Rapports Nationaux Italiens au XXI^e Congrès International de Droit Comparé - Asunción 2022

Italian National Reports to the XXI^st International Congress of Comparative Law - Asunción 2022

Sous la direction de / Edited by

Michele Graziadei - Marco Torsello

Edizioni Scientifiche Italiane

La pubblicazione è frutto di un'iniziativa della S.I.R.D. Società italiana per la ricerca nel diritto comparato e rientra nell'ambito delle attività del Laboratorio E-Law School, finanziato dal Progetto di Eccellenza 2018-2022 "Diritto, Cambiamenti e Tecnologie" del Dipartimento di Scienze Giuridiche dell'Università di Verona.

Graziadei, Michele; Torsello, Marco (*Sous la direction de / Edited by*)
Rapports Nationaux Italiens au XXI[e] Congrès International de Droit Comparé - Asunción 2022
Italian National Reports to the XXI[st] International Congress of Comparative Law - Asunción 2022
Collana del Dipartimento di Scienze Giuridiche dell'Università di Verona
sezione ricerche, raccolte e atti di convegno, 41
Napoli: Edizioni Scientifiche Italiane, 2022
pp. X+838; 24 cm
ISBN 978-88-495-4984-3

Internet: www.edizioniesi.it
E-mail: info@edizioniesi.it

Table des matières / Table of contents

 ISBN 978-88-495-4984-3

ISBN 978-88-495-4984-3

 ISBN 978-88-495-4984-3

ISBN 978-88-495-4984-3

Domenico di Micco, Michele Graziadei*

The Italian Way to the Rights of Nature

Table of Contents: 1. Premise. – 2. Rights of nature: a game changer? A recent constitutional amendment in Italy. – 3. Rights by other names. – 4. The 18th century: the first footprints of the Italian approach to rights of nature. – 5. The 19th century: the role of an enlightened political élite. – 6. The early 20th century: the *Ente Parco* legal-administrative figure. – 7. «Paesaggio»: an ambiguous wording in the Italian Constitution. – 8. The second half of the 20th century: affirmation of nature's biological value and international cooperation. Conclusions.

1. *Premise*

Several countries across the world have nowadays recognized the 'rights of nature' in formal legal documents, ranging from constitutions to city ordinances. A similar tendency is gaining traction at the international level as well, through the activity of international organizations, the initiatives of NGOs and community leaders. This report should therefore investigate whether and to what extent Italian law participates in this movement and shares a similar approach. Before turning to this fundamental question, examining some preliminary considerations concerning this subject seems appropriate.

An investigation concerning the rights of nature is fraught with several initial difficulties, and they cannot simply be sidestepped by assuming that such an expression has a self-evident meaning for present purposes.

* Domenico di Micco is Academic Fellow at Università Bocconi (domenico.dimicco@unibocconi.it).

Michele Graziadei is full Professor of Private Comparative Law at Università di Torino (michele.graziadei@unito.it).

This paper was submitted on, and therefore is updated as of 31 March 2022.This paper is the joint elaboration of its authors. Paragraphs belong to the authors as follows: 1, 2, 3 by Michele Graziadei; 4, 5, 6, 7 by Domenico di Micco; 8 is jointly written by the authors.

 ISBN 978-88-495-4984-3

To pick an illustrative example of problematic language, we should consider the preamble of United Nations agreement on climate change (2015), which affirms: «the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth» and notes: «the importance for some of the concept of *climate justice* when taking action to address climate change». What is the value of the recognition given by the preamble to the notion of 'Mother Earth' as a cultural element? Is this language challenging the scientific language featured in the rest of the sentence, where the notion of climate is advanced, or is it in continuity with it and with the concept of climate justice? These are very much open questions, of course.

To enter a debate on the rights of nature without generating misunderstandings one would have to clarify, first, what is the relationship between that entity and the notion of law, as a product of human cultures. The very word «nature» points in different directions in the various languages.[1] In the second place, one should consider which legal techniques are available to make any right ascribed to nature actionable. If this is indeed desirable, a further step would be to decide what claims, immunities, privileges, powers, follow from the recognition of any such right.

Furthermore, one should distinguish the approach defended by advocates of the rights of nature from the classical perspective of environmental law. The latter is mostly centred on the notion of environmental damage and the need (to prevent it and) remedy it. This perspective is dominant in market-oriented societies, while the discourse evoking the rights of nature which has been advanced in a number of contexts squarely rejects a market-based approach to the defence of nature.

Lastly, it should be clear that the discussion over the rights of nature has little to do with all the legal and philosophical references to «nature» in the context of natural law approaches to a whole variety

[1] F. Ducarme and D. Couvet, *What does 'nature' mean?*, in *Palsgrave Communication*, 2020, p. 1; F. Ducarme, F. Flipo, and D. Couvet, *How the diversity of human concepts of nature affects conservation of biodiversity*, in *Conservation Biology*, 2021, pp. 1019-1028; L. Fehnker, D. Pearson, and P.J. Howland, *Understanding Conceptions of 'Nature' for Environmental Sustainability: A Case Study in Tāmaki Makaurau Auckland, Aotearoa New Zealand*, in *Earth*, 2021, pp. 357-373. Similar definitional problems concern particular elements of nature: See, e.g., C. Dazzi and G.L. Papa, *A new definition of soil to promote soil awareness, sustainability, security and governance*, in *International Soil and Water Conservation Research*, 2022, pp. 99-108.

ISBN 978-88-495-4984-3

of topics, ranging to the protection of property to the manipulation of living entities through biotechnology. All these approaches draw upon the distinction between positive law and natural law. Such a distinction has a long tradition in Western legal thinking, but is hardly relevant in other contexts. Natural law itself (as understood in that tradition) is not innocent from arguments justifying the exploitation that has endangered the rights of nature as understood by its contemporary defenders. It is clearly impossible to cover all this ground in the present essay. Furthermore, many of the issues just mentioned have been abundantly discussed in the literature, which is known to the authors of this report, but will not be cited, because it is taken to be common ground among the national reporters on this topic. Therefore, in the following pages, we will address these themes by focusing on the Italian legal tradition, which incorporates several elements that may be of interest for a more general debate over the rights of nature.

