PRESERVING ENVIRONMENTAL SAFEGUARDS IN THE ANTHROPOCENE: NON-REGRESSION AMONG ENVIRONMENTAL LAW PRINCIPLES AND ITS IMPLICATIONS

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Abstract
The Anthropocene era, characterised by a significant human influence on the Earth's environment, calls for urgent legal responses to counter ecological degradation. This paper discusses the principle of non-regression within environmental law as an innovative means to combat climate change and preserve the well-being of all living species. The principle requires that existing legal guarantees for the protection of the environment should not be diminished over time and, where possible, should be improved. Despite its importance, challenges arise regarding its implementation and compatibility with other legal principles. The analysis explores first the evolution of environmental law principles, the challenges they pose and the intersection between environmental law and human rights. Secondly, it moves on to investigate the proliferation of the principle of non-regression at the international and European levels. It states that such principle is gaining ground, even in the absence of its explicit recognition in legal sources. Finally, it addresses concerns about its impact on two founding principles of the EU and of all democratic systems, namely the rule of law and equality, arguing that they are unjustified. Ultimately, the study emphasises that, although challenges persist, the principle of non-regression is less problematic than it seems and an important tool for reshaping environmental law in the age of the Anthropocene. In order to ensure its effectiveness, it is necessary to change the way environmental protection laws are viewed, shaped and implemented.

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Introduction

The term 'Anthoropocene' is used to describe the era after the Industrial Revolution, characterised by a significant impact of human activities on Earth. The transformation and subsequent degradation of the environment by human action has become particularly evident since the 1950s[1], highlighting the need for a different approach to inhabiting the planet. This transition involves recognizing the intrinsic connection between economic and ecological in-

[1] The so-called Great Acceleration: see Hibbard et al., 'Decadal interactions of humans and the environment' in R. Costanza et al., *Integrated History and Future of People on Earth* (2006).

terests and moving from a neo-liberal economic model to an ecological one[2]. Accordingly, it has been noted that '*l'urgence écologique se traduit par une urgence juridique*'[3], thus highlighting the pressing need for legal responses and a swift shift in the understanding of development principles.

This work does not wish to contribute to the longstanding discourse concerning legal mechanisms in the battle against climate change. Instead, it deals with the innovative principle of environmental non-regression, which provides that public authorities are prohibited from reducing or weakening legal guarantees of rights over time. While this principle has been endorsed about the values enshrined in Article 2 TEU[4], as well as in the domains of trade, investment[5] and labour[6], its application in the environmental context is still evolving. This has led to uncertainties regarding its nature, enforceability and relationship with other legal principles. This article aims to tackle some of these concerns. The analysis begins with a brief summary of the features and challenges of environmental law principles (Section I). Then, it raises the question of the existence of a principle of environmental non-regression by looking at its spread in international and national law (Section II). Finally, it explores the potentially problematic interplay between non-regression and two other principles that are central to democratic societies, namely the rule of law and equality (Section III).

SECTION I

1. The legal features of environmental law principles and their challenges

Principles generally emerge more slowly than rules, as a consequence of a change in the social substratum to which positive law

[2] W. E. Rees, *Ecological economics for humanity's plague phase*, 169 *Ecol Econ* (2020).
[3] O. Barriere, *L'urgence écologique, un impératif juridique*, 46(1) *RJE* 5 (2021).
[4] See e.g. E. Dice, *The Principle of Non-Regression in the Rule of Law in the EU* (2023) and D. Kochenov, *The Acquis and Its Principles: The Enforcement of the 'Law' Versus the Enforcement of 'Values' in the EU*, in A. Jakab and D. Kochenov, *The Enforcement of EU Law and Values* (2017).
[5] A.D. Mitchell and J. Munro, *An International Law Principle of Non-Regression from Environmental Protections*, 72(1) *ICLQ* (2023).
[6] See Section III.

gradually conforms[7]. Environmental law principles emerged as a response to ecological concerns, when awareness of the need to promote cooperation between States in order to achieve common benefits began to grow. On the one hand, the foundational substantive principles of environmental law developed between the 1972 Stockholm Conference and the 1992 Rio Conference[8]. The former enshrines the right to a high-quality environment and the prohibition of transboundary pollution. The latter establishes the principles of sustainable development (SD), intergenerational equity, precaution (PP), common but differentiated responsibility (CBDR) and the polluter pays principle (PPP). On the other hand, the Aarhus Convention of 1998 introduced procedural rights. Its pillars are the access to information, public participation and access to justice in environmental matters.

The importance played by principles is undisputed. In line with their etymology[9], they reflect the ethical values of a community, thus serving as a foundation for more detailed legislation and influencing the reasoning of judges. Yet, as their formulation is more general than rules, they might seem to contravene legal certainty. This claim, however, faces three obstacles. Firstly, the principles' strength lies precisely in their flexibility[10], which makes them adapt better and faster to different situations, ultimately determining their stability. Secondly, the distinction between rules and principles is not always as clear-cut as it might seem[11]. The formulation of some principles (such as the prohibition of transboundary pollution, the PP, or the PPP) seems quite narrow as discretion mainly concerns the modalities of implementation of the obligation. Instead, principles like that of SD[12], CBDR or intergenerational eq-

[7] N. Granato, *Il principio di non regressione in materia ambientale*, 3 *Giustamm.it* (2020).
[8] Which approved the United Nations Framework Convention on Climate Change (UNFCCC).
[9] From latin '*principium*'.
[10] T. Tridimas, *The General Principles of Law: Who Needs Them?*, 52(1) *Les Cahiers de Droit* (2015) talks about the 'protean nature' of general principles of law.
[11] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* 453 ff (2020).
[12] On its controversial nature, see J. Verschuuren, *Principles of Environmental Law: The Ideal of Sustainable Development and the Role of Principles of International, European, and National Environmental Law* (2003) and V. Lowe, *Sustainable Development*

uity have a vaguer content, which classifies them as proper principles[13]. Thirdly, when a case cannot be resolved by relying on rules alone, the use of principles is made more legitimate by the use of mid-level principles. These are embodied in the principles themselves and, being more restrictive than the latter but less than the rules, they mediate between the two, allowing agreement on interpretation even when there is no consensus on the fundamental principle[14].

To define the legal nature of principles is a more complex task[15]. This is due to their often ambiguous and open-ended formulation, their different interpretations by different legal systems and their enunciation in unconventionally legal sources of law, such as merits review decisions, policy documents and international soft law agreements[16]. Moreover, they are not exclusively written, some principles belonging to customary law[17], or being inferred by deduction[18]. The question therefore arises whether principles of environmental law, even where not explicitly or implicitly contained in treaties, are capable of direct application. Although the point is debated, support is given here to the thesis dictating that, in order to maintain the normative scope of a principle, its reiteration in normative documents (even non-binding ones, as long as its wide acceptance is demonstrated[19]) and its formulation in sufficiently prescriptive terms are sufficient[20].

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and Unsustainable Arguments, in Boyle A. and D. Freestone (eds.), *International Law and Sustainable Development* (1999).

[13] U. Beyerlin, *Different Types of Norms in International Environmental Law Policies, Principles, and Rules*, in D. Bodansky et al. (eds), *The Oxford Handbook of International Environmental Law* (2007).

[14] K. Henley, *Abstract Principles, Mid-Level Principles, and the Rule of Law*, 12(1) *Law Philos* (1993).

[15] See, R. Dworkin, *Taking Rights Seriously* (2013) and R. Alexy, *A Theory of Constitutional Rights* (2002).

[16] See E. Scotford, *Environmental Principles and the Evolution of Environmental Law* 3-28 (2017).

