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Climate change litigation against private entities: a liability in search of… a cause of action

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1. *Introduction*

The exponential growth in climate change litigation at the global level is paralleled by a series of doubts that substantially affect every aspect of the legal protection of the subjective position taken by the claimants (the very consistency of which is actually difficult to define with certainty, with all that this entails in terms of the *an* and *quomodo* of protection): from *locus standi* to jurisdiction, from the non-reviewability of political acts (when a state is a party) to the allocation of the burden of proof and the reliability of the available means of proof, to the type of protection (that can be requested and) provided.

Elsewhere, in exploring the problems posed at the evidentiary level, I argued that they are attributable not so much to the limitations of the means of proof available today as to the object of the required evidence: in other words, that the problem does not pertain to evidence's unfitness, but to the attempt to apply the usual theory of causality in this field. And, based on this assumption, I found that a unified solution – that is, a solution applicable both to injunctive and compensatory proceedings, and regardless of whether the defendant is a state or a private entity – can be outlined by drawing inspiration from the theory (developed with reference to international law) of contribution as causation, adapted to the Italian context using the framework of damage

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from *loss of chance*[1]. In the same paper, however, I deliberately left aside the preliminary question, namely that of identifying the necessary[2] cause of action for the defendant's liability.

Before investigating this aspect, it is necessary to premise that the reflection must necessarily become two-pronged: indeed, while such a cause of action, when a State is the defendant, is increasingly identified in the breach of their duty of due diligence[3], in application of international law, it is by no means certain that the same reasoning can be applied to judgments against private entities. Nor the question is not merely speculative, especially for Italian scholars, given that it was precisely the principles of international law that constituted one of the grounds for the claim brought by Greenpeace O.n.l.u.s., Recommon A.p.s., and several private individuals against ENI S.p.a., the Ministry of Economy and Finance, and *Cassa Depositi e Prestiti* S.p.a., aimed at ascertaining the defendant company's failure to comply with its obligations to achieve internationally recognized climate targets and ordering it to limit its aggregate annual CO2 emissions. During the proceeding, which is currently pending before the Court of Rome, the Court of Cassation, to which the case was referred for a ruling on jurisdiction, recently recognized the jurisdiction of the seised court, while leaving to this latter to «verify whether the international and constitutional sources invoked […] are suitable for imposing a duty of intervention directly on the defendants, such as to establish their non-contractual liability and therefore justify their conviction to pay compensation in specific form, pursuant to Article 2058 of the Civil Code»[4].

[1] V. CAPASSO, *Burdens and means of proof in climate change litigation: does the problem lie upstream?*, in *Diritto e clima*, n. 3, 2026, pp. 797 ff.

[2] G. BASILICO, *La tutela civile preventiva*, Milano, 2013.

[3] A. NOLLKAEMPER, *Causation Puzzles in International Climate Litigation*, in *Italian Yearbook International Law*, n. 33, 2023, pp. 25 ff.

[4] Cass. civ., un. sec., July 21, 2025, no. 20381. As L. SERAFINELLI, *"Greenpeace et al. c. Eni et al.": sogni (per alcuni, incubi per altri) di un'ordinanza di mezza estate sulla* climate change litigation *all'italiana*, in *Foro it.*, n. 1, 2025, p. 2238, stresses, «it is somewhat surprising to read […] how the Court of Cassation considers the damage claimed by the plaintiffs to be a "common action for damages", based precisely on the allegation of damage consisting of a violation of the right to life, the injustice of which is predicated on a mixture of national and international sources passed off as civil

2. *First attempt: the horizontal enforceability of international law*

This doubt is certainly not unfounded. Actually, the idea that international law can be used in relationships between private individuals is becoming more and more accepted among scholars[5], especially when it comes to fundamental rights. This is also supported by an analysis of the case law of supranational courts, which already shows a growing tendency to acknowledge a horizontal dimension of sources, in line with the doctrine of *Drittwirkung*[6]. This is the case, for exam-

wrongdoing, and aimed at establishing the liability of public and private entities operating directly or indirectly in the production, transport, and marketing of fossil fuels, which attribution science research holds responsible for the largest contribution to greenhouse gas emissions. Thus, the judges are called upon to verify "only" (*sic*!) whether the sources on which the complaints are based (and those identified on the basis of the *iura novit curia* principle) are sufficient to impose a duty of intervention on the defendants, such as to establish non-contractual liability and therefore justify their conviction to perform an act pursuant to Article 2058 of the Italian Civil Code». However, while «such a normalization of the climate discourse within the framework of non-contractual liability is surprising», it does not allow scholars to incline in one direction or the other: «[t]he order certainly sets a precedent regarding the possibility of subsuming liability for climate change within the framework of civil wrongs, but only in the theoretical sense. In fact, it will be up to the dynamics of the trial on the merits to ascertain the actual occurrence of all the elements of the facts of the case, as well as the procedural requirements». The implications of the ruling are further explored by the same author in L. SERAFINELLI, Climate change litigation *all'italiana contro operatori economici privati: riflessioni a partire da Cass. civ., sez. un., ord. 21 luglio 2025, n. 20381,* Greenpeace et al. c. Eni et al., in *Orizzonti del Diritto Commerciale*, n. 3, 2025, pp. 1158 ff. In addition, in order to the judgement's procedural implication, see P. MAZZA, *Dal contenzioso climatico un "*requiem*" per il "*forum rei", in *Foro it.*, n. 9, 2025, p. 2229, and G. SCARSELLI, *Per una corretta lettura della recente ordinanza della Sezioni unite (Cass. sez. un. 21 luglio 2025 n. 20381) in tema di contenzioso climatico*, in judicium.it, July 25, 2025.

