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Indice

2/2024

Saggi e articoli

Editoriale

Giovanni Cordini

La pubblicazione di una nuova rivista in tema di ambiente ed energia promossa da giovani ma già affermati studiosi che hanno manifestato interesse per queste tematiche è, per me, motivo di grande soddisfazione. Ho accolto, perciò, volentieri il cortese invito a scrivere l'editoriale di uno dei primi numeri tracciando un percorso che, in buona parte, ho potuto sperimentare personalmente nel corso degli anni. Riassumendo alcuni essenziali svolgimenti del diritto ambientale e sottolineando gli intrecci costanti delle problematiche ambientali con quelle energetiche non posso ignorare l'esperienza diretta che ho avuto modo di trarre nel corso degli anni d'insegnamento e di ricerca.

Il percorso di diritto interno e l'azione globale internazionale

In effetti io ebbi ad accostarmi, per la prima volta, alle problematiche giuridiche connesse alla nozione di "ambiente" nella seconda metà degli anni '70 del Secolo scorso. Il nostro Paese, in quel tempo, aveva concluso le prime due fasi dello sviluppo: a) quella della ricostruzione avviata all'indomani del secondo conflitto bellico mondiale che aveva sconvolto l'Europa e lasciato immani rovine in tutti i Paesi coinvolti e b) quella con cui si era dato inizio ad un'accelerata fase produttiva connessa all'aumentato benessere collettivo che aveva incrementato i consumi. Proprio alla fine degli anni '60, soprattutto da parte di circoli culturali piuttosto elitari venivano in essere indagini, rifles-

sioni, proposte che mettevano l'accento sulle conseguenze ambientali dello sviluppo. Il dibattito nazionale teneva conto di considerazioni e studi che erano stati avviati in ambito internazionale. Quel confronto, in larga parte, veniva alimentato da associazioni e circoli interessati ai problemi ambientali e da esponenti di organismi internazionali. Si possono rammentare, al proposito, i dibattiti e i documenti prodotti dal "Club di Roma" e le iniziative avviate dalle Nazioni Unite che trovarono un momento di raccordo e di ampio confronto nella Conferenza Internazionale di Stoccolma del 5-16 giugno 1972, convocata sulla base della risoluzione dell'Assemblea Generale delle Nazioni Unite adottata nel 1968. Quella prima conferenza mondiale approvò una "Dichiarazione delle Nazioni Unite sull'ambiente" in 26 principi mettendo in evidenza la necessità di "proteggere e migliorare l'ambiente a favore delle generazioni presenti e future", di preservare "le risorse naturali della Terra ivi comprese l'acqua, la terra, la flora, la fauna e particolarmente i campioni rappresentativi degli ecosistemi naturali"; l'esigenza di ristabilire e migliorare la "capacità della Terra di produrre risorse rinnovabili"; l'esigenza di tenere conto, nella "pianificazione per lo sviluppo economico", della biodiversità ai fini della "conservazione della natura". Rileggendo quei "principi" si può notare che, per quanto siano stati, poi, affinati in occasione dei successivi incontri globali in tema di ambiente (Rio 1992, Johannesburg 2002, Rio 2012), era già stata delineata un'azione globale necessaria per la salvaguardia dell'ambiente e per la tutela di un fondamentale diritto ad un ambiente sano cui corrisponde il dovere di preservare le essenziali condizioni di vita dei popoli della Terra. Le risorse energetiche erano considerate fondamentali per lo sviluppo sostenibile per cui già si poneva in primo piano la questione della ricerca e dell'applicazione di soluzioni alternative all'uso delle sole risorse fossili. I successivi affinamenti hanno offerto svolgimenti, proposto approfondimenti, indicato utili comparazioni, discusso in ordine agli strumenti utili e considerato i possibili limiti senza, peraltro, apportare significative modifiche al quadro generale tracciato in quella prima fase e poi riassunto con l'espressione "sviluppo sostenibile".

Quando ebbi a predisporre una relazione da presentare all'incontro promosso a Parigi e Bordeaux nel 1975 dall'*Association Capitant* avente per tema: "*La protection du voisinage et de l'environnement (journées françaises)*"[1] ebbi modo di segnalare i ritardi della legislazione del nostro Paese e l'attitudine della giurisprudenza ad utilizzare gli strumenti tradizionali offerti dai Codici per rispondere a nuove esigenze di tutela ambientale che emergevano, con sempre maggiore consistenza, anche in Italia. Queste esigenze erano state prese in esame in due fondamentali saggi di Massimo Severo Giannini sull'autorevole Rivista Trimestrale di Diritto Pubblico (1973 e 1975) che delineavamo un primo assetto teorico della materia, ordinando i profili e definendo indirizzi e strumenti. L'interesse che un reputato Maestro dedicava a questa tematica dice molto di più di quanto potrebbero tante ulteriori considerazioni o altri svolgimenti. Mi sembra opportuno ricordare altri due Autori che avevano dedicato attenzione a questi temi, se pure da prospettive diverse: Umberto Pototschnig e la Sua Scuola di Pavia in tema di acque e beni pubblici e Alberto Predieri per gli studi sul paesaggio e l'urbanistica. Non è un caso che si trattasse di studiosi del diritto amministrativo con la propensione a considerare e approfondire gli apporti della giurisprudenza e i rapporti giuridici che derivavano dalle interrelazioni tra Costituzione e potere amministrativo. Furono questi i presupposti teorici per i successivi, ora incontenibili, svolgimenti. Lo stato dell'arte agli inizi degli anni '90 lo si può rilevare dalla lettura del ponderoso volume di Atti del Convegno di Cagliari dell'aprile 1989[2] e dalla prima raccolta bibliografica sistematica in tema di diritto dell'ambiente prodotta dall'Istituto per la Documentazione Giuridica del Consiglio Nazionale delle Ricerche alla fine degli anni '80 e pubblicata nel 1991[3].

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[1] La relazione "*Rapport Interdisciplinaire*" è pubblicata nel volume degli Atti, *La protection du voisinage et de l'environnement*, Tome XXVII, Dalloz, Paris, 1976, 439 e ss.

[2] Si v. C. Murgia (a cura di), *L'ambiente e la sua protezione. Atti del convegno di studi giuridici*, Giuffrè, Milano, 1991.

[3] B. Inghirami *et al.*, *Bibliografia Giuridica dell'Ambiente. Rassegna ragionata di volumi e articoli pubblicati in Italia dal 1975 al 1990*, CNR, Roma, 1991. Il testo era an-

Introducendo questa ponderosa bibliografia ragionata Giorgio Lombardi osservava che "l'ambiente, come già da tempo viene considerato un altro grande valore costituzionale dell'umanità, cioè il principio di eguaglianza, non è più tanto un diritto o il fondamento di diritti, quanto il modo d'essere e la misura dei diritti."[4] In un breve saggio introduttivo dal titolo "Il diritto dell'ambiente"[5] ebbi a notare che "la centralità assunta dalla problematica ambientale in tempi recenti" era "testimoniata, per quanto riguarda il diritto, dal riscontro di uno stilema tipico comune in diversi testi costituzionali; dalla intensa produzione normativa di diritto interno ed internazionale; dal crescente e diffuso contenzioso che produceva, in tutti i Paesi, una considerevole giurisprudenza e dai numerosi contributi offerti dalla dottrina".

La politica ambientale ha posto in evidenza l'esigenza di operare gli adattamenti utili senza alterare le regole di base della natura e senza compromettere il nostro futuro. La resilienza deve essere perseguita nel rispetto rigoroso dei limiti e delle regole che preservano l'equilibrio ambientale e garantiscono la sostenibilità. L'estensione applicativa di quell'indirizzo di politica economica che viene definito come "economia circolare" potrà contribuire a rendere migliore la qualità della nostra vita sul Pianeta assecondando, così, l'idea per la quale noi siamo solo i temporanei gestori di un bene che non ci appartiene e che deve essere rimesso alle future generazioni senza compromettere i fattori essenziali per la conservazione delle specie animali e vegetali e per la vita e la salute delle persone. L'istituzione di un Ministero per la Transizione Ecologica che dovrebbe indicare prospettive di sviluppo che siano conformi ai 17 obiettivi delineati dal programma delle Nazioni Unite noto come "Agenda 2030" e alle iniziative definite dal programma ambiente dell'Unione Europea (con obiettivi che prevedono due termini di raffronto temporali, il 2030 e il 2050) risponde all'esigenza di raccogliere una sfida epocale e di trac-

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che informatizzato e la banca dati offriva un quadro imponente della dottrina giuridica recensendo quasi duemila lavori.

[4] *Ivi*, VIII.

[5] G. Cordini, *Il diritto dell'ambiente*, in B. Inghirami *et al.*, *op. cit.*, XI-XXII.

ciare un indirizzo adeguato allo scopo di conseguire gli ambiziosi propositi che sono definiti in questi programmi. Si tratterebbe di una significativa inversione di rotta che, se confermata dai fatti, potrebbe incidere in modo rilevante sull'impostazione futura delle politiche ambientali e della politica energetica di molti Stati. Per questa ragione una nuova rivista giuridica che intreccia due profili essenziali come quello ambientale e quello energetico mi sembra rispondere perfettamente all'esigenza di basare le decisioni su competenze acclarate e sulla ricerca scientifica.

Il diritto ambientale dell'Unione Europea

Nei primi anni '80 del Secolo scorso la Comunità Economica Europea aveva già sviluppato un'ampia normativa ambientale che coinvolgeva tutti i settori dell'azione comune per cui mi sembrò interessante approfondire la ricerca giuridica su questi temi. La normativa ambientale europea, a quel tempo, era già notevole e coinvolgeva molteplici settori dell'azione comune europea. Ancora oggi si può rilevare che l'Unione Europea ha posto in essere una politica ambientale vasta e intensa che interessa tutti i settori dell'ambiente e offre importanti strumenti operativi (dalla VIA alla VAS, dall'Ecolabel all'EMAS per fare soltanto qualche esempio concreto). Il riferimento all'azione ambientale posta in essere dall'Unione Europea è particolarmente interessante anche per il ruolo incisivo che l'Unione ha svolto in occasione delle Conferenze ambientali globali e per l'impegno assunto alla Conferenza di Parigi sul clima nel 2015, un impegno confermato negli altri appuntamenti internazionali, fino ad oggi. Riesce interessante osservare che l'attuale programma della Commissione ha previsto di rafforzare notevolmente la politica ambientale comune con stanziamenti assai significativi, in aderenza agli obiettivi indicati dall'8° programma ambiente che traccia gli indirizzi dell'azione ambientale dell'Unione fino al 2030. La crisi determinata dallo scontro armato tra la Russia e l'Ucraina ha rallentato questa azione ed ora, il disimpegno degli Stati Uniti annunciato dal Presidente Trump e le conseguenti inizia-

tive adottate dal Parlamento Europeo e dalla Commissione in tema di riarmo, potranno determinare, nel breve e nel lungo periodo, effetti decisivi anche per la politica ambientale comune.

Cenni conclusivi

Il conflitto Russia-Ucraina, le crisi in atto in molti Stati africani, il permanente conflitto arabo-israeliano, le sempre più evidenti divergenze d'indirizzo politico in tema di ambiente che la nuova leadership politica statunitense manifesta apertamente, sembrano aver mutato profondamente il quadro delle politiche ambientali e delle politiche energetiche e richiedono alle nuove generazioni di studiosi di seguire, con competenza ed acume, lo svolgersi dei fatti per trarne gli insegnamenti opportuni *sine irae ac studio*. Anche per queste ragioni un'arena utile per il confronto scientifico messa a disposizione della comunità scientifica dai promotori di questa rivista può rivelarsi molto efficace. Lo studio critico dell'esperienza europea, ponendo attenzione rivolta alle politiche avviate, agli impegni assunti, alle normative poste in essere e considerando i non pochi limiti che già sono stati messi in evidenza dalla dottrina, può risultare utile per segnalare l'urgenza di un approccio scientifico ai temi dell'ambiente e dell'energia differenziato in relazione alle distinte aree continentali, laddove l'integrazione delle politiche e la concreta risposta delle istituzioni potrebbero forse essere maggiormente efficaci rispetto alla globalizzazione con cui si confrontavano i precedenti programmi. Dispiace dover constatare che, ancora oggi, le Nazioni Unite, pur svolgendo un ruolo rilevante e sostenendo molte iniziative in campo ambientale (merita attenzione il piano di azione tracciato dall'Agenda 2030, sottoscritta dai governi di 193 Paesi membri il 23 settembre 2015 dove sono indicati diciassette importanti obiettivi globali per lo sviluppo sostenibile) non hanno mai costituito un organismo permanente dotato delle competenze necessarie per svolgere un ruolo globale d'impulso e di coordinamento in tema di ambiente, energia e sviluppo, così come riesce a tutt'oggi carente, per questi profili, la giurisdizione internazionale.

Saggi e articoli

Notes on civil liability for environmental damage in Brazil and Italy*

Ingo Wolfgang Sarlet - Lourenço Kantorski Lenardão

1. *Introduction*

Considering the global context of the environmental and climate crisis, it is becoming increasingly urgent to take seriously the general and special principles that guide environmental law, especially the demands of the human and fundamental rights to a healthy and balanced environment, and the right to a healthy, safe and stable climate. Furthermore, from the perspective of the objective dimension of these rights, it is imperative that all State actors fulfil the corresponding protection duties, expressly and/or implicitly enshrined at constitutional and international level.

Knowing that there are many ways to fulfil the State's protection duty, not only in environmental matters, but especially here, the establishment and strengthening of the legal system of civil liability for damage caused to the environment has increasingly taken centre stage in this context. However, this is not uni-

* Articolo sottoposto a referaggio.

form across States within the international community, existing important differences between the respective legal systems.

In light of this scenario, in the field of environmental civil liability it is not only interesting but also productive to consider the models adopted by different states for preventing and remedying environmental degradation, making it possible, through a comparative study, not only to reflect on the correctness of the strategies adopted, but also, depending on the analysis and its results, facilitating their improvement.

Given the need to delimit the subject of this study, a comparison between the Brazilian and Italian environmental civil liability regimes was chosen, seeking to outline the similarities and differences between the two legal systems and identify aspects that could be improved through the reception (unilateral or bilateral, but always filtered) of legal institutes, concepts and techniques. It should also be noted that the comparison between the Brazilian and Italian systems is justified by the fact that Italian civil liability law has been widely studied and even embraced in Brazil, both doctrinally and at jurisprudential and legislative levels.

From this perspective, the aim is to demonstrate that both countries have developed, albeit not symmetrically, a differentiated and strong legal regime for civil liability for environmental damage, and through the comparison of the main legal institutes is possible to establish and strengthen dialogue and mutual learning.

In order to do this, the first step is to delineate the legal institutes that will be compared in relation to environmental civil liability. Then, using legislative, jurisprudential, and doctrinal elements, a presentation will be made of how the matter is regulated in each legal system. Finally, the actual comparative analysis will be carried out, pointing out similarities and differences with regard to the treatment of civil liability for environmental damage in Italy and Brazil, assessing to what extent this comparison can contribute to the development of environmental protection in one or both countries.

2. *Presentation and delimitation of the legal institutes under analysis*

The object of this comparative study is civil liability arising from environmental damage. To this end, will be taken as a reference environmental damage in the strict sense, characterized by either patrimonial or non-patrimonial aspects that impacts the ecologically balanced environment from a trans-individual perspective. This excludes the so-called reflex environmental damage, which is merely individual, and also individual homogeneous rights, which are individual in their nature but receive artificially trans-individual jurisdictional treatment due to their common origin.[1]

It is from this perspective, as already mentioned, that we seek to understand and compare the institute of environmental civil liability in the legal systems of Brazil and Italy. In this exercise, the focus is solely on comparing the norms related to civil liability arising from environmental damage, rather than the general parameters of civil liability in each of the two countries.

It should be noted that the rules in force governing the matter will be studied, both at the infra-constitutional and at the constitutional level, from the perspective of the Constitution of the Italian Republic of 1947 (CRI) and the Brazilian Constitution of 1988 (CF). In this context, it is worth taking Professor Paulo Nader's lesson seriously, who states that comparative law should not be limited to laws and codes but should analyse the legal cultural facts of the country from which they originated.[2]

The doctrine of the two states analysed was selected thematically, and the works referenced refer to the period when both constitutions were in force. Finally, the jurisprudential section was also thematic, selecting important judgements and arguments to delineate the institute in the higher courts of the states.[3]

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[1] J.R.M. Leite; P.A. Ayala, *Dano Ambiental*, Grupo GEN, São Paulo, 2019, 143.

