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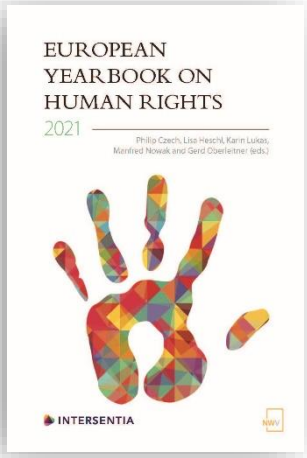

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THE RIGHT TO A HEALTHY ENVIRONMENT AS AN EU NORMATIVE RESPONSE TO COVID-19

A Theoretical Framework

Chiara Scissa*

ABSTRACT

The COVID-19 pandemic represents the umpteenth reason to establish a right to a healthy environment, still uncodified under EU law. Therefore, this contribution proposes an innovative theoretical framework that revolves mainly around the interpretative role of the European Court of Justice (CJEU) and Article 6.3 of the Treaty on European Union (TEU). Accordingly, an EU right to a healthy environment might be established on a threefold basis: first, this

* Many thanks to Giuseppe Martinico, whose comments and insightful suggestions significantly improved the consistency of the argument presented in this work.

fundamental right has been already embedded in the vast majority of EU Member States' constitutions or it has been ascertained by their constitutional courts. It is therefore argued that it constitutes a tradition common to the Member States. Second, it complies with the purposes, values and principles set out in the EU founding treaties, and it emerges as essential component to the fulfilling of the Union's secondary legislation on the environment. Third, its formulation is also supported by international and regional sources of law as required by the case law of the Court of Justice.

1. INTRODUCTION

In the attempt to give a rational explanation to the outbreak of the sudden, massively disruptive COVID-19 pandemic, numerous researchers linked its spreading to the level of air pollution, highlighting that highly polluted areas in Italy,[1] Spain[2] and in the United States correlate with the highest number of infection cases.[3] According to the literature, long-term exposure to fine particulate matter (PM) not only facilitates the diffusion of the virus but also increases its death rate.

Alas, the pandemic sheds light on states' failure in protecting both the environment and the health of their citizens. As regards the former, the Court of Justice of the European Union (CJEU, including also the former Court of the European Communities) found Italy,[4] one of the most severely coronavirus-affected countries, persistently and systematically violating the European Union (EU, the Union) rules against PM air pollution that, according to the World Health Organization (WHO), causes heightened mortality due to cardiovascular and respiratory diseases, such as COVID-19. As regards the latter, according to a study conducted by the University of Harvard, the exposition of African-Americans to the virus in the United States is three times higher than of white Americans, given their restricted access to the American health care system.[5]

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1 L. Setti, F. Passarini, G. de Gennaro et al., 'Position Paper. Relazione circa l'Effetto dell'Inquinamento da Particolato Atmosferico e la Diffusione di Virus nella Popolazione', available at https://www.simaonlus.it/wpsima/wp-content/uploads/2020/03/COVID19_Position-Paper_Relazione-circa-l%E2%80%99effetto-dell%E2%80%99inquinamento-da-particolato-atmosferico-e-la-diffusione-di-virus-nella-popolazione.pdf, last accessed 22.03.2021.

2 M. Marquèsa, J. Roviraab, M. Nadala, et al., 'Effects of Air Pollution on the Potential Transmission and Mortality of COVID-19: A Preliminary Case-Study in Tarragona Province (Catalonia, Spain)', (2021) 192, *Environmental Research*.

3 X. Wu, R. C. Nethery, M. B. Sabath et al., 'Air pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis', (2020) 6(45), *ScienceAdvances*.

4 CJEU, *Commission v Italy*, Case C-644/18, 10.11.2020, ECLI:EU:C:2020:895.

5 X. Wu, R. C. Nethery, M. B. Sabath et al. (2020), 'Air pollution and COVID-19', *supra* note 3.

The pandemic, therefore, represents the latest reason to establish a European right to a healthy environment, as also recently reiterated by the United Nations (UN) High Commissioner for Human Rights,[6] the European Parliament[7] and the Council of Europe.[8] Despite the absence of an explicitly recognised right to a healthy environment in the European Convention on Human Rights (ECHR) and in the Charter of Fundamental Rights of the European Union (hereinafter, the EU Charter), judicial authorities have taken steps to protect people from environmental harm. For instance, the CJEU affirmed that environmental protection should be horizontally integrated into the definition and implementation of all EU policies to promote sustainable development pursuant to Article 11 of the Treaty on the Functioning of the European Union (TFEU),[9] while in nearly 300 cases, the European Court of Human Rights (ECtHR) has concluded that environmental harm may lead to violation of a broad range of hitherto guaranteed human rights – that is, the right to life, to health, to private and family life and to property. Finally, in two occasions the European Committee of Social Rights has interpreted Article 11 of the European Social Charter (ESC)[10] on the right to health as including the right to a healthy environment.[11]

Given the solid regional jurisprudence on the matter, the timely call for actions launched by EU institutions and the Council of Europe, as well as the urgent need to curb the dramatic effects that air pollution and COVID-19 have on the health and life of millions of people, this contribution is aimed at supporting the official recognition of an EU right to a healthy environment through a likely innovative theoretical framework, as a normative response to the pandemic.

To this end, this contribution is organised as follows: the second section substantiates the need to establish a right to a healthy environment at the EU level via Article 6.3 TEU, stressing the pivotal role of the CJEU for it to succeed. In taking the Court's case law on the general principles of EU law and the precise methodology set out by Advocate General (AG) Trstenjak in *Audiolux* as a

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6 United Nations High Commissioner for Human Rights, 'Human Rights for the Planet – High-Level International Conference on Human Rights and Environmental Protection, Statement', 05.10.2020, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26343&LangID=E, last accessed 22.03.2021.

7 European Parliament, Draft Report on the Effects of Climate Change on Human Rights and the Role of Environmental Defenders on This Matter (2020/2134(INI)), 21.09.2020.

8 Georgian Presidency of the Committee of Ministers, Final Declaration, Environmental Protection and Human Rights, High-Level Conference organised under the aegis of the Georgian Presidency of the Committee of Ministers, 27.02.2020.

9 CJEU, *Commission of the European Communities v Republic of Austria*, Case C-320/03, 15.11.2005, ECLI:EU:C:2005:684.

10 European Committee on Social Rights, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, case 30/2005, 06.12.2006.

11 European Committee of Social Rights, *International Federation for Human Rights (FIDH) v Greece*, case 72/2011, 23.01.2013.

point of reference, the different sub-sections would seem to demonstrate the consistency of the right to a healthy environment with the set requirements. The third and last section contextualises the urgent need to recognise this fundamental right as a normative response to COVID-19, whose death rate has been found particularly severe in highly polluted areas. Against this scenario, an individual right to a healthy environment could provide a comprehensive and efficacious protection from environmental harm.

2. ESTABLISHING A RIGHT TO A HEALTHY ENVIRONMENT UNDER EU LAW: A THEORETICAL FRAMEWORK

The following paragraphs present some innovative suggestions for a new theoretical framework with the aim to contribute to the debate upon the formulation of a right to a healthy environment under EU law. The fundamental assumption is that several pieces composing the right to a healthy environment are already embedded in the EU founding treaties as well as in the Union's principles, values and aims. Consequently, it is also reflected in the secondary legislation adopted by EU institutions. For their part, the EU Member States and national courts are increasingly contributing to the emergence of the right to a healthy environment, set out in the majority of their constitutional charters or generated by case-laws. Moreover, both the Union and its Member States have adhered to international environmental treaties explicitly proclaiming a right to a healthy environment, which they are called to respect. In the author's view, these single, multilevel pieces could come together, flowing into Article 6.3 TEU, which recognises that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law. Through this provision, the Court of Justice may extrapolate the main values underlining the right to a healthy environment declared under international, EU and national law and transpose a new, common reference to this right at the EU level.

2.1. THE GENERAL PRINCIPLES OF EU LAW

Although essential to the interpretation and validity of the law of the Union and its Member States, there is still no agreed definition concerning the general principles of EU law, mostly depending on the lack of any explicit reference in the treaties, except for Article 340 TFEU, which mentions, yet without defining them, the general principles common to the laws of the Member States in the field of contractual liability. Consequently, the genesis of the general principles

has to be entirely attributed to the case law of the CJEU, which has over time *ex novo* created, or deduced, the existence of general principles of the Union which are not contemplated, or not expressly contemplated, by the treaties. Therefore, these principles result from a particular elaboration conducted by the Luxembourg judges, who have vested the EU legal order with principles common to the European legal culture, often present at the constitutional level or shared in the legislation of the Member States.