[5] See G. ZARRA, *I principi di diritto internazionale come fonte di obbligazioni nei rapporti di diritto civile*, in *Riv. dir. int.*, n. 2, 2025, pp. 327 ff.

[6] In Italy, the leading exponent of this theory – in its direct version, *i.e.*, not mediated by conforming interpretation (*unmittelbare Drittwirkung*) – is, as is well known, P. PERLINGIERI, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, voll. I-V, Napoli, 2020. See also M. ZARRO, *L'evoluzione del dibattito sulla Drittwirkung tra Italia e Germania*, in *Rass. dir. civ.*, n. 3, 2017, pp. 997 ff., and P. FE-

ple, for the European Court of Human Rights: despite operating in a system that, according to a restrictive interpretation of Article 34 ECHR, would prevent such an application, the Court has over time applied this doctrine «not only in substance, i.e. by affirming the ability of an increasing number of conventional rights to produce effects in interpersonal relationships, but also and above all in procedure, i.e. by overcoming the procedural (and structural) limitations referred to in Article 34 by enhancing the responsibility of the State», *inter alia*, «for failure to comply with the duty to protect individuals subject to its jurisdiction, which would also apply in the case of violations committed by individuals»[7]. This appears to have been the case – to cite a recent and particularly significant example *ratione materiae* – in the *Cannavacciuolo et al. v. Italy* case: there, the Court, in recognizing the State's responsibility for breach of its duty of due diligence, «presupposes and suggests a triangular relationship between the subjective position of the applicant victims, the State, which failed to adopt risk prevention measures, and third parties, who are the source of the danger to the right to life, having materially caused the environmental pollution»[8].

And, beyond the specific characteristics of the case in question – where the activity carried out by "third parties" is (was) certainly illegal, and therefore clearly falls (fell) within the state's responsibility to contrast – this "version" of horizontal application is neither surprising nor does it pose any particular theoretical problem: indeed, as is well known, «general obligations of prevention in environmental matters

MIA (ed.), «Drittwirkung»: *principi costituzionali e rapporti tra privati. Un percorso nella dottrina tedesca*, Napoli, 2018.

[7] F.M. PALOMBINO, *La dimensione «orizzontale» della Convenzione europea dei diritti dell'uomo*, in *Rass. dir. civ.*, n. 1, 2021, pp. 219 ff. (free translation); see also L. SERAFINELLI, *Responsabilità extracontrattuale e cambiamento climatico*, Torino, 2024, p. 73 and E.A. ALKEMA, *The third-party applicability or "*Drittwirkung*" of the European Convention of Human Rights*, in F. MATSCHER - H. PETZOLD (eds.), *Protecting human rights: The European dimension – Studies in honour of Gérard J. Wiarda*, Köln, 1988, pp. 33 ff.

[8] D. GRECO, *Diritto alla vita, obblighi positivi e approccio precauzionale*, in F. DE SANTIS DI NICOLA (ed.), *CEDU e "terra dei fuochi". A proposito della sentenza Cannavacciuolo e altri c. Italia*, Napoli, 2025, p. 72 (free translation).

are binding first and foremost on States. Therefore, even where the wrongful damage is materially caused by the conduct of private individuals, it is always the State that bears the general obligations in question, which the public authorities should have ensured were complied with by taking the necessary measures to prevent violations of the fundamental rights of individuals subject to their jurisdiction»[9]. It can therefore be accepted that the State is liable *even* where the damage is caused by *lawful* activities of individuals, insofar as the formal lawfulness of the latter's conduct is deemed to derive from the absence of (adequate) positive regulation, and therefore from substantial non-compliance with the duty of *due diligence* falling on the *regulator*[10].

[9] E. FERRIELLO, *Gli obblighi generali di prevenzione in materia ambientale nel contenzioso civile sul clima. Verso un'umanizzazione del diritto internazionale dell'ambiente?*, in *Rass. dir. civ.*, n. 2, 2025, p. 601 (free translation).