2. *Rights of nature: a game changer? A recent constitutional amendment in Italy*

No matter how acute is the need for some clarifications raised by the very idea of recognizing the 'rights of nature', it is also clear that all the developments linked to the emergence of the category 'rights of nature' are received with increasing interest and excitement by parts of the legal community. As a representation of a set of emerging fundamental claims they are considered 'hot': they are part of a more general – by now global – set of concerns relating to the future of the planet and of life on it.

The rights of nature appear to many to be game changers, providing an appealing alternative to the market led approach to the minimization of environmental damage underlying environmental law since the 1960s.[2] Environmental law has neither halted the degradation of the natural world, nor prepared a reassuring future for humanity. The proclamation of the rights of nature should instead foster a holistic approach to the regulation of the interaction

[2] See, e.g., I. Mumta and M. Montini, *Nature's rights and Earth jurisprudence. A new ecologically based paradigm for environmental law*, in E. Apostolopoulou and J.A. Cortes-Vazquez (eds), *The right to Nature: Social Movements, Environmental Justice and Neoliberal Natures*, Abingdon, New York, 2018, p. 221 ff. at p. 227 ff.

 ISBN 978-88-495-4984-3

between man and nature, driven by mankind's recognition of the necessity to live in harmony with nature.

The proclamation of the rights of nature is indeed unsettling deep-seated certainties on which modern law rests. This new approach targets the fundamental assumption that nature is not a subject, but rather an object of rights, while rights can only be held by human beings, either as individuals, or collectively. This belief is so deeply ingrained in the law of many modern legal systems that the advocates for the recognition of the rights of nature were initially greeted with scepticisms, if not with ridicule, the same reaction that the first proclamations of the rights of man elicited in the eighteenth and nineteenth century. However, now the wind has changed, and the rights nature are fully part of jurisprudential debates.

The specificities of those bedrock certainties upon which modern law rests can be traced back to the specific cultural traits that first emerged in the antiquity, in the Mediterranean - Middle East area, after the revolution of the Neolithic, with the agrarian use of nature within state-run structures organized as trade facilitating structures. The technical revolutions that in the nineteenth century led to the mass production of fossil fuels, with the consequent explosion of the consumption of energy, exacerbated the impact of cultural attitudes confining nature in the reign of sheer matter, subject to free appropriation. The initial historical scene presented an ambivalent, but somewhat balanced attitude towards nature, both considered as a means of sustenance at the service of basic human needs, and as a cosmic force governing the fate of human communities as well. In the epoch of the industrial revolution this equilibrium was dramatically altered, and then destroyed. The industrial revolution, and the advent of a new economy, based on the large-scale production of unprecedented amounts of energy, unleashed the devastating impact of ways of thinking that are still undermining the integrity of nature and the very existence of mankind on earth.

The discussion over the rights of nature *eo nomine* in Italy has eventually gained momentum in the last decades on the basis of the impulse provided by the comparison with the laws of those jurisdiction that first discussed or took up the suggestion to protect the rights of nature as such,[3] and on the basis of international

[3] For an excellent general treatment: M. Carducci, *Natura (diritti della)*, in *Digesto italiano delle discipline pubblicistiche*, VII supplement, Turin, 2017; A. Pisanò, *Diritti de-umanizzati: Animali, ambiente, generazioni future, specie umana*, Milan, 2012; S. Bagni, *Le voci (non del tutto inascoltate) della natura nella*

ISBN 978-88-495-4984-3

developments, such as the United Nations initiative to first proclaim the Mother Earth day in 2009, and to launch the initiative *Harmony with nature*, which covers as well the issue of the rights of Nature.[4]

Recently, a team of Italian legal scholars working in collaboration with experts of the UK NGO *Nature's Rights* prepared the *Study Towards an EU Charter of the Fundamental Rights of Nature* (2020) for the European Economic and Social Committee.[5] This study could pave the way for the legal recognition of the Rights of Nature in the EU legal order, as a prerequisite for a different and improved relationship between human beings and Nature. This aim should be possibly accomplished through the approval of an EU Charter on Fundamental Rights of Nature and a corresponding Directive.

The debate at the EU level does not point to a single direction, however. For example, the study *Can nature get it right? A Study on Rights of Nature in the European Context (2021)*,[6] commissioned by the European Parliament (Policy Department for Citizens' Rights and Constitutional Affairs) to Prof. Jan Darpö, emeritus in environmental law at Faculty of Law, Uppsala, is much more cautious on this subject. This document does «…not share the view that RoN entails a shift of paradigm in law that has the capacity to save the environment from the challenges we face today. […] When deconstructing the RoN concept, no radical new instruments come to light compared with what we have today…» Although the author of the study holds that the RoN concept: «advances fresh insights in its critique of Western society and presents ideas that

recente giurisprudenza colombiana e indiana, in *DPCE online*, 2019, issue 4; S. Fraudatario, *Dai diritti dei popoli ai diritti della natura. La voce dei tribunali di opinione*, in *DPCE online*, issue 4, 2018, pp. 943-954; E.A. Imparato, *I diritti della Natura e la visione biocentrica tra l'Ecuador e la Bolivia*', in *DPCE online*, 2019, issue 4; F.G. Cuturi (ed.), *La Natura come soggetto di diritti: Prospettive antropologiche e giuridiche a confronto*, Firenze, 2020; from the perspective of private law: U. Mattei and A. Quarta, *Punto di svolta. Ecologia, tecnologia e diritto privato. Dal capitale ai beni comuni*, Sansepolcro, 2018; R. Míguez Núñez, *Soggettività giuridica e natura. Spunti per una riflessione civilistica*, in *Diritto e questioni pubbliche*, 2020, p. 34; *Id*, *Né persone né cose: lineamenti de costruttivi per un rinnovamento concettuale della «summa divisio»*, in *Riv. crit. dir. priv.*, 2021, p. 359.

[4] See the harmony with nature website, which maintained by the UN: www.harmonywithnatureun.org/. For the latest UN resolution on this initiative: UN General Assembly, 75th session, twelfth resolution on Harmony with Nature (A/RES/75/220).

[5] M. Carducci, S. Bagni, V. Lorubbio, and E. Musarò (UniSalento-CEDEUAM); M. Montini, A. Barreca, and C. Di Francesco Maesa (UniSiena).

[6] PE 689.328 - March 2021.

