale*, in *Giornale di diritto del lavoro e di relazioni industriali*, n. 4/2022, pp. 513 e ss.; I.A. NICOTRA, *L'ingresso dell'ambiente in Costituzione, un segnale importante dopo il Covid*, in *Federalismi.it*, 23 giugno 2021; F. RESCIGNO, *Quale riforma per l'articolo 9*, in *Federalismi.it*, 23.6.2021; L. SALVEMINI, *Dal cambiamento climatico alla modifica della Costituzione: i passi per la tutela del futuro (non solo nostro)*, in *Federalismi.it*, n. 20/2021, p. 63 e ss. Finally, allow me to recall D. PORENA, *Sull'opportunità di un'espressa costituzionalizzazione dell'Ambiente e dei principi che ne guidano la protezione. Osservazioni intorno alle proposte di modifica dell'articolo 9 della Carta presentate nel corso della XVIII legislatura*, in *Federalismi.it*, n. 14/2020, p. 312 e ss.

<sup>24</sup> In other constitutions, the issue of future generations has not been introduced in terms of the rights that they could claim but, rather, in terms of the duties on the present generations that weigh in their favor. The deontic ethics of duties and responsibilities, as reconstructed by Hans Jonas, or even the idea of a "just saving", as expressed by John Rawls, among others, seems in fact to find confirmation in some constitutional provisions, such as that of the Grundgesetz, aimed at establishing a general duty of responsibility on those currently present but in favor of future generations.

<sup>25</sup> As recently observed by R. BIFULCO, *Prmissime riflessioni intorno alla l. cost. 1/2022 in materia di tutela dell'ambiente*, in *Federalismi.it*, 6.4.2022, p. 8, «la costituzionalizzazione delle generazioni future recupera implicitamente tutto l'acquis legato alla sostenibilità, stabilendosi che l'uso delle risorse deve tener conto anche di chi viene dopo di noi. E questo non è un principio scontato all'interno di una costituzione che nasce, come ho già ricordato, in un contesto di economia industriale orientata alla crescita».

## 5. Sustainability between principles and rules

As we are reaching the conclusion of my report, I will now try to present a brief reasoning on the ways in which the principle of sustainability asserts itself in contemporary constitutions.

The principle of sustainability is often criticized, the main critique being the excessively evanescent nature of the concept of sustainability, that is said to undermine the normativity of its content.

In my opinion, this criticism does not properly take into account the well-known constitutional and legal-philosophical debate that has been carried on for some decades with regard to the distinction between rules and principles.

It seems to me that the distinction between principles and rules plays a decisive role in understanding the legal phenomenon.

In extreme synthesis, rules and principles both belong to the categories of the normative phenomenon, but with some fundamental distinctions.

First of all, we must consider the degree of generalization, which is higher in the case of principles that are called to guide the development of legal systems along a large variety of fields.

Furthermore, principles constitute the reasons behind the rules: the normative scope of the principles is aimed, in a nutshell, at the construction of the rules, whereas the latter are aimed at the actual discipline of conduct.

From here, following the reasoning of Robert Alexy<sup>26</sup>, the fundamental difference between principles and rules appears to be the following: the latter are “all or nothing” provisions, requiring to be thoroughly followed.

Instead, principles constitute “optimization provisions”, that is to say guidelines in this case that there are not final and that need to be implemented to the highest possible extent on the basis of both real and juridical possibilities.

The limit of the juridical possibilities in implementing the aforementioned principles is then represented, as is known, by their relationship with other, and potentially colliding, principles of equal rank.

Lastly, the conflict between principles raises the issue of their respective weight and must be resolved through the mechanism of balancing.

The quick reference we made to the on-going debate on the distinction between rules and principles can support a conclusion in favor of the full normativity of the concept of sustainability as a principle.

I really don't think we can doubt the generality and breadth of the principle of sustainability, especially given the extent of the issues pertaining sustainability.

And there are no doubts, in my opinion, that the principle of sustainability is aimed, among other things, at inspiring the practical regulatory discipline of the vast systemic sectors that I have just briefly mentioned.

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<sup>26</sup> See R. ALEXY, *Theorie der Grundrechte*, Frankfurt am Main, 1994.

The concept of sustainability would therefore identify a principle, with a very high axiological content, aimed at preserving the fundamental rights as well as the essential needs of future generations. As such, the principle of sustainability cannot escape the balancing mechanics existing between fundamental principles<sup>27</sup>.

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<sup>27</sup> With regard to the provisions that make a reference to future generations in various constitutions, this topic has been introduced by R. BIFULCO, *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, Milano, 2008, p. 127, who observes that «la presenza di riferimenti alle generazioni future all'interno di disposizioni costituzionali che mirano alla disciplina di un oggetto determinato rafforza l'obbligo dei destinatari di quella disposizione di tener conto, nel momento del bilanciamento, degli interessi degli uomini che verranno».