[2] P. Nader, *Introdução ao Estudo do Direito*, Grupo GEN, São Paulo, 2023, 49.

[3] Corte costituzionale italiana; Corte Suprema di Cassazione; Supremo Tribunal Federal; Superior Tribunal de Justiça.

3. *Civil liability arising from environmental damage in Brazilian law*

3.1. *General notions and normative basis*

In Brazil, environmental civil liability has constitutional and infra-constitutional basis. Beyond the generic provisions of the civil code, there is a legislative option for a special and robust regime in the case of liability arising from environmental damage, which stems from a privileged constitutional option for the right to a balanced environment. Furthermore, in procedural terms, the country has adopted a particular system for dealing with diffuse and collective transindividual rights or interests, which are the focus of this analysis.

Initially, the legislation differentiates between diffuse interests, collective interests and homogeneous individual interests, in addition to merely individual interests. In the case of civil liability arising from environmental damage, this distinction is important, as it permeates the legal treatment of environmental damage in the country's jurisdictional system and fits in with the very nature of the legal good of a balanced environment. In Brazilian procedural legislation, we can see a change in perspective from the 1980s onwards, in order to make suitable instruments available for the protection of transindividual rights. The issue was first dealt with in Law 6.938/81, which instituted the National Environmental Policy (PNMA) and designated the Public Prosecutor's Office as the holder of the right to bring an action to repair environmental damage.[4] It's important to say that, in addition to the fact that all previous environmental legislation (especially the PNMA and the constitutionalisation of the Public Civil Action - ACP) has been accepted by the Federal Constitution, the establishment of a collective procedural (but also material) system in Brazil has continued to be strengthened, as evidenced by the huge first step taken in 1990 with the Consumer Protec-

[4] I.W. Sarlet; T. Fensterseifer, *Curso de Direito Ambiental*, Forense, Rio de Janeiro, 2022, 672.

tion Code (CDC), which attempts to conceptualise the categories of diffuse, collective and individual homogeneous rights in its Article 81, Sole Paragraph[5], among other important advances over the years, including the improvement of the ACP and an increasing focus on so-called structural processes and structuring measures.[6]

To briefly recall the classification mentioned above, diffuse rights are those owned by undetermined people and linked by factual circumstances. The indeterminability of the interested parties and the broad indivisibility of the right are its defining features. In the case of collective rights, the transindividual nature of the right is limited to people belonging to a certain group, linked by a legal relationship. These may be individuals belonging to associations, categories or classes and, as a result, holders of a collective right.[7] Finally, homogeneous individual rights are materially individual. However, procedurally, they are dealt with individually because they have the same triggering event that affects all their holders, as well as issues related to procedural economy.[8]

With regard to the constitutional basis for the special regime of civil liability arising from environmental damage in Brazil, the 1988 Constitution contains two provisions that deal specifically with liability arising from environmental damage. The first of these is paragraph 2 of article 225, which prescribes that: "Anyone who exploits mineral resources is obliged to restore the degraded environment, in accordance with the technical solution required by the competent public body, in accor-

[5] T. Zavascki, *Reforma do processo coletivo: indispensabilidade de disciplina diferenciada para direitos individuais homogêneos e para direitos transindividuais*, in A.P. Grinover, A.G.C. Mendes; K. Watanabe (eds), *Direito Processual Coletivo e o anteprojeto de Código Brasileiro de Processos Coletivos*, Revista dos Tribunais, São Paulo, 2007, 10-15.

[6] On this subject, see the masterly collective work organised by S. Arenhart; M.F. Jobim; G. Osna, *Processos Estruturais*, Editora JusPODIVM, Salvador, 2022.

[7] Brazil. [Consumer Defence Code]. *Law n. 9.078/1990*. Available at: *https://www.planalto.gov.br/ccivil_03/leis/l8078compilado.htm*.

[8] T. Zavascki, *op. cit.*, 10-15.

dance with the law".[9] Even though the provision refers specifically to damage resulting from mining, the obligation to recover the environment is emphasized. The primacy of in natura reparation is highlighted as the preferred option when it comes to the right to the environment.

Secondly, paragraph 3 of the same art. 225 states that "Conducts and activities considered harmful to the environment will subject offenders, whether individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damage caused".[10] This rule encompasses the three areas of environmental responsibility: criminal, administrative and civil.[11]

However, in constitutional terms, the main source of environmental civil liability is the state's duty of protection arising from the objective dimension of the fundamental right to a balanced and healthy environment, which also includes the so-called climate protection duties.[12]

The first infra-constitutional basis for a specific regime of environmental civil liability, as already mentioned, predates the Federal Constitution, namely Law 6938/81, which provides for the PNMA, and which, according to the provisions of art. 14, §1, prescribes the following:

> "Without regarding the application of the penalties provided for in this article, the polluter is obliged, regardless of fault, to indemnify or repair the damage caused to the environment and to third parties affected by its activity. The Federal and State Public Prosecutor's Offices shall have legal standing to bring civil and criminal liability actions for damage caused to the environment".[13]

[9] Brazil. [Constitution (1988)]. *Constituição da República Federativa do Brasil de 1988*, Brasília, Presidency of the Republic. Available at: *http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm*.

[10] *Ibidem.*

[11] I.W. Sarlet, G. Wedy, T. Fensterseifer, *Curso de Direito Climático*, Revista dos Tribunais, São Paulo, 2023, 612.

[12] *Ivi*, 143.

[13] Translation: "Sem obstar a aplicação das penalidades previstas neste artigo, é o poluidor obrigado, independentemente da existência de culpa, a indenizar ou repa-

Analysing this provision, it is possible to outline the following specific characteristics of environmental civil liability in Brazil, which have guided its orientation and formed a subsystem with its own logic, principles, and rules. The first particularity lies in the fact that it is an objective liability, as it does not require the existence of fault.[14] Furthermore, it allows and even prioritizes collective protection, as later reaffirmed by the Public Civil Action Act[15] and the Federal Constitution. In addition, the objective nature of liability for environmental damage is particularly important given the circumstances that often prove difficult to establish the polluter's fault for the damage.[16] Another aspect to emphasise is that art. 3, item IV of the same law presents an expanded concept of polluter to include all those who contribute in some way to the chain of environmental damage, thus establishing the figure of the so-called indirect polluter, as the one who contributes through action or omission, albeit indirectly, to the materialization of the damage.[17]

3.2. *Doctrinal positions*

Doctrine shows that Brazil has a special constitutional regime for civil liability arising from environmental damage.[18]

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rar os danos causados ao meio ambiente e a terceiros, afetados por sua atividade. O Ministério Público da União e dos Estados terá legitimidade para propor ação de responsabilidade civil e criminal, por danos causados ao meio ambiente". Brazil. [National Environmental Policy Law]. *Law No. 6.938/1981*. Available at: *http://www.planalto.gov.br/ccivil_03/leis/l6938.htm*.

[14] P. Nader, *Curso de Direito Civil: Vol. 7 Responsabilidade Civil*, Grupo GEN, São Paulo, 2015, 408.

[15] Brazil. *Law 7.347/85.* Available at: *https://www.planalto.gov.br/ccivil_03/leis/l7347orig.htm*. Accessed on: 15/12/2023.

[16] J.R.G. Bueno, M.V. Delupo, *Responsabilidade Civil por Dano Ambiental decorrente do rompimento de barragem*, in *Revista Questio Iuris*, vol. 10, n. 3, 2017, 2147.

[17] I.W. Sarlet; T. Fensterseifer, *Curso de Direito Ambiental*, cit., 672.

[18] Translation: "a) difícil identificação dos sujeitos da relação jurídica obrigacional, pois a "dobradinha" autor-vítima quase nunca aparece com seus contornos bem definidos (atuação coletiva e vitimização também coletiva, com a consequente fragmentação de responsabilidades e de titularidade b), na medida em que estamos diante de relações jurídicas poligonais ou multilaterais, próprias da sociedade pós-in-

According to Paulo Nader, "Article 225 of the Constitution itself, in its paragraphs and subparagraphs, presents a list of guiding principles for ecological civil liability".[19]

As a result, there is a construction of principles and identification of rules in this system, which differs from the general rules in the 2002 Civil Code, in order to provide greater environmental protection.[20] Seeking to justify the need for a different treatment of situations involving environmental damage, in relation to all other civil offences that are regulated by general rules, Benjamin points out the following reasons:

> "a) difficulty in identifying the subjects of the obligatory legal relationship, as the plaintiff-victim "double" almost never appears with its well-defined contours (collective action and collective victimisation, with the consequent fragmentation of responsibilities and ownership), as we are dealing with polygonal or multilateral legal relationships, typical of post-industrial society; b) the requirement to characterize the fault of the degrader, in those systems that still require it (...); c) the complexity of the causal link; d) the fluid and elusive nature of environmental damage in itself".[21]

Thus, the very peculiarities of environmental damage justify a different regime, based on precaution and objective liability. Sarlet and Fensterseifer point to the break with the classic individual liberal paradigm of civil liability that occurs in cases of en-

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dustrial; b) a exigência de caracterização da culpa do degradador, naqueles sistemas que ainda a exigem (...) c) a complexidade do nexo causal; d) o caráter fluido e esquivo do dano ambiental em si mesmo considerado." A.H.V. Benjamin, *Responsabilidade Civil Pelo Dano Ambiental*, in *Revista Brasileira de Direito Ambiental*, vol. 9, n. 8, 1988, 8. Available at: *https://revistadostribunais.com.br/maf/app/delivery/offload/get?_=1655410574323*.

[19] P. Nader, *Civil Law Course: Vol. 7 Civil Liability*, cit., 403.

[20] In this sense, the principle of *in dubio pro natura*, a jurisprudential hermeneutic construction arising from the special regime of environmental civil liability, is worth mentioning and will be discussed in this article.

[21] Brazil. [Constitution (1988)]. *Constituição da República Federativa do Brasil de 1988*. Brasília: Presidency of the Republic. Available at: *http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm*.

vironmental damage, given the strong normative basis for holding the polluter responsible.[22] It is important, doctrinally, to distinguish between transindividual and individual interests in environmental matters. This is due to the position that some elements of the special environmental civil liability regime do not apply to individual interests resulting from so-called reflex environmental damage, especially imprescriptibly, which will be addressed in the next section.[23]

In this context, the doctrine identifies principles governing the system of environmental civil liability, which communicates with the general system arising from article 186 of the Civil Code. However, it differs from it by legislative choice in view of the peculiarities of environmental damage. *The Polluter Pays Principle* emerges as a general principle of Brazilian environmental law and is essential for understanding civil liability for environmental damage.[24] It is enshrined in the Federal Constitution and expressed in the PNMA, in its article 4, item VII:

> "Art. 4 The National Environmental Policy shall aim to: VII- the imposition, on the polluter and the predator, of the obligation to recover and/or indemnify the damage caused and, on the user, of the contribution for the use of environmental resources for economic purposes".[25]

In that regard: "in a very crude way, it is equivalent to the formula 'he who dirties, cleans', elementary in our daily relations".[26] Its application aims to individualise the burden, at least

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[22] I.W. Sarlet, T. Fensterseifer, *op. cit.*, 609.

[23] *Ivi*, 666.

[24] G. Wedy, R.M.C. Moreira, *Manual de Direito Ambiental: de acordo com a Jurisprudência dos Tribunais Superiores*, Editora Fórum, Belo Horizonte, 2019, 52.

[25] Trasnlation: Art. 4º A Política Nacional do Meio Ambiente visará: VII- à imposição, ao poluidor e ao predador, da obrigação de recuperar e/ou indenizar os danos causados e, ao usuário, da contribuição pela utilização de recursos ambientais com fins econômicos. Brazil. [National Environmental Policy Law]. *Law No. 6.938/1981.* Available at: *http://www.planalto.gov.br/ccivil_03/leis/l6938.htm*.

[26] A.H.V. Benjamin, *Responsabilidade Civil Pelo Dano Ambiental*, in *Revista Brasileira de Direito Ambiental*, vol. 9, 1988, 8. Available at: *https://revistadostribunais.com.br/maf/app/delivery/offload/get?_=1655410574323*.

the economic one, that comes from environmental degradation.[27]

The principle of *full reparation* must also be strictly observed in civil reparation for environmental damage. This is a general principle of civil liability, deriving from article 944 of the 2002 Civil Code. By stating that compensation is measured by the extent of the damage, the law states that it must be repaired in full.[28] In the case of environmental damage, this means seeking to restore the status quo ante in relation to the environment and the individuals affected. However, due to the peculiarities and magnitude of certain environmental damages, the preferential option of restoration is impractical. In view of this, attention must be paid to the possibility of this measure, which, when unfeasible, must be replaced by compensatory forms of degradation.[29]

Article 927 of the Civil Code of 2002 opens up the possibility of liability for damage regardless of fault, when the law specifies this, or when the agent's activity represents a risk of damage to others. Risk assumes relevance as a special paradigm of civil liability. In cases where fault is not adequate to meet demands and guarantee the right to compensation for unjust damage, the risk theory is used.[30] In the case of environmental damage, the majority position currently centres around the theory of integral risk for environmental damage, which means that it is impossible to apply any exclusions of unlawfulness, such as unforeseeable circumstances and force majeure.[31]

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[27] D.A. Moreira, L.M.R.T. Lima, I.F. Moreira, *O princípio do poluidor-pagador na jurisprudência do STF e do STJ: uma análise crítica. Veredas do Direito*, Belo Horizonte, vol.16, n. 34, 2019, 367-432. P.B. Antunes, *Responsabilidade civil ambiental: uma breve introdução*, Indaiatuba, SP, Foco, 2024. Acesso em 01 mar 2025.

[28] R.F. Pinheiro, J.R.D.T. Trautwein, *O princípio da reparação integral e a contraofensiva da culpabilidade: Revisitando a cláusula de redução equitativa da indenização*, in *RIL Brasília*, vol. 57, n. 226, 2020, 71-92.

[29] P.B. Antunes, *Direito* Ambiental, GEN Group, São Paulo, 2021, 473.

[30] E. Facchini Neto, *Da Responsabilidade Civil no Novo Código*, in *Revista do TST*, vol. 76, n. 1, 2010, 31.

[31] B. Miragem, *Responsabilidade* Civil, Grupo GEN, São Paulo, 2021, 283.

3.3. *Case law*

The case law of the Superior Court of Justice (STJ) and the Federal Supreme Court (STF) in relation to environmental damage provides fundamental guidelines for understanding the institute and the liability that arises from it. Firstly, there are precedents from the STJ which, when judging cases related to environmental damage, have used the principle of *in dubio pro natura*, a hermeneutic construction also referred to by legal doctrine:

> "It is important to take into account the command of Article 5 of the Law of Introduction to the Civil Code, which states that when applying the law, "the social purposes to which it is directed and the requirements of the common good" must be taken into account. A corollary of this rule is the realisation that, in the event of doubt or any other technical-redactional anomaly, the environmental rule requires interpretation and integration in accordance with the hermeneutic principle of *in dubio pro natura*. This is precisely because, it should be remembered, all legislation to protect vulnerable individuals and diffuse and collective interests must always be understood in the way that is most beneficial to them and best enables, from the perspective of practical results, the provision of justice and the ratio essendi of the rule".[32]

In the excerpt from the vote transcribed above, the rapporteur, Justice Benjamin, used *in dubio pro natura* as a tool to de-

[32] Translation: "Incumbe levar em conta o comando do art. 5ºda Lei de Introdução ao Código Civil, que dispõe que, ao aplicar a lei, deve-se atender "aos fins sociais a que ela se dirige e às exigências do bem comum". Corolário dessa regra é a constatação de que, em caso de dúvida ou outra anomalia técnico-redacional, a norma ambiental demanda interpretação e integração de acordo com o princípio hermenêutico in dubio pro natura. Assim é precisamente porque, convém lembrar, toda a legislação de amparo dos sujeitos vulneráveis e dos interesses difusos e coletivos há sempre de ser compreendida da maneira que lhes seja mais proveitosa e melhor possa viabilizar, na perspectiva dos resultados práticos, a prestação jurisdicional e a ratio essendi da norma." STJ, Brazil. *Recurso Especial N. 1.198.727-MG. Lex*, A.H. Benjamin; J.L.R. Leite; S. Capelli, in *Revista do Superior Tribunal de Justiça*, vol. 27, n. 239, 2015, 36.

termine the extent of environmental protection rules. In this sense, he argues that they must be interpreted in such a way that their purpose, the effective protection of the environment, is fully met. The STJ also argues that full reparation of the damage does not exempt the defendant in an environmental civil liability action from the duty to indemnify. In this regard, the rapporteur, Mr Humberto Martins, argued using the principle of *in dubio pro natura*.[33]

In the STJ case law, there has also been a large-scale expansion of the concept of polluter in the identification of the causal nexus to include, in the field of passive joint and several liability, according to Justice Herman Benjamin's proposition, "those who do, those who don't do when they should, those who don't care if they do, those who remain silent when it is their duty to denounce, those who finance others to do, and those who benefit when others do".[34] In this judgement, the STJ establishes a system of passive solidarity for all those who, directly or indirectly, contribute to environmental damage through their actions or omissions.