The Court led this operation, especially in cases where international or EU law was not sufficient to solve the dispute at stake, as well as to comply with its duty to ensure respect for the law in the interpretation and application of the treaties, as set out in Article 19 TEU. This task, therefore, justified, in the eyes of the judges, the creation of an unwritten source of law, superior to secondary legislation and binding to the Union and its Member States, that was functional to the achievement of EU objectives in general, and to the protection of fundamental rights, in particular.[12] Some of these new sources were introduced either in terms of principles, such as the principle of proportionality and of subsidiarity, or in terms of rights, such as the right to property[13] and the right to freedom of conscience and religion.[14] As emphasised by Sabino Cassese, two other implicit reasons underline the purposes of this clause: first, the establishment of pluralism as a common ground for the EU legal order, by recognising that national identities (expression of diversity) and the EU legal order (expression of uniformity) can go hand-in-hand; second, the rejection of the view that each legal system is necessarily and entirely peculiar to a nation-state, and therefore that legal systems cannot converge. In other terms, according to some scholars, the CJEU took this occasion to 'Europeanise' the different national concepts of fundamental rights.[15]

It is clear that the judiciary, by devising a new source of law not belonging to the treaties, has played the role of an active legislator,[16] giving rise to a so-called 'European jurisprudential law'[17] or, according to J. J. H. Weiler, to an 'integration through law scholarship'.[18] This action had also the effect of accelerating the process of cultural and legal integration of the legal systems of the Member States. In this sense, the Court 'has had an important task in integrating the legal

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12 S. Cassese, 'The "Constitutional Traditions Common to the Member States" of the European Union', (2017) 4(1), *Rivista Trimestrale di Diritto Pubblico*, p. 942.

13 Among many others, CJEU, *Aquacultur*, C-20-64/00, 10.07.2003, ECLI:EU:C:2003:397.

14 Among many others, CJEU, *Achbita*, C-157/15, 14.03.2017, ECLI:EU:C:2017:203.

15 J. Jones, 'Common Constitutional Traditions: Can the Meaning of Human Dignity under German Law Guide the European Court of Justice?', (2004) 167(1), *Public Law*.

16 F. Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-making in the European Union', (2010) 17(8), *Journal of European Public Policy*.

17 G. Strozzi and R. Mastroianni, *Diritto dell'Unione Europea – Parte Istituzionale*, 2016, p. 220.

18 M. Cappelletti, M., Seccombe and J.J.H., Weiler, *Integration Through Law. Europe and the American Federal Experience*, WdeG, 1986.

systems, preferring to interpret Community law using the teleological method rather than the literal one, and thus pushing the national system towards interpenetration with the supranational one […]'.[19]

Thus, the emergence of general principles of law not only revealed the Court's protagonism through the production of a new positive source of law but also its contribution to standardise the different legal cultures of the Member States. In fact, it enhanced the internal coherence of the EU legal order by the means of '[…] a process of osmosis and spontaneous adjustment leading domestic legal systems to align themselves with those general principles of the Union'.[20]

As noted, and as we will see in the next paragraph, the Court has formulated a significant number of general principles, without bothering to assess how common these principles actually were.[21] Presumably, the constitutional traditions common to the Member States would require a constant exercise of comparative analysis to determine whether a fundamental right or principle were shared by all constitutional charters. Actually, the CJEU has been much more flexible,[22] as it included in the general principles of EU law not only those truly common to all the Member States, but even those present in a small minority of legal systems. Some commentators have acknowledged that 'the analysis of the CJEU case law reveals first of all a large group of judgments that appear to be stingy, if not silent, in terms of useful indications for the reconstruction of the methodological paths followed by judges to determine the cases of fundamental rights'.[23] At this point of the analysis, it is therefore relevant to note that the Court has not merely imported principles from the Member States and literally transposed them into EU law. Rather, it has developed them in such a way as to align them with the requirements and aims of the treaties.

2.2. FUNDAMENTAL RIGHTS AS GENERAL PRINCIPLES OF EU LAW

Fundamental rights were virtually absent at the origin of the European project, whose initial aim was to establish a common market and a functional type of economic integration. The issue of the protection of fundamental rights

19 A. Pin, *Precedente e Mutamento Giurisprudenziale, La Tradizione Angloamericana e il Diritto Sovranazionale Europeo*, Milano 2017, p. 193. Translation from Italian.

20 Ibid., p. 222.

21 S. Cassese, 'The "Constitutional Traditions Common to the Member States"', *supra* note 12, p. 942. See also, G. Balas, 'I Principi Generali dell'ordinamento Europeo nella Giurisprudenza della Corte di Giustizia dell'Unione Europea', (2019) 4, *Giuricivile*. Translation from Italian.

22 G. Martinico, 'Exploring the Platonic Heaven of Law: General Principles of EU Law from a Comparative Perspective', (2020) (1), *Nordic Journal of European Law*.

23 L. Cozzolino, 'Le tradizioni costituzionali comuni nella giurisprudenza della Corte di giustizia delle Comunità europee', in P. Falzea, A. Spadaro and L. Ventura (eds.), *La Corte Costituzionale e le Corti d'Europa*, Giappichelli 2003, p. 10. Translation from Italian.

was therefore mostly overcome through the exercises of judicial elaboration conducted by the CJEU.

After an initial rejection to take a position on the protection of fundamental rights by national authorities,[24] in *Stauder* the Court held,[25] for the very first time, that fundamental rights were a part of the general principles of Community law. In 1970, in the landmark *Internationale Handelsgesellschaft* case,[26] the CJEU not only confirmed its views, but added that the protection of fundamental rights '[…] albeit being informed by the constitutional traditions common to the Member States, is to be guaranteed within the structure and purposes of the Community'.[27] It is in this notorious decision that the Court mentions for the very first time the constitutional traditions common to the Member States, an expression that at that time was not used in the treaties and that, therefore, resulted from its judicial elaboration.[28] Despite reaching the conclusion that, in that case, the system of licences did not violate any right of a fundamental nature,[29] the CJEU examined whether any other fundamental right guaranteed in Community law had been disregarded, in light of the fact that: '[…] respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'.[30]

In this judgment, the clause was considered as a source of inspiration for European law, and not as an autonomous source of fundamental rights. Since *Costa v Enel*,[31] in fact, the CJEU declared the primacy of the EU legal order over the legislation of the Member States. In the context of the protection of fundamental rights, this implies that national, even constitutional, provisions do not have direct efficacy in the supranational order and cannot override EU law. Hence, the final rule applicable by the Court at the EU level could not be simply transposed from the legal order of a Member State – rather, it should derive from a re-elaboration of national provisions. In *Nold*,[32] the range of elements that the Court takes into account in protecting fundamental rights expands beyond the common constitutional tradition and includes the 'international Treaties on the protection of human rights that the Member States have signed or cooperated with'.[33]

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24 CJEU, *Stork*, Case C-1/58, 04.02.1959, ECLI:EU:C:1959:4.
25 CJEU, *Stauder*, Case C-29/69, 12.11.1969, ECLI:EU:C:1969:57.
26 CJEU, *Internationale Handelsgesellschaft*, Case 11/70, 17.11.1970, ECLI:EU:C:1970:114.
27 Ibid., p. 1126.
28 For an in-depth analysis on the issue, please see G. Martinico (2020), 'Exploring the Platonic Heaven of Law', *supra* note 22.
29 Ibid.
30 Ibid., p. 1134.
31 CJEU, *Flaminio Costa v E.N.E.L.*, Case 6-64, 15.07.1964, ECLI:EU:C:1964:66.
32 CJEU, *Nold*, Case 4/73, 14.05.1974, ECLI:EU:C:1974:51.
33 Ibid., p. 507.

The Maastricht Treaty crystallised in Article 6.3 TEU the importance of, and the respect for, fundamental rights, then restated under the Amsterdam Treaty and, from 2009 onwards, also protected under the EU Charter. It is on this occasion that the reference to the common constitutional traditions acquired an autonomous position as well as the mention to the ECHR, therefore confirming that the protection of fundamental rights in the EU draws on both internal and external sources of law, as also repeatedly reiterated by the Court itself.[34] Emblematically, they are also present both in the Preamble and in Article 52.4 of the EU Charter.