[17] M. Vordermayer-Riemer, 433 (2020).

[18] A principle that can be derived by inference is that of intergenerational equity. Although variously mentioned in international treaties, its legal status has remained undefined and, in any case, its meaning is said to be implicit in the concept of SD: see V. Barral, *Sustainable Development in International Law: Nature; and Operation of an Evolutive Legal Norm*, 23(2) *EJIL* 380-381 (2012).

[19] M. Vordermayer-Riemer, *Non-Regression in International Environmental Law*, cit. at 17, 460.

[20] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, cit. at 11, 458.

From the assertion of the normative nature of environmental law principles derives the question of their justiciability. Scotford notes that environmental law principles can be used by judges as policy or legal instruments[21]. In the first case, they do not influence the outcome of the decision at all. In the second case, they are used teleologically to resolve questions of interpretation or to limit the discretion exercised by legislators. In any case, they are rarely used as a means of independent judicial review, especially if they are particularly general and likely to change their meaning according to the context of application. In this vein, it has been argued that the PP and PPP, being more 'stable' than other principles of environmental law, are more frequently litigated in court[22]. Overall, the Court of Justice's (ECJ) jurisprudence demonstrates a tendency to make environmental law principles justiciable by indirect means, as it often resorts to implicit or explicit links between them and the relevant measure under scrutiny[23]. This could also be due to the fact that the courts, considering the broad scope of principles, do not deem themselves competent to carry out a penetrating review of their merits.

A further obstacle to the correct functioning of environmental law principles is to be found in their insufficient practical application[24] and in the inadequacy of the efforts to realise the goals set by the United Nations Framework Convention on Climate Change (UNFCCC)[25]. This has been compounded by the failure to make proper efforts to create legal systems capable of scratching the

[21] E. Scotford, *Environmental Principles and the Evolution of Environmental Law*, cit. at 16, ch 4.
[22] C. Hilson, *The Polluter Pays Principle in the Privy Council*, 30(3) *J Environ Law* 512 (2018).
[23] Examples of the former are Case T-13/99 *Pfizer v. Council* [2002] ECR II-3305; Case C-2/90 *Commission v. Belgium* (*Walloon Waste*) [1992] ECR I4431; of the latter: Case C-293/97 *R v. Secretary of State for the Environment and MAFF*, *ex p. Standley* [1999] ECR I-2603; Case C-236/01 *Monsanto v. Presidenza del Consiglio dei Ministri* [2003] ECR I-8105. See C. Hilson, *Rights and Principles in EU Law: A Distinction without Foundation?,* 15(2) *MJ* (2008).
[24] T. Scovazzi, *Il Principio Di Non-Regressione Nel Diritto Internazionale Dell'ambiente* in D. Marrani (ed.), *Il Contributo del Diritto Internazionale e del Diritto Europeo all'affermazione di una Sensibilità Ambientale* (2017).
[25] W.F. Lamb et al., *A Review of Trends and Drivers of Greenhouse Gas Emissions by Sector from 1990 to 2018*, 16(7) *Environ Res Lett* 73005 (2021). See also J. Kuyper et al., *The Evolution of the UNFCCC*, 43(1) *Annu Rev Environ Resour* (2018).

causes of environmental disruption beyond the surface[26]. This is due, on the one hand, to the difficulty of reconciling different political and cultural visions[27] and in the unwillingness of many States to undertake concrete commitments. An example of this can be provided by looking at the evolution of the CBDR principle, which will be discussed below. On the other hand, in light of the complexity of the topic and the increasing environmental crises, the legislation has exponentially grown, giving rise to the fragmentation of environmental law[28]. This has accentuated regulatory inconsistencies[29], and further discouraged States from fulfilling their environmental pledges[30].

2. The right to a healthy environment as a human right

Nowadays, there is a widespread awareness that without a healthy environment, other fundamental rights, such as the right to life and dignity, cannot be realised (and vice versa). Therefore, environmental issues can be widely recognised as being closely related to human rights. It is suggested that when talking about environmental protection the phrasing 'expansive right to the environment'[31] or 'human right to the environment'[32] would be the most

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[26] J.G. Speth, *Red Sky at Morning: America and the Crisis of the Global Environment* 102 (2004). See also W. Boyd, *Climate Change, Fragmentation, and The Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage*, 32(2) *U Pa J Int'l L* (2010).

[27] According to the Brutland Report, 'The Earth is one but the world is not'. See World Commission on Environment and Development, *Our Common Future* 26 (1987).

[28] F. Zelli and H. van Asselt, *The Institutional Fragmentation of Global Environmental Governance: Causes, Consequences, and Responses – Introduction*, 13(3) *GEP* (2013).

[29] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, cit. at 11, 405 who states that 'while the volume of laws is increasing, their quality is declining'.

[30] J.C. Morgan, *Fragmentation of International Environmental Law and the Synergy: A Problem and a 21st Century Model Solution*, 18(1) *Vt J Envtl L* (2016).

[31] L.E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized under International Law - It Depends on the Source*, 12 *Colo J Int'l Envtl L & Pol'y* (2001) says that the expansive right to the environment incorporates the right *to* environment (with its anthropocentric emphasis) and that *of* environment (focused on the environment's intrinsic value).

[32] D. McGoldrick, *Sustainable Development and Human Rights: An Integrated Conception*, 45 *ICLQ* 810 (1996). In the opposite vein, see G. Handl, *Human Rights and Protection of the Environment: A Mildly "Revisionist" View* in A.C. Trinidade, *Human Rights, Sustainable Development and the Environment* (1992).

appropriate. These expressions encompass both the substantive principles and rights aimed at guaranteeing minimum standards of environmental quality, as well as the procedural ones linked to them.

The first document to account for the link between environmental law and human rights was the Stockholm Declaration which, also with respect to intergenerational equity, guaranteed individuals the right to freedom, equality and adequate living conditions, to be realised 'in an environment of a quality that permits a life of dignity and well-being'[33]. Later, this has been recognised in various reports, international soft law instruments, national constitutions and judicial decisions. In the EU, the right to the environment does not appear in the Treaties as a fundamental right. However, since the Lisbon Treaty was introduced and gave the Charter of Fundamental Rights (and thus Article 37 on the protection of the environment therein) the same legal value as the Treaties, it contains all the virtues of such rights[34]. Yet, the autonomy of a human right to the environment struggles to be recognised. Judicial decisions usually protect environmental interests when their impairment is linked to that of a human right, such as the right to life or that to private and family life[35]. Even the recognition in national constitutions does not seem to guarantee a subjective right to bring legal action[36].

To admit that environmental protection is now a human right could, firstly, facilitate its justiciability. Indeed, when a fundamental right is at stake, any holder can claim protection from a court. Furthermore, the argument that most environmental provisions, due to their generality, are considered to contain guiding principles

[33] Preamble and Principle 1.

[34] M. Prieur, *Le Principe de Non Regression "Au Cœur" du Droit de l'Homme* 137 at <https://e-revista.unioeste.br/index.php/direitoasustentabilidade/article/view/12361/8610>.

[35] *E.H.P. v Canada*, Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (1984); *Oneryildiz v Turkey* (2002) ECHR App no 48939/99; *López Ostra v Spain* (1994) ECHR App no. 16798/90; *Kyrtatos v Greece* (2003) ECHR App no. 41666/98. An independent right to a healthy environment has been recognized, for example, in *Commission of the European Communities v Council of the European Union* (Case C-176/03 [2005] ECR I-07879) and *Taskin and Others v* Turkey (2004) ECHR App no 46117/99.