Regarding the causal nexus, the STJ has already ruled that it must be observed based on the valuation of all the elements that contribute to the occurrence of the damage through legal-normative criteria, which applies to environmental cases in which the mere direct relationship of cause and effect based on a naturalistic conception is often not adequate. On the other hand, the legal valuation of all the elements may be the most appropriate decision-making technique, given the causal plurality typical of this type of damage.[35] It is also worth mentioning the jurisprudential support for the adoption of the integral risk theory within the special regime of environmental civil liability. The STJ

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[33] STJ, Brazil. *Recurso Especial No. 1.198.727-MG. Lex*, A.H. Benjamin, J.L.R. Leite, S. Capelli, in *Revista do Superior Tribunal de Justiça*, cit.

[34] STJ, Brazil, *REsp 1.071.741/SP*, T., Reporting Justice Herman Benjamin. Date of judgement: 24/03/2009.

[35] STJ, Brazil. *REsp 1.718.564/SP*, Rel. Min. Paulo de Tarso Sanseverino, Date of judgement: 23/06/2020.

has already ruled in this regard, as can be seen in the following judgement:

> "The integral risk theory is an extreme form of the risk theory in which the causal nexus is strengthened so that it cannot be broken by the implementation of causes that would normally jeopardise it (e.g. the victim's fault, third party event, force majeure). This modality is exceptional and is the basis for legal hypotheses in which the risk posed by economic activity is also extreme, as is the case with nuclear damage (art. 21, XXIII, 'c', of the Federal Constitution and Law 6.453/1977). The same happens with environmental damage (art. 225, caput and § 3, of the Federal Constitution and art. 14, § 1, of Law 6.938/1981), given the growing concern for the environment".[36]

It is also important to mention the recent STF decision that culminated in General Repercussion Thesis number 999, establishing the imprescriptibility (no limitation) of environmental damage. Extraordinary Appeal No. 654.833/AC, reported by Justice Alexandre de Moraes, dealt with a claim for compensation from the Ashaninka-Kampa indigenous community, which suffered from illegal logging in its territory between 1981 and 1982 by the Cameli Group, an economic conglomerate from

[36] Trasnlation: "A teoria do risco integral constitui uma modalidade extremada da teoria do risco em que o nexo causal é fortalecido de modo a não ser rompido pelo implemento das causas que normalmente o abalariam (v.g. culpa da vítima; fato de terceiro, força maior). Essa modalidade é excepcional, sendo fundamento para hipóteses legais em que o risco ensejado pela atividade econômica também é extremado, como ocorre com o dano nuclear (art. 21, XXIII, 'c', da CF e Lei 6.453/1977). O mesmo ocorre com o dano ambiental (art. 225, caput e § 3º, da CF e art. 14, § 1º, da Lei 6.938/1981), em face da crescente preocupação com o meio ambiente." STJ, Brazil. *REsp 1.373.788-SP*, Rel. Min. Paulo de Tarso Sanseverino, Date of judgement: 06/05/2014. Translation: Nessa linha, conclui-se que a existência de direitos fundamentais individuais não tem o condão de afastar a supremacia do interesse público no que se refere à conservação de um meio ambiente ecologicamente equilibrado e sadio à qualidade de vida .Ante o exposto, extingo o processo, com julgamento demérito, em relação ao Espólio de Orleir Messias Cameli e a Marmud Cameli Ltda, com base no art. 487, III, b do Código de Processo Civil de 2015, ficando prejudicado o Recurso Extraordinário; e sugiro a fixação da seguinte tese: "É imprescritível a pretensão de reparação civil de dano ambiental.

Acre. The debate in the Supreme Court centred on the applicability of the limitation periods in the Civil Code to environmental damage, with the prevailing view being that environmental damage is imprescriptible. In the vote of the Reporting Justice, it reads:

> "Along these lines, it can be concluded that the existence of individual fundamental rights does not have the power to override the supremacy of the public interest with regard to the conservation of an ecologically balanced environment that is healthy for the quality of life. In view of the above, I extended the proceeding, with judgement on the merits, in relation to the estate of Orleir Messias Cameli and Marmud Cameli Ltda, on the basis of art. 487, III, b of the 2015 Code of Civil Procedure, with the Extraordinary Appeal being dismissed; and I suggest that the following thesis be established: "The claim for civil reparation for environmental damage is imprescriptible".[37]

Regarding the topic, there is a new development; in September 2023, the Supreme Court extended the rule of imprescriptibility to actions for compensation to the federal treasury arising from illegal mining, a thesis that resulted from the Court's General Repercussion Topic No. 1268: "The claim for compensation to the treasury arising from the irregular exploitation of the federal treasury's mineral assets is imprescriptible, as it is inseparable from the environmental damage caused".[38] In a unanimous decision, accepting the vote of the Rapporteur, Justice Rosa Weber, the Court understood that the illicit act in question does not merely cause economic damage to the Federal Government, but harms the community in its fundamental right to a balanced environment, since the environmental damage is inherent to mining carried out illegally.

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[37] STF, Brazil. *RE:654833/AC*. Rel. Min. Alexandre de Moraes, 2020. Available at: *https://portal.stf.jus.br/processos/detalhe.asp?incidente=4130104*.

[38] STF, Brazil. *General repercussion in Extraordinary Appeal 1.427.694/Santa Catarina.* Reporting Justice Rosa Weber. Date of publication: 01/09/2023. Available at: *https://portal.stf.jus.br/processos/downloadPeca.asp?id=15360808802&ext=.pdf*. Accessed on: 16 September 2023.

So, having outlined some of the main points on the subject from the Brazilian perspective, let's move on to the Italian system.

4. *Civil liability for environmental damage in Italian law*

4.1. *General notions and normative basis.*

Firstly, it should be noted that Italian doctrine and jurisprudence also recognise the classification of transindividual rights adopted by the Brazilian Consumer Protection Code, which divides them into diffuse, collective and individual homogeneous rights or interests. The mention of these categories is also present in Italian law in the country's Consumer Code and, in particular, was the subject of a recent reform of the Italian Code of Civil Procedure, through Law 31/2019, which created a new form of collective action, similar to class action in Anglo-Saxon law, and officially included homogeneous individual rights in the transindividual category.[39]

However, it should be noted that the country's doctrine has a different conception regarding the defence of diffuse and collective rights than in Brazil. Currently, the prevailing position is that the defence of diffuse interests can be sustained in a similar way to collective rights.[40] In other words, through environmental associations, which need recognized legitimacy to bring collective actions in environmental matters. In Italian positive law, limited mention of the protection of diffuse transindividual rights are found. In the country, the protection is being consolidated within environmental issues, through case law.[41]

The normative basis for liability arising from environmental damage in Italy has been expanded over the course of the 21st

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[39] G. Scarselli, *La nuova azione di classe di cui alla legge 12 aprile 2019 n. 31*, *Jusicum*, 2019.

[40] G. Alpa, *Interessi diffusi*, in *Digesto delle discipline privatistiche*, Sezione civile, vol. IX, UTET, Torino, 1993, 609-617.

[41] G. Iudica, *Diritti diffusi*, in *Enciclopedia del Novecento*, *III Supplemento*, 2004. Available at: *https://www.treccani.it/enciclopedia/diritti-diffusi_(Enciclopedia-del-Novecento)/*.

century, in the face of a European Community context that has been moving towards ensuring environmental protection. Nevertheless, it is important to note that the duty to indemnify for environmental damage was already supported by rules in the Italian Constitution of 1948, which deal with the social rights to health, culture and the environment. Article 9, point two, recognises the Republic's duty to protect the nation's landscape and artistic heritage.[42] Article 32 provides for the fundamental right to health, which is directly related to the protection of the environment.[43] Article 2 of the Constitution also protects the dignity of the human person, a fundamental value that correlates with environmental protection and sustainable development.[44]

The express provision of the environment as a fundamental right in the country's constitutional text is recent, as it was only in February 2022 that a Constitutional Amendment was enacted, modifying articles 9 and 32 of the Italian Constitution to include the "protection of the environment, biodiversity and ecosystems, also in the interests of future generations",[45] as a duty of the Italian state. This addition to the constitutional text is paradigmatic, as it opens the door to the development of an ecocentric approach to environmental protection in the country, in line with European legal doctrine, with a view to the formation of an eco-

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[42] As in the Italian Constitution: "Art. 9: The Republic promotes the development of culture and scientific and technical research and protects the landscape and the historical and artistic heritage of the nation." Italy, Constitution of the Italian Republic, 1947. Available at: *https://www.senato.it/sites/default/files/media-documents/COST_PORTOGHESE.pdf*.

[43] Here, we adopt Rocha's position in the sense that environmental protection must be thought in an integrated way with universal health protection, and that the ecological crisis has an important relationship with the health crises evolving, for example, the COVID-19 pandemic. L.R.L. Rocha, *The environmental emergency room: protecting the rights of nature in Latin America*, in *Brazilian Journal of Public Policy*, vol. 10, n. 3, 2020, 176.

[44] S. Terracino, *La responsabilità civile in materia ambientale: tra risarcimento, sanzione e principio di precauzione*, in *Laurea thesis in private law 2*, rapporteur A. Zimatore, 115.

[45] Italy. Constitutional Law 11 February 2022, n. 1. Official Gazette of the Italian Republic. General Series. N. 44. 2022.

logical constitutionalism.[46] Furthermore, the express mention of the interests of future generations incorporates the definition of sustainable development presented in Principle 2 of the 1992 Rio Declaration on the Environment, which emphasises the intergenerational dimension of protecting nature.[47]

At the infra-constitutional level, injuries to the environment that gave rise to a duty to compensate were dealt with in the generic rules of the Italian Civil Code until the advent of Law no. 348/1986. Through this law, the Italian legislator recognized the environment as an autonomous right, subject to direct protection, within the competence of the ordinary court of first instance.[48] Furthermore, article 16 of this law defines environmental damage as:

> "Any intentional or culpable act that jeopardises the environment obliges the perpetrator to compensate the damage. The judge, even if a precise quantification of the damage is not possible, determines it on an equitable basis, taking into account the seriousness of the individual's fault, the cost necessary for reparation, and the offender's profit".[49]

This definition is very close to the generic definition of damage in Article 2043 of the Italian Civil Code, so it is argued that Law 348 did not attempt to establish a different civil liability regime for environmental protection. In this way, it is empha-

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[46] I.W. Sarlet; T. Fensterseifer, *Direito Constitucional Ecológico*, Editora Revista dos Tribunais, São Paulo, 2021, 59-61.

[47] "Principle 3: The right to development must be exercised in such a way as to respond equitably to the development and environmental needs of present and future generations." UN. *Rio Declaration on Environment and Development*. Rio de Janeiro: UN, 1992. Available at: *https://www.un.org/esa/dsd/agenda21_spanish/res_riodecl.shtml*. Accessed on: 06 July 2023.

[48] P.G. Monateri, *La responsabilità civile*, UTET, Torino, 1998, 650.

[49] Translation: "Qualunque fatto doloso o colposo che comprometta l'ambiente [...] obbliga l'autore del fatto al risarcimento del danno [...] il giudice ove non sia possibile una precisa quantificazione del danno, ne determina l'ammontare in via equitativa tenendo comunque conto della gravità della colpa individuale, del costo necessario per il ripristino, e del profitto conseguito dal trasgressore [...]" Italia, Corte di cassazione. 1 September 1995, n. 92111, RCP, 1996.

sised that the law adopted subjective liability for environmental damage, which was considered a step backwards by the doctrine of the time.[50]

However, the country's environmental legislation has been strongly impacted by European Community Law. In 2004, the European Parliament issued Directive 2004/35/EC, which instituted what is known as the Community environmental liability regime.[51] Based on the polluter-pays principle,[52] it aims to standardize the approach of European Union members to environmental damage. To this end, it provides a broad definition of environmental damage, including damage to water, air and soil, as well as acts that affect flora and fauna. It is also based on the principles of prevention and precaution,[53] aiming to create a merely subsidiary system of reparation for when the damage actually occurs.

In annex 2, the types of environmental repair are defined, in order of priority for the executing party. Primary reparation, which involves returning the situation to the status quo ante, takes precedence over the others because it is the most effective way of restoring what has been degraded to nature. However, is also the most challenging to achieve due to the characteristics of environmental damage and its potential impact on society. Therefore, in a subsidiary way, two other forms of reparation are suggested: complementary reparation, which covers the measures to be taken to "compensate for the fact that primary repa-

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[50] U. Salanitro, *Il risarcimento del danno all'ambiente: un confronto tra vecchia e nuova disciplina*, in F. Alcaro *et al.* (eds), *Vallori dela persona e modelli di tutela conto i rischi ambientali e genotossici*, Firenze, University Press, Firenze, 2008, 341-342.

[51] M. Maccaroni, *Environmental damage*, in *Rivista elettronica di diritto pubblico, di diritto dell'economia e di scienza dell'amministrazione*, 2012.

[52] Article 1: "The purpose of this Directive is to establish a framework of environmental liability based on the 'polluter pays' principle, to prevent and remedy environmental damage."

[53] E.U. *Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004. Official Journal of the European Union. L.143/75.* 20/04/2004. Available at: *https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32004L0035&from=EN*.

ration does not result in the full re-establishment of the damaged natural resources and/or services"; and compensatory reparation, which must be carried out while full recovery is not yet in full effect.[54] It happens that recovery measures often take years to be carried out, so the solution is in the form of measures to compensate for the environmental damage caused.

Thus, the European legislator's preference for factual reparation over monetary compensation is clear, although it is not completely excluded as a compensatory instrument.[55] Regarding potential liability proceedings for environmental damage, Article 10 already sets a limitation period of 5 years from the date of discovery of the environmental offence for bringing civil or administrative liability actions. In Article 35, the law also clarifies that the preferential regime for preventing environmental damage is independent of the subjective element. This directs the European legislator towards a special regime for civil liability arising from environmental damage, based on objective liability.

This directive was established as mandatory for EU member states, which had to regulate it by 30 April 2007.[56] Reiterating its purpose of environmental protection, the text does not prohibit the establishment of stricter national laws by member states to protect the environment.[57]

Based on the new European system of environmental civil liability, the Italian state took steps to update its legislation on the matter within the established deadlines. In 2006, the Environmental Code, or Single Environmental Text (TUA), was approved, which expanded environmental legal protection in the country. Initially, the text repeals the provisions of Law 348/86, instituting, according to Maccaroni, a "Copernican revolution in

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[54] A.H. Benjamin, *Responsabilidade Civil Pelo Dano Ambiental*, cit.

[55] M. Maccaroni, *op. cit*.

[56] S. Terracino, *op. cit*.

[57] E.U *Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004. Official Journal of the European Union. L.143/75. 20/04/2004.* Available at: *https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32004L0035&from=EN* Accessed on: 1 July 2022.

the environmental remediation regime".[58] The new definition of environmental damage in the Italian legal system is introduced by art. 300 of the TUA: "Environmental damage is any significant and measurable deterioration, direct or indirect, of a natural resource or of the assured utility of that resource".[59] This more delimited definition places measurability as a detriment to the classification of environmental damage. However, systematic interpretation of this provision must be carried out in order to recognize the significance of environmental damage in a broad way, based on the polluter-pays principle, as will be demonstrated below when we look at Italian case law.[60]

As for the civil liability system, reading article 298 of the law reveals cases in which liability is objective, there is no need to assess damage or the polluter's fault. These are the cases in which the damage results from a professional activity listed in Annex 5 of the law, which adopts the theory of presumed risk, in which the mere potential for degradation of the activity is embedded in the duty of precaution and prevention of environmental damage.[61] The annex contains various risky activities, such as mining, the treatment of urban and industrial waste, the storage, production or transport of objects that are potentially harmful to the environment, such as fossil fuels, among others.[62]

However, other contexts are presented in which the subjective elements are indispensable for the agent's liability. Article 308(4) and (5) highlight hypotheses that exclude strict liability,

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[58] M. Maccaroni. *op. cit.*, 9.