[10] This is not the case in the *Greenpeace v. Eni* dispute: as noted by the Court of Cassation, and emphasized in doctrine (L. SERAFINELLI, *"Greenpeace et al. c. Eni et al."*, cit., p. 2236), «the involvement of the other two entities, Mef and Cdp, the former clearly a state administration, the latter an entity whose nature still causes uncertainty in terms of classification, does not cast doubt on the fact that this is a horizontal climate dispute. In fact, they are being sued not in their capacity as public administrations against which liability can be asserted for failure to adopt adequate policies, but rather as shareholders in a position of controlling Eni (in the private law sense), and therefore responsible for directing the investee company towards compliance with climate objectives. On this basis, the court concludes that the case against the oil company does not present the same problems of separation of powers as those found in "*Giudizio Universale*", in which, by contrast, the dispute was dismissed on procedural grounds due to a total lack of jurisdiction (the case having been filed against the Italian State)» (free translation).

Indeed, as is well known, by declaring the absolute lack of jurisdiction, the Court of Rome essentially determined that what citizens were claiming in the "*Giudizio Universale*" case is not a "right" nor a "legitimate interest", so the judgment is actually a judgement on the merits, excluding the claimants from having standing before any Italian court (P. PATRITO, *I "motivi inerenti alla giurisdizione" nell'impugnazione delle sentenze del Consiglio di Stato*, Napoli, 2016, pp. 173 ff.). More precisely, the court argued that deciding how and when to manage climate change involves discretionary political and socio-economic choices. These decisions require complex cost-benefit analyses across many sectors of public life, which the court believes are the responsibility of the Government and Parliament, not the judiciary. However, there is a strong counter-argument to this: political power is only "free" to choose its own goals when it is not bound by specific laws. Since Italy has signed international treaties like the Paris

By contrast, greater concern is raised by the idea that, in such a scenario, private individuals themselves would be liable for the damage they caused. In fact, although we recognize the persuasiveness of the argument that there is – in general – no reason not to treat international law principles in the same way as constitutional principles in hermeneutics (and therefore to derive obligations from the former in exactly the same way as we do from the latter)[11], we remain convinced of the validity of the argument that only *rules*, and not *principles*, are susceptible to violation[12]. Consequently, it is difficult to conceive of any liability that does not arise from the violation of specific and binding rules; but such rules, in the matter at hand, are certainly not found in international law at present.

3. *Second attempt: the EU Directive 2024/1760*

The considerations made thus far justify the opportunity to turn

Agreement (which has moreover been signed by the European Union too), it is bound to the obligations which stem from those treaties. Because the State has committed to these international standards, its actions are no longer purely "discretionary" but are subject to legal rules that a court could, in theory, monitor. It should in any case be acknowledged that – as C.M. MASIERI, *La causa "Giudizio Universale" e il destino della* climate change litigation, in *Nuova giur. civ. comm.*, n. 2, 2024, p. 309, stresses – the absolute lack of jurisdiction appears to having been affirmed with exclusive reference to the specific remedy sought by the plaintiffs in the present case, namely an order to perform; this raises the question of whether the same result would have been achieved if the plaintiffs had sought only monetary compensation.

In any case, the story is not expected to end with this initial ruling, as the decision is currently under appeal, and the Court of Cassation has not been vested of the question yet. Nonetheless, there abovementioned decision of the Court in the pending case against ENI raises some doubts. Indeed, it cannot be said with certainty that, in recognizing the jurisdiction of the ordinary courts and stressing that in that case the same objections raised by the Court of Rome in the Last Judgement case could not apply, the Court of Cassation intended to uphold the ruling of the Court of Rome, but it is expected that both parties will seek to support an interpretation that is favorable to them: L. SERAFINELLI, Climate change litigation *all'italiana*, cit., pp. 1164 ff.

[11] G. ZARRA, *I principi*, cit.

[12] R. DWORKIN, *Taking Rights Seriously* (1977), italian translation by G. Rebuffa, *I diritti presi sul serio*, Bologna, 1982, pp. 90 ff.

our attention to EU law, especially in light of the fact that the recently introduced Directive (EU) 2024/1760 on corporate sustainability due diligence[13] would seem – at least for EU Member States – to constitute the basis for liability that climate change litigation against private individuals appears to require[14].

The Directive, in fact, «in addition to establishing forms of public enforcement, entrusted to specific national supervisory authorities, in the form of prohibitory injunctions and administrative fines imposed on companies (Article 27), has introduced a system of private enforcement based on non-contractual civil liability for breaches of the duty of care. Article 29(1) of the Directive provides that a company may be held liable for damage caused to a natural or legal person if it has failed, intentionally or negligently, to comply with the obligations set out in Articles 10 on the prevention of potential negative (environmental and human rights) impacts, and 11, on the termination of actual negative impacts, and such breach is attributable to the company, its subsidiaries, or its direct or indirect business partners in the chain of activities»[15].