[36] G. Romeo and S. Sassi, *I modelli di costituzionalismo ambientale tra formante legislativo, giurisprudenziale e culturale*, 2 *DPCE Online* (2023) at <https://iris.unibocconi.it/handle/11565/4056896> 814-815 and the mentioned case law.

that influence the interpretation and application of the law without being judicially enforceable, would be curbed. Secondly, it would increase the efforts of public authorities in environmental protection, as the recognition of a human right is followed not only by a negative obligation on their part (i.e. the duty to abstain from actions that might lead to its limitation, destruction or abrogation), but also a positive one[37]. The latter would be particularly evident in the case of measures aimed at implementing principles such as sustainable development, CBDR or intergenerational equity, which have a distinctly programmatic nature.

Overall, the question of whether it is possible to recognise the autonomy of a human right to the environment depends on the political setup of each legal system and its willingness to leave the courts free to interfere in the decisions of governments[38]. In Europe, despite some hesitations, the requirements for affirming the existence of such a substantive and independent right seem to be met[39]. This proposition is supported by certain judicial rulings[40], the enshrinement of environmental protection in national constitutions, the importance attached to effective judicial protection and to procedural rights, as well as the scope of Article 37 of the ECHR.

SECTION II

In advocating the existence of a principle of non-regression, the legal doctrine has played a central role. Since, to date, the affirmation of the principle at the international level has encountered some obstacles, various scholars[41] have attempted to abstract it by studying and comparatively analysing treaties, international declarations, constitutional provisions and judicial decisions. Some significant milestones are briefly examined in the course of this sec-

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[37] P. Craig, *EU Administrative Law* 510-511 (2006).

[38] A. Boyle, *Human Rights or Environmental Rights - A Reassessment*, 18 *Fordham Envtl L Rev* 507 ff (2007).

[39] See N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81(1) *Nord J Int Law.*

[40] See Section II, para. 1.1.

[41] Particularly important is the analysis conducted in France by Michel Prieur and the *Centre International de Droit Comparé de l'Environnement* (CIDCE).

tion, before moving on to discuss the Global Pact of the Environment (GPE), which represents the first case of a multilateral environmental agreement to codify the principle of non-regression.

1. Direct and indirect recognition of non-regression at international and EU level

In international law, a first reference, albeit indirect and partial, to the principle of non-regression can be found in the document *The Future We Want*, adopted in 2012 following the Rio+20 Conference. Paragraph 20 states: 'It is critical that we do not backtrack from our commitment to the outcome of the Earth Summit'. The choice of the verb 'backtrack', instead of 'regress', was due to the concern (expressed primarily by the United States during the negotiations in New York) that the explicit assertion of a principle of non-regression would tie the hands of Congress excessively. Later, the principle was mentioned in the Escazù Agreement and in the International Covenant on Environment and Development. Except for these minor examples, no other international document contains an explicit reference to the principle. Even in the Paris Agreement, despite its ambitious scope, non-regression can only be inferred by reference to the duty of environmental progression. Given the difficulties in directly affirming the principle, some deny that international environmental law has ever recognised the existence of the principle or given a normative character to it[42].

The EU, in the run-up to Rio+20 and although a 2011 European Parliament Resolution called 'for the recognition of the principle of non-regression in the context of environmental protection as well as fundamental rights', surprisingly appeared among the Parties that were against its unequivocal inclusion in *The Future We Want*, on the grounds that such principle does not exist in international law. Moreover, the Treaties lack an explicit reference to this principle, only imposing a duty of progression in environmental protection[43].

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[42] A.D. Mitchell and J. Munro, *An International Law Principle of Non-Regression from Environmental Protections*, cit. at 5, 63-64.

[43] Explicitly mentioned in Articles 3 and 4(3) of the Paris Agreement and implicitly derived by a joint reading of Articles 191 TFEU, 3 TEU and 37 of the Charter of Fundamental Rights.

1.1. Non-regression in national law and the cases of France and Belgium

Many states around the world have granted special safeguards to environmental protection. Among these, only a few have recognised a duty of non-regression in their constitutions, national laws and judicial decisions[44]. However, the terminology used by jurists to describe the retreat of the level of protection varies: standstill, *effet cliquet*, intangibility, *status quo*, eternity clause, *prohibicion de regressividad* or *de retroceso* are just some of the expressions to indicate the same phenomenon.

Outside the EU, direct references to the principle can be found in the legislation of some South American countries. For example, the Constitution of Ecuador recognises nature as a subject of law[45] and prohibits the regression of fundamental rights, including that to the environment[46]; the Constitution of Bhutan states that at least 6% of the territory must always be covered by forests[47]; in Paraguay, non-regression is mentioned in the regulation on air quality along with other principles of environmental law[48].

In the EU, non-regression has so far received special attention mainly in France and Belgium[49]. In Belgium, the Constitution provides under Article 23 for a right to the 'protection of a healthy environment'. Although the right to the environment is traditionally referred to as a third-generation right, characterised by a strong collective dimension, the Belgian Constitution classifies it as second-generation, thus equating it with economic, social and cultural rights. The latter require the State to fulfil a positive obligation, which is in line with the Constitution having recognised a right to the *protection* of the environment, rather than the right to a healthy environment *per se*. According to the preparatory documents, the

[44] For an overlook, see L. Collins and D. Boyd, *Non-Regression and the Charter Right to a Healthy Environment*, 29 *J environ law pract* 285 (2016).
[45] Article 71 ff.
[46] Article 11(8).
[47] Article 5(3).
[48] Article 4 of Law no. 5211 on Air Quality (2014).
[49] There are also references in laws, legislative proposals and case law of other Member States. See S. Candela, *Il Principio di Non Regressione Ambientale all'Interno dell'Ordinamento Giuridico Italiano: Indici di Emersione e Prime Iniziative di Riconoscimento*, 2 *RQDA* 30 (2021); A. De Nuccio, *El principio de No Regresión Ambiental en el Ordenamiento Español,* 2 *RQDA* 80 (2021).

provision does not have a direct effect and does not confer subjective rights, but it entails a standstill obligation[50]. This was explicitly acknowledged by the Belgian Constitutional Court only in 2006, in a ruling that, however, limited the scope of such standstill rule[51].

In France, the duty of non-regression was included in Article L110-1 II (9) of the *Code de l'environnement* as one of the principles related to sustainable development. Since this took place through a legislative provision, the proposal to strengthen the principle by promoting it to a higher legal status has been put forward on several occasions, albeit unsuccessfully[52]. The principle was first declared compliant with the Constitution by the *Conseil constitutionnel* in 2016[53] and subsequently applied by the *Conseil d'État*[54]. However, also the French judges, while claiming that the principle of non-regression was compatible with the precautionary principle and while recognising its intelligibility and normative force, have limited its scope. Both rulings will be analysed in greater detail below[55].

2. The Global Pact for the Environment

The GPE originated from the willingness to incorporate the main principles of environmental law into a single document, establish the founding act of an ecological citizenship and contribute to reforming the constitutions of States. The initiative was promoted in France by the *Club de Juristes*, an international network of scholars from various countries. The European Commission supported the initiative through a Recommendation[56] aimed at obtaining authorisation from the Council to negotiate the pact on behalf

[50] I. Hachez, *L'Effet de* Standstill*: le Pari des Droits Économiques, Sociaux et Culturels?*, 24 *APT* (2000).
[51] *D'Arripe and Others v. Walloon Government* (Belgian Constitutional Court, no. 135/2006).
[52] See F. Bouin, *Cinq Années d'Application du Principe de Non-Régression en France*, 2 *RQDA* 72 (2012).
[53] See J. Dellaux, *La Validation du Principe de Non-Régression en Matière Environnementale par le Conseil Constitutionnel au Prix d'une Redéfinition a Minima de sa Portée*, 42(4) *RJE* (2017).
[54] *Décision no. 404391 du 8 décembre 2017.*
[55] Section III, para 1.3.
[56] Recommendation for a Council Decision authorising the opening of negotiations on a Global Pact for the Environment (COM/2018/0138 final).

of the EU. The draft of the pact was presented in Paris in June 2017 and negotiations are still ongoing[57].