[59] Italia. *Decreto Legislativo 3 aprile 2006, n. 152. Gazzetta Ufficiale della Repubblica Italiana*, 2006. Translation: Articolo 300. 1. È danno ambientale qualsiasi deterioramento significativo e misurabile, diretto o indiretto, di una risorsa naturale o dell'utilità assicurata da quest'ultima.

[60] M. Benozzo, *La responsabilità oggettiva del danno ambientale nel codice dell'ambiente*, in *Ambiente & Sviluppo*, n. 10, 2011, 755.

[61] G.D. Comporti, *Il danno ambientale e l'operazione rimediale*, in A. D'Adda, I.A. Nicotra; U. Salanitro (eds), *Principi europei e illecito ambientale*, Giappichelli, Torino, 2013, 84.

[62] Italia. *Decreto Legislativo 3 aprile 2006, n. 152. Gazzetta Ufficiale della Repubblica Italiana*, 2006.

circumstances in which intent and fault are indispensable for liability:

> "4. The costs of precautionary, preventive and restorative actions taken in accordance with the provisions of the sixth part of this decree shall not be borne by the operator if he can prove that the environmental damage or the imminent threat thereof: a) was caused by a third party and occurred despite the existence of abstractly adequate safety measures; b) is a consequence of the observance of a mandatory order or instruction issued by a public authority, other than those given as a result of a problem attributable or accidental to the operator; in this case the Minister for the Environment and Protection of the Territory and the Sea takes the necessary measures to allow the operator to recover the costs incurred.
>
> 5. The operator shall not be obliged to bear the costs of the actions referred to in paragraph 5 (...) if he proves that it is not culpable or intentional behaviour".[63]

Therefore, a mixed system has been adopted, in which strict liability has taken on relevance when applied to activities previously considered to be more damaging to the environment. However, in the Italian system, it has not been given a general or even ordinary character, as there are clear hypotheses in which intent or fault are essential for liability.[64]

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[63] Free translation: 4. Non sono a carico dell'operatore i costi delle azioni di precauzione, prevenzione e ripristino adottate conformemente alle disposizioni di cui alla parte sesta del presente decreto se egli può provare che il danno ambientale o la minaccia imminente di tale danno: a) è stato causato da un terzo e si è verificato nonostante l'esistenza di misure di sicurezza astrattamente idonee; b) è conseguenza dell'osservanza di un ordine o istruzione obbligatori impartiti da una autorità pubblica, diversi da quelli impartiti a seguito di un'emissione o di un incidente imputabili all'operatore; in tal caso il(Ministro dell'ambiente e della tutela del territorio e del mare adotta le misure necessarie per consentire all'operatore il recupero dei costi sostenuti. Italia. *Decreto Legislativo 3 aprile 2006, n. 152. Gazzetta Ufficiale della Repubblica Italiana*, 2006. 5. L'operatore non è tenuto a sostenere i costi delle azioni di cui al comma 5 (...) qualora dimostri che non gli è attribuibile un comportamento doloso o colposo. Italia. *Decreto Legislativo 3 aprile 2006, n. 152. Gazzetta Ufficiale della Repubblica Italiana*, 2006,

[64] S. Terracino. *op. cit.*, 118.

The central role of the State as guarantor of a balanced environment and responsible for actions concerning environmental damage in the strict sense should also be emphasized.[65] In this sense, art. 304 et seq. of the TUA stipulates that the Ministry of the Environment, an organ of the Italian central executive power, acts as a procedural substitute in environmental civil liability actions, in the name of protecting diffuse interests.[66]

4.2. *Doctrinal positions*

Firstly, some doctrinal considerations about the regime of Law 348/86 will be analysed. In this context, Monateri points out that the definition of the content of the subjective right arising from environmental damage in Italy had been established by case law decisions. The author wrote that the 1986 Italian model was inspired by the National Environmental Policy Act, a US law from the early 1970s. This would explain the legislative choice not to define specific criteria for verifying environmental damage, delegating more functions to the jurisdiction, with an open legal provision.[67]

> "It continues to be fully recognized that, in environmental matters, complete and detailed proof of damage is objectively impossible. Firstly because some harmful effects, constituting certain damage, become evident only over time, and secondly because they are extremely difficult to prove".[68]

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[65] Environmental damage in the strict sense is understood as collective property damage to the environment, which has the community as its victim and refers to the diffuse right to a healthy and balanced environment. Its protection, therefore, can be seen as collective J.R. Leite, P.A. Ayala, *op. cit*.

[66] U. Salanitro, *op. cit.*, 341-342.

[67] P.G. Monateri, *op. cit.*, 921.

[68] Free translation: "Ne segue il pieno riconoscimento che nella materia ambientale una prova completa e minuziosa del danno è obiettivamente impossibile. Innanzitutto, perché alcuni effetti pregiudizievoli, pur costituendo un pregiudizio certo, si evidenziano solo con il tempo, in secondo luogo perché alcuni sono di difficilissima dimostrazione". *Ivi*, 922.

In this sense, it is argued that the polluter cannot benefit from the difficulty of proving the causal link. Once again, the theory of the probability of damage is particularly important. Under this theory, when risky activities are proven, the causal link is presumed. Regarding to the legislative option for settlement on an equitable basis, Monateri states that, in this judgement, it is important to individualize the facts that are attributable to the convicted party, in order to avoid them being responsible for facts attributable to third parties or any other concause, such as natural phenomena. There is thus a tendency to consider general exclusions from culpability even in cases of environmental damage.[69]

As for the regime of the Environment Code, he considers that the legislation has created two different regimes for environmental civil liability. One of them, corresponding to European legislation 2004/35/EC, defines that the liability of agents involved in risky activities is objective, and must be protected by the Ministry of the Environment in procedural substitution. The second regime is similar to that of Article 18, with the regime of subjective liability and compensation in cash applying to polluting agents in general. According to the author, the solution presented for reconciling the two different regimes involves re-signifying the character of fault beyond its punitive function, as well as applying the solid criteria presented in the EU Directive for awarding compensation.

In fact, the ambiguity in the wording of the Italian Environmental Code has been criticized by legal scholars. On the one hand, it is argued that the old rule in Article 18 of Law 346/1986, although it was limited and brought the field of environmental liability too close to public law, still outlined a system of compensation for environmental remediation. In this sense, community law regulations would have focused too much on forms of factual reparation, such as environmental compensation and full reparation, forgetting to regulate what, although not the

[69] U. Salanitro, *op. cit.*, 341-342.

most desirable, is often the only possible way of recovering the damage: compensation in money.

Another criticism, made by Maccaroni, relates to an apparent step backwards in recognising the importance of the subjective element in environmental civil liability.[70] As will be elaborated in the next section, it should be noted that although the 1986 law provides for a system that requires proof of intent and fault, Italian jurisprudence had already bypassed this issue to decide that the causal link, mere risk, was sufficient to determine compensation.

4.3. *Case law*

The Italian Constitutional Court has handed down important rulings on environmental law, affirming its autonomy, unity and the civil liability of agents responsible for environmental damage.[71] It has even acted to complement initially abstract provisions in the country's legislation which, as already explained, with Law 348/86, failed to establish the normative content of basic concepts, such as environmental damage itself.[72] Initially, it should be pointed out that the Court has already defined the right to a balanced environment as a "fundamental right of the person and an interest of the community".[73] It has also considered it as:

> "A unitary intangible asset, despite having several components, and each of them can also individually and separately be the object of care and protection, but all of which together lead to unity".[74]

This shows the multifaceted nature of the environment, despite its unity as an autonomously protected legal asset. This

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[70] M. Maccaroni, *op. cit.*

[71] B. Pozzo, *La Responsabilità Civile per danno ambientale*, in S. Nespor, A.L. Cesaris (eds), *Codice dell'ambiente*, Milano, Giuffré, 2003, 266.

[72] P.G. Monateri, *op. cit.*, 925.

[73] "Diritto fondamentale della persona ed interesse fondamentale della collettività" Italia. Corte costituzionale, n. 210, RGA, 1987, 334.

[74] Italia. Corte costituzionale. 30 dicembre 1987 *n. 641*, *FI*, 1988.

construction is important because it deals with environmental damage, taking into account the various dimensions it can take on: moral, patrimonial, temporal, ethical, which may partly justify treating it differently from the general rules of civil liability. Still in this context, it is important to note that Italian case law is beginning to delineate these characteristics, defining, for example, that:

> "Environmental damage includes the concept of impairment or damage to the environment, consisting of the alteration, destruction or deterioration of all or part of the environment. In other words, it is not enough for there to be a formal violation of environmental protection rules in terms of pollution, but it is necessary for the state or territorial entities to deduce that the environment has been compromised".[75]

In the above decision by the Supreme Court of Cassation, the problem of civil liability is addressed, namely the measurement of environmental damage, which, however, needs to be certified by the public authorities, which highlights the importance of the state in the Italian environmental liability system.

In a more recent decision, already under the TUA, the Court of Cassations addressed the regime of strict liability for those who carry out dangerous activities:

> "Whether referring to the exercise of a dangerous activity or to damage caused by causes in custody, it is indispensable for the assertion of liability of the exerciser of the dangerous activity in custody that a causal link be accepted between the activity or the thing and the damage caused by the third party (...). Therefore, even in cases where the person carrying out the dangerous activity has not taken all the appropriate measures to avoid the damage, thereby creating a situation highly capable of giving rise to liability, a causal link between the latter and the dangerous activity lies in the efficient cause that has the character of an unforeseeable event and is capable, on its own, of causing the event, which

[75] Italia. Corte di cassazione. 1° settembre 1995, *n. 92111*, *RCP*, 1996.

has liberating effects even when it is attributable to the harmful event itself or to a third party".[76]

It should also be noted that Italian jurisprudence rejects the application of the theory of integral risk in civil liability for environmental damage. Therefore, the exclusions of civil liability must be taken into account: unforeseeable circumstances and force majeure. On the other hand, the discussion on relativizing the statute of limitations for environmental damage has not developed in the Italian context.

5. *Comparative and conclusive summary*

In light of the above, which sought to elucidate the legal treatment of civil liability arising from environmental damage in Brazil and Italy, we proceed to explore the similarities and differences between the two legal systems. First of all, it should be noted that the right to a balanced environment is constitutional and fundamental in both legal systems.[77] It is worth noting that, although Italy only expressly provided for environmental protection in its constitution in 2022, this right was already considered

[76] Translation: Sia con riguardo all'esercizio di attività pericolosa, sia in tema di danno cagionato da cose in custodia, è indispensabile, per l'affermazione di responsabilità, rispettivamente, dell'esercente l'attività pericolosa e del custode, che si accerti un nesso di causalità tra l'attività o la cosa e il danno patito dal terzo: a tal fine, deve ricorrere la duplice condizione che il fatto costituisca un antecedente necessario dell'evento, nel senso che quest'ultimo rientri tra le conseguenze normali ed ordinarie del fatto, e che l'antecedente medesimo non sia poi neutralizzato, sul piano eziologico, dalla sopravvenienza di un fatto di per sé idoneo a determinare l'evento. Pertanto, anche nell'ipotesi in cui l'esercente dell'attività pericolosa non abbia adottato tutte le misure idonee ad evitare il danno, realizzando quindi una situazione astrattamente idonea a fondare una sua responsabilità, la causa efficiente sopravvenuta che abbia i requisiti del caso fortuito – cioè la eccezionalità e l'oggettiva imprevedibilità – e sia idonea, da sola, a causare l'evento, recide il nesso eziologico tra quest'ultimo e l'attività pericolosa, producendo effetti liberatori, ciò anche quando sia attribuibile al fatto del danneggiato stesso o di un terzo. Italia, Cassazione civile., *sez III, 10/03/2006, n. 5254*, in *Giust. civ. Mass*., 2006.

[77] As seen in Article 225 of the Brazilian Constitution of 1988 and Articles 9 and 32 of the Italian Constitution of 1948.

implicit in its text by the doctrine previously,[78] deriving from the right to life and health, provided for in the original 1958 text. In the case of Brazil, art. 225 §2 and §3 of the Federal Constitution not only expressly enshrines a fundamental right to a balanced environment, but also includes civil liability as an environmental protection strategy, which is not the case in the Italian Constitution.

In the procedural system for protecting transindividual rights, similarities can be seen in the doctrinal approach in both legal systems, emphasizing the differences between diffuse, collective and homogeneous individual rights. However, it should be pointed out that in Brazil this construction is expressed in the Consumer Code and is also observed in environmental collective proceedings. On the other hand, in Italy, the protection of transindividual environmental rights, especially diffuse interests, is built on jurisprudence, where there are greater obstacles to protecting these rights, especially due to the strict criteria for protecting diffuse interests through environmental associations.

However, given the importance of the environment as a fundamental right in both countries, it should be noted that around the same time, in the mid-1980s, both countries introduced infra-constitutional legislation outlining specific rules on civil liability for environmental damage. In the case of Brazil, this was regulated by the National Environmental Policy Act of 1994, which predates the 1988 Constitution itself, in Article 14 § 1. In Italy, it was regulated by Law No. 348 of 1986, in particular art. 18. This is an important point of difference. In Brazil, on the one hand, the aforementioned paragraph expressly established a system of strict liability for cases of environmental damage. In Italy, on the other hand, the liability system is generally subjective, with strict liability only in situations listed by law. Possibly as a result of this normative basis, the majority of national doctrine supports the existence of a special regime for environmental lia-

[78] C.A. Lunelli, *Italian jurisdiction, ideology and environmental protection*, EDUCS, Caxias do Sul, 2017.

bility in Brazil. The exceptional rule of liability was adopted only on proof of the causal link, without going into subjective issues in relation to the polluter (intent or fault). On the other hand, Italian doctrine does not identify this expression of a special regime, although there are positions defending strict liability.[79]

The fact is that, with the advent of Council of Europe Directive 2004/35/EC, at least speak of a special Community regime for civil and administrative liability for environmental damage can be discussed. When the Italian Single Environmental Text regulated the directive in 2006, there was greater independence from the general rules of the Italian Civil Code, moving towards a system closer to that of Brazil. Although the current regime is predominantly one of subjective liability, the new regulations, in line with the European Union, established specific cases in which the subjective element is dispensable: in the case of agents who carry out polluting activities. This is in line with the principle of prevention, which permeates the new European legislation.[80]

In Brazil, prevention is also considered one of the governing principles of environmental civil liability. It should be noted that both countries are signatories to the 1992 UN Declaration on Environment and Development, which includes precaution as principle number 15.[81] However, the central difference is that in Brazil, civil liability is objective in all cases of environmental damage, while in Italy it is only objective when the damage results from activities listed by law. Another important distinction between the two countries legal systems lies in most of the case law adhering to the theory of integral risk, which is the case in Brazil, while in Italy, according to the case law analysed in this article, liability exclusions are considered, even in the exceptional cases in which liability is objective.

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[79] M. Benozzo, *op. cit.*, 755.

[80] M. Maccaroni, *op. cit.*, 18.

[81] UN. *Rio Declaration on Environment and Development*, 1992, Available at *https://cetesb.sp.gov.br/proclima/wp-content/uploads/sites/36/2013/12/declaracao-rioma.pdf*.

In short, the issue of statute of limitations is considered to be of the utmost importance, and its discipline in Brazilian law, through jurisprudence, has culminated in the imprescriptibility of environmental damage. In Italy, as in other European countries such as Germany, France, Spain and Portugal, this is not the case.[82] Italy has a five-year statute of limitations, in accordance with a European directive. However, the limitation period only begins once the damage has been suffered by the victim (which may be the state or the community).

Looking at the comparison from a global perspective, it is possible to say that the treatment given to civil liability arising from environmental damage in Brazil tends to favour broad reparation of the damage by the agent, whether if he was (is) directly or indirectly responsible, while Italy adopts a more cautious position, in which those involved in environmental damage can use more legal remedies to avoid liability. That said, Brazil's protective stance, mainly through strict liability and imprescriptibility, is in line with the idea that Brazil's commitment to environmental preservation is proportional to the size of its biodiversity, which is the greatest of any country in the world, according to Conservation International.[83] Therefore, despite the fact that both countries, Brazil and Italy, have the polluter pays and prevention principles as a reference point, the Brazilian legal system offers a much stronger protection of the environment when it comes to civil liability.