No penalties for private entities guarantee compliance with Article 22 of the Directive, which is rather addressed to Member States: the

[13] See, among others, M. LIBERTINI, *Sulla proposta di Direttiva UE sul "Dovere di diligenza e responsabilità delle imprese"*, in *Riv. soc.*, nn. 2-3, 2021, pp. 325 ff.; M. VENTORUZZO, *Note minime sulla responsabilità civile nel progetto di Direttiva Due Diligence*, ivi, pp. 380 ff.; C.G. CORVESE, *La sostenibilità ambientale delle società nella proposta di Corporate Sustainability Due Diligence Directive (dalla insostenibile leggerezza dello scopo sociale alla obbligatoria sostenibilità della due diligence)*, in *Banca Impresa Soc.*, n. 3, 2022, pp. 391 ff.; S. ADDAMO, *Le novità del testo finale della corporate sustainability due diligence directive: un cambio di passo per la politica di sostenibilità dell'UE*, in *Nuove leggi civ. comm.*, n. 5, 2024, pp. 1258 ff.; e M. VENTORUZZO, *Uno sguardo d'insieme alla CS3D: riflessioni preliminari sulla tecnica normativa*, in *Riv. soc.*, n. 3, 2024, pp. 447 ff.

[14] From Serafinelli's review (L. SERAFINELLI, *Responsabilità*, cit., pp. 75 ff.) it emerges that, although there is no shortage of national laws on corporate due diligence, the value of the environment and/or climate is either completely absent from those protected (as is the case in the United Kingdom, the Netherlands, and Germany) or is, in any case, placed in a secondary position (as in France).

[15] O. FERACI, *Contenzioso climatico e diritto internazionale privato dell'Unione Europea*, Torino, 2025, pp. 250 ff. (free translation).

latter are required to ensure that companies to which the Directive applies «adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5° C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities». And yet, it has been observed that if «the failure to adopt the plan, its possible inadequacy in terms of climate mitigation objectives and the related eco-sustainable measures promised by the company, or its failure to implement it, do not entail the risk for the company involved of incurring the civil liability regime prescribed by the directive, since this provision is not referred to in Article 29», it cannot be ruled out that «in the imminent future, if horizontal transnational climate action is brought before a court of a Member State against a company falling within the subjective scope of the directive, which is under an obligation to prepare climate transition plans [...], the *adoption and/or implementation* of the latter and their content may be invoked in court in order to contest the assertion of the company's climate liability»[16].

Nevertheless, even the Directive appears far from conclusive, at least due to its limited subjective scope of application. Indeed, while

[16] Ivi, p. 251, who goes on to specify that «since these are not legal rules but written commitments drawn up by the defendant company itself, it seems reasonable to consider that they cannot be taken into account in judicial assessments as rules but only as facts left to the discretion of the court hearing the case, regardless of which law is designated as applicable on the basis of the regulation» (free translation).

Actually, there are some opposite statements in domestic case law: see, for example, Cass. civ., January 3, 2019, no. 5, according to which «the self-regulatory rules provided for by internal provisions must also be considered binding on the company, even if they are more stringent than the general provisions laid down by law, regulatory sources, or self-regulatory codes. When a company, as a result of a completely free choice, decides to adopt rules of corporate conduct and to express this decision to the market, it is in fact bound to comply with them, as the above choice represents a voluntary self-restriction on the part of the market operator».

the initial version of the Proposal that gave rise to it[17] would have affected – according to EU executive estimates – approximately 13,000 EU companies and 4,000 third-country companies[18], based on the final approved version, the Directive, «once transposed, will only apply to around 4,500 companies, corresponding to 0.5% of commercial operators active in the European market and around a quarter of the companies that would have been subject to the obligations under the text of the Proposal»[19].

Of course, it has also been noted that, if «the subjective scope of application of civil liability provided for by the [at the time] Proposal appears to be rather limited, both with regard to the identification of leading companies and with regard to the extension of the value chain and the identification of companies for whose negative social and environmental impacts a leading company is responsible», this does not imply that «this limited subjective scope of application can be interpreted, *a contrario*, as introducing a sort of exemption from liability for companies that do not fall within it».

According to this reading, «the lack of legislative provision for a due diligence procedure for certain categories of companies cannot be understood as an exemption from the duty of diligence, but only as the absence of a suitable tool to facilitate its fulfillment and verification». This would be confirmed, on the one hand, by Italian case law, which has already «recognized the direct liability of transnational companies […] on the basis of common law on non-contractual liability»[20]; on the other hand, by the Directive recital 88, which underlines that «[t]he civil liability rules under this Directive should be without prejudice to

[17] See, among others, M. ZARRO, *Danno da cambiamento climatico e funzione sociale della responsabilità civile*, Napoli, 2022, pp. 164 ff.

[18] F. CECI, *Luci e ombre della direttiva sul dovere di diligenza ai fini della sostenibilità*, in *Quaderni AISDUE*, n.d., p. 8 (free translation).

[19] Ivi, p. 12.

[20] G. CARELLA, *La responsabilità civile dell'impresa transnazionale per violazioni ambientali e di diritti umani*: *il contributo della proposta di direttiva sulla* due diligence *societaria a fini di sostenibilità,* in *Freedom, Security, Justice,* n. 2, 2022, pp. 24 ff. See also D. ZANNONI, *The liability of corporations for negligent governance in value chains under the EU Due Diligence Directive: reality or illusion?*, in *Riv. dir. int.*, n. 2, 2025, pp. 559 ff.

Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive. A stricter liability regime should also be understood as a civil liability regime that provides for liability also in cases where the application of the liability rules under this Directive would not result in the liability of the company»[21].

However, this last point seems to confirm (the inability of the Directive itself to constitute a *general* source of corporate climate liability, and therefore the idea) that the answer to the question that prompted these pages can only be found in national law.

4. *Third attempt: national law, from the 2022 Constitutional reform…*

It is well known that national law has been moving for some time towards overcoming the distinction between rules and principles; it is also well known that one of the causes of this phenomenon is the so-called jurisdiction by principles. However, these principles – as it has been clearly emphasized – are very different from those referred to in Article 12 of the Preliminary Provisions to the Civil Code, which were derived by abstraction from a plurality of rules and therefore, even if based on complex reasoning, maintained the interpretation within the scope of the previous law. On the contrary, the phenomenon referred to here results in the development of principles that are not derived from rules, but which create rules after the fact[22].

Against this background, it is not surprising that private entities' responsibility for climate change has already been advocated by some scholars, by directly arguing from constitutional principles.

Reference is primarily made to Article 2 Const., which provides,

[21] In this regard, M. ZARRO, *Danno*, cit., p. 172, hypothesizes the application of Article 2050 Civil Code and of the provisions on environmental damage set forth in the Environmental Code.

[22] N. LIPARI, *Considerazioni introduttive*, in E. NAVARRETTA (ed.), *Effettività e* «drittwirkung»: *idee a confronto*, Atti del convegno (Pisa, 24-25 febbraio 2017), vol. 1, Torino, 2018, p. VIII.

among other things, for the duty of solidarity, from which a «functional and axiological» interpretation of Article 2043 of the Civil Code would already follow; according to this reading, indeed, the above-mentioned article would not only impose «negative conduct (such as, for example, the obligation to refrain from conduct that may be harmful to the legal sphere of other people)», but also «positive conduct (i.e., conduct aimed at enabling the realization of human value)»[23]. Furthermore, Article 2 itself, in conjunction with Articles 9, 32, 41, and 118 Const., should, on the one hand, bring about a transformation of civil liability's function (which, «by resolving conflicts that may arise from social contact, would become the instrument for ensuring peaceful coexistence») and, on the other hand, legitimize individuals to act not only in their own interests but also in those of the community[24].

It should be noted that, while the principles of solidarity (Article 2 Const.) and subsidiarity (Article 118 Const.) have long been classic "arguments" in the creation of new (substantive and procedural) rights, Articles 9 and 41 of the Constitution, as recently amended, are particularly important in the context of climate litigation.

Indeed, as it has been pointed out, «although the environment had already been the subject of legal protection as a result of valuable constitutional jurisprudence, [...] an explicit reference to it in its meaning as a *vital asset*»[25] remained absent from the Constitution until Constitutional Law No. 1 of February 11, 2022, which inserted a second paragraph into Article 9, expressly mentioning the «protection of the environment, biodiversity, and ecosystems, also in the interest of future generations», and amended Article 41, paragraphs 2 and 3, providing that private economic initiative cannot «be carried out in conflict [...] or in such a way as to cause damage», among other things, to «the en-

[23] M. ZARRO, *Danno*, cit., p. 151.

[24] Ivi, p. 152. And it is no coincidence that, with the exception of Article 118, all the Constitutional provisions referred to in the text were invoked by Greenpeace in its lawsuit against Eni: v. L. SERAFINELLI, "*Greenpeace et al. c. Eni et al.*", cit., p. 2235.

[25] A. MOLFETTA, *L'interesse delle future generazioni oltre la riforma degli articoli 9 e 41 della Costituzione*, in *Rivista AIC*, n. 2, 2023, p. 223 (free translation), referring to the definition devised by B. VIMERCATI, *Il diritto ai beni vitali*, in *Rivista Gruppo di Pisa*, n. 2, 2016, p. 3, *i.e.* a good which is «deemed necessary to meet the basic needs of daily life» (free translation).

vironment» and placing «environmental» goals alongside «social» ones, to which the programs and controls that the legislator is required to put in place must be functional.

The potential of these measures cannot be denied: «an explicit reference in the Constitution to the "interests of future generations"» – as significantly demonstrated by the ruling of March 24, 2021, of the German *Bundesverfassungsgericht*, which ruled on the Federal Climate Change Act of December 12, 2019, applying the clause of "responsibility towards future generations" contained in Article 20a of the Basic Law[26] – may constitute a [...] *substantial* parameter of constitutional legitimacy», such as to impose «a *conformative* legal obligation on the choices of political decision-makers, prescribing inquiries, deliberations, and weighing of interests specifically aimed at considering the long-term effects of those choices and, at the same time, making the latter measurable and assessable in the context of a judicial review of reasonableness, not limited to mere *non-manifest unreasonableness* (or *arbitrariness*), but extended to the much more stringent tests of *suitability*, *necessity*, and *proportionality in the strict sense*»[27].