The GPE begins with the Preamble, which sets out the international treaties and soft law instruments from which it draws its inspiration. Compared to these, in some respect the GPE constitutes a novelty. A first element of innovation is the choice of the term 'pact': this reveals the intention to present the agreement as ethics-based, representative, democratic and legitimate as possible. Regarding its content, it is based on two pillars, namely the universal right to an ecologically sound environment (Article 1) and the duty to care for it (Article 2), which are a leitmotif of environmental law agreements. Here, what is new is the scope of application, since the duty to protect the environment is extended by the GPE to private law subjects, recognising that not only public authorities are to play a pivotal role in environmental protection. The following provisions set out principles familiar to environmental law, without introducing any significant changes, except for Articles 16 and 17[58], which codify for the first time the principles of resilience and non-regression respectively. These two eco-legal principles, born out of the dialogue between law and natural sciences[59], are connected and complementary. On the one hand, the principle of non-regression requires that there be no retreat in the level of environmental protection guaranteed by the law in force; on the other hand, the principle of resilience aims to identify the criticality of each ecosystem in order to prevent its deterioration.

With regard to its impact in the legal scenario, the GPE has been greeted with general optimism, as it was deemed capable of strengthening the scope of environmental law principles, promoting their incorporation into national law and, moving away from a

[57] For an overview, see P. Thieffry, *The Proposed Global Pact for the Environment and European Law*, *Eur Energy Environ Law Rev* (2018); M. Monteduro et al., *Testo e Contesto del Progetto di «Global Pact for the Environment» Proposto dal Club des Juristes*, 1 *RQDE* (2018).

[58] However, Monteduro et al., ibid, argue that the GPE also paves the way for a broader responsibility of States regarding the cross-border nature of prevention, as it imposes a 'reinforced' duty of vigilance. In fact, Article 5, which enshrines the principle of precaution, by requiring States to monitor the activities undertaken in their territories in order to avoid possible repercussions beyond their borders, ties in with Article 7, which contains a complementary duty of information linked to the prevention principle enshrined in Article 5.

[59] N. Granato, *Il principio di non regressione in materia ambientale*, cit. at 7.

sectoral approach to the development of environmental law, encouraging the abandonment of legislative fragmentation[60]. Moreover, if the binding nature of the Pact were recognised, as advocated by the *Club de Juristes*, the problem around the justiciability of its principles could be overcome. The latter would be given direct effect, thus becoming enforceable in court. In this sense, the ECJ would likely be accorded a central role not only as guarantor of the enforcement, but also as the body responsible for defining the trajectory to be taken by the Member States within the framework of the Pact. Without denying its potential, however, it seems wrong to claim that the GEP is without its drawbacks[61]. First, as noted, it largely reproduces principles affirmed elsewhere, without introducing remarkable innovations. In this regard, it has been argued that it is not radical enough, as it 'often regurgitates many, though not all, generally accepted principles of IEL and that it is mostly devoid of an eco-centric ethic of socio-ecological care'[62]. Second, the involvement of non-state actors and subnational entities in its implementation is insufficient, since it is limited to an encouragement contained in Article 14, which is devoid of effect and weaker than the due diligence required from private actors by Article 2. Third, the Pact does not address the central cause of the environmental crisis, that of distributive equality. There is no reference to the latter either in the Preamble or in the resilience principle. This displays the long-standing inconsistency, typical of global law, of contaminating universalist aspirations with a typically Western worldview. Fourth, no mechanism for monitoring and resolving disputes in the global sphere is envisaged. Fifth, it cannot be ignored that the GPE is currently under negotiation and that, if experience teaches us anything, such process generally leads to a decrease in the provisions' prescriptiveness.

Finally, although the *Club de Juristes* has maintained that the GPE is binding, doubts remain as to the legal nature of this instru-

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[60] See M. Burger et al., *Global perspectives on a global pact for the environment* (2018) at <https://ccsi.columbia.edu/news/global-perspectives-global-pact-environment>.

[61] See S. Biniaz, *10 Questions to Ask About the Proposed Global Pact for the Environment*, *Columbia Law School Sabin Center for Climate Law* (2017) at <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1090&context=sabin_climate_change>.

[62] L.J. Kotzé and D. French, *A Critique of the Global Pact for the Environment: a Stillborn Initiative or the Foundation for* Lex Anthropocenae? 18(6) *INEA* 816 (2018).

ment. In light of the nature of a pact, the doctrine is divided between those who consider it to be a soft law instrument[63] and those who consider it to be *quasi*-hard law[64]. In reality, the distinction might be of little relevance. On the one hand, soft law can mature into hard law when it generates expectations of conformity that translate into state practices accepted as law[65]. In this sense, the GPE seems to be fit for purpose. On the other hand, to assume that only hard law gives rise to legal obligations would be simplistic and indeed wrong. Soft law agreements also have an authoritative force vis-à-vis the parties entering into them. They simply reflect the evolution of international relations, which have become more flexible and cooperation-oriented[66].

3. Non-regression beyond codification: the implicit recognition

The previous paragraphs have tried to persuade on the progressive popularity of the principle of non-regression at the international and national level. However, if such development was not enough to persuade about the existence and normative scope of the principle, it could be useful to explore whether its existence could be upheld even in the absence of an explicit mention, either because

[63] See T.P. Navajas and N. Lobel, *Framing the Global Pact for the Environment: Why It's Needed, What It Does, and How It Does It*, 30(1) *Fordham Envtl L Rev* 57-58 (2018).
[64] B. McGarry, *The Global Pact for the Environment: Freshwater and Economic Law Synergies*, 21(4) *J Int Econ Law* (2018). Some believe that the Pact does not reflect contemporary environmental problems at all and has no normative force: see C.R. Payne, *A Global Pact for the Environment, in American Society of International Law Insight*, 22(12) (2018) at <https://www.asil.org/insights/volume/22/issue/12/global-pact-environment>.
[65] L. Collins, *Are We There Yet - The Right to Environment in International and European Law*, 3 *McGill Int'l J Sust Dev L & Pol'y* 126 (2007).
[66] L.E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized under International Law*, cit. at 31, 43-44. The same applies in areas other than environmental law. For a more in-depth discussion of the general debate on soft law, see J. J Kirton and M. J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance* (2016); D. Bradlow and D. Hunter, *Advocating Social Change Through International Law: Exploring the Choice Between Hard and Soft International Law* (2019). Specifically on the justiciability of soft law instruments, see Ș. Oana, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (2013).

it is implicit in other general principles, or because it would be guaranteed by the connection between environmental law and human rights.