Abstract

This article examines the fundamental legal aspects of civil liability for environmental damage in Brazil and Italy. The research, considering the alarming scenario of environmental and climate crisis, seeks to understand civil liability as a way to face this scenario, through a comparative study. The two countries'

[82] J.M. Tesheiner, *Direito ambiental e prescrição*, in *Revista Direito Ambiental e Sociedade*, vol. 4, n. 1, 2014, 9-39.

[83] I.W. Sarlet, T. Fensterseifer, *Curso de Direito Ambiental*, cit., 66.

institutes are dealt with separately. The normative framework for this liability, doctrinal perspectives from both states, and the jurisprudential manifestations carried out by the Supreme Courts of the countries in analysing the matter are addressed. Finally, the similarities and differences between the two civil liability systems are outlined.

Keywords: Brazilian Environmental Law; Italian Environmental Law; Civil Liability; Environmental Damage.

Il contributo esamina gli aspetti giuridici fondamentali della responsabilità civile per danno ambientale in Brasile e in Italia. La ricerca, considerando l'allarmante scenario di crisi ambientale e climatica, cerca di considerare la responsabilità civile come strumento per affrontare questo scenario, attraverso uno studio comparato. Gli istituti dei due Paesi sono trattati separatamente. Vengono affrontati il quadro normativo della responsabilità, le prospettive dottrinali di entrambi gli Stati e la giurisprudenza delle Corti Supreme dei due Paesi. Le conclusioni delineano le analogie e le differenze tra i due sistemi di responsabilità civile.

Parole chiave: Diritto ambientale brasiliano; Diritto ambientale italiano; Responsabilità civile; Danno ambientale.

Transiciones para la sostenibilidad socioambiental: la diversidad como valor[*]

Milena Petters Melo

Introducción

En el mundo globalizado, ante la crisis ecológica y climática, son grandes los desafíos que se ponen para el Derecho en sus diferentes ramas y niveles de normatividad. Hoy en día, considerando la constitucionalización del Derecho y la abertura constitucional hacia el derecho internacional, especialmente respecto a la protección de los derechos humanos, no se puede más pensar el Derecho fuera del ámbito de la sostenibilidad socioambiental: un cuadro normativo que comprende, por lo tanto, la complexidad de un abordaje integral al conjunto de los derechos humanos y a la protección ambiental, con particular atención a la protección de la biodiversidad y de la diversidad cultural como bienes comunes, pensando a las presentes y futuras generaciones.

En este sentido, considerando la profusión de instancias normativas y de instancias de resolución de conflictos en la esfera transnacional, se pone para el constitucionalismo contempo-

[*] Articolo sottoposto a referaggio.

ráneo (multilevel)[1] el desafío de una razón transversal y dialógica que atraviese los distintos niveles de normatividad y pueda dar respuestas efectivas a los problemas concretos que se presentan[2]. Respuestas efectivas, articuladas en políticas constitucionales – esto es, programas, proyectos, acciones en diferentes niveles de gobierno, local, regional, nacional, transnacional, y en sinergia con diferentes sectores y actores sociales – que buscan implementar, en la práctica, la normatividad que proviene del dialogo, ni siempre armonioso, entre el campo constitucional y el sistema internacional con sus diversas velocidades e fragmentaciones..

Este artículo se articula en cinco breves tópicos para la reflexión, resultado de investigaciones que parten de la teoría de la constitución e de la comparación constitucional en un enfoque dialógico y interdisciplinar, con el objetivo de contribuir para el debate sobre las transiciones necesarias en el contexto hodierno, especialmente en lo que respecta a la relación entre el derecho y el medio ambiente y los desafíos planteados para las políticas de transición constitucional orientadas a la sostenibilidad socioambiental.

1. *La era de los derechos y del desarrollo*

La segunda mitad del siglo pasado, conocida como la "era de los derechos" – como definido en el título de la obra clásica

[1] I. Pernice, *La dimensión global del constitucionalismo multinivel: una respuesta global a losdesafíos de la globalización*, Ceu Ediciones, Madrid, 2012; I. Pernice, *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, in *European Constitutional Law Review*, n. 11, 2015, 541-562; E. Petersmann, *Multilevel Trade Governance in the WTO requires Multilevel Constitutionalism*, in C. Joerges, E. Petersmann (eds), *Constitutionalism, multilevel trade governance and social regulation*, Hart, Oxford, 2006. Para una contextualización del concepto en el debate en Alemania, v. N. Walker, *Multilevel Constitutionalism: Looking Beyond the German Debat*, in LEQS Paper, n. 8, 2009.

[2] Es en este sentido que se configura el transconstitucionalismo, cf. Marcelo Neves, y crece en relevancia la comparación constitucional y el estudio del Derecho como política constitucional. A propósito, v. M. Neves, *Transconstitucionalismo*, WMF, São Paulo, 2009; M. Petters Melo, M. Carducci, *Políticas Constitucionais Desafios Contemporâneos* (vol. 1 e 2), Imaginar o Brasil, 2021.

de Norberto Bobbio[3] – fue también llamada de "era del desarrollo" (Wolfgang Sachs)[4]. En este periodo, al mismo tiempo en que se afirmaba el sistema internacional de protección de los derechos humanos y se consolidaba la tutela de los derechos fundamentales en sus diferentes generaciones/dimensiones como característica del constitucionalismo democrático en grande parte de los países occidentales, el "Sur del Mundo" ha combatido para alcanzar el "Norte", *experts* hostigaron aldeas, próximas y distantes, y millares de personas se tornaron asalariados y consumidores.

Como "un faro que guía a los marineros hacia la "salvación", el "desarrollo" se consolidó como una idea que ha orientado las naciones emergentes en su ruta a través de la historia que inició con el fin de la Segunda Guerra Mundial. Democracias y dictaduras lo han proclamado como la aspiración principal, ya que estaba superada la subordinación colonial, y, asi, el "desarrollo" fue abrazado por los gobiernos y por la sociedad civil, por las élites y los movimientos sociales, en las estrategias políticas internas e internacionales, tanto de la "derecha" como de la "izquierda"[5].

En este contexto, como señala Wolfgang Sachs, el "desarrollo" pasó a implicar muy más que actividades técnicas o comportamientos sociales y económicos: "*it has become a perception that models reality, a myth that comforts societies, legitimates and justifies interventions, programs and projects, and often appears illusionary while provoking great passion*"[6].

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[3] N. Bobbio, *L'età dei diritti*, Einaudi, Torino, 1990.

[4] W. Sachs, *The development dictionary*, Zed Books, London and New York, 1993, 4.

[5] Cfr.W. Sachs: "*Like a towering lighthouse guiding sailors to safety, 'development' once stood as the idea that oriented emerging nations during their journey through the post-war period*", *Ibidem.*

[6] En este contexto, el "desarrollo" ha llegado a implicar mucho más que actividades técnicas o comportamientos sociales y económicos: se ha convertido en una percepción que da forma a la realidad, un mito que reconforta a las sociedades, legitima y justifica intervenciones, programas y proyectos, y muchas veces parece ilusorio, mientras provoca grandes pasiones. Cf. W. Sachs, *Ivi*, 1.

En efecto, el "desarrollo" se tornó central en un importante y potente debate semántico y político. En el "*inaugural address*" de 20 de janeiro de 1949, Harry Truman ha declarado que el hemisferio sur era "sub-desarrollado" y, muy rápidamente, el "desarrollo" ha hecho su camino en un léxico universal, invadiendo no solo las declaraciones oficiales, pero también el lenguaje usado por los movimientos sociales de base en diferentes regiones del mundo. El resultado fue un nuevo significado como forma de identificación y polarización geopolítica y *una nueva percepción de unos en relación a los "otros"*: los desarrollados y los sub-desarrollados[7].

El "subdesarrollo", según Gustavo Esteva, empanzó en aquel momento, en el día 20 de janeiro de 1949:

> "En aquel día, dos billones de personas se han vuelto subdesarrolladas. En un sentido real, a partir de aquel momento, ellas dejaron de ser lo que eran, en su diversidad, y se transformaron mágicamente en un reflejo invertido, reflejado en la realidad de los demás. Una proyección deformada que subestima y simplifica la identidad de estas personas, en una estandarización que las clasifica como una estrecha minoría, a pesar de que, en realidad, son ricas en su diversidad y constituyen una mayoría. Desde entonces, el desarrollo ha connotado una cosa: escapar de la indigna condición llamada sub-desarrollo, la amenaza de una vida de subordinación y discriminación, el riesgo de quedarse atrás en el curso de la historia"[8].

Así, para gran parte de la población mundial, "pensar en desarrollo requiere, antes de todo, la percepción de si propios como sub-desarrollados, con toda la carga de connotaciones que esta percepción conlleva"[9].

En este sentido, el concepto de "desarrollo" conquistó un violento poder colonizador, convirtiendo la historia en un programa, como un necesario e inevitable destino. La producción

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[7] Cf. G. Esteva, *Development*, in W. Sachs, *Ivi*, 7 ss.
[8] *Ibidem.*
[9] *Ibidem*.

industrial, que era solamente un método, entre otros, de construcción social, se convertido en el destino final de un camino unilineal de evolución social. Esta acepción colonizadora de desarrollo ha conferido hegemonía global a una genealogía de la historia enteramente occidental, robando de las personas de culturas distintas la oportunidad de definir sus propias formas de vida social.

Gradualmente, la palabra "desarrollo" pasó a hacer parte del lenguaje económico, político y social, acumulando una variedad de connotaciones. Todavía, al mismo tiempo, la abundancia de contenidos relacionados al termine ha diluido un significado preciso. De hecho, pocas palabras son tan vagas, confusas, frágiles e inadecuadas para dar substancia y significado a un pensamiento o comportamiento. Tal vez es exactamente esta la razón de su generalización: la permeabilidad del termine permite a los diferentes actores de introducir en el "desarrollo" sus particulares interpretaciones, intereses y demandas, asignándole significados ambivalentes, ambiguos y por veces contradictorios.

Aunque sea deficitario de una precisión conceptual, el "desarrollo" tomó forma en la percepción popular e intelectual como la evocación de una red de significados, una trama que representa una trampa aparentemente irremediable, ya que la palabra parece envolver un cambio favorable: da la impresión de un paso del simple al complejo, del inferior al superior, del malo a algo mejor. Sin embargo, para gran parte de los habitantes del planeta, la connotación positiva de la palabra "desarrollo" es un constante alerta para lo que ellos exactamente no lo son. Evoca un estado constante que reside entre el indeseable y el indigno, una condición degradante. Para escapar de esta condición, gran parte del mundo pasó a ser esclavo de los sueños y experiencias de otras personas, provenientes de otras realidades, incorporando formas de vida y importando modelos estructurales e institucionales diseñados para otras sociedades[10].

[10] *Ivi*, 10.

2. *La cuestión ambiental en el plano internacional: ¿un desarrollo sostenible?*

A partir de los anos 1970, con la creciente relevancia que la cuestión ambiental pasó a tener en el debate político, ha ganado mayor espacio en la comunidad internacional y transnacional la noción de "desarrollo sostenible", que integra los derechos de la persona y del género humano – incluso aquellos de las futuras generaciones – garantías respecto a la cualidad de la vida y a la preservación del ambiente.

La definición mas difusa de desarrollo sostenible se encuentra en el Informe Brundtland (1987) que define "sostenible" la forma de desarrollo capaz de satisfacer a las necesidades de las generaciones actuales, sin comprometer la posibilidad que también lo hagan las generaciones futuras, señalando la sostenibilidad como una estrategia de desarrollo que pone en relación diferentes elementos – los recursos naturales y humanos, los aspectos físicos y financieros – para el incremento de la riqueza y del bien-estar, pensado a longo plazo.

Como objetivo, por tanto, el desarrollo sustentable remueve las políticas y prácticas que mantienen los *estándares* actuales de producción y consumo, que, al deteriorar la base productiva y los recursos naturales, dejan a las generaciones futuras con peores proyecciones y mayores riesgos. En cuanto a las necesidades, la definición del Informe Brundtland se refiere, en particular, a las necesidades de los pobres del mundo e incluye la idea de límites, capacidad tecnológica y organizaciones sociales, en cuanto a la posibilidad de que el medio ambiente satisfaga las necesidades actuales y necesidades futuras.

En este sentido, es necesario observar que el concepto de desarrollo sostenible, al mostrar la distinción entre elementos cuantitativos (por ejemplo, el mero crecimiento del PIB) y elementos cualitativos, abre consideraciones sobre el nivel de servicios y la garantía efectiva de derechos, como salud y educación, e introduce valores éticos: justicia, libertad, relación con la naturaleza y las generaciones futuras, solidaridad y cooperación. De

esta manera, comporta una visión del mundo, y del futuro del mundo, que engloba el plan personal y el ámbito de la comunidad. El concepto de sostenibilidad asume así un carácter tanto analítico como dialéctico, y por tanto abierto, ambivalente y en construcción.

En un contexto teórico y político de creciente complejidad, para la definición de connotaciones y significados reales del desarrollo, las agencias de desarrollo, gobiernos, analistas, movimientos sociales, ONG, asociaciones, comenzaron a contribuir y competir, aglutinando y reforzando interacciones en diferentes ámbitos: local, nacional, regional, internacional y global. Un proceso de creciente apertura a la participación de diferentes actores, que desembocó en la Conferencia Mundial en Río de Janeiro, en 1992.

Desde del Summit de Johannesburgo (2002), gana terreno un concepto más amplio y complejo de desarrollo sostenible, que se puede traducir en los siguientes términos: el desarrollo sostenible es un modelo que tiene como objetivo eliminar la pobreza, mejorar los estándares nutricionales, la salud y la educación, asegurando un adecuado acceso a los servicios y recursos naturales y culturales, eliminando progresivamente las disparidades y desigualdades globales en la distribución del ingreso; asegurar la igualdad de oportunidades entre los sexos y los jóvenes, promoviendo modelos de producción y consumo que respeten los requisitos de protección y gestión de los recursos naturales; que garantiza la paz, la seguridad, la estabilidad y el respeto de los derechos humanos, también a través del *empowerment* de la *governance* en todos los niveles, y promueva la solidaridad y la ayuda para el desarrollo hacia los países más pobres, en cantidad y calidad, especialmente por parte de los países desarrollados y mediante la cooperación internacional.

Esta concepción no ha evolucionado sustancialmente en conferencias y cumbres internacionales recientes. Así se pudo ver en Río+20, que mantuvo esta semántica del desarrollo sostenible (y sus ambigüedades y ambivalencias), abriéndose todavía a especificaciones en cuanto a la inclusión de algunos temas,

como el derecho fundamental al agua. Estableciendo parámetros objetivos, la agenda de la ONU 2030 (2015), los Objetivos de Desarrollo Sostenible y sus 169 metas, corroboran esta comprensión integral del desarrollo sostenible a nivel internacional, estableciendo un conjunto complejo de "medidas audaces y transformadoras para promover el desarrollo sostenible para los próximos 15 años "sin dejar a nadie atrás"[11].

Sin embargo, la falta de un acuerdo claro sobre el gobierno de los recursos y, por lo tanto, sobre la protección de los bienes comunes, alimenta la ambigüedad de fondo que ha caracterizado los procesos y discursos de globalización y las políticas para el desarrollo sostenible, y pone en riesgo los objetivos socio-económicos establecidos por la comunidad internacional en diferentes documentos internacionales.

Considerando las evoluciones teóricas y normativas en el ámbito internacional, en el que tomó forma una concepción mas comprensiva del desarrollo sostenible, no es complicado comprender un abordaje integrado a los derechos humanos y al desarrollo sostenible, que abraza un elenco articulado de derechos emanados para la protección de los recursos naturales, de los bienes comunes, de la dignidad humana y de la vida en sus diversas manifestaciones, y prioriza la lucha contra la pobreza, el respecto por la autodeterminación de los pueblos, la promoción y protección de los derechos civiles, sociales, económicos, culturales y políticos y que valoriza la diversidad cultural como fuente de innovaciones, indispensable à la *good governance* e a la sostenibilidad socio-ambiental.