 ISBN 978-88-495-4984-3

can be developed within our conventional legal notions» the study also argues that the failure to combat climate change and large-scale losses of biodiversity is not due to the circumstance that nature does not have rights, or to other basic flaws of the legal system, but is due instead to the lack of public support for a radical change, and the lack of the necessary political will to have such change.[7]

In 2022 the pressure to develop a reaction against the degradation of the environment has led Italy to amend art. 9 of its Constitution. That article was originally dedicated to the development of culture and scientific and technical research, as well as to the protection of landscape and the cultural heritage of the Nation. The new version of that provision introduces the duty of the Republic to protect: «…the environment, biodiversity and ecosystems, also in the interests of future generations. State law governs the ways and forms of protection of animals». The new text does not adopt the language of foreign constitutions that protect the 'rights of nature'. On the other hand, the references to biodiversity, the protection of ecosystems, and the protection of the interests of future generations relate to elements that feature prominently in the general discourse over the rights of nature. The constitutional amendment was completed with references to the protection of the environment in art. 41 const., concerning the regulation of economic activities, while a reference to ecosystem was first mentioned in 2001 in art. 117 const., concerning the division of legislative competences belonging to the State and to the regional governments.

Any scholar of comparative law knows that the enactment of a new legal text is not enough to draw conclusions about what the law in action shall be. It is definitely too early to know whether this recent constitutional innovation will have lasting consequences in terms of more effective enforcement of rules protecting what would be the rights of nature in other countries. For the moment, the new amendment points to a growing awareness of the necessity to change the course that has been followed so far, and to adopt more stringent measures and a more effective enforcement thereof to avoid

[7] Ibidem, p. 60. For further reflections on the developments in EU law the essential references are: H. Schoukens, *Should Trees Have Standing Also in the European Union?*, in *Journal for European Environmental & Planning Law*, 2018, pp. 273-274; K. Hovden, *The Best Is Not Good Enough: Ecological (Il) literacy and the Rights of Nature in the European Union*, in *Journal for European Environmental & Planning Law*, 2018, pp. 281-308; H. Schoukens, *Granting Legal Personhood to Nature in the European Union: Contemplating a Legal (R)evolution to Avoid an Ecological Collapse (Part 1)*, in 15 *J. Eur. Envtl & Plan. L.*, 2018, p. 309.

ISBN 978-88-495-4984-3

further havoc. In any case, environmental associations both national and local in Italy are entitled to sue to obtain the compensation of environmental damages.[8]

3. *Rights by other names*

It follows from what has been said so far that the Italian legal system does not provide for any form of personification of nature in general, nor deals with the rights of nature in general terms.

When confronted with a similar question, an Italian lawyer could however make the point that certain natural areas have been recognized as legal persons to protect their integrity, by recognizing them as parks under Italian law. Twenty-five national parks are currently included in the Official List of Protected Areas (EUAPs), covering a total area of more than 16,000 km², which corresponds to approximately 5.3% of the national territory.[9]

It is very difficult to distinguish the institution of a park over a certain territory from the environmental personhood now enjoyed by several natural entities across the world (e.g., to New Zealand's Whanganui River). Violations of the rules governing the park would surely trigger a legal response by the managers of the park in Italy. Analogous consideration could be formulated with other protected areas such as those natural habitats that must be respected under the habitats directive (Council Directive 92/43/EEC of 21 May 1992).

Furthermore, the Italian law n.168/2017 recognizes for the first time in the history of our country that certain original communities have normative primary powers concerning the management of the natural, economic and cultural heritage whose territorial basis consists of the collective property of certain lands.[10]

These forms of collective landholding – these commons – are considered by law as original, primary legal orders governing a certain community.[11] Once more, these ancient forms of relationships

[8] For a full discussion: F. Scalia, *La giustizia climatica*, in *Federalismi*, 2021, n. 10, 7 April 2021.

[9] Elenco ufficiale delle aree protette (EUAP), Supplemento ordinario n. 115, G. U. n. 125, 31.5.2010.

[10] L. n. 168 del 20.11.2017, "Norme in materia di domini collettivi".

[11] The historical debate over these forms of collective landholdings was reconstructed by the classic work by P. Grossi, *An Alternative to Private Property*, Eng. trans, Chicago, 1981.

 ISBN 978-88-495-4984-3

with nature do raise the issue of the recognition of the primacy of the (legal) order established with respect to certain natural elements over the law of the state, and resonate with the idea that nature has an ontological status beyond the reach of the law of the state.

On the other hand, as mentioned above, so far, the general question concerning the personhood of nature does not receive a positive answer under our law.

Nonetheless, to do justice to the complexity of the problem, it must be observed that Italy historically responded to those same needs for protection and conservation that underlie the choice to grant nature a form of legal personhood through centuries-old legislation, with an innovative approach for those times. Hence, although neither the Italian legislature, nor the Italian courts, have so far ascribed personhood to natural elements in general as such, one can still argue that the Italian legal framework has nevertheless granted rights to nature through both protection and conservation principles, which have thus become the legal lever for nature's presence on the legal scene. One way in which this was done was to make an intensive use of certain legal-administrative notions and legal devices such as the notion of natural reserve (*riserva naturale*), namely the individuation of a certain territory as subject to specific protective legal regimes established by private or public powers.[12]

With the purpose of offering as complete a reconstruction as possible of the Italian paradigm, these pages will cover the main steps that led to this approach.

4. *The 18th century: the first footprints of the Italian approach to rights of nature*

Looking back at the history of Italian law, some pre-unitarian Italian states had already developed, fairly early in history, a significant legislative sensitivity towards nature.[13] Most of them granted some

[12] P. Cendon, *Proprietà riserva e occupazione*, Naples, 1977.

[13] Until 1861, the Italian territory was divided between several sovereign states: the Sardinian-Piedmontese Kingdom in the north (Turin), with Lombardy (Milan) and Veneto (Venice) belonging to the Austrian Empire. The middle part of the Italian territory constituted the Papal States, while the Kingdom of the Two Sicilies ruled the south of Italy. The Italian Risorgimento culminated in the birth of the Kingdom of Italy in 1861 when King Victor Emmanuel II of Sardinia was proclaimed King of Italy. Rome was not annexed until 1870. The Kingdom of Italy would last until the end of World War II, when, after the fall of fascism, in 1946 a referendum sanctioned the choice of the Italian people to abandon the monarchy and establish the Italian Republic.