Today, Article 6.3 TEU reads as follows: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. The term tradition implies two peculiar dimensions: that of culture and of time. According to Merryman,

> [a] legal tradition […] is a set of deeply rooted, historically conditioned attitudes about the nature, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.[35]

Similarly, Cassese affirmed that the term embraces not only states' constitutional provisions, but also their history and implementation, so as to make reference '[…] to the set of rules, but also to relevant customs, practices, beliefs, doctrines, as well as to their history', highlighting that this wording introduced 'a time dimension into European law: the newcomer (the EU) recognizes the older history of its seniors (the Member States' native institutions)'.[36]

Several experts have chronologically analysed the jurisprudence of the CJEU prior to the enactment of the EU Charter in the field of the constitutional traditions common to the Member States in order to understand how the Court usually determines that a certain principle derives from the common traditions of the Member States. For instance, how many constitutions must share a tradition for that to become common? What kind of comparative study shall the Court conduct in this regard? May the CJEU hold, and if so, under what circumstances, that a certain number of constitutional provisions, which

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34 See, among others, CJEU, *P, X v Commission of the European Communities*, Case C-404/92, 05.10.1994, ECLI:EU:C:1994:361; CJEU, *Kremzow*, Case C-299/95, 29.05.1997, ECLI:EU:C:1997:254.

35 J.M. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America,* Stanford University Press, Stanford 1969, p. 2.

36 S. Cassese (2017), 'The Constitutional Traditions', *supra* note 12, p. 3.

provide for a similar yet not identical tradition, could still be interpreted as shaping a shared tradition? As anticipated, the Court almost never conducted such an empirical examination, making it practically impossible to answer these questions. Conversely, as noted by Michele Graziadei, the jurisprudence shows that the CJEU upheld to a common tradition even provisions that can be found only in a marginal number of constitutions.[37]

In this sense, the *Hauer* case is particularly relevant because it represents almost the only ruling where the Court engages in a sort of comparative analysis on the issue.[38] Although it acknowledged that the right to property was protected in accordance with the principles common to the constitutions of the Member States and noted its transposition in the Additional Protocol to the ECHR, it also considered the latter insufficiently precise as to solve the issue raised by the German Administrative Court. Therefore, the judges decided to examine the constitutional texts of, at that time, nine Member States. However, the CJEU explicitly analysed only three constitutions (the German, Italian and Irish ones) and *a priori* concluded that the traditions of all the nine Member States allowed to regulate the use of private property in the general interest.

Conversely, in *Hoechst v Commission*,[39] the Court had to decide on the protection of the right to inviolability of the domicile to both natural and legal persons. The comparative analysis carried out by AG Kokott showed that, while both subjects were protected under the German, Danish, Spanish, French, English and Italian legal systems, it was not the case for Greece, Ireland and the Netherlands. In the remaining three countries (Belgium, Portugal and Luxembourg), the matter was deemed insufficiently clear. On these grounds, the CJEU concluded that the widest recognition of right to domicile was precluded, since 'the legal systems of the Member States show not inconsiderable differences as regards the nature and extent of the protection of business premises against intervention by the public authorities'.[40]

In *Mangold*,[41] the Court declared the prohibition of discrimination on grounds of age as pertaining to the common heritage of constitutional traditions of the Member States although, at the time, this principle was mentioned in the constitutions of two Member States only, namely, Finland and Portugal.[42] In this

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37 M. Graziadei and R. De Caria, 'The "Constitutional Traditions Common to the Member States" in the Case-Law of the European Court of Justice: Judicial Dialogue at its Finest', (2017) 4, *Rivista Trimestrale di Diritto Pubblico*.

38 CJEU, *Liselotte Hauer v Land Rheinland-Pfalz*, Case 44/79, 13.12.1979, ECLI:EU:C:1979:290.

39 CJEU, *Hoechst AG v Commission of the European Communities*, Joined cases 46/87 and 227/88, 21.09.1989, ECLI:EU:C:1989:337.

40 Ibid., p. 2870.

41 CJEU, *Werner Mangold v Rüdiger Helm*, Case C-144/04, 22.11.2005, ECRI-9981.

42 The wide discretionality used by the Court in Mangold gave rise to wide criticism. Please see, A. Arnull, 'What is a General Principle of EU Law?' in S. Vogenauer (ed.), *Prohibition of Abuse of Law A New General Principle of EU Law?*, Hart, 2017; and M. Graziadei and R. De Caria (2017), 'The Constitutional Traditions Common to the Member States' *supra* note 37, p. 968.

respect, AG Mazàk supported the decision of the Court and justified the use of such a high level of flexibility on the grounds that:

> [b]y formulating general principles of Community law […] the Court has actually added flesh to the bones of Community law, which otherwise – being a legal order based on a framework treaty – would have remained a mere skeleton of rules, not quite constituting a proper legal 'order'. This source of law enabled the Court – often drawing inspiration from legal traditions common to the Member States, and international treaties – to guarantee and add content to legal principles in such important areas as the protection of fundamental rights and administrative law.[43]

The flexible attitude endorsed by the Court, along with its implicit evaluations, allegedly affecting the transparency of its legal reasoning,[44] does not seem to be replicated by the AGs, who, conversely, engaged in deep comparative exercises. For instance, AG Szpunar examined 25 constitutions to conclude that the principle of the retroactive application of a more lenient penal law was common to the constitutional traditions of the Member States, with the exception of the British and Irish ones.[45]

A final, significant point of this excursus on the general principles of EU law concerns the fact that the clause on common constitutional traditions, according to Cassese, cannot produce new sources of EU law, even if the Treaties and the EU Charter codified it in a standalone provision. In *X v Commission of the European Communities*,[46] the right to private life was included among the common traditions to the Member States because it was also embodied in Article 8 ECHR as well as, later in *Varec SA v Belgian State*,[47] in Article 7 EU Charter. This suggests therefore that the Court uses them in conjunction with other internal or external sources of law, probably with the aim 'to lend more authority to the latter'.[48] However, in *Council v Hautala*, AG Léger seemed to provide a different interpretation of the sources capable of generating general principles pertaining to two main issues. On the one hand, he stated that 'the convergence of the constitutional traditions of the Member States may suffice in order to establish the existence of one of those principles without the need to obtain confirmation

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43 CJEU, *Félix Palacios de la Villa*, Case C-411/05, Opinion of Advocate General Mazàk, 16.10.2007, ECLI: EU:C:2007:106, paras. 83–86.

44 G. Martinico (2020), 'Exploring the Platonic Heaven of Law', *supra* note 22, p. 7.

45 CJEU, *Berlusconi et al.*, Case C-387-391-403/02, Opinion of Advocate General Kokott, 14.10.2004, ECLI:EU:C:2004:624.

46 CJEU, *X v Commission of the European Communities*, Case C-404/92 P, 05.10.1994, ECLI:EU:C:1994:361.

47 CJEU, *Varec SA v Belgian State*, Case C-450/06, 14.02.2008, ECLI:EU:C:2008:91.

48 S. Cassese (2017), 'The Constitutional Traditions', *supra* note 12, p. 6.

of its existence or content by referring to international rules'.[49] On the other hand, he found that, for the fundamental rights to be recognised at the EU level, the constitutional texts were not required to perfectly match, given the fact that, according to his view, it was sufficient to share a common conception.[50]

It is crucial to stress that a significant number of fundamental rights has been so far recognised as stemming from the traditions common to the Member States and from external law sources. The following non-exhaustive list of rights or principles has been acknowledged in approximately one hundred decisions of the CJEU that refer to common constitutional traditions:[51] the right to be heard;[52] the right to private life; the right to property; freedom of expression;[53] the right to workers' freedom of movement; the right to freedom of conscience and religion; the prohibition of discrimination;[54] the right to an effective remedy or to effective judicial protection;[55] the right to a fair trial;[56] the principle of retroactivity of more lenient criminal law;[57] and the principle of the legality of criminal offenses and of punishments.[58] Significantly, there is nothing in the treaties or in the jurisprudence of the CJEU contrary to a further expansion of this list in the future.[59]

In her opinion in *Audiolux*,[60] AG Trstenjak acknowledged that the Court, in approaching the matter with such wide flexibility, endorses a great margin of manoeuvre when it comes to deducing the existence of a general principle of EU law that, as recalled, led to 'scepticism about how conscientiously the Court of Justice has actually examined national and international law and expose it

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49 CJEU, C*ouncil of the European Union v Heidi Hautala*, Case C-353/99 P, Opinion of Mr Advocate General Léger delivered, 10.07.2001, para. 68.