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[11] En septiembre de 2015, representantes de los 193 Estados miembros de la ONU se reunieron en Nueva York y reconocieron que la erradicación de la pobreza en todas sus formas y dimensiones, incluida la pobreza extrema, es el mayor desafío mundial y un requisito indispensable para el desarrollo sostenible. Al adoptar el documento "Transformar nuestro mundo: la Agenda 2030 para el Desarrollo Sostenible" (A/70/L.1), los países se comprometieron a adoptar medidas audaces y transformadoras para promover el desarrollo sostenible en los próximos 15 años sin dejar a nadie atrás. Cf. ONU Brasil: *https://brasil.un.org/pt-br/91863-agenda-2030-para-o-desenvolvimento-sustent%C3%A1vel*.

En esta perspectiva, analizando los documentos internacionales emanados a partir de la década de 1960 a la actualidad, sobre derechos humanos, medio ambiente y protección del patrimonio natural y cultural, es posible observar una gradual apertura cognitiva que subraya la multidimensionalidad de estos temas – caracterizados por aspectos sociales, económicos, culturales y ambientales – y la tendencia para evidenciar las conexiones y recíprocas relaciones de interdependencia y fortalecimiento[12]. Esta observación resulta clara en el estudio sistematico de documentos como la Declaración sobre Derechos Humanos de Viena (ONU, 1993), la Declaración Universal sobre la diversidad cultural (UNESCO, 2001), la Convención para la Salvaguardia del Patrimonio Inmaterial (UNESCO 2003) la Declaración Universal sobre Bioética y Derechos Humanos (UNESCO, 2005) o la Carta de la Tierra (Comisión de la Carta de la Tierra, 2000).

Hoy, por lo tanto, ya no es posible pensar el desarrollo y las políticas constitucionales, en el ámbito interno y transnacional, sin tener en cuenta la complejidad de la temática del desarrollo sostenible en sus múltiples dimensiones – ecológica, humana, económica, social, cultural – y sus repercusiones en los diversos niveles: global, nacional, regional y local. Y puesto que la semántica del "desarrollo" permanece ligada al crecimiento económico, algunos autores y movimientos sociales prefieren usar la expressiòn "sostenibilidad socioambiental".

Esta comprensión é aún más evidente nel ámbito de la expansión del constitucionalismo ambiental[13] y de la convivencia problemática de los derechos fundamentales en el diálogo y en las tensiones entre Constitución, ambiente, economía y cultura.

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[12] M. Petters Melo, *Cultural Heritage Preservation and Environmental Sustainability: Sustainable Development, Human Rights and Citizenship*, in K. Mathis (ed.), *Efficiency, Sustainability, and Justice to Future Generations*, Springer, Heidelberg, 2011.

[13] A propósito del constitucionalismo ambiental en una excelente perspectiva comparatística, v. D. Amirante, *Costituzionalismo ambientale: Atlante giuridico per l'Antropocene*, il Mulino, Bologna, 2022. Para una contextualización comparada a partir de Brasil e Amèrica Latina, v. M. Petters Melo, *Constitucionalismo Ambiental Multilevel e democracia socioambiental*, in *Revista Novos Estudos Jurídicos*, vol. 29, n. 3, 2024.

3. *Entre eficacia de derechos y eficiencia económica*

Pero a pesar de lo interesante que pueden ser, y lo son, estas evoluciones teóricas y normativas relacionadas con el desarrollo sostenible en el plano internacional, es cuando se piensa en la materialización de estos derechos, principios y reglas de promoción y protección, que la cuestión se vuelve mucho más compleja. De hecho, en diversas ocasiones, el discurso sobre el desarrollo sostenible sirve para sostener el desarrollo capitalista, y no para dar soporte al florecimiento y garantía de las diversas formas de vida natural y social.

En la era de la globalización y de la hegemónica presencia de los mercados, la efectividad de los derechos es a menudo sustituida por el principio de la eficiencia económica. El predominio de intereses monetarios, acentúa los aspectos negativos del capitalismo, como la desigualdad de renta mundial, mercados de trabajo inestables y degradación ambiental.

Además, la retracción económica a favor de la especulación financiera plantea serias dudas sobre lo que comúnmente se reconoce como aspecto positivo del capitalismo: la capacidad de generar riqueza[14]. Porque la riqueza producida ha demostrado ser ilusoria, como han confirmado las reiteradas crisis económicas y socioambientales que han afectado a diferentes regiones del planeta y que siguen surtiendo efectos, evidenciando la urgencia de repensar los modelos de desarrollo, poniendo el ser humano y al medio ambiente en el centro de las prioridades.

Al mismo tiempo, cuando se trata de la sostenibilidad socioambiental, de la protección de los derechos humanos y de la defensa del patrimonio natural y cultural de la humanidad, se hace referencia a vínculos con el futuro, perspectivas que aún están por proyectarse: un ambicioso programa basado en la equidad intergeneracional, que requiere planificación estratégica, competencia técnica, curiosidad epistemológica, creatividad, responsabilidad y necesariamente diálogos interculturales.

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[14] D. Ikeda, *Peace Proposal. Toward Humanitarian Competition: A New Current in History*, Soka Gakkai International - United Nations Organization, 2009.

De hecho, el desarrollo es uno de los pilares del sistema de la Organización de las Naciones Unidas. Pero en efecto, por muchos vértices, el sistema de las Naciones Unidas en su conjunto se presenta de modo impositivo, así como otros conceptos que lo sustentan y por él son sostenidos. Sobre todo el modelo de democracia y de desarrollo privilegiado por los organismos económico-financieros de la ONU (FMI, Banco Mundial), toman en consideración el modelo de Estado y de producción y reproducción económica, social y cultural, de los países hegemónicos en el eje euroatlántico.

Aunque en el nuevo milenio declaraciones y convenciones han optado por un camino más pluralista y orientado a la sostenibilidad socioambiental, madurando el concepto de desarrollo sostenible, y aun cuando el derecho al desarrollo garantizado a partir de 1986 implique el vínculo que conecta y reconcilia el desarrollo con el conjunto de los derechos humanos en el plano individual y colectivo, la estructura del sistema y las acciones promovidas por la ONU siguen preponderantemente en el sentido de ignorar e incluso contrastar, aspectos culturales distintos del standard occidental, insistiendo en enfatizar el crecimiento económico, la acumulación y el poder adquisitivo como medios de satisfacción de necesidades de consumo.

En este sentido, sin desmerecer las adquisiciones evolutivas del sistema internacional de protección de los derechos humanos, se debe subrayar que el sistema ONU se expone a críticas contundentes, pudiendo interpretarse como un sistema organizado a partir de un modelo de sociedad que se comprende como universal y que utiliza el estándar de una pequeña parte de la humanidad, concentrada en los países ricos y en las élites de los países pobres, como paradigma a seguir por los que en él aún no están "incluidos" y deben "desarrollarse".

Una "inclusión" mucho más orientada hacia la capacidad de consumo que hacia una efectiva inclusión social, cultural y política para la toma de decisiones en los diferentes niveles de interacción socioeconómica, integración jurídica, producción y reproducción cultural. Esta tendencia, que gana fuerza en los

diferentes niveles, lleva a hablar en Europa del paso "de la forma Estado a la forma mercado", o del paso del "Estado de bienestar" al "estado de bienestar de los negocios"[15]. Y, en ese contexto, la planificación estratégica para la sostenibilidad socioambiental pierde un centro de coordinación fundamental: si no es el Estado el que cumple esa función, ¿qué institución podrá ejercerla de modo sistemático y efectivo, a medio y largo plazo?

Al mismo tiempo, siguiendo en dirección muy diferente, algunas Constituciones en América del Sur, y más específicamente Ecuador, 2008 y Bolivia, 2009, innovan al redefinir el desarrollo en la perspectiva del Bien Vivir y de la interculturalidad, introduciendo un avanzado modelo constitucional que reconoce la naturaleza como sujeto de derechos, protege el derecho fundamental al agua, la soberanía alimentaria y energética, enriqueciendo el constitucionalismo de la diversidad en el marco de la descolonización.

4. *Interdependencia y reciprocidad*

En el mundo común de la pluralidad humana, que se caracteriza ontológicamente en la dinámica entre la igualdad y la diferencia, Hanna Arendt definió los derechos humanos como una "invención que exige la ciudadanía". De hecho, "si los hombres no fueran iguales, no podrían entenderse. Por otro lado, si no fueran diferentes no necesitarían ni la palabra ni la acción para hacerse entender"[16]. En esta perspectiva, la igualdad resulta de la organización humana, que puede igualar las diferencias a través de las instituciones. Es la *polis* que hace a los hombres iguales por medio de la ley y de los derechos, y es en este sentido que la política instituye la pluralidad humana y un mundo común.

En este sentido, la cuestión de un enfoque integrado de los derechos humanos y de la sostenibilidad socioambiental es pro-

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[15] C. Amirante, *Dalla forma stato alla forma mercato*, Giappichelli, Torino, 2008.

[16] C. Lafer, *A reconstrução dos direitos humanos: um diálogo com o pensamento de Hannah Arendt*, Cia das Letras, São Paulo, 1988, 153.

fundamente compleja, especialmente teniendo en cuenta la integración jurídica efectiva, política y social de los diferentes sujetos y comunidades en el mundo de hoy y en sus rearticulaciones geopolíticas, jurídicas y económicas.

Los fenómenos que se han acelerado en las últimas décadas del siglo pasado y que vienen siendo llamados de globalización, nos colocan en la fase "planetaria" de la "evolución" humana. Una fase en la que los problemas, y las modalidades de respuesta a éstos, ya no caben dentro de la nación. En el plano del lenguaje político recurrente, se habla de interdependencia y reciprocidad.

Pero, al mismo tiempo, crecen los nacionalismos, los fundamentalismos, la xenofobia, las discriminaciones, la intolerancia, los discursos de odio, la inseguridad con respecto al futuro, catalizada en la aversión al extranjero, a lo "diferente", al "otro". Acontecimientos recientes[17] revelan buenas razones para cuestionar la superación o el fin de la "era de los derechos" y de las relaciones internacionales de base democrática.

Sin embargo, urgencias dramáticas como la crisis ambiental y climática, o la pandemia de COVID-19, nos mostraran que estamos juntos en esta nave y que los mayores problemas que se plantean actualmente para la humanidad son problemas comunes, con causas y efectos transnacionales.

Frente a un mundo problemático y un futuro incierto, las identidades (nacionales, religiosas, políticas) se reafirman de forma unilateral, sectaria y violenta. No obstante, en este proceso, cada uno debería ser alentado a asumir su propia diversidad, a concebir su propia identidad como la suma de sus diversas pertenencias, en lugar de confundir la identidad como una única pertenencia suprema, instrumento de exclusión y a veces instrumento de guerra[18].

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[17] Como la crisis migratoria, la emergencia refugiados, los discursos que llevaron a la elección de líderes en declarado enfrentamiento con los derechos humanos, impulsados por pautas discriminatorias, fundamentalistas y violentas.

[18] A. Maalouf, L'*Identità: un Grido contro Tutte le guerre*, Bompiani, Milano, 1999.

5. *La diversidad como valor*

Una convivencia "globalizada" sostenible en la perspectiva ecológica, y pacífica, es impensable si no se parte del principio que la diversidad es valor, recurso, derecho, en el sentido de llevar las relaciones humanas e interinstitucionales, en el ámbito público y privado, hacia un ethos de la reciprocidad, en la perspectiva de una "vida buena" (Alessandro Baratta), con y hacia el otro, en instituciones justas (Paul Ricoeur)[19].

La diversidad, como especifica Richard Lewontin, es el derecho inalienable de toda persona, y de los grupos, "a realizarse y a expandirse en toda su originaria plenitud, afianzándose como humanidad diferente (no solo de los otros, sino también de sí misma), a fin de no deteriorarse en el conformismo y en la repetición"[20]. Las diversidades son, por tanto, valores constitutivos de las personas y de los grupos, manifestaciones de la misma naturaleza que se expresa al plural, desdoblamientos concretos de la igualdad ontológica.

Este dato permanente de identidades diversas que se van especificando a partir de una misma matriz, la humanidad en cada uno y en todos, debería obligar al conocimiento recíproco, sin idealizaciones, exclusiones o exaltaciones.

Como recuerda Eligio Resta[21], los derechos humanos son aquellos derechos que pueden ser amenazados solo por la humanidad, pero que no pueden encontrar vigor sino gracias a esa misma humanidad, se trata, así, de un tema que implica una ¿responsabilidad universal, a medida que "ser humano", ser parte de la humanidad, no garantiza que se posea ese singular "sentimiento de humanidad". Es en este sentido que la fraternidad/solidaridad – el tercer apoyo del "*trípode*" revolucionario francés, relegado por las grandes vertientes de la teoría política y jurídica en los últimos siglos – puede retornar a la escena como protagonista. En un proceso de transición y reinvención política

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[19] P. Ricoeur, Soi-*même Comme un autre*, SEUIL, Paris, 1990.
[20] R. Lewontin, La *diversità umana*, Zanichelli, Bologna, 1987.
[21] Cf. E. Resta, *Il diritto fraterno*, Laterza, Roma-Bari, 2005.

orientado a la sostenibilidad socioambiental, en una praxis que apunte a la "buena vida", plural, democrática, humanista y ambientalmente responsable, que podrá traducirse en el plano normativo en un modelo de derecho que abandone el marco cerrado de la ciudadanía nacional y mire hacia nuevas formas de integración jurídica y de cooperación. Una integración dictada no solo por las normas formales del Derecho, sino por el compromiso efectivo con los derechos y los sujetos en sus necesidades y capacidades peculiares y diversificadas. Un "derecho fraterno", como propone Eligio Resta, que, yendo más allá de la globalización de los mercados, encuentre fundamento en la inderogabilidad universalista de los derechos humanos y se imponga al egoísmo de los lobos artificiales o de los poderes informales que, a su sombra, gobiernan y deciden[22].

Como se ha podido observar en este breve recorrido, hodiernamente no es complicado comprender un enfoque integrado a los derecho*s* humanos y a la proteccion sostenible, que abarca un conjunto articulado de derechos emanados para la protección de los recursos naturales, de la dignidad humana y de la vida en sus diversas manifestaciones, y prioriza la lucha contra la pobreza, el respeto al derecho de autodeterminación de los pueblos, la promoción y protección de los derechos civiles, sociales, económicos, culturales y políticos y que valora la diversidad cultural como fuente de innovaciones, indispensable para la buena gobernanza y la sostenibilidad socioambiental.

Sin embargo, la "invención que exige la ciudadanía", a la que se refería Hanna Arendt, hace referencia a las sociedades políticamente organizadas del modelo occidental. Gran parte del recorrido histórico del sistema internacional de protección de los derechos humanos y de la Organización de las Naciones Unidas consideró ese modelo de sociedad que fue exportado al mundo a través de los diferentes procesos de colonización e imperialismo cultural, y que está alcanzado el ápice de difusión con los procesos de globalización. Esto no significa que sea el mejor mo-

[22] *Ibidem.*

delo de civilización, incluso porque ha demostrado reiteradamente sus limitaciones en relación con los costos humanos y ambientales de su desarrollo[23].

De estas observaciones resulta clara la actual inderogable necesidad di apertura cognitiva del Derecho y de la política a los enfoques interdisciplinarios y diálogos interculturales, para proteger y promover la diversidad como valor. "La necesidad de aprender con el Sur" (Boaventura de Sousa Santos)[24], de escuchar el "mensaje de los pueblos originarios" (Leonardo Boff)[25], de usar el "diálogo creativo" para catalizar la "universalidad" interior y peculiar de cada ser humano y "diseñar el futuro" (Daisaku Ikeda)[26], poniendo en sinergia las potenciales contribuciones en la resolución de problemas comunes, inusitados y gravísimos en las actuales proporciones.

Como destaca el Preámbulo de la Carta de la Tierra[27]:

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[23] Sobre los límites del modelo occidental de desarrollo y las bases de otro paradigma, preciosas son las contribuciones teóricas de V. Shiva, W. Sachs, G. Esteva y otros autores en W. Sachs (ed.), *op. cit.*

[24] Cf. B. Sousa Santos, La *globalización del Derecho. Los nuevos caminos de la regulación y la emancipación.* Universidad Nacional de Colombia, Instituto de Servicios Legales Alternativos, 1998, Bogotà D.C., Colombia, 208.