ISBN 978-88-495-4984-3

protection to nature through the promulgation of legal provisions by which certain natural resources such as ancient trees, forests and mountainous territories found care and rights affirmation.

The Kingdom of Sicily and the Kingdom of Naples pioneered this type of legislation as early as the 18th century. This should not come as a surprise, since in the panorama of pre-unification Italian states, these two kingdoms were the main Italian gateway to the European Enlightenment.

In particular, as early as August 1745, the Kingdom of Sicily enacted some measures to protect several territories and natural resources.[14] Those measures are generally regarded as among the world's oldest legal evidence of the public recognition and protection of nature by the State. By itself, this would justify an examination of these measure here. But the real reason why they are so valuable to us is that they already contain all the elements that historically constitute the Italian approach to this kind of rights. Nearly two hundred years later, those same elements and that same approach would flow, almost unchanged, into the 1948 Republican Constitution. Let us then take a closer look at this original approach.

In 1745, the *Ordine del Real Patrimonio di Sicilia*[15] intended to protect the Greek theatre of Taormina, the "Hundred Horses" Chestnut tree of Mascali and the nearby ancient wood of Carpineto. This legal-administrative act was therefore aimed at protecting both a specific natural element – the "Hundred Horses" Chestnut tree – and an ecosystem too – the ancient wood of Carpineto. To this purpose, the *Ordine del Real Patrimonio di Sicilia* issued an *Ordine* – a legal-administrative act – identifying a few cultural and natural assets to be protected, stating reasons why they were to be protected and laying down sanctions for offenders. The Hundred-Horse Chestnut is the largest and oldest known chestnut tree in the world. The tree's name originated from a legend. A queen of Aragon and her company of 100 knights are said to have found shelter under the tree during a severe thunderstorm. Located on the eastern slope of Mount Etna, it is generally believed to be 2,000 to 4,000 years old.[16]

[14] *Ordini*, Tribunale del Real Patrimonio, Archivio di Stato di Palermo, Vol. atti 1744-1745.

[15] The *Ordine per il Real Patrimonio di Sicilia* was an administrative-judicial body that, in its centuries-long existence, had many areas of competence. It was a governmental body with judicial power. The mixture of these powers gave the Order a strong capacity to achieve results. The acts issued by this authority were called *Ordini.*

[16] The tree is now the property of the Sicilian Region; it is included in the Monumental Plants Register of Sicily (RPM) and in the Intangible Heritage Register

 ISBN 978-88-495-4984-3

The heading of that old legal-administrative act makes clear the approach and the reasons for the protection it grants to these natural elements: «*Ordine Patrimoniale per la conservazione de' maravigliosi alberi nel bosco del Carpinetto sopra la città di Mascali.*»[17]

The reason for granting legal protection to these trees – in particular to Hundred Horse Chestnut tree – is their exceptional wonder, due to their exceptional age. In other words, the criterion that underlies this protection depends on the particular aesthetic value of these trees. In fact: «*Tra le cure pressanti, che tengono questo Sup.mo Patrim.le in continua attenzione non è la minore quella d'invigilare, in che si conservassero con pari diligenza ed oculatezza in questo Regno alcune meraviglie, che con le loro celebri rarità siccome appalesano i portenti della natura così ugualmente apportano lode e decoro al Regno, di cui elle ne sono la propagine, e lo germe; affinché con tale conservazione propria d'una buona Regenza, tramandar si potesse alla veggente posterità un monumento dell'insigne naturale portento*».[18]

The 1745 Sicilian order makes clear that protecting a marvellous specimen of nature also has inestimable value to the Kingdom. For this very reason, it must be preserved for posterity.

Once the intent and the reasons for this measure have been clarified, this legal-administrative text goes on to formulate the actual protective order: «*ordiniamo di dover con tutta diligenza, et ugual premura invigilare a che non fosse apportato ai cennati alberi di Castagno, o di altra sorte che siino, danno, o pregiudizio alcuno, o con tagli, o con fuoco, o con altra forma, e maniera che potesse andar da inferirgli il loro decadimento; ma che venissero custoditi, e curati con tutt'attenzione, conforme ce lo persuadiamo dalla vostra buona*

(REI). In 2008 the Hundred Horses Chestnut tree was declared UNESCO's "Messenger of Peace Monument". Due to its extraordinary characteristics, this tree is included in the list of the Monumental Trees of Italy (*Alberi Monumentali d'Italia*), under the national law number 10 of 14.1.2013 *Norme per lo sviluppo degli spazi verdi urbani*, that requires Italian municipalities to list their veteran trees.

[17] Order for the preservation of the marvelous trees in the Carpinetto wood in Mascali [our translation]

[18] Among the pressing cares, which keep this Institution in constant attention, is not the least, that of securing that some marvels are preserved with equal diligence and care in this Kingdom, which with their famous rarity, as they show the portents of nature, so also bring praise and decorum to the Kingdom, of which they are the offshoot, and the gem; so that with such preservation, proper to a good Regency, a monument of the illustrious natural portent may be handed down to the posterity. [our translation].

ISBN 978-88-495-4984-3

condotta; imponendo delle pene pecuniarie, personali, carcerazioni, o altro a' Campieri, Guardiani, e Gabelloti, di esso Bosco, affin di accertarsi l'intento della conservazione di detti alberi, e mantenersi con ciò sempre più viva e recente la memoria di una tale naturale maraviglia».[19]

The *Ordine* establishes thus a duty of protection. This is fully operative because it is sanctioned by pecuniary penalties and by imprisonment for offenders. Protection is granted by listing forbidden conducts (cutting down the tree, setting it on fire, etc.). The prohibitions, when read by using the framework of rights, become the tree's rights: *the right not to be cut down, the right not to be set on fire and not to be subjected to any other action that might prejudice it*.

In other words, this 1745 Sicilian administrative provision affirms the will to protect and preserve these wonderful trees for the future generations; it reveals the aesthetic criterion according to which this protection is granted; it translates a mere principle into a precise series of legal commands that build up a protective regime around the tree, as if it were a right holder, finally, it provides for effective penalties and sanctions for transgressors. All this is done without elevating the tree to a legal person. The question then inevitably comes: does it make any difference that the language of personhood is not used?