50 Ibid., para. 68: '*Those national rules, although the content of their corresponding legal systems are not necessarily the same, demonstrate a common conception in most of the Member States […]*'.

51 M. Graziadei and R. De Caria (2017), 'The "Constitutional Traditions Common to the Member States"', *supra* note 37, p. 968.

52 CJEU, *Sopropé – Organizações de Calçado Lda v Fazenda Públic*, Case C-349/07, 18.12.2008, ECLI:EU:C:2008:746.

53 CJEU, *Herbert Karner Industrie-Auktionen*, Case C-71/02, 25.03.2004, ECLI:EU:C:2004:181.

54 CJEU, *Dansk Industri*, Case C-441/14, 19.04.2016, ECLI:EU:C:2016:278 on grounds of age; and CJEU, *Römer*, Case C-147/08, 10.05.2011, ECLI:EU:C:2011:286.

55 Among others, CJEU, *Agrokonsulting*, Case C-93/12, 27.06.2013, ECLI:EU:C:2013:432; and CJEU, *Unibet*, Case C-432/05, 13.03.2007, ECLI:EU:C:2007:163.

56 Among others, CJEU, *Trade Agency*, Case C-619/10, 06.09.2012, ECLI:EU:C:2012:531; CJEU, *Salzgitter Mannesmann*, Case C-411/04 P, 25.01.2007, ECLI:EU:C:2007:54.

57 Among others, CJEU, *Toshiba*, Case C-17/10, 14.02.2012, ECLI:EU:C:2012:72; and CJEU, *Campina*, Case C-45/06, 08.03.2007, ECLI:EU:C:2007:154.

58 Among others, CJEU, *Intertanko*, Case C-308/06, 03.06.2008, ECLI:EU:C:2008:312.

59 Ibid.

60 CJEU, *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, Case C-101/08, Opinion AG Trstenjak, 30.06.2009, ECLI:EU:C:2009:410.

to criticism that it is, in reality, pursuing an agenda of its own'.[61] To counteract these sources of criticism, and to fill the methodological gap left unresolved by the CJEU, AG Trstenjak outlined a precise methodology to be followed by the Luxembourg judges to evaluate the existence of a general principle. First, she distinguished between general principles in the narrow sense, such as the fundamental rights enlisted above, and those common to the legal and constitutional orders of the Member States:

> Whereas the first category of general principles can be derived directly from primary Community law, the Court essentially uses a critical legal comparison in order to determine the second category, which does not, however, amount to using the lowest common denominator method. Nor is it regarded as necessary for the legal principles developed in this way in their specific expression at Community level always to be present at the same time in all the legal orders under comparison.[62]

The proposed methodology therefore takes account of an analysis of the relevant sources of law (international guidelines, EU primary law and secondary legislation); the constitutional status of the norm at stake; and its general validity.

The *Audiolux* case concerned the feasibility to declare the existence of a general principle of equal treatment of stakeholders. In applying the aforementioned methodology to the case, the AG found that, on the one hand, neither international guidelines on company law nor international company law provided sufficient and clear elements to solve the issue. On the other hand, despite the considerable number of references to an equal treatment of stakeholders in secondary legislation acts, these were predominantly restricted to a specific branch of law, namely company law, thus lacking 'the general, comprehensive character which is otherwise naturally inherent in general principles'.[63] Apart from a lack of shared conviction in legal literature on the existence of such general principle and of a clear definition of the notion, the two main reasons that led AG Trstenjak to deny a general principle of equal treatment of stakeholders concerned therefore the lack of constitutional status and of general validity.

By contrast, by sustaining that the right to a healthy environment under EU law would have, among other features, both a constitutional status and general validity, this contribution attempts to support the recognition of the right to a healthy environment as stemming from Article 6.3 TEU.

Therefore, this work takes AG Trstenjak's methodology as point of reference, given that it structures in a comprehensive way the different elements progressively considered by the Court's jurisprudence and integrates the opinions of other

61 A. Arnull (2017), 'What is a General Principle of EU Law?', *supra* note 42, p. 10.
62 CJEU, *Audiolux*, Opinion AG Trstenjak, *supra* note 60, para. 69.
63 Ibid., para. 84.

AGs and legal scholars on the matter. For instance, AG Trstenjak excludes the use of a pure arithmetical approach in order to assess the existence of a tradition common to the Member States, as also highlighted by the legal literature as well as by AG Maduro[64] and Lagrange,[65] among others.[66]

It is therefore argued that the right to a healthy environment may be derived on three main grounds that are separately addressed in the following sections. First, it is expressly mentioned in external sources of law that reinforce its legitimation, such as Article 11 ESC as interpreted by the Committee on European Social Rights, and Article 1 of the 1998 Aarhus Convention, which both the Union and, singularly, all its Member States have adhered to. Moreover, there is wide institutional support to the establishment of this right at all levels of policy-making. Second, it is expressly endorsed in the constitutions of the majority of the EU Member States, while the constitutional Courts of several countries, whose Charter does not specifically contain this right, have nevertheless discerned its existence from other constitutional rights. Third, it is in line with the aims of the Treaties and of EU environmental policy, and it complies with the principle of sustainable development and of improvement of the quality of the environment as well as the protection of health, established both under the Treaties and under Article 37 EU Charter. It is reasonable therefore to consider the right to a healthy environment as an essential component to achieve transversal Union's objectives and principles, which in turn likely confirms its general validity.

2.3. THE RIGHT TO A HEALTHY ENVIRONMENT SUPPORTED BY EXTERNAL SOURCES OF LAW

The first remarkable steps taken by the EU in the field of the environment trace back to the post-Rio period, when it took the lead in the environmental policy-making process, becoming party or signatory to many international environmental agreements negotiated under the auspices of the United Nations.

Among these, the EU ratified the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter, Aarhus Convention) in 2005 along with all its Member States. As mentioned before, the objective of the Convention

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64 CJEU, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies) v Council of the European Union, Commission of the European Communities and Giorgio Fedon & Figli SpA, Fedon America, Inc. v Council of the European Union*, Commission of the European Communities, Joined Cases C-120/06 P and C-121/06 P, Opinion AG Maduro, ECLI:EU:C:2008:98, para. 55.

65 CJEU, *Hoogovens v High Authority*, Case C-14/61, Opinion AG Lagrange, 04.06.1962, ECLI:EU:C:1962:19, para. 283–284.

66 For further analysis on the matter, please see G. Martinico (2020), 'Exploring the Platonic Heaven of Law', *supra* note 22.

is '[…] to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'. Hence, Article 1 correlates the right to health and wellbeing of present and future generations to an adequate environment. The Aarhus Convention also provides for a wide range of procedural rights in the field of environmental protection that enable citizens and environmental non-governmental organisations to request internal review of EU environmental acts.[67] Therefore, the Aarhus Convention represents the first international environmental agreement that recognises the indissoluble relationship between the protection of the environment and the protection of human rights, as stated in Article 1. Thus, according to AG Jääskinen, the Aarhus Convention is not a mere administrative environmental agreement, but rather, the expression of 'a human right to the environment in its most solemn form'.[68] The Union has transposed the procedural environmental rights enshrined in the Aarhus Convention into a vast number of secondary acts, such as Directive 2003/4/EC which provides for a wider application of the right to access information;[69] Regulation no. 1367/2006/EC ('Aarhus Regulation'),[70] which specifically refers to access to information held by EU institutions and bodies; Directive 2000/60/EC concerning public participation in water policy;[71] and Directive 2001/42/EC on participation in environmental plans and programmes, among others.[72]

Other international environmental Treaties that bind both the EU and its Member States are, to mention but a few, the UN Framework Convention on Climate Change (UNFCCC), which provides the fundamental international

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67 For an in-depth analysis of the procedural rights in the field of environmental law enshrined in the Aarhus Convention, please see L. Lanceiro, 'The Review of Compliance with the Aarhus Convention of the European Union', in E. Chiti and B.G. Mattarella, *Global Administrative Law and EU Administrative Law Relationships, Legal Issues and Comparison*, Springer 2011, pp. 359–383. For an analysis of the possible influence of the Aarhus Convention on the EU environmental policy, and in particular on the European Green Deal, see C. Scissa, 'What room for the 1998 Aarhus Convention in the European Green Deal? An Analysis of the possible reluctance of the Court of Justice', (2021) 1, *Rivista Quadrimestrale di Diritto dell'Ambiente*, available at https://www.rqda.eu, last accessed 07.10.2021.