[25] L. Boff, *Ecologia grito da terra, grito dos pobres*, Editora Atica, São Paulo, 1995, 190-191. En este sentido, cabe mencionar la cita de Leonardo Boff de los hermanos Vilas-Boas: "Se quisermos ficar ricos, acumular poder e dominar a Terra, é inútil pedirmos conselhos aos indígenas. Mas se quisermos ser felizes, combinar ser humano com ser divino, integrar a vida com a morte, inserir a pessoa na natureza, articular o trabalho com o lazer, harmonizar as relações entre as gerações, então escutemos os indígenas. Eles têm sábias lições a nos dar". *Apud* Boff, *Ibidem*.

[26] D. Ikeda, *op. cit.*

[27] La Carta de la Tierra es el resultado de una década de diálogo intercultural, en torno a objetivos comunes y valores compartidos. El proyecto de la Carta de la Tierra comenzó como una iniciativa de las Naciones Unidas, pero se desarrolló y finalizó como una iniciativa global de la sociedad civil. En 2000 la Comisión de la Carta de la Tierra, una entidad internacional independiente, concluyó y divulgó el documento como la carta de los pueblos. La redacción de la Carta de la Tierra implicó el más inclusivo y participativo proceso asociado a la creación de una declaración internacional. Este proceso es la fuente básica de su legitimidad como un marco de guía ético. La legitimidad del documento se ha visto reforzada por la adhesión de más de 4.600 organizaciones, incluyendo varios organismos gubernamentales y organizaciones internacionales, como la UNESCO, la UICN (Unión Internacional para la Conser-

> "Estamos en un momento crítico de la historia de la Tierra, en el cual la humanidad debe elegir su futuro. A medida que el mundo se vuelve cada vez más interdependiente y frágil, el futuro depara, a la vez, grandes riesgos y grandes promesas. Para seguir adelante, debemos reconocer que, en medio de la magnífica diversidad de culturas y formas de vida, somos una sola familia humana y una sola suela comunidad terrestre con un destino común. Debemos unirnos para crear una sociedad global sostenible fundada en el respeto hacia la naturaleza, los derechos humanos universales, la justicia económica y una cultura de paz. (...)"

Para actuar transiciones efectivas y llevar a cabo estas aspiraciones,

> "(…) debemos tomar la decisión de vivir de acuerdo con un sentido de responsabilidad universal, identificándonos con toda la comunidad terrestre, al igual que con nuestras comunidades locales. Somos ciudadanos de diferentes naciones y de un solo mundo al mismo tiempo, en donde los ámbitos local y global, se encuentran estrechamente vinculados. Todos compartimos una responsabilidad hacia el bienestar presente y futuro de la familia humana y del mundo viviente en su amplitud. El espíritu de solidaridad humana y de afinidad con toda la vida se fortalece cuando vivimos con reverencia ante el misterio del ser, con gratitud por el regalo de la vida y con humildad con respecto al lugar que ocupa el ser humano en la naturaleza".

Observaciones finales

La dimensión normativa y prospectiva de los derechos humanos y de la protección del medio ambiente en el plano internacional y en el plano constitucional impone transiciones efectivas para replantear y rearticular la política y la economía al servicio de los derechos humanos y de la protección de la natu-

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vación de la Naturaleza) y ICLEI (Consejo Internacional para Iniciativas Ambientales Locales). El texto completo de la Carta puede consultarse en el sitio de internet: *http://www.cartadaterrabrasil.org*. Versión en español: *https://cartadelatierra.org/lea-la-carta-de-la-tierra/preambulo/*.

raleza, es decir, al servicio de la vida en sus diferentes dimensiones. Sin esa base axiológica de fundamentación, que, a partir de la segunda mitad del siglo pasado, fundó el Derecho en el plano internacional y constitucional, el Derecho, la política y la economía no son más que técnicas áridas de mantenimiento del poder y de privilegios. Es sobre esa base de valores volcados a la protección de la vida que el Derecho en los Estados democráticos encuentra su base de legitimación y su razón de ser. Y es por eso por lo que también se impone hoy al Derecho, para la protección de los derechos, un diálogo productivo con la ética socioambiental, en abordajes interdisciplinares que valoricen, protejan y promuevan la diversidad cultural.

Concebir las otras culturas como portadoras de modalidades de respuestas alternativas a problemas comunes quiere decir reconocer en nosotros una humanidad común, de la cual las diversas culturas son una expresión parcial. Significa comprender que las posibilidades humanas intrínsecas a cada uno nos "hacen comunes" (constituyen la "común-unidad" humana), nos reúnen como seres humanos, diferentes por cultura, pero iguales en la búsqueda de una totalidad que no se identifica con ninguna cultura. Este es un paso imprescindible para construir un futuro común comprendido como convivencia pacífica y socio-ambientalmente sostenible en este planeta, para las presentes y futuras generaciones.

Abstract

Frente a la crisis ecológica y climática, considerando la profusión de instancias normativos y de resolución de conflictos en el ámbito transnacional, se pone para el constitucionalismo contemporáneo (multinivel) el desafío de una razón transversal y dialógica que atraviese los distintos niveles de normatividad y pueda dar respuestas efectivas a los problemas concretos que se presentan. Respuestas efectivas, articuladas en políticas constitucionales – es decir, programas, proyectos, acciones en diferentes niveles de gobierno, local, regional, nacional, transnacional, y en

sinergia con diferentes sectores y actores sociales – que buscan implementar, en la práctica, la normatividad que proviene del diálogo, no siempre armónico, entre el campo constitucional y el sistema internacional con sus diversas velocidades y fragmentaciones. Este artículo, resultado de investigaciones fundamentadas en la teoría constitucional y en la comparación constitucional, en un enfoque dialógico e interdisciplinario, tiene como objetivo contribuir a la reflexión sobre la relación entre el derecho y el medio ambiente y los desafíos planteados para las políticas constitucionales de transición orientadas a la sostenibilidad socioambiental.

Palabras clave: Derecho constitucional medioambiental; Sostenibilidad socio-ambiental; Diversidad cultural.

In the context of the ecological and climate crisis, considering the profusion of normative and conflict resolution instances at the transnational level, contemporary (multilevel) constitutionalism faces the challenge of a transversal and dialogical reason that crosses the different levels of normativity and can provide effective responses to the concrete problems that arise. Effective responses, articulated in constitutional policies – that is, programs, projects, actions at different levels of government, local, regional, national, transnational, and in synergy with different sectors and social actors – that seek to implement, in practice, the normativity that comes from the dialogue, not always harmonious, between the constitutional field and the international system with its various speeds and fragmentations. This article, the result of research based on constitutional theory and constitutional comparison, in a dialogic and interdisciplinary approach, aims to contribute to the reflection on the relationship between law and the environment and the challenges posed for constitutional transition policies oriented to socio-environmental sustainability.

Keywords: Constitutional environmental law; Socio-environmental sustainability; Cultural diversity.

Nel contesto della crisi ecologica e climatica, considerando la profusione di istanze normative e di risoluzione dei conflitti in ambito transnazionale, il costituzionalismo contemporaneo (multilivello) è sfidato dalla necessità di una razionalità trasversale e dialogica che attraversi i diversi livelli di normatività e possa fornire risposte efficaci ai problemi concreti che si presentano. Risposte efficaci, articolate in politiche costituzionali – cioè programmi, progetti, azioni a diversi livelli di governo, locale, regionale, nazionale, transnazionale, e in sinergia con diversi settori e attori sociali – che cercano di attuare, nella pratica, la normatività che scaturisce dal dialogo, non sempre armonico, tra il campo costituzionale e il sistema internazionale con le sue diverse velocità e frammentazioni. Questo articolo, frutto di ricerche fondate sulla teoria costituzionale e sulla comparazione costituzionale, in un approccio dialogico e interdisciplinare, vuole contribuire alla riflessione sul rapporto tra diritto e ambiente e sulle sfide poste alle politiche costituzionali di transizione, orientate alla sostenibilità socio-ambientale.

Parole chiave: Diritto costituzionale ambientale; Sostenibilità socioambientale; Diversità culturale.

Blurring Boundaries: A Comparative Analysis of Public-Private Law Dichotomy in the Age of Environmental Protection*

Damiano Fuschi

SUMMARY: 1. The fluidity of legal boundaries: public and private law in the age of globalisation. – 2. Overcoming the public-private dichotomy in post-modern law. – 3. The hybridisation of law: constitutional foundations and environmental protection. – 4. Other areas of overlap between public and private law: public contracts, common goods and fundamental rights. – 5. From dichotomy to dialogue: the evolution of the relationship between public and private law in environmental protection and the overcoming of merely restorative actions. – 6. Jurisprudence in the service of the environment: reflections on the qualification of damage. – 7. Conclusion: reimagining Legal Boundaries in the Globalized Era with a Focus on Environmental Imperatives.

1. *The fluidity of legal boundaries: public and private law in the age of globalization*

Hans Kelsen, in his famous essay of 1924, questions the ontological distinction between public and private law, highlighting its artificial and historically conditioned character.[1] His critique, deeply rooted in the general theory of law, challenges the dominant conception in the European-continental legal tradition, which sees the separation between the two spheres as a founding

* Articolo sottoposto a referaggio.

[1] H. Kelsen, *Public and Private Law*, in *Anthology of Public Law*, n. 2, 2024, 5-22 (first published: H. Kelsen, *Public and Private Law*, in *Riv. int. fil. dir.*, 1924).

principle of the legal system. Kelsen unmasks the groundlessness of this dichotomy, showing how the normative foundation is unitary and how the distinction between public and private is nothing more than a product of legal systematics, rather than an intrinsic reality of law.[2]

This approach, although innovative for its time, takes on renewed relevance today. The increasing permeability between public and private law is manifested in many areas: the constitutionalisation of private law, the public regulation of the market, the spread of private instruments in administrative action and the growing incidence of supranational sources have made the boundaries between the two categories increasingly blurred. Kelsen's idea that private law is not a neutral and autonomous space, but an eminently political dimension, is reflected in the current debate on the regulation of private powers and the need for regulatory instruments capable of rebalancing the asymmetries of power in contractual relations.[3]

However, Kelsenian thought also shows elements of outdatedness. His conception of private law as a form of democratic normative production appears today inadequate to grasp the transformations of society and its new needs, which can be summarised in the need to protect the environment, in its broadest possible sense, and future generations. Mass contracting, the dominant role of digital platforms and the growing concentration of economic power have highlighted how market dynamics, moreover, are moving away from the model of parity on which Kelsenian theory was based.[4] Private law, far from being a sphere of free self-determination, is increasingly regulated by public interventions aimed at rebalancing negotiating positions and ensuring effective protection of weaker contracting parties.

Within this framework, Kelsen's critique retains a strong heuristic capacity, offering useful tools for understanding the de-

[2] G. Resta, "Diritto pubblico e diritto privato: elogio dell'inattualità kelseniana". *Antologia di Diritto Pubblico*, n. 2, 2024, 38-57.

[3] *Ibidem.*

[4] *Ibidem.*

cline of the dichotomy between public and private law. However, his approach needs updating in the light of the transformations of the global economy and the new forms of legal regulation, which make it increasingly difficult to apply rigidly the traditional categories of legal dogmatics.[5]

Thus, we can record that the evolution of the contemporary legal system is characterised by a phenomenon of progressive erosion of the traditional boundaries between public and private law, a complex and multiform process that is redrawing the fundamental coordinates of legal experience.[6]

The distinction between public and private law is a constant in the various legal traditions, although it has been the subject of varying formulations and interpretations over time.[7] Already in Roman law, authors such as Ulpianus, Gaius and Cicero outlined articulated conceptions, united by the idea that public law protects collective interests and is characterised by the exercise of authoritative power by the public subject against the private party, whereas private law is based on equality between the parties and the realisation of individual interests.[8] This approach has become entrenched throughout history, with the exception of common law, where the distinction is not based on a different regulatory regime, but exclusively on the nature of the interests pursued.[9]

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[5] *Ibidem.*

[6] L. Carasik, *Renaissance or retrenchment: Legal education at a crossroads*, in *Indiana Law Review*, vol. 44, 2011, 735.

[7] On this point see, *ex multis*, A. Pizzorusso, *La comparazione giuridica e il diritto pubblico*, in *Il Foro Italiano*, vol. 102, 1979, 131-132.

[8] On this topic see *ex multis*: P.G. Alpa, *Dal diritto pubblico al diritto privato*, Mucchi, Modena, 2017; G. Alpa, *Diritto privato e diritto pubblico. Una questione aperta*, in *Economia e diritto del terziario*, vol. 11, n. 2, 1999, 311-374; L.R. Perfetti, *Crepuscolo della distinzione tra diritto pubblico e private? A partire da B. Sordi, Diritto pubblico e Diritto privato. Una genealogia storica*, il Mulino, Bologna, 2020, in *PA Persona e Amministrazione*, vol. 11, n. 2, 2023, 895-9915; G.A. Benacchio, M. Graziadei, *Il declino della distinzione tra diritto pubblico e diritto privato. IV Congresso nazionale SIRD, Trento 24-26 settembre 2015*, vol. 24, Università di Trento, 2016.

[9] On this point, see: A. Torre, *Common law: protagonists and ideas in the history of a legal system:(studies in memory of Francesco De Franchis)*, vol. 10, Maggioli Editore, Santarcangelo di Romagna, 2015.

Beginning in the 1960s, doctrine – particularly civil law doctrine – began a process of revising dogmatic conceptions, shifting the focus to the role of constitutional norms in relations between private individuals.[10] Private autonomy ceased to be considered an independent sphere, being progressively limited by typically public legal instruments. At the same time, the alleged equality of contractual positions has been called into question in cases where one party holds preponderant bargaining power.[11] Against this backdrop, the legal debate at the end of the 20th century began to question the persistence of the dichotomy between public and private law, while case law continued to reflect traditional categories without anticipating doctrinal change.

2. *Overcoming the public-private dichotomy in post-modern law*[12]

In the context of post-modern law, every dogmatic category, including the major conceptual divisions, is subject to critical revision. The boundary between public and private law, already made mobile by the transformations of the 20th century, has further weakened with the beginning of the new millennium. On the one hand, the constitutionalisation of private law has consolidated the application of constitutional principles in interprivate relations, even if the discussion on their direct application or mediated through general clauses such as good faith and public order remains open.[13] On the other hand, the expansion of supranational sources has produced a progressive Europeanisation of private law, leading to an overall reconsideration of the regulatory system.[14]

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[10] Cf. G. Zagrebelsky, *The Mild Law. Law, rights, justice*; Einaudi, 1992; S. Rodotà, *Il diritto di avere diritti*, Laterza, Bari, 2013; P.G. Alpa, *op. cit.*

[11] S. Rodotà, *Le fonti di integrazione del contratto*, Rome TrE-Press, Roma, 2024.

[12] On the notion of post-modern law see: G. Grisi, C. Salvi, *A proposito del diritto post-moderno. Atti Seminario Leonessa, 22-23 Settembre 2017*, vol. 12, Rome TrE-Press, Roma, 2018.

[13] E. Pesce, *Gli itinerari della buona fede secondo Stefano Rodotà*, in *Politica del diritto*, vol. 50, n. 1, 2019, 125-144.

[14] H.W. Micklitz, *The visible hand of European Regulatory private law. The*

A further development is the so-called 'privatisation' of public law, which sees the use of private instruments for the pursuit of public goals and for the regulation of relations between administrations and private parties. In the economic context, the debate has shifted to the state's ability to govern the market and the possibility of a law independent of state regulation.

These processes testify to the decline of the traditional distinction between public and private law. The transformations of post-modern law have made it increasingly uncertain whether it is possible to draw a clear line of demarcation between the two spheres, undermining the legal certainty that classical categories guaranteed in previous eras.[15]

This hybridisation process represents one of the most significant transformations of the legal landscape in recent decades, as highlighted by the most recent case law and masterfully theorised by Stefano Rodotà.[16]

The traditional conception that, as we have seen, saw a clear separation between the public and private spheres has undergone a profound transformation, as is clear from the most recent case law. Among the decisions that corroborate this view, we can cite Judgment No. 3041 of 2016 of the Council of State[17] that

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transformation of European private law from autonomy to functionalism in competition and regulation, in *European University Institute, Department of law*, n. 14, 2008.

[15] P. G. Alpa, *op. cit*.

[16] S. Rodotà, *op. cit*.