5. *The 19th century: the role of an enlightened political élite*

The path thus traced in the Italian 18th century continued in the 19th century. On closer inspection, the aforementioned Sicilian legal-administrative act represents the archetypal legal tool through which the Italian ruling class proceeded to create this kind of protection for what was to be preserved; statutes, decrees and administrative regulations, or bureaucratic practices which, no matter their legal nature, were the expression of the same legal consciousness deeply ingrained in the political-legislative power itself.

[19] We order that no damage or harm is done to the aforementioned chestnut trees, or to any other kind of trees, either by cutting, or by fire, or in any other way that might lead to their decay; but that they be guarded and cared for with all due care, in accordance with our conviction of your good conduct; imposing pecuniary, personal, prison or other penalties on the Fieldsmen, Guardians, and Landlords of this Wood, so as to ascertain the intent of the conservation of these trees, and to keep the memory of such a natural marvel ever more alive and fresh. [our translation]

 ISBN 978-88-495-4984-3

All legal measures that were taken on this subject from the epoch of the pre-unitarian States up to the 1948 Republican Constitution are the legal product of a cultured bourgeoisie. Sitting in Parliaments and holding governmental offices, this élite has historically found in such legal-administrative acts the tools to assert its vision of how to provide protection to certain natural elements that thus became part of the national heritage.

The Italian legislator who approved these measures could be described as a "cultured": it had its own sensibility towards nature; a *romantic* and *enlightened* sensibility. On the other hand, this elevated approach to the protection of beauty in its various forms did not resonate with the popular elements of culture for the greatest part of the history we are considering. How to explain this?

The Italian cultural and religious tradition historically do not admit nature as a possible object of veneration. Christianity posited a disconnect between the earthly and heavenly dimensions, with a clear preference for the latter. If the heavenly dimension was considered to be pure because it reflected God's perfection, all that belonged to the earthly dimension was considered impure, misguided and unhealthy. All that formed part of natural reality was subject to decay, and ultimately to death.

This approach, which generally goes by the name of *contemptus mundi*, permeates the entire medieval worldview.[20]

The human being too was considered from this perspective. Man's soul was considered immortal and, for this reason, it received all the necessary attention and care, taking a central place in medieval thought; on the contrary, the human body was given no consideration other than as a weak point of human beings: the weak part that is subject to decay and death. Given these cultural and religious premises it is not surprising that the lower classes were not interested praising nature, nor in considering its protection a vital mission.

Within this cultural paradigm, some famous cases of attention to nature emerged nonetheless. Among these, St Francis of Assisi is the most famous. In his wonderful poem Canticle of the Creatures (1224), he thanks God for nature. It is certainly an important

[20] The *Contemptus mundi* (contempt of the world) is a theme of the intellectual life of both classical antiquity and Christianity, both in its mystical vein and in its ambivalence towards secular life. According to this vision, mankind would have to free itself from all interest in material things in order to achieve a state of grace and serenity.

ISBN 978-88-495-4984-3

reference because it contrasts with the dominant Christian culture of the time, which – as we have said – preferred the ideal, otherworldly world to the physical one. Still, in St Francis's prayer nature appears as something placed by God at man's disposal.[21] This vision, (later known as *anthropocentrism*) will be consolidated in the so-called Humanism, which will put man at the centre of the world, with nature becoming, indeed, a resource at his disposal.

Pico della Mirandola in his famous *De homine dignitatis*[22] – which is considered the manifesto of Humanism – put man at the centre of the universe, the only creature that is not already pre-ordained by God, but is able to choose what to become.

This brief digression, which has brought us back to the Middle Ages and the Renaissance, highlights how a culture, strongly impregnated with Catholicism, had reasons to ignore nature, or make a particular use of it. When it did not ignore it, it presented it as a gift from God to satisfy man's needs.

This approach would change, as we said before this digression, with the arrival of the Enlightenment and Romanticism. But these two cultural movements affected only the elites (who, with their sensitivity, created the first legislations that granted certain rights to nature, such as the one of 1745 that we have just looked at). The development of similar sensitivity among ordinary people was late to come.

Living in strongly anthropized territory, nature was hardly regarded by the population as an 'inviolable temple' but rather as part of equilibrium that translates into coexistence between nature itself and human communities (on this point, see further the next paragraph).

Even the proclamation of the oldest Chestnut tree as a National Monument confirms this pattern. When the State catered for essential preservation needs, it did so by taking into account as well the long-term interests of the human communities that lived in the area. Perhaps this is the reason why the Italian approach to preservation of specific natural resources has been so successful in avoiding conflicts involving the local communities that were affected by preservation measures. This approach did not proclaim the recognition of rights of nature but that rather affirmed them indirectly, by spelling out duties rather than rights, balancing all the other competing interests as well.

[21] St Francis of Assisi, *Laudes Creaturarum*, 1224.
[22] Pico della Mirandola, *Oratio de homine dignitatis*, 1486.

 ISBN 978-88-495-4984-3

This approach was followed as well in the first decades of the 19th century. For example, in 1826 the Kingdom of the Two Sicilies – the absolute monarchy that ruled Southern Italy – decided to preserve the forests of Montecalvo, San Vito and Calvi by granting them a special legal status.[23] These measures were the first legal protection in the world established in the form of *nature reserve*.

After the pioneering initiatives of the previous century, the 19th century witnesses more institutionalized protective measures. The already mentioned establishment of the Montecalvo, San Vito and Calvi forests as a "conservation areas" were milestones in this change.

This idea of protecting nature and therefore of granting it certain rights – at least in the form of immunities – (not to be exploited without limits, not to be attacked by human activities, not to be entirely subject to the will of the owner) become henceforth an ordinary way of proceeding. All those ingredients that we have already found, by analyzing the Sicilian Order of 1745, must now find a more stable and autonomous form of organization. This form will be eventually the *Ente Parco*.

6. *The early 20th century: the* Ente Parco *legal-administrative figure*

As early as 1905, Italy protected the ancient pinewood of Ravenna.[24] The initiative came from two eminent jurists and politicians of the time: Luigi Rava,[25] who would later become Minister of Agriculture, Industry and Commerce, and Giovanni Rosadi,[26] who would later support several other laws on this subject.