68 CJEU, *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Case C-401/12 P, Opinion of Mr Advocate General Jääskinen, 08.05.2014, para. 89.

69 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L041.

70 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L264.

71 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L327.

72 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L197.

framework to address climate change issues; the 1997 Kyoto Protocol, with the aim to reduce greenhouse gas emissions through mitigation and reduction mechanisms; and the Paris Agreement, adopted in December 2015, which substitutes the Kyoto Protocol. Akin to the Aarhus Convention, the Preamble of the Paris Agreement acknowledges the relationship between the environment and human rights, especially the right to health and to development, both strictly related to the right to a healthy environment.[73] Despite its relevance, such reference was only included in its non-binding part, thus leading to some disappointment.[74] To date, 191 out of 197 parties to the UNFCCC are parties to the Paris Agreement, among which were the Union and all its EU Member States. Arguably, the right of people to live in a healthy environment could very well be considered as part of those human rights that states have to comply with, when tackling climate change.[75]

Most recently, the United Nations Human Rights Council passed a resolution requesting, *inter alia*, the Special Rapporteur to work on identifying challenges and obstacles to the full realisation of states' human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and protection gaps thereto.[76] It also calls on states to conserve, protect and restore ecosystems, as well as to consider adopting and implementing national measures that respect and protect the rights of those who are particularly vulnerable to the loss of healthy ecosystems and biodiversity. Remarkably, during the council session, 15 UN entities delivered a joint statement expressing their support for the global recognition of the right to a healthy environment, seen as essential to guarantee present and future generation's human rights, to leave no one behind, and to ensure a just and equitable transition to a healthy world for all.[77]

The widespread importance of the right to a healthy environment is additionally confirmed at the regional level, where the majority of human rights conventions provide for a direct protection of human environmental rights, including a healthy environment, which is in fact explicitly proclaimed in regional treaties ratified by 126 states. In particular, 52 States are bound by Article 24

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73 Adoption of the Paris Agreement, Decision 1/CP.21, in COP Report No. 21, Addendum, at 2, U.N. Doc. FCCC/CP/2015/10/Add.1, 12.12.2015, preambular para. 11.

74 R. Bratspies, 'Claimed not Granted: Finding a Human Right to a Healthy Environment', (2017) 26(2), *Transnational Law and Contemporary Problems*, p. 273.

75 In this regard, please see, among others, A. Savaresi, 'Human rights and the impacts of climate change: Revisiting the assumptions', (2021) 11(1), *Oñati Socio-Legal Series*, pp. 231–253; A. Savaresi and J. Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation', in *Social Science Research Network* (SSRN) 2021.

76 Resolution 46/7 *Human rights and the environment*, adopted by the Human Rights Council on 23.03.2021, during the 46th session 22.02–24.03.2021, A/HRC/RES/46/7, para. 6.

77 Joint statement of United Nations entities on the right to healthy environment, Human Rights Council, 46th Session. General Debate, Item 3, available at https://www.unep.org/news-and-stories/statements/joint-statement-united-nations-entities-right-healthy-environment, last accessed 13.10.2021.

of the African Charter on Human and People's Rights (hereinafter, African Charter), which acknowledges the right of all people to a general satisfactory environment favourable to their development, and it was interpreted as the first binding international obligation relating to the right to the environment.[78] Additionally, Articles 18 and 19 of the 2003 Protocol to the African Charter on the Rights of Women in Africa guarantees to women the right to live in a healthy and sustainable environment. Both Article 38 of the 2004 Arab Charter on Human Rights and Article 11 of the additional protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) declare the right to a healthy environment, respectively binding 16 state parties.[79] In the Asian continent, Article 28(f) of the Human Rights Declaration set out by the Association of South-East Asian Nations recognises the right to a safe, clean and sustainable environment as part of the right to an adequate standard of living, and has been adopted by ten states. Although not legally binding, the declaration succeeds in representing a shared vision towards higher levels of human environmental rights protection.

At the European level, the ECHR, as well as the ESC, both ratified by all the Member States, fail in recognising a right to a healthy environment and, according to Elisabeth Lamperts, this is 'what makes the European human rights instruments less satisfactory that all the other regional instruments'.[80] The Georgian Presidency of the Council of Europe has seen the healthy environment as a precondition for the very enjoyment of individuals' rights and liberties,[81] therefore encouraging, among other initiatives, both the ECtHR and the European Committee of Social Rights to further substantiate their case law and give priority consideration to complaints involving issues of environmental protection. In particular, experts have been advocating for the adoption of an additional protocol to the ECHR covering the so-called third-generation human rights – including those related to solidarity, the environment and peace, among others.[82] Most recently, the Parliamentary Assembly to the Council of Europe adopted, in September 2021, a draft resolution calling for an Additional Protocol to the ECHR in order to 'anchor' the right to a healthy environment to the Convention. The reason for this lies in the urgent need to secure a healthy, sustainable environment for present and future generations as well as to uphold

78 R. Zetter, 'Unlocking the Protracted Displacement of Refugees and Internally Displaced Persons: An Overview', (2011) 30(4), *Refugee Survey Quarterly*, p. 11.

79 For an excellent analysis of the right to a healthy environment in in the jurisprudence of the Inter-American Court of Human Rights, please see T. Zhunussova, 'Human Rights and the Environment before the IACtHR', in E. Chiti, A. di Martino and G. Palombella (eds.), *L'età della Interlegalità*, Il Mulino, 2021.

80 E. Lambert, 'The Environment and Human Rights, Introductory Report to the High-Level Conference Environmental Protection and Human Rights', 27.02.2020, p. 10, available at https://rm.coe.int/report-e-lambert-en/16809c827f, last accessed 13.07.2021.

81 Ibid.

82 Ibid., p. 11.

states and non-state actors' responsibilities towards the preservation of the environment and towards the protection of all people against environmental harm eventually caused by them. More specifically:

> The Assembly considers that an explicit recognition of a right to a healthy and viable environment would be an incentive for stronger domestic environmental laws and a more protection-focused approach by the Court. It would make it easier for victims to lodge applications for remedies and would also act as a preventive mechanism to supplement the currently rather reactive case law of the Court.
>
> Recognising an autonomous right to a healthy environment would have the benefit of allowing a violation to be found irrespective of whether another right had been breached and would therefore raise the profile of this right. [...][83]

However, the Court has so far refused to embark in this project.[84]

Nonetheless, as far as the ESC is concerned, in the only two complaints lodged on the right to a healthy environment, the European Committee of Social Rights introduced two novel elements: (i) It promoted a dynamic interpretation of the ESC, holding that for it to be a living instrument, its rights and freedoms should be interpreted in the light of the present-day conditions;[85] and (ii) it established a normative partnership between the ESC and the ECHR on the ground of human dignity, given that 'human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the ESC or under the European Convention of Human Rights and [that] health care is a prerequisite for the preservation of human dignity'.[86] In its decision on *Marangopoulos Foundation for Human Rights v Greece*, it took account of 'the growing link that states party to the Charter and other international bodies […] now make between the protection of health and a healthy environment […]'.[87] The Committee found a complementarity between Article 11 ESC on right to the protection of health and Articles 2 and 3 ECHR,[88] by explicitly stating that the provisions contained in Article 11 ESC should be interpreted as to remove the causes of ill health also resulting from environmental threats. The Committee continued its legal reasoning by identifying environmental

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83 Parliamentary Assembly to the Council of Europe, 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe', draft resolution adopted on 1 September 2021, paras. 8–9, available at https://assembly.coe.int/LifeRay/SOC/Pdf/TextesProvisoires/2021/20210909-HealthyEnvironment-EN.pdf, last accessed 07.10.2021.

84 E. Lambert, 'The Environment and Human Rights', *supra* note 80, pp. 11–15 for a precise recollection of the grounds set out by the ECtHR in this regard.