However, as is easy to see, the scholars commentaries – in line with the classic interpretation of Article 41 Const. – focus on the impact that the provisions contained therein have on *legislative* activity: after all, if «the relationship between private economic initiative and 'social utility' is mediated through the law», then it must logically be excluded «that decisions on whether to intervene, in the name of "social utili-

[26] In the so-called *Neubauer* case, in fact, «the reference to *künftigen Generationen* led to the 'constitutional incompatibility' of certain provisions of the *Bundes-Klimaschutzgesetz*. In short, the emission reductions planned with the ultimate goal of climate neutrality in 2050 would have led to an excessive disproportion between the sacrifices envisaged in the short term and the resulting higher costs in the medium and long term: too few constraints for the current generation and an excessive burden for future generations»: F. CIRILLO, *L'interesse delle future generazioni: ragionamenti fallaci e interpretazioni sostenibili*, in *AmbienteDiritto*, n. 2, 2023, p. 14.

[27] M. CECCHETTI, *La riforma degli articoli 9 e 41 Cost.: un'occasione mancata per il futuro delle politiche ambientali?*, in *Quad. cost.*, n. 2, 2022, pp. 352 ff. (free translation); but also see ID., *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune*, in *Forum Quad. cost.*, n. 3, 2021, pp. 285 ff.

ty", in private economic initiative, and on how, when, and where to intervene, can be taken directly by the executive or judicial powers»[28].

However, while these premises appear acceptable, it must be acknowledged that the constitutional amendment, while outlining «the task of public authorities to develop intergenerational environmental policies, combining economy, environment, and social development, lacks any substantial and formal-procedural specification». Yet such specifications remain «indispensable in this field in order to adequately *juridify* political discretion, bringing it into line with the best and most effective pursuit of environmental protection objectives. [...] Environmental protection cannot be accomplished without constitutional-level regulation (or, at least, regulation that takes precedence over ordinary legislation); and the more precise and analytical this regulation is in providing legislators with the fundamental guidelines and constraints on which to build environmental policies, the less their choices will be left to the purely political (or, worse, purely ideological) assessments of public opinion and electors, or to the almost elusive mesh of the judges' review of non-manifest unreasonableness»[29]. In other words, the newly introduced Constitutional provisions appear to be merely *programmatic*.

Of course, the degree of uncertainty surrounding the distinction between prescriptive and programmatic norms is well known, just as it is undisputed that this uncertainty allows the judge – by means of the qualification applied in each case – to *pursue* (rather than *derive*) a cer-

[28] F. GALGANO, sub *Art. 41*, in F. GALGANO, S. RODOTÀ, *Rapporti economici*, in G. BRANCA (ed.), *Commentario della Costituzione,* Bologna-Roma, 1982, p. 42. These considerations are long-standing and generalised, but they are significantly echoed in the criticism often levelled – even at international level – at the role that courts are assuming in the fight against climate change: see, among others, L. BURGERS, *Should Judges Make Climamte Change Law?*, in *Transnational Environmental*, vol. 9, n. 1, 2020, pp. 1 ff., e H.P. GRAVER, *Judging for Utopia: Climate Change and Judicial Action*, in *Eur. Law Rev*., vol. 8, n. 4, 2020, pp. 885 ff.

[29] M. CECCHETTI, *La riforma degli articoli 9 e 41 Cost.*, cit., p. 353 ff. (free translation). A contrary opinion is expressed by A.M. BENEDETTI, *Oltre il profitto: «assetti organizzativi adeguati» - «sostenibilità» - «impresa»*, in *Riv. trim. dir. proc. civ*., n. 1, 2025, pp. 249-251: according to the author, such «legislative mediation» would not be «necessary» nor «relevant» today, given the «enhancement of the principles and general clauses» (free translation).

tain result that is nevertheless presented as purely interpretative: just think of the events surrounding the so-called extraordinary appeal to the Court of Cassation, created by the jurisprudence of the Court of Cassation on the assumption that Article 111, (first paragraph 2, today) paragraph 7, of the Constitution, in providing that an appeal to the Court of Cassation is always admissible for violation of the law, was (and is) a prescriptive rule[30]. With regard to Article 111, however, it should be noted that, on the one hand, the Court of Cassation intervened at a historical moment when the interpretative operation could be said to be justified to some extent by the *practical* impossibility of centralized review of constitutional legitimacy[31] and – on the other hand – it resulted, on closer inspection, in the application of a clear procedural *rule*[32]. By contrast, it is not difficult to understand how, if the same operation were aimed at the application of Articles 9 and 41 of the Constitution (which, as mentioned, lay down *principles* without specifying the content of the positive obligations deriving from them), the margin of discretion so granted to the judge would risk being so wide as to result in arbitrariness[33].

[30] See R. TISCINI, *Il ricorso straordinario in Cassazione*, Torino, 2005, pp. 3 ff., also for further references.

[31] R. TISCINI, *Il ricorso*, cit., p. 9.