Why the Ravenna pine forest obtained this special status?[27] This

[23] Kingdom of the Two Sicilies Royal Rescript, 23 December 1826.

[24] L. n. 441, 16 luglio 1905, "*dell'inalienabilità dei relitti della pineta di Ravenna e della sua costa*".

[25] Luigi Rava was a lawyer and professor of Philosophy of Law at the University of Bologna; mayor of Rome (1920-1921); he also served in the Chamber of Deputies and Senate of the Kingdom of Italy.

[26] Giovanni Rosadi was a lawyer that also served in the Chamber of Deputies and Senate of the Kingdom of Italy. Together with Benedetto Croce, he worked on the draft of the first national law on this subject in 1922.

[27] *Riserva Naturale Pineta di Ravenna* is a natural area protected by Emilia-Romagna with a surface of 709 hectares. It is included in the *Parco regionale del Delta del Po*. The origins of the pinewood date back to the Roman Empire. The Romans planted it in order to produce the wood necessary for vessels. L. Rava, *La pineta di Ravenna: piccola storia di una grande bonifica*, Rome, 1926.

ISBN 978-88-495-4984-3

environment is remarkable both for its beauty and in the light of national history. This pinewood was one of Dante Alighieri's favourite places during his exile from Florence. It is also mentioned by many other great Italian poets, including Boccaccio and Pascoli.[28] The preservation of it is strongly connected with key features of Italian culture, literature and national history, thus demonstrating, once again, the aesthetic-cultural conception that permeated the Italian approach to this issue.

A missed opportunity, however, was the Legge n. 364/1909 on the protection of artistic beauties, in which Rava himself had included the protection of "gardens, parks, waters and natural beauties". This wording was in fact removed by the Senate, because it feared it would hinder the country's development.[29]

A second very interesting aspect of this missed opportunity was the proposed introduction of an *actio popularis* whereby any citizen could take legal action in the interest of the nation's archaeological, artistic and historical heritage. Sometimes things that seem so modern to us are actually very ancient: this norm dates back to Roman law, where any citizen could bring judicial proceedings in defence of public interests, in particular common goods (*res communes omnium*) such as the air, the waters, the sea, the coasts.

Rava and Rosadi, would once more take an historic initiative in 1922 when Italy passed its first national law on this subject. While the 1905 Italian act was still aimed at protecting a specific natural element (the Ravenna pine forest), the 1922 act achieved a more ambitious purpose: to establish a countrywide nature conservation paradigm. For this reason, the L. n. 778/1922, (better known as «Legge Croce» from the name of its proposer, the philosopher Benedetto Croce)[30] is an enormous step forward, coronating the ambition of a countrywide nature conservation project.

[28] The Ravenna pinewood is one of the natural places that have most influenced man's literary imagination. The most authoritative testimony is Dante Alighieri's *La Divina Commedia*, Purgatorio, XXVIII. Giovanni Boccaccio mentions it by setting the novella of Nastagio degli Onesti in that pinewood. (Decamerone, 5th day, novella 8). Poet John Dryden made this pinewood known abroad and Lord Byron galloped through it. Poet Giovanni Pascoli with a daring fiction imagined that Dante and Giuseppe Garibaldi could be together in the pinewood in his poem *L'eroe Italico* (The Italian Hero).

[29] R. Balzani, *Per le antichità e le Belle Arti. La legge n. 364 del 10 gennaio 1090 e l'Italia giolittiana*, Bologna, 2003.

[30] L. n. 778, 11 giugno 1922, ("Legge Croce"), *Per la tutela delle bellezze naturali e degli immobili di particolare interesse storico*.

 ISBN 978-88-495-4984-3

The Legge Croce consists of only seven articles, which are clear, concise and well drafted. The first one is perhaps the most significant for present purposes: «Art. 1. Sono dichiarate soggette a speciale protezione le cose immobili la cui conservazione presenta un notevole interesse pubblico a causa della loro *bellezza naturale* o della loro particolare *relazione con la storia civile e letteraria*. Sono protette altresì dalla presente legge le *bellezze panoramiche*».[31]

This article introduces the fundamental distinction between «natural beauty», in the first paragraph, and «panoramic beauty» in the second. In other words, from this moment on, it can no longer be said that the Italian legislator ignores 'nature' by only dealing with «landscape». On the contrary, through the distinction between «natural beauty», (mountains, forests, a specific tree, a river, etc.) and «panoramic beauty» (which may also be referred as landscape) it makes explicit the will to protect both, in accordance with earlier practice.

This legislation therefore acknowledges the existence of this double terminology and takes care to clarify its intention to protect everything the two linguistic formulae together may indicate.

This approach obviates the need to keep the two concepts separate: if the intention is to protect 'everything' that they can together indicate, they might as well be combined in a single term. This is essentially why, after the Legge Croce, subsequent legislation (primarily Article 9 of the 1948 Constitution) abandoned such distinction, and used a single encompassing term: «landscape».

For these reasons, the Legge Croce was a milestone, although it also showed a great limitation: the aesthetic criterion as the polar star to decide when protection was to be granted.[32]

The year 1922 was also a fateful year for Italy. On 28 October 1922, Benito Mussolini staged the 'March on Rome': the *coup d'état* that put an end to Italy's liberal political era and ushered twenty years of Fascist dictatorship. During this period, the establishment of the great Italian National Parks was accomplished.

Just to mention some of the most famous parks, in 1922, the King, Vittorio Emanuele III, donated to the Italian State 2,100 hectares

[31] L. n. 778, 11 giugno 1922, Art 1. The immovable things whose conservation is of considerable public interest because of their *natural beauty* or their *particular relationship with civil and literary history* shall be declared subject to special protection. This law also protects *panoramic beauties*. [our translation and emphasis].

[32] Benedetto Croce was one of the most authoritative exponents of so-called «aesthetics».

ISBN 978-88-495-4984-3

of his hunting reserve for the creation of a national park: the Gran Paradiso National Park.[33] A few days later, on 11 January 1923, the Abruzzo National Park was created.[34] The Circeo National Park was established in 1934[35] and the Stelvio National Park the following year.[36]

Special consideration should be given to the creation of Circeo national Park. Mussolini had begun the reclamation of the Pontine Marshes in the same period. But since marshes do not respond to the traditional criterion of beauty, the decision to protect them as well reveals the awareness of their intrinsic environmental value, which today we would call biodiversity.