85 European Committee of Social Rights, *Marangopoulos*, *supra* note 10, para. 194.

86 European Committee of Social Rights, 'Interpretative Statement on Article 11 of the Charter', para. 5, available at http://hudoc.esc.coe.int/eng/?i=2005_Ob_1-1/Ob/EN, last accessed 13.07.2021.

87 Ibid.

88 Article 11 ESC reads: '*Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable*'.

protection as one of the key components of the right to health and concluded that states are responsible for harmful activities to the environment, whether carried out by public authorities or by private companies. Therefore, it ruled that Article 11 ESC had to be interpreted as to include the right to a healthy environment. In *International Federation for Human Rights (FIDH) v Greece*, the Committee went even further, by complementing the right to a healthy environment not only with Articles 2 and 3 ECHR, as previously ruled, but also with Article 8 ECHR on the right to private and family life, as far as severe environmental pollution may adversely affect individuals' well-being.[89]

By endorsing an extensive interpretation of the Convention's provisions, the ECtHR has repeatedly acknowledged the violation of the human rights enshrined therein owing to environmental factors. In so doing, the Court has recurrently found violations of the right to private and family life and,[90] in the most extreme cases, of the right to life owing to environmental threats.[91]

In particular, in *Lopez Ostra* and *Fadeyeva*,[92] the ECtHR held the respective states responsible for the violation of Article 8 ECHR due to industrial pollution,[93] the toxic emissions of which had impinged the applicants' right to private and family life, as well as to health and to property. In their joint dissenting opinion in *Hatton and others v the United Kingdom* Judgment, where conversely the Court denied the state's violation of Article 8 for presumed excessive acoustic pollution, the Judges Costa, Ress, Türmen, Zupančič and Steiner affirmed that 'the close connection between human rights protection and the urgent need for a decontamination of the environment leads us to perceive health as the most basic human need and as preeminent',[94] thus considering the healthy environment as a prerequisite for the enjoyment of other rights.

Interestingly, the recognition of a right to a healthy environment is particularly evident at the national level. According to the UN Special Rapporteur on the issue of human rights obligations relating to enjoyment of a safe, clean, healthy and sustainable environment,[95] there are 101 states where this right has been incorporated into national legislation, whereas more than 80% of UN States Members (156 out of 193) have legally recognised the right to a healthy

89 European Committee of Social Rights, *International Federation for Human Rights (FIDH) v Greece*, *supra* note 11.

90 Among others, ECtHR, *López Ostra v Spain*, no 303-C, 09.12.1994 and ECtHR, *Guerra and Others v Italy*, no 116/1996/735/932, 19.02.1998.

91 ECtHR, *Öneryıldız v Turkey*, no 48939/99, 30.11.2004.

92 ECtHR, *López Ostra v Spain*, no. 16798/90, 09.12.1994.

93 ECtHR, *Fadeyeva v Russia*, case no 55723/00, 09.06.2005.

94 Joint dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton and others v the United Kingdom* judgment, para. 1.

95 UN Human Rights Council, 'Right to a healthy environment: good practices. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc A/HRC/43/53, 30.12.2019.

environment. What's more, 100 national constitutions explicitly incorporate the right to a healthy environment, also with different terminology.[96] There are at least 12 additional countries where courts have ruled that the right to a healthy environment is an essential element of the right to life and therefore is an enforceable, constitutionally protected right. In total, at least 155 states are required, through Treaties, constitutions and legislation, to respect, protect and fulfil the right to a healthy environment.

One way to interpret these findings is that they encourage a global recognition of the right to a healthy and sustainable environment and could, as we will see, support the CJEU to move forward its establishment at the EU level.

In conclusion, it seems clear that the states parties to the EU and beyond have progressively increased their binding commitment to promote a healthy environment for the benefit of present and future generations, sharing common efforts towards the preservation of the planet in accordance with the principle of sustainable development. To this end, the number of treaties in the field of environmental protection has been also significantly rising, akin to the quantity of EU and national implementing measures and good practices to boost the quality of the environment.[97]

2.4. THE RIGHT TO A HEALTHY ENVIRONMENT AS A CONSTITUTIONAL TRADITION COMMON TO THE MEMBER STATES

Another essential requirement for the genesis of general principles according to AG Trstenjak's methodology is the constitutional status embodied by the provision at stake.

The previous analysis revealed that for the CJEU to extrapolate fundamental rights from the traditions common to the Member States was sufficient as a common underlining vision. Therefore, the Court put more emphasis on the alignment between that right and the spirit and the scopes of the EU treaties, rather than on the actual number of charters containing it.

Indeed, in order to overcome the normative gaps of the treaties in the field of the protection of fundamental rights, the Court has often extrapolated values and ideas shared by only a small minority of states and reproduced them so as to be accepted also by those members that originally did not enclose them in their

96 UN Human Rights Council, 'Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', Report of the Special Rapporteur, UN Doc A/HRC/40/55, 08.01.2019, para. 13.

97 UN General Assembly, Special Rapporteur's Supplementary Report: Additional Good Practices in the Implementation of the Right to a Safe, Clean, Healthy and Sustainable Environment, UN Doc A/HRC/43/53/Annex III, 13.12.2019.

constitutions. As we have seen, the list of fundamental rights created by the case law increased over time and will continue to expand in the future according to the present-day conditions.

Today, 16 out of 27 Member States have expressly included the right to a healthy environment into their national constitutions: Portugal (1976); Spain (1978); the Netherlands (1983); Hungary (1989); Croatia (1990); Bulgaria and Slovenia (1991); Czech Republic along with Slovakia (1992); Belgium (1994); Finland (1995); Poland (1997); Latvia (1998); Greece (2002); Romania (2003); and France (2005).[98] More precisely, they all recognise the right to a healthy environment both in their constitutions and national legislation, and have also ratified international treaties covering the subject. This means that more than half of the Member States share a common view on the need to protect this right. What's more, 23 Member States have environmental provisions in their national constitutions. Beyond those already mentioned, these are: Italy (1948); Malta (1964); Austria (1984); Sweden (1987); Estonia and Lithuania (1992); Belgium and Germany (1994); Poland (1997); Romania (2003); and Luxembourg (2007).[99] The Supreme Courts of six other Member States (in Italy, the Netherlands, Poland,[100] Ireland, Estonia and Lithuania)[101] have ruled the implicit presence of this right into their constitutions and have discerned it from other constitutional provisions protecting fundamental rights, especially the right to health and to the protection of the environment. For instance, despite the absence of a specific provision setting out a right to a healthy environment, the Constitutional Court has repeatedly asserted that Article 32 of the Italian Constitution on the right to health provides for an adequate legal basis in order to recognise this right.[102] Interestingly, the Irish High Court based the existence of the right to a healthy environment on a different set of rights.[103] In affirming that the Constitution of the Republic of Ireland provided for the right to 'an environment that is consistent with the human dignity and well-being of citizens at large', it implied it from Articles 40.3.1 and 40.3.2 of the Irish Constitution, which respectively

98 A.G. González, 'The Right to a Clean and Healthy Environment: GMOs in Mexico and the European Union', (2019) 10(2), *Mexican Law Review,* p. 100.

99 Ibid.

100 There is no explicit right to a healthy environment in Poland's Constitution. However, in January 2019, in case VI C 1043/18, a Polish trial court found that such a right can be derived from Article 23 of the Polish Civil Code. This decision is currently under appeal.

101 UNGA Annex VIII, 'Recognition of the Right to a Healthy Environment in Constitutions, Legislation and Treaties: Western Europe and Others Region', 14.02.2020, UN Doc A/HRC/43/53/Annex VIII.

102 See, among others, Corte di Cassazione Sezioni Unite, Decision No. 5172/1989; Corte Costituzionale, Decision No. 210/1987; Corte Costituzionale, Decision No. 641/1987. For a recent reference in this regard, please see R. Luporini, 'The "Last Judgment": Early reflections on upcoming climate litigation in Italy', (2021) 8(1), *Questions of International Law*.