[32] In this context, too, «rule» is understood in the sense it takes on in Dworkin's dichotomy (R. DWORKIN, *Taking*, cit.).

[33] Even without referring to the new constitutional provision, but in commenting on the aforementioned ruling of the Court of Cassation (Cass. civ., un. sec., July 21, 2025, no. 20381), G. SCARSELLI, *Per una corretta lettura della recente ordinanza della Sezioni unite*, cit., § 4.1, comes in principle to similar conclusions: the author underlines that the Court of cassation correctly left the trial judge the task to determine if international and constitutional sources impose a direct duty of intervention on defendants, because non-contractual liability requires conduct to be unlawful (that is, contrary to specific rules). Moreover, Scarselli stresses that this judicial assessment must reconcile the right of enterprise with the differing legal obligations of the State and private entities, specifically evaluating whether instruments such as the UNFCCC, the Paris Agreement, and EU climate regulations establish binding commands for companies or merely programmatic goals for government action. Finally, while Article 2050 c.c. requires firms to adopt precautionary measures to avoid third-party harm, this duty cannot authorize the judiciary to impose new obligations not explicitly provided by law, as doing so would compromise the principle of legality and unfairly penalize companies for regulatory gaps.

5. *… to case law developments on the so-called «atypical harmful yet lawful acts»*

The considerations made so far stem, on the one hand, from the defense of traditional doctrine, according to which if an act or activity, which is lawful in itself, nevertheless causes damage, the latter is not subject to compensation, but only (where provided for by law) to indemnification, which in turn is based on the assumption that the exercise of a right does not necessarily exempt its holder from the duty to bear the economic consequences suffered by third parties, unless the activity is in some way regulated or limited, and its actual exercise goes beyond the limits of the applicable law[34] (but, in that case, the act clearly ceases to be lawful, so there is no deviation from the rule); on the other hand, from the opposition, already expressed elsewhere, to the phenomenon of jurisdiction based on principles, which I believe conflicts not only with the judge-law relationship outlined in Article 101 Const., but also with every basic requirement of legal certainty.

It must certainly be acknowledged that these premises may appear difficult to maintain today, given the increasingly insistent voices that – not without referring to authoritative and certainly not recent theories – emphasize the progressive emancipation of compensable damage from tort[35], to the point of concluding that, «[b]ased on current law [...], the "minimum effective unit" of the principle of *neminem laeder*e does not concern either the issue of fault or intent in the act, or the "violation of a mandate or prohibition" nor the more general "discrepancy between the fact and the law", i.e. the question of the unlawfulness and/or illegality of the conduct in its traditional subjective and objective connotations, but only the injustice of the damaging event (whether pecuniary or non-pecuniary), i.e. the injury to an interest and/or a legal situation protected by the legal system»[36].

[34] G. BASILICO, *La tutela*, cit., p. 62.

[35] A. PROCIDA MIRABELLI DI LAURO, *L'ingiustizia del danno nel sistema della responsabilità civile*, in *Danno resp.*, n. 4, 2025, pp. 409 ff., quoting, among others, R. SCOGNAMIGLIO, *Illecito (Diritto vigente)*, in *Noviss. Dig. it.*, vol. VIII, Torino, 1962, pp. 164 ff.

[36] A. PROCIDA MIRABELLI DI LAURO, *L'ingiustizia*, cit., p. 417.

This conclusion appears to be supported, insofar as it is relevant here, by at least one ruling of the Court of Cassation. Indeed, although the majority opinion at the time held «that a lawful harmful act constitutes an exceptional case, limited, as such, to cases expressly provided for by law»[37], and that this thesis is still endorsed by prevailing case law[38], the statement of the Court of Cassation, December 16, 2015, no. 25292[39], cannot be neglected. In that ruling, the Court recognized the potential to establish liability for «atypical harmful yet lawful acts», as a general category: more precisely, according to the Court, when Article 1173 Civil Code, provides, as a source of obligations, additional to contract and tort, «any other act or fact capable of producing them in accordance with the legal system», would not refer to «a mere summary indication of a closed list consisting of all the other sources (other than contract or tort) mentioned, i.e., expressly regulated by the legislator, but would allow for analogy and therefore for the possibility that certain events, other than those specifically provided for by law, may be considered suitable for the creation of obligations in light of the principles and criteria that can be inferred from the legal system, considered in its entirety and complexity and in its evolution».

The ruling, however, does not appear to be based on a specific choice between the opposing doctrinal arguments concerning the relationship between unlawfulness (of conduct) and injustice (of damage), but rather on a certain interpretation of the scope of application of an-

[37] Cf. G. GRASSO, *Atto lecito dannoso e condominio*, in *Il Libro dell'Anno del diritto 2017*, Roma, 2017, for a survey of the provisions of the code relating to the concept (and the importance of the disagreement, upstream, about the very possibility of discussing a lawful harmful act, given that, for some scholars, those same hypotheses would, in reality, constitute cases attributable to civil wrongdoing).