All these examples bear witness to the political choice to institutionalize the protection of nature and conservation (that means to recognize nature's right not to be exploited, consumed and disfigured by human activities) through the *Ente Parco* legal-administrative institution.

In addition to the 25 national parks mentioned above, Italy also has 105 Regional Parks, covering a total area of some 12,000 square kilometres, which include areas of land, sea, rivers and their banks, lakes and their surroundings that are of environmental or naturalistic importance and are often appreciated for their landscape features and for representing particular local traditions. Regional Parks are regulated by Presidential Decree 616/77.[37] The official list of protected natural areas (abbreviated: EUAP) currently includes 134 regional parks, covering a total area of approximately 1.3 million hectares.[38]

National parks and regional parks are therefore the two expressions through which the *Ente Parco* legal administrative institution takes shape. Whether national or regional, parks enjoy legal personhood. As such, they are to all intents and purposes legal entities, endowed with legal capacity and ability to act. (Through this legal-administrative figure the park can conclude contracts, take

[33] r. d. n. 1584, 3.12.1922.

[34] r. d. n. 256, 11.1.1923.

[35] Circeo National Park was established by the Legge n. 285, 25.1.1934 by order of Benito Mussolini, under advice from Senator Raffaele Bastianelli, to preserve the last remains of the Pontine Marshes which were being reclaimed in that period.

[36] L. n. 740, 3.6.1935.

[37] D.P.R. n. 616, 24.07.1977.

[38] The list is drawn up and periodically updated by the Ministry of the Environment and Protection of Land and Sea; it lists all officially recognized protected natural areas, both marine and terrestrial.

 ISBN 978-88-495-4984-3

legal action, inherit, receive donations, etc.). The Park is therefore also the entity that initiates legal action to secure the protection of the part of nature it stands for. Which court is to be seized will obviously depend on the type of infringement or damage for which the action is brought. Each park has its own budget, management and organizational capacity. Furthermore, a park also has, albeit limited, regulatory power. Each Park can regulate many aspects relating to its internal life (including a wide range of aspects relating to resource management which also affect local communities' lives, such as wildlife control, controlled logging, etc.).

But where does the idea of park come from? The concept of 'park' has considerably evolved through history.

The earliest forms of park were those to which sacred and supernatural functions were attributed. In fact, many ancient cultures used to ascribe specific natural areas for magical purposes. Nemi, a small town in central Italy, owes its name to the Latin *nemus aricinum*, meaning 'grove of Ariccia'. This grove was the site of one of the most famous Roman cults dedicated to Diana Nemorensis. Similarly, in Spoleto, two stones from the end of the 3rd century BC have survived, inscribed in archaic Latin, which establish penalties for the profanation of the woods dedicated to Jupiter. These stones are better known as the Lex Luci Spoletina. Finally, another famous sacred grove existed behind the House of the Vestals, on the edge of the Forum, in Rome. It burnt down in the Great Fire of Rome in 64 AD. This sacred use of nature was common among the Romans and other archaic Italic groups, but the advent of Christianity swept away this practice at the dawn of imperial Rome.[39]

From the Renaissance onwards a new form of park emerged throughout the Italian peninsula: the hunting reserve park. This new form of park was created for the exclusive use of noblemen and notables. The *Bosco Fontana* near Mantua,[40] the *Boschi di Carrega* near Parma,[41] and the numerous Savoy hunting reserves in various

[39] The local cult was rendered famous by the classic study by J. Frazer, *The Golden Bough. A study in comparative religion*, London, 1890.

[40] The first historical references to Bosco Fontana date back to the 14th century, when the Gonzagas, the future lords of Mantua, came into possession of this estate, which was covered by a vast and dense forest that immediately became their hunting reserve. Thanks to the Gonzagas' hunting reserve, this untouched natural corner of the Po Valley has come down to us. The Bosco Fontana Nature Reserve is now a protected natural area covering an area of 233 hectares, under the protection of the Carabinieri.

[41] The Boschi di Carrega regional park is a protected area covering an area of approximately 2600 hectares in the province of Parma. Within it, an area of 1283

ISBN 978-88-495-4984-3

valleys of Piedmont and Valle d'Aosta (such as the Gran Paradiso National Park, mentioned above) belong to this typology.

In the 20th century, due to the changed historical and social conditions, these hunting reserves have been totally converted into national or regional parks.

However, even this most recent form of park has a certain number of characteristics that must be made explicit. Unlike other countries, which create parks as if they were inviolable sanctuaries, Italy opts instead for an "integrated model", capable of combining nature conservation with local communities' living and development needs. This approach is indeed typical of many other European countries, all of which have to deal with a densely populated territory. The idea that traditional activities can be compatible with the protection of areas with significant naturalistic components gained ground.[42]

7. *«Paesaggio»: an ambiguous wording in the Italian Constitution*

As motioned above, the Italian constitution has been recently amended. First of all, it must be said that the Italian Constitution of 1948 was the first in the world to expressly protect the «landscape». The original text of art. 9 Const provided: «*La Repubblica promuove lo sviluppo della cultura e la ricerca scientifica e tecnica. Tutela il paesaggio e il patrimonio storico e artistico della Nazione*».[43]

The first twelve articles of Italian Constitution, to which this article belongs, are defined by Constitution itself as "fundamental principles". Consequently, the framers' choice to insert among these twelve fundamentals articles the protection of «paesaggio» indicates

hectares is classified as a Site of European Community Interest. (IT4020001). Originally, thus was the Dukes of Parma's hunting reserve, with several historical residences. After annexion of the Duchy by the Kingdom of Italy, the estate became part of the national heritage of the Kingdom of Italy, and was then partly sold to private owners. Today, it is managed by the Ente di Gestione per i Parchi e la Biodiversità Emilia Occidentale (Parchi del Ducato).

[42] In the meantime, the UIPN (Union Internationale pour la Protection de la Nature) was created, which in 1956 became the UICN (Union Internationale pour la Conservation de la Nature). It will be this body that will propose to unify the nomenclature of protected areas in collaboration with UNESCO, in the context of the "Man and the Biosphere" programme, the "reserves of the biosphere".