103 Irish High Court, *Merriman v Fingal County Council; Friends of the Irish Environment Clg v Fingal County Council* (2017) IEHC 695.

guarantee the personal rights of the citizen and the state vindication for the life, person, good name and property rights of every citizen. The Dutch courts have been particularly active in proclaiming a right to a healthy environment, even if not expressly provided. Some case laws have indicated that it is implicit in Article 21 of the Dutch Constitution, which states: 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'.[104] Most recently, in the landmark *Urgenda* case, the Supreme Court of the Netherlands found that Articles 2 and 8 ECHR gave rise to environmental rights to which all governments are bound.[105] Finally, it is significant to mention the case of Lithuania, whose Supreme Court ruled that 'a person's right to a healthy environment is a prerequisite for a dignified life and for the exercise of many other constitutional rights, and therefore, if actions (inaction) that violate this right are detected, the court must defend it'. The judges also found that 'The right to a safe and clean environment is a constitutional right guaranteed to all individuals […]. Ensuring the right to a healthy and clean environment as one of the objectives of state activities is also a public interest'.[106]

In light of the foregoing, there might be evidence that the right to a healthy environment constitutes a common tradition among the vast majority of the Member States. A terminological analysis of the qualifications given by the 22 Member States where this right serves as a unifying principle that permeates legislation, regulations and policies, reveals that the adjective mostly used to describe the personal right to enjoy the environment is 'healthy' (in 15 cases out of 22).[107] Two constitutions, that of the Czech Republic and Slovakia, opt for the term 'favourable', while Latvia propended for a 'benevolent environment'. Two other Member States respectively acknowledged an individual right to a 'healthy and balanced' environment (France) and for a 'healthy and ecologically balanced living environment' (Portugal). The Spanish Constitution is the only one to provide for an 'adequate' environment, while Greece guarantees the protection of 'the natural and cultural environment' in the context of the principle of sustainable development.[108] From the comparative use of these

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104 See, for example, Council of State, Administratieve beslissingen (Administrative decisions) 1991-591, 18.07.1991; Council of State, Administratieve beslissingen (Administrative decisions) 1991-592, 22.04.1991; Council of State, *Milieu en Recht* (Environment and Law) 1992, 29.05.1992, p. 477; Supreme Court, *Milieu en Recht* (Environment and Law) 1989, 14.04.1989, p. 258.

105 Dutch Supreme Court, *Urgenda Foundation v State of the Netherlands*, 22.12.2019, HAZA C/09/00456689.

106 Supreme Court of Lithuania, Case No. 3K-3-112/2013, 16.01.2013.

107 These are: Bulgaria, Croatia, Estonia, Hungary, Lithuania, Romania, Slovenia, Belgium, Finland, France, Ireland, Italy, the Netherlands, Norway, and Portugal. Poland's trial court also established a right to a 'healthy' environment in its case-law, however, this ruling is under appeal.

108 UNGA Annex VIII, 14.02.2020, *supra* note 101, pp. 1–50.

formulations, it could be inferred that there seems to be a common *fil rouge* that links the vast majority of the Member States in recognising and protecting the right to a healthy environment. The flourishing range of qualifications to describe the type of environment they ensure to their population is indicative of a '*comune sentire*', a common need towards the preservation of the environment. As seen, the Court may use these national provisions as a source of inspiration in order to extrapolate the ideas and values underlying them, to then identify the most adequate formulation to be transposed at the Union level. This solution should be the best suited to achieve the objectives of the treaties and must not collide with the legal order of the Member States. Given that all 27 Member States and the Union itself are bound to the 1998 Aarhus Convention, whose Article 1 proclaims the right to a healthy environment, it might be concluded that the transposition of this right at the Union level could hardly be contrary to any Member State's legal order.

2.5. THE RIGHT TO A HEALTHY ENVIRONMENT IN LINE WITH THE SCOPE OF THE TREATIES

According to AG Trstenjak, for a disposition to amount to general principle, it has to meet the specific objectives of the EU Treaties and the basic principles of EU law. As previously mentioned, the environmental component has been at the core of the objectives of the Union since the 1970s. At that time, and until the enactment of the Single European Act, the treaties did not provide the Union with a competence in the field of the environment. Still, to include environmental measures, the legislators relied upon a combination of provisions of the treaty establishing the European Economic Community, namely Articles 2 (standard of living and quality of life), 100 (approximation of laws, regulations or administrative provisions of the Member States) and 235 (the so-called flexibility clause). Consequently, the harmonisation of the legal orders of the Member States was already used not only to boost environmental acts, but also to overcome the normative gap of the treaties.

Today, environmental policy represents a shared competence by virtue of the principle of subsidiarity, according to Article 4.2 TFEU. The possibility given by the treaties to the EU and the Member States to implement environmental objectives is also affirmed in Article 191.4 TFEU, according to which both, within their respective spheres of competence, shall cooperate with third countries and competent international organisations to promote environmental protection. The EU environment policy is enshrined in Articles 11 and 191–193 TFEU. In particular, Article 191 TFEU contains a list of objectives to be pursued, which include: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at the international level to deal with regional or world-wide

environmental problems – in particular, combating climate change. Arguably, providing Union law with the right to a healthy environment would considerably promote the achievement of each of these scopes, both in line with national legal orders and in compliance with environmental obligations undertaken at the international level.

The right to a healthy environment also seems perfectly in line with the values enshrined in Article 2 TEU, where the Union lies upon the respect for human rights. Article 3 TEU includes among the aims of the Union the 'sustainable development for Europe, based […] on a high level of protection and improvement of the quality of the environment'. In promoting intergenerational solidarity (Article 3 TEU), the sustainable development of the Earth and the sustainable management of global natural resources (Article 21.2(f) TEU), as well as the protection of human rights and the strict observance and development of international law (Article 3.5 TEU), the EU Treaties appear to suggest to spontaneously embed the right to a healthy environment. Finally, the EU Charter states in its Article 37 that: 'A high level of environment protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. The CJEU has repeatedly ruled that the protection of the environment constitutes one of the essential objectives of the Union.[109]

Finally, the Court has found that Article 11 TFEU, according to which environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, emphasises the fundamental nature of the Union's aim to promote sustainable development and to protect the environment as well as its extension across the range of those policies and activities.[110]

Not only does the right to a healthy environment seem to perfectly align with the purposes and the values of the EU Treaties, but it also aligns with the current and future aspirations of the Union. Emblematically, Article 11 TFEU is at the core of the Commission's proposal for the 8th Environment Action Programme (2021–2030) presented in late 2020 and adopted in 2021. In particular, the Commission repeatedly emphasises the benefits that a healthy environment, a situation that the Commission strives to achieve by 2050, will bring to the wellbeing of citizens, biodiversity and natural capital.[111]

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109 Among others, CJEU, *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)*, Case 240/83, 07.02.1985, ECLI:EU:C:1985:59, para. 13; CJEU, *Commission v Denmark*, Case 302/86, 20.09.1988, ECLI:EU:C:1988:421, para. 8, CJEU, *Commission of the European Communities v Republic of Austria*, *supra* note 9, para. 71.

110 CJEU, *Commission of the European Communities v Republic of Austria, supra* note 9, para. 73.

111 European Commission, Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2030, COM(2020) 652 final, 14.10.2020, Article 2.1.

Furthermore, the European Green Deal demonstrates the core relevance that the EU is dedicating to the issue of environmental protection. It has been welcomed as a new growth strategy that aims to transform the EU into the first climate-neutral continent, with a modern, resource-efficient and competitive economy by 2050. Through its Communication, the Commission restates that it must put people first, recalling the principle to leave no one behind at the core of the 2030 Agenda on Sustainable Development. The Green Deal provides the guidelines for the development of a wide set of legislative proposals aimed at filling the current normative gaps, such as the proposal for the first-ever EU climate law, or at resetting the scopes of the EU environmental policy. From a zero-pollution ambition to the promotion of clean and circular economy, from renovating the energy sector to smart mobility, the Commission is pursuing the final aim of reaching a sustainable future for the present and future generation of EU citizens. In the author's view, this framework would inevitably suffer from the lack of an essential component such as the right to a healthy environment, which underlies all the proposals made by Commission. Arguably, tacking climate change and unsustainable policies without committing to upholding those fundamental rights associated with them could potentially frustrate the final outcomes. What otherwise would be the logic behind the attempt to improve Member States' industrial policies without equipping local populations with an explicit right to a healthy environment and clean air to claim in case of states' non-compliance?