With regard to the first point, the principle of non-regression appears very similar to those of precaution, intergenerational equity and sustainable development. The PP requires the adoption of appropriate protective and preventive measures when it is not certain that a phenomenon is harmful to the environment, but there are objective and scientifically reliable doubts that it could be. As a technical assessment is required to carry out the measurement, this principle seems to overlap with that of non-regression, which also demands for scientific measurements. The two principles, however, differ in terms of the proportionality assessment they imply, which balances environmental concerns against the other interests at stake. In the case of non-regression, proportionality would act as a catalyst because environmental interests are those that must suffer the lesser restriction. In the case of precaution, it would act as a restraint, because it ensures that precautionary measures impose the least possible sacrifice on interests other than the environmental ones[67]. Moreover, since non-regression aims not only to maintain the standard of protection achieved but also, whenever possible, to improve it, it seems to have a solidaristic vocation that is absent in prevention[68]. As for the principle of intergenerational equity, it implies that States must maintain the diversification (the so-called 'conservation of options') of the natural heritage and preserve its quality (the so-called 'conservation of quality'[69]). Such obligation appears to delineate a duty not to regress in the level of protection. On closer inspection, however, the two principles differ. Intergenerational equity, being strongly future-oriented, is more uncertain from a theoretical point of view and more difficult to use in practice. Furthermore, the non-regression principle has a greater impact as it seeks to prevent *de facto* and *de jure* backward steps, regardless of their impact on options and quality[70]. Finally, the principle of non-regression also differs from that of sustainable development. The

[67] A. De Nuccio, *El principio de No Regresión Ambiental en el Ordenamiento Español*, cit. at 49, 100.
[68] A. Scarpati, *Principio di Non Regressione nell'Ordinamento Belga e Francese, tra Formante Giurisprudenziale e Normativo*, 2 *DPCE Online* 761 (2023).
[69] Both expressions are by M. Vordermayer-Riemer, *Non-Regression in International Environmental Law*, cit. at 17, 436-437.
[70] Ibid.

latter is extremely broad and nebulous. It is characterised by a strong transnational dimension, which is missing in the idea of regression, and encompasses interests beyond environmental protection[71]. Moreover, many doubts exist among experts as to its normative scope, since it is not yet clear whether SD is an ideal, a principle, a meta-principle, or a proper rule[72].

While arguing that there is no need to codify non-regression seems to be open to challenges when considering its affinity with other principles of environmental law, it might be easier to advance the same claim in light of the link between environmental law protection and human rights. In this vein, it has been observed that the principle of non-regression is a false legal creation of environmental law, being derived from human rights law[73]. The Preamble of the Universal Declaration of Human Rights states that the objective of human rights is to 'promote social progress and better standards of life', whilst Article 30 states that the Declaration cannot be interpreted in a way 'aimed at the destruction of any of the rights and freedoms set forth herein'. Similar statements are also found in Article 5 of the Covenant on Social, Economic and Political Rights and the European Convention on Human Rights (ECHR)[74]. A teleological interpretation of these provisions makes it clear, as already discussed, that the recognition of a human right is followed not only by a negative duty, but also by a positive obligation on the part of the State. If, in order to ensure a right, public authorities must invest resources, it is not clear why they should subsequently limit its level of protection. Therefore, if human rights protection is to be progressive, it also cannot regress. Recognition of the existence of a human right to a healthy environment thus presupposes a standstill obligation without making it necessary to categorise it as belonging to the first, second or third generation of rights.

[71] E. Scotford, *Environmental Principles and the Evolution of Environmental Law*, cit. at 16, 193 ff.
[72] See n 12.
[73] M. Prieur, Une Vraie Fausse Création Juridique: le Principe de Non-Régression, *RJE no. spécial* (HS16) (2016).
[74] Especially the Preamble and Articles 17 and 53.

SECTION III

After having attempted to dispel doubts about the existence of a principle of non-regression by arguing that it is gradually emerging at international and national level, this section investigates the potentially conflicting relationship between the obligation of non-regression and two founding principles of the European Union and of all liberal democracies: the rule of law[75] and the principle of equality. Although equality can be considered a value included in the broader notion of the rule of law, for the purposes of this paper the two concepts will be treated separately. As will be seen, in relation to them, non-regression poses the same and additional problems with respect to the other principles of environmental law.

1. Non-regression and the rule of law

In its relation to rule of law, non-regression becomes particularly relevant with regard to three of its corollaries[76], namely those of legal certainty, the right to judicial review and the separation of powers.

1.1. Non-regression and legal certainty

The principle of legal certainty presupposes, firstly, 'the ability to identify the subject matter as a legal norm'[77] and, secondly, that the law is accessible, intelligible, clear and predictable[78]. The normative dimension of the principle of non-regression has already been discussed. With respect to the second requirement, non-regression seems to comply with legal certainty. By stipulating that the protection afforded to environmental interests may not be regressed, it prescribes a minimum threshold below which it is prohibited to go. At a closer look, however, this principle, rather than possessing characteristics of foreseeability in itself, confers such characteristics on the rules to which it applies. The idea of non-regression, *per se*, appears difficult to be defined: how is regression measured? And from what point in time is it to be assessed?

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[75] This paper does not share Raz's view that respect for the rule of law and democratic values do not necessarily go hand in hand: see J. Raz, *The Rule of Law and ITS Virtue* in Id., *The Rule of Law and the Separation of Powers* (2017).
[76] See T.H. Bingham, *The Rule of Law*, 66(1) *CLJ* (2007).
[77] R. Alexy, *Legal Certainty and Correctness*, 28(4) *Ratio juris* 443 (2015).
[78] T.H. Bingham, *The Rule of Law*, cit. at 76, 69.

A fair attempt to answer these questions exists in the French and Belgian doctrine, especially in light of their greater development of the principle of non-regression compared to other Member States. Regarding the question of whether regressive measures should be considered individually, or as a whole, it has been argued that a global approach is preferable when necessary to integrate into a single set of initiatives that are part of the same problem or contribute to the protection of the same ecosystem[79]. As to the moment from which regression is to be measured, given the positive obligation that the duty to protect the environment places on the State, it might be preferable to calculate it by looking at the immediately preceding legislation, instead of the moment in which the principle was introduced into national law[80]. Moreover, it is questionable whether the principle should only apply to substantive regressions, or also to procedural ones, and whether it applies both to general and more specific provisions. As to the first point, considering the extensive nature of environmental law, which includes procedural obligations, it seems intuitive to assume that the latter may also be subject to a lowered level of protection. With regard to the second point, it appears more reasonable to focus on the protected good, rather than on the type of rule that enshrines it. If, regardless of the rule that has been changed, the general level of protection afforded to that good decreases, a violation of the non-regression principle occurs.

What emerges is that the non-regression obligation alone cannot do much. Its effectiveness depends on parameters that allow for the detection of possible backward steps. Following the example of Belgium[81], this can be achieved by introducing a legislative evaluation procedure and by developing reliable indicators to assess the effects of the legislator's choices. Such a strategy, by linking the assessment to scientific parameters, could perhaps tackle the objections of those who claim that the definition of progress (and, therefore, that of regress) cannot be objective. Nevertheless, one cannot overlook the challenges entailed in such an assessment, which appear to exceed those required when evaluating backsliding in the

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[79] L. Dutheillet de Lamothe, *Droit national - Principe de Non-Régression*, 43(1) *RJE* (2018).
[80] Ibid.
[81] I. Hachez, *L'Effet de* Standstill, cit. at 50.

common values enshrined in Article 2 TEU. Indeed, in the environmental sphere the regression threshold is more 'mobile'[82], as it lacks the fixed threshold of the *aquis communautaire* to serve as limit.