[38] According to the majority position, in fact, the hypotheses of so-called harmful lawful acts provided for by law constitute, in reality, obligations *ex lege*, and are therefore typical: in this sense, among the most recent rulings, Cass. civ., December 3, 2024, no. 30981, in *Danno resp.*, n. 5, 2025, p. 601, commented by F. PIAIA, *La cassazione e la crociata contro la responsabilità derivante da (f)atto lecito*; among scholars, see G. ALPA, *Manuale di diritto privato*, Padova, 2017, p. 658.

[39] In *Foro it.*, 2016, n. 1, p. 1311.

alogical interpretation; but this, as Gorla already observed, is a «problem of constitutional law»[40].

Therefore, despite any assessment of the (in)correctness of the solution adopted by the Court in the abovementioned ruling[41], it does not appear to have refuted the thesis according to which the exercise of a lawful activity that is «harmful even though it complies with all the rules governing its performance» cannot give rise to compensation or be prohibited by order of the court, *because* «the legal system has [already] balanced the conflicting interests, so that the activity [which] may be carried out» must be presumed to have been considered «to respond to an interest that prevails over that of the injured party»[42].

And, if one agrees with this reasoning, it is clear that the perceived gap (in the field of climate change, as in other areas) is – if anything – axiological, certainly not normative[43]: thus, recourse to analogy is precluded[44].

[40] G. GORLA, *I precedenti storici dell'art. 12 disposizioni preliminari del codice civile del 1942* (*un problema di diritto costituzionale*?), in *Foro it.*, 1969, n. 5, p. 120 ff.

[41] The scope of which, beyond the generalizing nature of the legal principle affirmed, seems however worth to be limited, given the peculiarity of the case at stake and the weight the reference to distributive justice in condominium matters had on Court's reasoning.

[42] G. BASILICO, *La tutela*, cit., p. 62. Indeed, as D. RUBINO, *La fattispecie e gli effetti giuridici preliminari*, Milano, 1939, p. 206, already underlined, the *Leitmotiv* of the hypotheses of liability for lawful acts provided for by law is «the legislative intent to resolve a conflict of interests, particularly balanced ones, so as not to subordinate one interest entirely to the other, and to repair the damage caused to an individual without first imposing an obligation on the other» (free translation).

[43] As L. PASSANANTE, *La prova illecita nel processo civile*, Torino, 2017, to which the reader is referred for the extensive bibliographical references too (Ivi, pp. 16 ff.), summarizes: «[t]here is a regulatory gap when a specific case cannot be decided due to the lack of a rule governing it in the legal system. On the other hand, there is an axiological, ideological, or evaluative gap when, on the basis of ethical and political considerations, there is no fair rule in the legal system, i.e., a rule that should exist» (Ivi, p. 19; free translation).

[44] Obviously, where the balance struck by the legislator appears manifestly unreasonable, there is a different remedy: «while the absence of regulatory provisions for a particular case opens the way to recourse to analogy, provided that a provision dictated for a comparable case can be found in the law, the different regulation of similar cases», like the conduct by states and by companies that causes and/or prevents dam-

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Abstract[*]

Ita

Il contributo esplora la possibilità di agire in giudizio contro soggetti privati al fine di farne valere la responsabilità climatica in base al diritto positivo (internazionale, europeo e domestico) attuale, muovendo dall'idea che la *causa petendi*, in tale ipotesi, sia diversa da quella azionabile avverso gli Stati. Pur riconoscendo che dai sistemi indagati possa essere inferita una serie di principi, la conclusione infine negativa discende dalla ritenuta necessità che, ai fini della responsabilità dei privati, sia dato individuare una specifica disposizione violata.

Parole chiave: *Drittwirkung*, ECHR, Direttiva UE 2024/1760, articoli 9 e 41 Costituzione italiana, causa petendi

En

This paper explores the possibility of taking legal action against private entities to enforce their climate responsibility under current positive law (international, European, and domestic), on the assumption that the cause of action in this case is not the same as that applicable to states. While acknowledging that a series of principles can be inferred from all the regulatory systems under investigation, the claimed necessity that, for the purposes of private individual liability, a specific rule must have been violated, nevertheless leads to a negative conclusion.

Keywords: *Drittwirkung*, ECHR, EU Directive 2024/1760, articles 9 and 41 Italian Constitution, cause of action

age could possibly be considered, «constitutes grounds for challenging the discriminatory rule before the Constitutional Court on the grounds of unreasonableness *ex* Article 3 of the Constitution»: G. SORRENTI, La *Corte di cassazione penale e l'illegittimità consequenziale delle leggi nella «seconda modernità»*, in *Rivista AIC*, n. 4, 2012, p. 8 (free translation). *Contra*, V. VELLUZZI, *L'analogia giuridica presa sul serio. Osservazioni su Cass., Sez. un. Penali, 17.3.2021, n. 10831*, in *Criminalia*, 2020, pp. 203 ff., according to whom the analogy would also be admissible in the case of an axiological gap.

[*] Articolo sottoposto a referaggio fra pari a doppio cieco (*double-blind peer review*).