Moreover, in the framework of the European Green Deal, the European Commission asserted that the achievement of the commitments undertaken under the EU Biodiversity Strategy 2030 are essential to the wellbeing and economic prosperity of present and future generations in a healthy environment.[112] In a recent resolution, the European Parliament shares the Commission's ambition by stressing that all people should be granted the fundamental right to a safe,[113] clean, healthy and sustainable environment and to a stable climate, without discrimination, and that this right must be delivered through ambitious policies and must be fully enforceable at all levels.[114]

3. THE RIGHT TO A HEALTHY ENVIRONMENT AS A NORMATIVE RESPONSE TO COVID-19

Air pollution poses a direct threat to the adequate enjoyment of numerous human rights, from the right to health, life, food and water to the intergenerational

112 European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2020)0380, 11.12.2019.

113 European Parliament, Resolution on the effects of climate change on human rights, 21.09.2020, *supra* note 7.

114 Ibid., para. 6.

right to a healthy and sustainable environment. Fine particulate air pollution is the single largest environmental risk to health worldwide. More than 90% of the world's population lives in regions that exceed WHO guidelines for healthy ambient air quality.[115] In Europe, the major sources contributing to air pollution, which may expose individuals to risks to their health and wellbeing, are commonly known and relate to fossil fuel and biomass combustion, small- and large-scale emissions and industrial and agricultural productions. Similarly, assuming that air pollution is a vehicle for the spreading of respiratory diseases is far from being new or surprising. This connection has been verified by epidemiological findings and acknowledged both in the political arena and in judicial proceedings.

As a matter of fact, some epidemiological studies have demonstrated that the incidence and severity of COVID-19 depends on air pollution, therefore substantiating the existing association between highly polluted areas with the number of infection cases. Air pollution has been therefore interpreted as a boosting factor of the spreading of COVID-19, regardless of other socioeconomic, demographic, weather, behavioural, epidemic stage and health care-related confounders. Emblematically, the research conducted by the University of Harvard found that a small increase in PM produces a large increase (8%) in COVID-19 death rate. Similarly, research has found that the there is an occurrence of higher case rates in case of low-income families belonging to ethnic minorities, due to their precarious health status, potential higher exposures and reduced resilience to social, environmental and economic risks.[116]

At the political level, the European Environmental Agency (EEA) has frequently called the Union and its Member States for stronger commitment in avoiding exceeding the EU legal limits of air pollution levels for the protection of human health. Air pollution is, according to EEA, the primary cause of premature deaths from environmental factors in Europe, which takes around 400,000 lives every year.[117] In the framework of the European Green Deal, the EU has pledged to follow the revised WHO Air Quality Guidelines with the double aim to abate air pollution and decrease the risks to human health and

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115 World Health Organization, 'Don't Pollute my Future!: The Impact of the Environment on Children's Health', report, 2017, available at https://www.who.int/ceh/publications/don-t-pollute-my-future/en/, last accessed 10.05.2021.

116 P. Fimiani, 'Inquinamento ambientale e Diritti Umani', Questione Giustizia, rubrica Diritti senza Confini, available at https://www.questionegiustizia.it/speciale/articolo/inquinamento-ambientale-e-diritti-umani_81.php, last accessed 13.07.2021.

117 European Environmental Agency, 'Air Pollution: How It Affects Our Health', 14.12.2020, available at https://www.eea.europa.eu/themes/air/health-impacts-of-air-pollution#:~:text=In%202018%2C%20the%20EEA%20estimates,States%20and%20the%20United%20Kingdom, last accessed 24.03.2021.

the environment.[118] However, as several experts feared, the termination of national lockdowns has coincided with an immediate rise of air pollution levels.

In this regard, Italy, one of the most coronavirus-affected countries, has been repeatedly condemned for violation of the right to private and family life as well as of the right to effective remedy both under the ECHR and the EU Charter in the field of the environment.[119] Recently, the CJEU has held that Italy systematically exceeded the maximum limit values applicable to concentrations of PM10 laid down by the Air Quality Directive between 2008 and 2017,[120] thus infringing EU law on ambient air quality. These judgments not only reveal the Italian negligence towards clean air, but also corroborate the epidemiological thesis that COVID-19 spreads easily and more rapidly in highly polluted areas.

The multitude of scientific facts substantiating the impingement of human rights due to environmental factors, together with political and regulatory actions addressing air pollution as a coronavirus-counterstrategy substantiate the concrete and urgent need to a right to a healthy environment for all. The establishment of such a fundamental right is not merely a matter of legal theory. There is a real, concrete need for a right that both protects the environment and the human rights of those who live that environment, which can be appealed in case of violations and enforced. If the Court aims to be the guardian of the treaties as well as of the fundamental rights enshrined therein, the moment has come for it to step up and provide expressed protection from the current and future threats against them.

4. CONCLUSIONS

As I have attempted to illustrate above, the global health crisis caused by the COVID-19 pandemic has disrupted the life of millions of people along with their human rights. Some reliable epidemiological studies have suggested that the strength and incidence of this virus is associated with the level of air pollution, therefore giving a scientific explanation for the major occurrence of COVID-19

118 European parliament, 'Air pollution and COVID-19', executive summary, 2021, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/658216/IPOL_STU(2021)658216_EN.pdf, last accessed 22.03.2021.

119 For instance, in Di Sarno and others and Cordella and others, the Strasbourg judges found the Italian Republic responsible for having exposed the applicants to toxic and polluted emissions, hampering their fundamental rights. Please see, ECtHR, *Di Sarno and Others v Italy*, 10.01.2012 and ECtHR, *Cordella and Others v Italy*, Joined cases 54414/13 and 54264/15, 24.01.2019.

120 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L152.

cases and the related death rate in highly polluted areas of Italy, Spain and the United States.

The ongoing pandemic exacerbates therefore the already pressing urgency posed by environmental threats and climate change to expressly proclaim the right to a healthy environment under EU law.

This contribution intended to contribute to the discussion upon the establishment of this right by presenting a probable new theoretical framework, wherein the CJEU is called to play a paramount role. As a consequence, its feasibility depends on the interpretation of Article 6.3 TEU that the Court may or may not give, this representing a double-edged sword. According to some authors,[121] the CJEU already had the opportunity to derive the right to a healthy environment from its case law, but decided not to pursue it. Similarly, the Court may continue on the path already traced by its jurisprudence in the field of the environment – therefore ruling on the issue at stake without touching upon the right to a healthy environment – or, it could instead chart a new course. The reflections set out in this contribution depart from the second of these two possible choices.

In fact, by means of Article 6.3 TEU, it is suggested that the Court may establish a right to a healthy environment as stemming from the constitutional traditions common to the Member States. Following the methodology offered by AG Trstenjak, this contribution recalled some reliable international studies on the matter to note that the vast majority of them has already incorporated, with similar formulation, the right to a healthy environment into their national constitutions and in their national legislation, while in several other cases this right has been implicitly ascertained by other constitutionally protected rights. Moreover, the proclamation of the right to a healthy environment seems to be consistent with the aims, principles and values of the EU founding treaties. As recalled, the protection of human rights, the principle of sustainable development and the improvement of the quality of the environment guide the mandate of the Union. Finally, regional and international treaties that bind both the Union and its Member States – such as the 1998 Aarhus Convention on procedural environmental rights, the ESC and the ECHR – are external sources of law that explicitly provide for, or have been interpreted to include, a right to a healthy environment. These provisions therefore support the national movements in this direction. It has been concluded, therefore, that the CJEU may be considered as having all the elements to extrapolate from the national traditions the best suited formulation for a right to a healthy, favourable or adequate environment to be adapted at the EU level.

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121 C. Feliziani, 'Il Diritto Fondamentale all'ambiente Salubre nella Recente Giurisprudenza della Corte di Giustizia e della Corte EDU in Materia di Rifiuti. Analisi di due Approcci Differenti', (2020) 6, *Rivista Italiana di Diritto Pubblico Comunitario*, p. 3. The author mentioned the CJEU case, *European Commission v Italy*, C-297/08, 04.03.2010, ECLI:EU:C:2010:115.

The active judicial role in deducing a binding source of EU law from the treaties is not new in the history of EU legal and cultural integration. The absence of fundamental rights in the first steps of the Community has led the Court to proclaim a wide range of fundamental rights as general principles of law in order to comply with its task and proceed swiftly towards a stronger 'Europeanisation'. Given the present-day conditions, the CJEU is called once again to shape a new course of EU law, rooted in the principle of sustainable development and of intergenerational solidarity.