1.2. Non-regression and judicial review

It has already been noted that principles are more hardly justiciable than rules in light of their often general (if not generic) formulation and their enunciation in non-traditional sources of law. As to their level of precision, however, principles vary. In this regard, non-regression is likely to be more easily justiciable than other principles of environmental law. In fact, once the way to measure any step backwards in the level of protection has been established, the principle of non-regression would contain a specific obligation that would make it considerably similar to a rule. Therefore, the greatest obstacle to a direct judicial review of non-regression is the absence of its express enshrinement in the law of most Member States, along with its enunciation in the GPE. Since the latter is still in draft form, it is unclear whether it will culminate in a binding treaty or a soft law instrument. Although the difference between hard and soft law is actually more nuanced than many claim, the first option would be preferable in order to ensure the smooth enforceability of its principles. What is more troublesome, however, is the lack of global enforcement mechanisms within the Pact. The monitoring of the implementation of the GPE is mentioned in Article 21, which, nonetheless, only provides for an independent expert group to facilitate compliance. Moreover, the formulation of such provision indicates a great reliance on the conduct of the Parties, upon which the efficacy of the Pact depends. Therefore, on the one hand, it is to be hoped that the prolonged negotiations will not water down the (already rather permissive) scope of the GPE and, on the other hand, that the latter will promote the incorporation of the principle of non-regression at the constitutional level, making it a means of independent judicial review available to the courts.

[82] A. Festa, *Indipendenza della Magistratura e Non-Regressione nella Garanzia dei Valori Comuni Europei. Dal Caso Repubblika alla Sentenza K 3/21 del Tribunale Costituzionale Polacco*, 3 *Freedom, Security & Justice: European Legal Studies* 88 (2021).

1.3. Non-regression and the separation of powers: litigation as a tool for enforcement

While waiting for an explicit recognition of the principle of non-regression by national legislators, the question arises as to whether a 'reverse' enforcement is possible. In other words, one wonders whether the courts could oblige national public authorities to respect non-regression through their rulings. The issue, however, raises problems from the point of view of the separation of powers. While proponents of rights-based theories support judicial activism, political constitutionalists warn against the danger of a 'government by the judges'[83]. According to them, judges, unlike legislators and politicians, have 'neither power nor will, but only judgement'[84]. This would be even more the case in the environmental sphere, given the wide discretion granted to public authorities in setting national policies to address climate change. Nevertheless, there are two circumstances in which even political constitutionalists admit the possibility of judicial power interfering with the political one: when the law is clear and predictable (and thus the boundaries of discretion are well delineated), or when fundamental rights are at stake[85]. Without demeaning the complex nature of the debate, it does not seem difficult to find arguments that would reassure political constitutionalists about the possibility of judges enforcing non-regression. Drawing from what has been argued above, it can be pointed out that, on the one hand, the principle of non-regression has a more precise scope than other principles of environmental law and, on the other hand, the right to live in a healthy qualitative environment is a fundamental right.

Further arguments could, however, be advanced in favour of litigation as a tool for the enforcement of environmental non-regression. Firstly, the case law has already independently applied non-regression in the field of worker protection. In his opinion to the landmark *Mangold*[86] judgment, Advocate General Tizzano has clarified the meaning of Article 8(3) of the Framework Agreement on

[83] P. Craig, *Political Constitutionalism and the Judicial Role: A Response*, 9(1) *ICON* (2011).
[84] Translation from A. Ferrari Zumbini, *The Judicial Power: the Weakest or the Strongest One? A Comparison Between Germany and Italy*, 2 *IJPL* 328 (2023).
[85] P. Craig, *Political Constitutionalism*, cit. at 83.
[86] Case C-144/04, *Mangold v Helm* [2005] ECR I-9981.

Fixed-Term Work[87], explaining that the non-regression clause therein is not merely exhortative, but rather binding on the national legislator. However, he also argued that such provision should not lead to a crystallisation of the working conditions, as its main objective is not to prevent the reduction of standards, but to promote transparency. That is, the level of protection should not be reduced without providing an objective and proportionate reason to support it[88]. The same approach was reiterated in *Angelidaki*[89] and *Sorge*[90]. Although, in light of the restrictive scope accorded to the principle, it has been contended that the transparency obligations referred to in these pronouncements are too easy to fulfil[91] and that the non-regression clause is overbroad (and, therefore, ineffective[92]), these judgments have succeeded in indicating the possibility for the European courts to impose limits on national legislators when amending the rules on the protection of workers. However, two remarks are due. To begin with, according to the principles of division of competences and subsidiarity, the ECJ cannot impose a non-regression obligation on Member States in areas not covered by EU competence. Moreover, in the above-mentioned cases the ECJ was relying on the existence of a Directive[93] featuring a non-regression clause related to workers' protection. The absence in EU law of a provision prescribing non-regression in environmental protection is an obstacle to the courts' activism on the matter.

Secondly, imposing environmental non-regression duties on public authorities would not actually result in the annulment of their power. This aspect has been addressed by the Belgian and French case law, which has demonstrated that judges are aware that they do not have unlimited powers when imposing limits on political authorities. The cited *D'Arripe and Others v. Walloon Government* judgment of the Belgian Constitutional Court allows the inference

[87] 'Implementation of this Agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the Agreement'.
[88] Paras 58-62.
[89] Cases C-378/07 to C-380/07, *Angelidaki et al. v Organismos Nomarkhiaki Aftodiikisi Rethimnis*, [2009] ECR I-3071.
[90] Case C-98/09, *Sorge v Poste Italiane* [2010] ECR I-05837.
[91] S. Peers, *Non-Regression Clauses: The Fig Leaf Has Fallen*, 39(4) *ILJ* 441 (2010).
[92] L. Corazza, *Hard Times for Hard Bans: Fixed-Term Work and So-Called Non-Regression Clauses in the Era of Flexicurity*, 17(3) *ELJ* 395 (2011).
[93] Council Directive 1999/70/EC of 28 June 1999, implementing the Framework Agreement on Fixed-Term Work.

to be drawn that the principle of standstill is to be applied only to substantial regressions[94] and that retrogession is permissible only when justified by a public interest. The same has been held by the French courts, which since the pronouncement of constitutionality of Article L110-1 II (9) have accorded non-regression a minimum scope[95]. They ruled that non-regression is binding only upon regulatory authorities (not on legislative ones) and that the legislator is always free to amend a previous law, as long as constitutional requirements are not deprived of legal guarantees. In France, however, the limitation to the functioning of the principle can be justified by the fact that the standstill obligation was introduced by legislation, not by an amendment to the Constitution. Indeed, the *Conseil Constitutionnel* has implicitly clarified that the ordinary legislator does not enjoy the same authority as the constituent assembly.

Despite these attempts at downsizing, the principle retains an important function. It sets the minimum level of protection against which the validity of a restriction is examined and requires legislators to justify their regressive choices. At the same time, it does not tie their hands excessively: the legislator can take a step forward, or one sideways. And he can even take a step backwards, if justified[96]. Therefore, it can be argued that the principle of non-regression does not diminish, but rather enhances the legislative function[97]. In this sense, the 'compensation' of regressions with an objective justification is a manifestation of the balancing of different interests, to be carried out through a proportionality test. It can be said, accordingly, that where one opts for a 'moderate' view of non-regression, which requires for an objective justification to allow regressions in environmental protection, accusations of excessively powerful judges are unlikely to arise.

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[94] See M. Martens, *Constitutional Right to a Healthy Environment in Belgium*, 16(3) *Review of European Community & International Environmental Law* 293 (2007), who suggests that such criterion should be abandoned as it is excessively focused on the justification of the intensity of the decrease of protection rather than on the justification of the decrease itself.

[95] *Conseil constitutionnel, Décision no. 2016-737*; more recent judgments are: *Conseil d'État, Décision no.* 420804 *du 9 octobre 2019; Conseil d'État, Décision no. 426528 du 30 décembre 2020; Conseil Constitutionnel no. 2020-809 DC du 12 décembre 2020.*

[96] I. Hachez, *L'Effet de* Standstill, cit. 50, 79.