[43] Art. 9. Const. The Republic promotes the development of culture and scientific and technical research. It protects the *landscape* and the historical and artistic heritage of the Nation [our translation].

 ISBN 978-88-495-4984-3

that this element is part of the inalienable values on which Italian constitutional order is based. This thus represents the strongest recognition that Italy can give to that element.

The term «paesaggio» needs, however, some clarification. Should this word be understood as referring to the portion of a territory on which a man's gaze rests, or should it include a wider meaning, such as "nature"? It seems that the meaning that is to be preferred is the latter, otherwise it would not really make sense to grant protection to it in the founding articles of the Constitution.

However, since what is obvious is often also most misunderstood, we will now look for proof of this statement. In this regard, although the Constitution is the founding document of Italy's Republic as it emerged from the resistance to the fascist regime, it must also be said that the Constitution drew upon aspects of the legislation enacted in the previous decades, including legislation approved during fascism, for a variety of purposes. Article 9 of the Italian constitution until its recent amendment has this genealogy. Its formulation is in fact the "efficient synthesis" of previous legislation on the subject.

Article 9, in essence, can thus be considered as the "constitutionalization" of two acts enacted under fascism; both called «Leggi Bottai» from the Minister who promoted them. These two acts were officially promulgated in 1939,[44] but, on closer inspection, they essentially mirror previous acts on this subject: precisely, the so-called "Legge Rosadi-Rava" (L. 364/1909), concerning cultural heritage conservation and the "Legge Croce" (L. 778/1922) that we already mentioned several times. Article 9 must therefore be considered as the "constitutional synthesis" of all these previous legal measures. The term "landscape" that features in this provision should be properly understood in its more comprehensive sense, thus including "nature". The recent 2022 constitutional amendment of art. 9 of the Italian Constitution supports this argument.

But why did the framers of the Constitution prefer «paesaggio» to «natura» as a term under which such a synthesis would be realized? The Italian approach to nature preservation has focused on "beauty to be preserved", whether artistic or natural. Landscape fits better with the high idea of 'beauty'.[45]

[44] "Legge Bottai", L. n. 1089/1939, concerning cultural heritage conservation (*Sulla Tutela delle cose d'interesse artistico o storico*), and "Legge Bottai" L. n. 1497/1939 concerning nature protection (*Sulla Protezione delle bellezze naturali*).

[45] «Che una legge in difesa delle bellezze naturali d'Italia sia invocata da più tempo e da quanti uomini colti e uomini di studio vivono nel nostro Paese, è cosa ormai

ISBN 978-88-495-4984-3

Indeed, the term «paesaggio» still continues to be preferred by the Italian legislator in various contexts. When the *Codice per i beni culturali e del paesaggio* (Code for cultural heritage and landscape), the so-called "Codice Urbani" was approved – a modern code, recognising the intrinsic value of nature – the term used to refer to it is still «paesaggio».[46]

This perhaps is due to the fact that legal language has in itself a conservative tendency; once found a term (in this case «landscape»), legal language tends to reproduce it, and to reuse, even if its meaning is no longer exactly the same. Article 9 of the Italian Constitution summed up half a century of previous legislation on this topic. Even if the non-cultural dimension of nature was already recognized, the aesthetic approach to its conservation has prevailed until recently. The constitutional amendment of 2022 marks a change of perspective at least in this respect.

8. *The second half of the 20th century: affirmation of nature's biological value and international cooperation. Conclusions.*

In the last quarter of the 20th century the global discussion on these issues gained momentum. As a result, Italy too participates in the proliferation of international agreements, declarations of principle and instruments of regulatory harmonization for all those aspects that, in general, have the purpose to advance nature conservation and protection.

The incredible push towards the huge consumption of soil, the hydrogeological disasters that Italy has experimented in recent years,

fuori da ogni dubbio; una legge che ponga, finalmente, un argine alle ingiustificate devastazioni che si van consumando contro le caratteristiche più note e più amate del nostro suolo. Occorre difendere e mettere in valore, nella più larga misura possibile, le maggiori bellezze d'Italia, quelle naturali e quelle artistiche, poiché *il paesaggio altro non è che la rappresentazione materiale e visibile della patria»*, from Benedetto Croce's 1922 speech to the House of representatives while introducing the "Croce Law"; (The fact that a law in defense of Italy's natural beauties has been long called for by all those who live and study in our country is now beyond doubt; a law that finally puts an end to the unjustified devastation that is being wrought upon the best-known and best-loved features of our soil. It is necessary to defend and enhance, to the greatest extent possible, the major beauties of Italy, both natural and artistic, *because the landscape is nothing other than the material and visible representation of the homeland*.) [our translation and emphasis].

[46] D.l. n. 42, 22.1.2004, better known as "Code of Cultural Heritage and Landscape" regulates the protection of the cultural heritage and landscape in Italy. It entered into force on 1.5.2004.

 ISBN 978-88-495-4984-3

the level of pollution of air and water, the poor conservation of its revere and costal resources, and of many habitats, all require new legal instruments and new approaches.

In this context, the intrinsic biological value of nature alongside the traditional criterion of its *beauty* comes to be recognized more and more frequently, as international and European regulatory cooperation gradually overtakes national state policies in the *design* of nature's protection.

The value of international cooperation for the protection of nature, therefore, is fundamental. Today, more than ever, *nature must be seen as a global common good* which cannot "suffer" the costs arising from so many (and often insufficient) national managements.

Cultivating this perspective also leads to re-think the basic assumption that is behind such a huge, unsustainable exploitation of nature, namely the consideration of nature as an object rather than as a subject, in an ethical and legal world that does not admit obligations and rights towards any entity which is not a subject.

ISBN 978-88-495-4984-3

LA BUONA STAMPA

Questo volume è stato impresso
nel mese di settembre dell'anno 2022
per le Edizioni Scientifiche Italiane s.p.a., Napoli
Stampato in Italia / Printed in Italy
red.nignat - ftc.cimgio

Per informazioni ed acquisti

Edizioni Scientifiche Italiane - via Chiatamone, 7 - 80121 Napoli
Tel. 0817645443 - Fax 0817646477
Internet: www.edizioniesi.it