[97] Ibid.

1.3.1. Limits to *locus standi*

An obstacle to the viability of litigation as an enforcement tool is the difficulty of claiming the impairment of the right to the environment when there is no violation of an individual interest. Since environmental protection does not comprise a specific subjective right, but rather a collective interest, traditional rules of standing struggle to apply. This seems contrary to the right to extensive access to justice in environmental matters guaranteed by the Aarhus Convention. Article 9(2) provides that access to justice is to be granted to the 'members of the public concerned' who have a sufficient interest or, where a Party's law so provides, who can assert the impairment of a right. Although Article 9 appears to guarantee the effectiveness of judicial protection thanks to its broad scope, one cannot ignore its 'soft'[98] nature and its continuous references, especially under Articles 9(2) and 9(3), to the discretion of the Parties as to the fulfilment of the requirements for legal standing. Issues emerge particularly in the EU because Member States' traditional objective of judicial review is to protect individual interests[99]. As a consequence, especially in the past members of the public and environmental associations have mostly been denied standing on the grounds that they did not have a sufficient interest under national law or could not assert the impairment of a right of their own[100]. A progressive reversal of the trend can be observed in recent years. From a normative perspective, following the amendment of Regulation no. 2006/1367 (implementing the right to judicial review under the Convention in Europe), NGOs and 'members of the public' are now granted more grounds for bringing actions before the courts. Yet, the most significant changes can be witnessed in the case-law[101], which increasingly recognises environmental associations' legitimacy to act for the violation of collective interests[102], in

[98] E. Rehbinder, *Judgement on German Implementation of the Aarhus Convention*, 41(3) *Envtl Pol'y & L* 145 (2011).
[99] Article 263(4) TFEU.
[100] See S. Poli and T. Tridimas, *Locus Standi of Individuals Under Article 230(4): The Return of Euridice?* in A. Arnull et al. (ed), *Continuity and Change in EU Law* 70 (2008).
[101] See L. Krämer, *The EU Courts and Access to Environmental Justice* in B. Boer (ed), *Environmental Law Dimensions of Human Rights* (2015).
[102] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255; Case C-664/*15 Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation contro Bezirkshauptmannschaft Gmünd*

the name of the principles of broad access to justice and effectiveness of protection. This has proven necessary also in light of the assertion that natural resources constitute a heritage common to the peoples of Europe[103] and the identification of associations as subjects of law, as envisaged in the Convention itself.

Although these developments are to be welcomed, it cannot be ignored that thus far the Court has only extended standing before national courts. The possibility of bringing an action for infringement of provisions protecting the environment (and thus also of the principle of non-regression) directly before the ECJ is still excluded. This is at odds with the fact that, according to Article 216(2) TFEU, the Aarhus Convention and Article 47 of the EU Charter on Fundamental Rights are binding not only on the Member States, but also on the EU institutions themselves. Moreover, the references made by the Convention to state sovereignty make its scope too permissive, thus hindering effective judicial protection of environmental interests.

2. Non-regression and equality

Investigating non-regression in light of equality is interesting because, if the latter is intended as equality before the law, it should be concluded that the prohibition of backwards steps in environmental protection is incumbent on all States. This is in line with the conception of natural heritage as a right to be enjoyed by all humanity and, therefore, as a right that everyone has a responsibility to preserve. Such argument, however, would amount to debasing equality, reducing it to a one-dimensional concept that only considers equality of treatment. The substantive dimension of equality, which pertains to the content of rights and is status-based[104], would be left out. This requires acknowledging, firstly, that countries – even inside the EU – significantly differ in their development and economic possibilities and, secondly, that these differences become

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[2017]; Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673.

[103] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7; Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-06221; Case C-404/13 *ClientEarth v The Secretary of State for the Environment* [2014]; Case C-723/17 *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest* [2019].

[104] T. Tridimas, *The General Principles of EU Law* (2006) 59-60.

particularly evident when it comes to combating climate change[105]. Therefore, in accordance with substantive equality, 'subsistence' regressions[106] should be legitimised when necessary to promote economic and social progress.

2.1. Equality, equity and justice in environmental law: the Common But Differentiated Responsibilities principle

The substantive dimension of equality is intertwined with the concept of justice and, more specifically, with that of equity. Although often used interchangeably, the concept of equity differs from that of equality because it is broader and the very prerequisite of formal equality. Equity's objective is to ensure that everyone has an equal chance of success. Hence, it aims at levelling the playing field, recognising that additional support or resources may be needed to overcome historical disadvantages or systemic barriers. Equity, nonetheless, also leaves room for differences. These stem from merit and personal skills, which allow some individuals to stand out among the others. As a result, disadvantageous situations can arise alongside advantageous ones, but the latter could not be indicated as unfair, having both originated from identical conditions.

Sadly, the evolution of environmental law cannot be said to have paid sufficient attention to the value of equity. Indeed, the former is said to be characterised by a 'double inequality'[107] which reverses the distribution of risk and responsibility. Despite the fact that developed countries (the so-called global North) are responsible for most of the climate-related damage[108], they do not suffer its most severe consequences. These predominantly affect the least progressed countries (the so-called global South), that, however, have contributed least to the current crisis.

[105] A. Underdal and T. Wei, *Distributive Fairness: A Mutual Recognition Approach*, 51 *Environ Sci Policy* (2015).
[106] C. Shaw, *The Role of Rights, Risks and Responsibilities in the Climate Justice Debate*, 8(4) *International Journal of Climate Change Strategies and Management* 511 (2016) writes about 'subsistence emissions'.
[107] D. McCauley and R. Heffron, *Just Transition: Integrating Climate, Energy and Environmental Justice*, 119 *Energy Policy* (2018).
[108] See A.D.F. Giardina, *Il Principio delle Comuni ma Differenziate Responsabilità*, G&A (2020) at <https://www.giustiziaeambiente.it/professionisti/avvocato-giardina/notizie-avv-giardina/34-il-principio-delle-comuni-ma-differenziate-responsabilita.html>.

The CBDR principle[109] aims precisely at addressing this problem. It was created following an ideal of justice and solidarity, under the awareness that those who have endangered the Earth's climate have an ecological debt that they must honour[110]. Accordingly, when first introduced by the Kyoto Protocol, such principle imposed quantified emission reduction targets only on industrialised countries. Its interpretation and implementation, however, soon proved to be 'major sources of disagreements'[111]. Indeed, developed countries believed in the need to focus on current and future contributions to climate change, thus insisting on the inclusion of rapidly developing countries such as China and India in the obligations, whereas developing States understood the CBDR principle as based on historical responsibility and demanded that a clear North-South distinction be maintained. As a consequence of this debate, the 'top-down' approach of the Protocol gradually faded[112], until it was abandoned with the Paris Agreement and replaced by a bottom-up one. The latter consists of a pledge-and-review formula, wherein each country freely declares its climate targets within a given timeframe. Albeit acknowledging the disadvantaged situation of some countries, it provides only for voluntary, rather than legally binding obligations, thus offering few guarantees to success.

For the sake of fairness, it must be observed that the reason for this change cannot be attributed solely to the intention of 'stronger' States to impose their views and interests on the weaker ones[113]. Indeed, operationalising the CBDR principle is not a simple task[114]. How should the historical contributions to climate change be distinguished, in order to establish the causal link for the attribution of liability? And who should be held accountable: governments,

[109] For an overview, see J. Brunnée and C. Streck, *UNFCCC as a Negotiation Forum: Towards Common but More Differentiated Responsibilities*, 13(5) *Climate Policy* (2013); C. Okereke and P. Coventry, *Climate Justice and the International Regime: Before, During, and after Paris*, 7(6) *Wiley Interdiscip Rev Clim Change* (2016).
[110] See S. Caney, *Climate Change and the Duties of the Advantaged*, 13(1) *CRISPP* 218 (2010).
[111] C. Okereke and P. Coventry, *Climate Justice and the International Regime*, cit. at 109, 837.
[112] See UNFCCC 2009, UNFCCC 2010, UNFCCC 2011.
[113] On the 'westernisation' of principles see C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17(1) *Eur J Int Law* (2006).
[114] R. Dellink et al., *Sharing the Burden of Financing Adaptation to Climate Change*, 19(4) *Glob Environl Change* (2009).

companies or citizens? In addition, such principle is not completely ineffective. In the judgment *Urgenda v The Netherlands*[115], a court recognized for the first time its normative content and concluded that the Netherlands had a duty of leadership in climate mitigation by the mere fact of being a developed country, irrespective of the proof of its responsibility.

Despite these considerations, the feeling that more is to be done persists. It is sufficient to look at the Paris Agreement or the GPE to realise how hard it is to include in the treaties rules that tackle inequality and poverty and to design a strategy that distributes the burdens fairly between countries, not exclusively focused on the distinction between North and South.

2.2. Regressive measures as a limit to mutual recognition

Mutual recognition is a non-hierarchical form of governance[116], alternative to harmonisation and derived from the principle of mutual trust, which is both its presupposition and objective. It assumes that between different political-administrative systems there can be, if not equal legal norms, at least equal objectives, which should give rise to equality of treatment. If equality is the condition of the existence of mutual recognition, it follows that the latter is undermined by different regulatory standards.

In the EU, mutual recognition, as defined from the *Cassis de Dijon*[117] judgment onwards, provides that goods or services lawfully produced and marketed in one Member State may circulate freely in the others. An exception is added to this rule: mutual recognition must be balanced against other interests, in particular those related to safety, health, consumer and environmental protection[118]. The relation between the latter and free trade can be particularly challenging[119]. On the one hand, in order to attract investment, some Member States would be inclined to lower their standards, giving rise to the a 'race to the bottom' in environmental protection. On the other hand, States with higher levels of protection

[115] The Hague District Court, *Urgenda Foundation v. The State of the Netherlands* (2015).
[116] A. van den Brink et al., *Mutual Recognition and Mutual Trust: Reinforcing EU Integration?: Introduction*, 1(3) *European Papers* 861 (2016).
[117] Case 120/78 *Cassis de Dijon* [1979] ECR 649.
[118] J. Pelkmans, *Mutual Recognition in Goods. On Promises and Disillusions*, 14(5) *Journal of European Public Policy* (2007).
[119] See C. Poncelet, *Free Movement of Goods and Environmental Protection in EU Law: A Troubled Relationship?*, 15(2) *Int'l Comm L Rev* (2013).

could restrict trade with more permissive ones. Consequently, if environmental protection standards were lowered in one country as following the implementation of a regressive measure, the others should be free to derogate from the principle of mutual recognition.

Although this may sound straightforward in theory, it may prove more complicated in practice, especially within the EU. Here, in the (explicit) attempt to create an 'ever closer union'[120] and in the (implicit) one to prioritise economic interests, the concept of mutual trust has acquired the status of a constitutional principle. Opinion 2/2013[121] has clarified that the sharing of 'a set of common values' justifies the existence of mutual trust between Member States. The ECJ drew further consequences from this, stating that the compliance with common values is presumed among member States, except in extraordinary circumstances[122]. Therefore, the inference that failure to respect non-regression could fall within the exceptions to mutual recognition is not obvious, albeit desirable. However, this is not sufficient to promote the abandonment of mutual recognition in favour of maximum harmonisation in order to promote greater levels of protection. Indeed, not only does mutual recognition allow for more flexibility and an increasing legitimacy[123] in the European '*demoi*-cracy'[124], but it can also be used to exploit the connection between Member States to spread best practices in countries that try to keep standards low to invite investment. In order to accomplish this goal, blind trust should be replaced with a constructive one, to be built on knowledge, mutual cooperation and monitoring. In other words, it is necessary to shift from a 'blind\w\ 1' form of mutual recognition to a 'managed'[125] one.

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[120] Article 1 TEU.

[121] Case Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU* [2014].

[122] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016].

[123] S.K. Schmidt, *Mutual Recognition as a New Mode of Governance*, 14(5) *J Eur Public Policy* 670 (2007).

[124] K. Nicolaidis, *Trusting the Poles? Constructing Europe through Mutual Recognition*, 14(5) *J Eur Public Policy* 682 (2007).

[125] R. Roy, *Environmental standards in world trade: a study of the trade-environment nexus, disadvantages of the unilateral imposition of standards and mutual recognition as an alternative* 215 ff (2015).

Conclusion

The recent inclusion of the principle of non-regression in the landscape of environmental principles has underlined its importance in the fight against climate change. However, it has also ignited the debate about the chances of its operability. Some of these are common to all principles of environmental law, and are tied primarily to the challenge of making them directly justiciable, in light of their broad wording and enshrinement in non-traditional legal instruments. Others, instead, are inherent to the principle itself.

This paper has addressed two main concerns posed by environmental non-regression. Firstly, it has tried to curb the doubts around its existence. Although progressive openness towards its recognition can be observed in the legislation and jurisprudence of some States, the principle still struggles to be included into positive law both at international and national level. I have argued that non-regression is sufficiently widespread and debated to be seen by wise lawmakers as a limitation of their freedom to legislate, even when it has not found explicit mention in their legal system. This is substantiated by the fact that the right to a healthy environment should be considered a human right and, as such, it should not admit any downgrading in the protection it guarantees.

Secondly, the paper has addressed the question of compatibility of non-regression with the principles of rule of law and equality. I have maintained that the former is by no means irreconcilable with the latter. Regarding the rule of law, once appropriate indicators are created to objectively determine how potential backtracking should be evaluated, issues of legal certainty would rarely arise. Moreover, non-regression would not endanger the democratic guarantees and the separation between the political and judicial power. As the principle does not aim to prevent changes in the law, but rather damage to the environment, a legislative intervention that relaxes standards without threatening the environment is unlikely to be condemned. In addition, the contention that it excessively ties the legislator's hands should be dismissed, since lawmakers are constantly called upon to balance interests within the scope of their functions.

Regarding equality, I have claimed that no violation of the principle arises if States are asked, when implementing environmental non-regression, to intensify or diminish their efforts accord-

ing to their economic and developmental capacities. On the contrary, such differentiation would be the embodiment of equity. The latter, being implied in the idea of substantive equality and in the principle of common but differentiated responsibilities, is irreconcilable with a 'one-size fits all' approach. Differences in resources to deal with the climate crisis between countries are also relevant to mutual recognition, especially in the EU. If compliance of Member States with the principles of environmental law was monitored, rather than taken for granted, mutual recognition could be waived against States that did not comply with non-regression.

Overall, many steps need to be taken before environmental non-regression can be considered fully effective. However, these do not depend on its nature, which does not seem as troublesome as many suggest. Rather, they are due to the economic and political set-up which is dominant in the EU and in all Western countries and likely to undermine the proper functioning of environmental law. Albeit being characterised by a self-proclaimed 'high level' of protection, such set-up is fragmented, highly discretionary and lacking precise control mechanisms. This suggests that short-term economic gains are still prioritised over the denationalisation of interests in natural goods and the promotion of fundamental ideas of justice.