[17] Council of State Judgment No. 3041 of 2016. In this judgment of Palazzo Spada, it is pointed out that the notion of public entity in the Italian legal system is not fixed and immutable, but functional and changing. An entity may be qualified as a public body not in a static and formal manner, but in a dynamic and substantial manner, depending on the regulatory framework to which it is subject for the performance of certain activities. Therefore, the qualification of an entity as public does not depend on its formal status, but on its concrete subjection to obligations and duties, or prerogatives and powers, of a public nature according to the reference legislation. This also applies to legally recognised non-state universities, which, despite having certain public features, cannot be considered public bodies for the purposes of applying the transparency and publicity regulations set forth in Legislative Decree No. 33/2013. This conclusion is imposed by Article 33 of the Italian Constitution, which recognises the freedom of teaching and the right of entities and private individuals to establish schools and educational institutes, as well as by Article 1 of Law no. 243/1991, which

elaborated a "changing" and "functional" conception of the legal nature of subjects and their activities, emphasising how the very notion of public entity is no longer static and immutable, but is configured as a dynamic concept that can vary depending on the regulatory and functional context. This evolution finds further confirmation in the recent Order No. 15911 of 2024 of the United Sections of the Italian Supreme Court,[18] which reiterated how the criterion for qualifying an entity can no longer be merely formalistic but must consider the substance of the activities performed and the ratio of the regulatory interventions. This orientation fully reflects the thought of Rodotà, who theorised a progressive 'publicisation' of private law and a parallel 'privatisation' of public law. The thinning of the boundaries between public and private is particularly evident in the field of participated companies and public services. As pointed out by the Civil Cassation in Order No. 11265 of 2020,[19] even when there are

provides for the applicability to non-state universities of the public regulations only within the limits of compatibility with the constitutional principle of pluralism and freedom of private initiative in the field of education.

[18] Civil Cassation United Sections Order No 15911 of 6 June 2024. In this order, jurisdiction over the dispute relating to the termination or cessation due to expiry of the term of a contract of gratuitous loan of immovable property concluded between public administrations in the context of the liquidation procedure of the grantor body belongs to the ordinary judge and not to the administrative judge. The criterion for dividing jurisdiction between the ordinary judge and the administrative judge is based on the substantive *petitum*, i.e. on the nature of the subjective legal position invoked in the action, and not on the mere public status of the persons involved or on the generic involvement of public interests. When public administrations resort to negotiated instruments of private law, such as the contract of gratuitous loan, to regulate their patrimonial relations, the dispute relating to the performance or termination of such a contract falls within the jurisdiction of the ordinary courts, since it is not the exercise of an administrative power that is at issue, but compliance with the agreed contractual regulation. The exclusive jurisdiction of the administrative court in the matter of agreements between public administrations, provided for by Article 133(1)(a)(2) of the Code of Civil Procedure, exists only when the dispute concerns the agreement itself and not purely pecuniary matters related thereto. Therefore, even if the commodation agreement were to fall within the notion of an 'agreement between public administrations', the dispute relating to its performance or termination would remain before the ordinary courts, since it does not concern the exercise of an administrative power.

[19] Civil Cassation Sec. I Order No. 11265 of 11 June 2020.

forms of public control, the companies maintain their own legal and patrimonial autonomy, in a delicate balance between a private nature and public purposes. The Civil Cassation, in Judgment No. 22209 of 2013,[20] identified some key factors of this evolution, including the abandonment of a merely authoritative conception of the Public Administration and the adoption of a functional perspective oriented towards the protection of the public interest, accompanied by a growing trust in the regulatory capacities of the market. Particularly significant is the position of the Constitutional Court, which, in Judgement no. 152 of 2024,[21] emphasised the principle of subsidiarity and the recognition of

[20] Civil Cassation Sec. I Judgment No. 22209 of 27 September 2013. In order for local authorities to pursue the public interest through corporations, the legislature opted for a private instrument. This choice, however, implies that these companies assume the risks associated with their possible insolvency. Otherwise, it would violate the principles of equality and third-party reliance, as well as the rules on competition, which require equal treatment between market operators with identical structure and operating methods.

[21] Constitutional Court judgment no. 152 of 26 July 2024. The subject matter of civil law, which falls within the exclusive legislative competence of the State pursuant to Article 117(2)(l) of the Italian Constitution, includes the regulation of legal entities governed by private law, including the determination of the types of controls that the public body may exercise over such entities. Therefore, the regional rules subjecting the exponential bodies of collective property, such as the agrarian participations, to the powers of direction, supervision and substitutive control provided for the bodies dependent on the Region, encroach on the State's legislative competence in the field of civil law, since the Region cannot regulate the content and manner of exercising such controls. The ruling also stands out for having dealt with the delicate issue of legal persons under private law operating in the field of collective property, with particular reference to agrarian participations, outlining an important principle on the division of competences between State and Regions. In fact, the Court reiterated that the regulation of private legal persons, including public control mechanisms, falls within the exclusive legislative competence of the State, emphasising that environmental protection retains an essential core reserved to State legislation to ensure uniformity of treatment throughout the national territory.

A particularly innovative aspect of the ruling concerns the interpretation of the principle of sustainable development, which is directly linked to the protection of future generations. This approach is manifested through an integrated vision that goes beyond the traditional conception of the environment as a mere limitation to economic initiative, to embrace a broader perspective that considers the environment as a shaping and integrating element of economic development.

associative forms for the performance of activities of general interest, echoing Rodotà's vision of a civil law open to instances of solidarity and social functionality.

Judgment no. 152/2024, moreover, is also particularly relevant from a procedural-civil law perspective, as highlighted by the recent Order no. 19452 of 15 July 2024 of the United Sections of the Italian Supreme Court,[22] which specifically addressed jurisdiction profiles in the matter of environmental damage. In fact, the Supreme Court clarified that the attribution to the ordinary judge of the jurisdiction of disputes concerning compensation for environmental damage represents a constitutionally legitimate legislative choice, which meets the need to ensure effective and complete judicial protection. This orientation was further strengthened by judgment no. 8826 of 3 April 2024 of the Third Civil Section,[23] which outlined an articulated system of procedural protection, in which the action for compensation for environmental damage is configured as a complementary instrument of protection with respect to the other remedies provided by the system. In this framework, the protection of the environment is achieved through an integrated procedural system, in which the various forms of protection – injunctive, compensatory and restorative[24] – combine to ensure effective protection

[22] Civil Cassation United Sez. Order No. 19452 of 15 July 2024.

[23] Civil Cassation Sec. III Judgment No. 8826 of 3 April 2024.

[24] The protection of rights in our legal system is articulated through different forms of legal protection, each with specific purposes and characteristics. Injunctive protection aims to prevent or stop unlawful conduct before it can produce or continue to produce damage, thus representing an instrument of preventive protection. Through an action for an injunction, the right holder can obtain a judicial measure ordering the subject to refrain from certain harmful conduct, thus preventing the violation from occurring or continuing. This form of protection is particularly effective in situations where it is necessary to intervene promptly in order to avoid damage that is difficult to repair.

Compensatory protection, on the other hand, intervenes at a later stage, when the damage has already occurred, and is aimed at repairing the prejudice suffered through economic compensation. Compensation may be sought both for pecuniary damage, quantifiable in monetary terms, and for non-pecuniary damage, such as moral or existential damage. This form of protection aims to re-establish the economic equi-

of the environment, confirming the nature of primary constitutional value that recent legislative and jurisprudential developments have definitively recognised[25].

3. *The hybridisation of law: constitutional foundations and environmental protection*

This hybridisation process has a constitutional basis in Articles 42[26] and 43[27] of the Constitution, which introduced the con-

librium altered by the tort, placing the injured party in the situation he would have been in had the harmful event not occurred.

Restorative protection, finally, is characterised by its aim of materially restoring the situation to the state prior to the violation of the right. Unlike compensatory protection, which offers economic compensation, restorative protection aims to concretely eliminate the effects of the wrongful act through the removal of the material changes produced by the harmful conduct. This form of protection is particularly relevant in areas such as the environment or construction, where it is possible and necessary to physically restore the state of the place.

These different forms of protection are not alternatives but complementary, as they can also be used together to ensure more effective protection of rights. For example, in the case of environmental violations, it is possible to request either the immediate cessation of the polluting activity (prohibitory protection), or the restoration of the state of the place (restorative protection), or compensation for the damage already occurred (compensatory protection). The choice of the most appropriate form of protection depends on the nature of the right violated, the type of injury suffered and the objectives to be pursued through legal action.

On this point see: A. di Majo, *Forme e tecniche di tutela*, in *Il Foro Italiano*, vol. 112, 1989, 131-132.

[25] V. A. Russo, *Gli strumenti processuali di tutela collettiva in materia ambientale: un sistema multilivello di enforcement "integrato" (ed* in progress*) nella prospettiva interna e transnazionale*, Tesi di Dottorato, Università di Padova, 2024.

[26] Art. 42, Italian Constitution:

Property is public or private. Economic property belongs to the state, to entities or to private persons.

Private property is recognised and guaranteed by law, which determines the ways in which it may be acquired, enjoyed and its limits in order to ensure its social function and to make it accessible to all.

Private property may, in cases provided for by law, and subject to compensation, be expropriated for reasons of general interest.

The law lays down the rules and limits of legitimate and testamentary succession and the rights of the State over inheritances.

[27] Art. 43, Italian Constitution:

cept of the social function of ownership and provided for the possibility of public intervention in strategic economic sectors. This constitutional basis has allowed the development of hybrid forms of management, as evidenced by Article 17 of the Consolidated Law on Publicly Owned Companies (Testo unico in materia di società a partecipazione pubblica),[28] which regulates mixed public-private companies. This aspect clearly highlights the process of evolution of the law and how, in various areas of law, both procedural and substantive, the public-private dichotomy outlined at the outset is an increasingly blurred and unmarked boundary. This evolution is not, therefore, a mere confusion of legal categories, but rather an evolutionary response to the growing complexities of contemporary society. As theorised by Rodotà, this process requires a new legal grammar capable of combining individual autonomy with the requirements of social cohesion, property rights with instances of solidarity, contractual freedom with responsibility towards the community.[29] This evolution requires a dynamic and functional interpretative approach that goes beyond the rigid traditional categorisations to embrace a more complex and articulated vision of the legal phenomenon, in which public and private are no longer separate spheres but complementary dimensions of a single regulatory system oriented towards the effective protection of the rights and interests of the community.[30]

The transformation of the relationship between public and private law is particularly evident in civil liability, where there is a progressive publicisation of the interests protected. As high-

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For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers' or users' association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest.

[28] Decreto legislativo 19 agosto 2016, n. 175. Testo unico in materia di società a partecipazione pubblica. For the details of the entire operative part of this article, please refer to the Consolidated Text.

[29] S. Rodotà, *op. cit*.

[30] P. G. Alpa, *op. cit*.

lighted by the Civil Cassation in Judgment No. 7513 of 2018,[31] the restorative function of damages is increasingly accompanied by deterrence and prevention purposes, typical of public law. This judgment, while mainly dealing with non-asset damage in the general civil law context, has interesting connections with environmental protection, especially from the perspective of personal injury resulting from environmental damage.

In the context of environmental law, the principle expressed by the Court of Cassation on the non-duplication of damage can be applied when assessing injuries suffered by individuals due to environmental damage.

For example, in the case of damage to health caused by pollution, a distinction must be made:

1. Biological damage resulting from exposure to harmful substances or alteration of the environment (quantifiable through medico-legal assessment);

2. The dynamic-relational prejudices that are a direct consequence of the biological damage and therefore already included in its quantification.

3. The additional and autonomous prejudices, such as the subjective moral damage linked to the awareness of living in a polluted environment or the existential damage resulting from the need to change one's lifestyle due to environmental degradation.[32]

This distinction is particularly relevant in environmental compensation actions, where they are often intertwined:

– Injunctive protection (to stop the polluting activity);

– Restorative protection (for environmental restoration);

– Compensatory protection for personal injury.[33]

In this context, the principle of non-duplication is fundamental for a correct quantification of the damage, avoiding overlapping between the various items of damage but at the same

[31] Civil Cassation Sec. III Order No. 7513 of 27 March 2018.

[32] L. D'Apollo, *Danno biologico risarcito secondo le tabelle*, vol. 31, Maggioli Editore, Santarcangelo di Romagna, 2010.

[33] See note 24.

time guaranteeing full compensation for all the injuries actually suffered, including those which, although connected to environmental damage, have their own conceptual autonomy and therefore require autonomous assessment and settlement. This interpretation is in line with the evolution of jurisprudence in environmental matters, which tends increasingly to recognise the multidimensionality of environmental damage and its repercussions on the personal sphere of individuals, while maintaining the need to avoid duplication of compensation.

4. *Other areas of overlap between public and private law: public contracts, common goods and fundamental rights*

Another significant area of this evolution is public contract law, where the administration increasingly acts *iure privatorum*, while maintaining public interest constraints and purposes. Council of State Judgment No. 4614 of 2017[34] highlighted how even in the executive phase of the contract, traditionally dominated by private law, there remain publicist elements linked to the need to guarantee the general interest. Particularly emblematic is the case of common goods, a conceptual category that transcends the public-private dichotomy. As emphasised by the United Sections of the Supreme Court in Judgment No. 3665 of 2011,[35] these assets are characterised by a collective functionality

[34] Council of State Judgment No 4614 of 2017.

[35] Civil cassation Sez. Unite sentence no. 3665 of 14 February 2011. The judgment in question, referring to the Venetian fishing valleys, states that the Constitution (Articles 2, 9, 42) protects human personality and its development in the welfare state, including the protection of the landscape. This protection is not limited to state property or state assets, but extends to all those assets that, by nature or destination, serve the collective interest, regardless of a specific legislative classification. Their 'commonality' prevails over the issue of ownership, making the state-owned aspect secondary to their social function.

With regard to public property, state ownership indicates a dual ownership: to the community and to the public body that represents it. Ownership is not mere ownership, but a service: the entity must guarantee the conservation of the characteristics of the asset and its public enjoyment. Therefore, state property (both state and local) implies governance obligations to ensure the effective public enjoyment of the asset.

that transcends formal ownership of the right of ownership, requiring forms of participatory management that go beyond the traditional distinction between public and private management. It is important to remember that Judgement No. 3665 predates by 11 years the introduction of Constitutional Law. 1/2022, which amended Articles 9 and 42 of the Constitution. However, Italian jurisprudence has always guaranteed a high level of environmental protection. Perhaps the canon of interpretation of the 2022 constitutional reform should be overturned, highlighting how it was precisely a decades-long stratification of environmental protection in jurisprudence that led to an accomplished constitutional reform, capable of affecting even one of the articles of the fundamental principles. The phenomenon of hybridisation also manifests itself in the field of the protection of fundamental rights, where the Constitutional Court, in Judgment No. 85 of 2013,[36] elaborated the concept of 'dynamic balancing' between constitutionally protected interests, overcoming the rigid opposition between individual rights and public interest. In the field of economic regulation, as highlighted by the Civil Cassation in Judgment No. 1465 of 2019,[37] there is a growing intermingling of private instruments and public purposes, with the emergence of 'reflexive' forms of regulation that see the active participation of the regulated subjects in the definition of the rules. This evolu-

[36] Constitutional Court Judgment No. 85 of 9 May 2013.

[37] Civil Cassation Sec. I Judgment No. 14657 of 29 May 2019. The judgment establishes a fundamental principle: the illegitimate occupation of property by the public administration, regardless of whether it is qualified as usurpative or acquisitive, always constitutes a civil tort (Article 2043 of the Civil Code) and entitles the party to compensation for damages. Jurisprudence has abandoned the interpretation according to which an unlawful activity of the public administration could result in the loss of private property. Now, the general scheme of Articles 2043 and 2058 of the Civil Code applies, granting the owner real and precautionary protection, in addition to compensation, without the administration acquiring the property. The distinction between usurpative and acquisitive occupation is therefore superseded: in both cases, the illegitimate action of the public administration deprives the private party of property without transferring it to the administration. Finally, mere prolonged detention or acts of possession are not sufficient for usucapation; explicit material actions of opposition against the owner-possessor are required.

tion has led to the emergence of new subjective figures, such as public law bodies and in-house companies, that escape traditional categorisations. The United Sections of the Supreme Court of Cassation, in Judgment No. 16741 of 2017,[38] highlighted how these figures require a substantive approach that looks at the actual nature of the activity carried out rather than the legal form adopted, therefore, the importance of the ruling is first and foremost manifested in its interpretative approach to procedural rules, where the Court establishes that, in the absence of a specific discipline (even in traditionally public law cases), the general rules of the Code of Civil Procedure apply.

Significant is also the development in the field of the liability of directors of public companies, where the Civil Cassation, in its judgment no. 25038 of 2013,[39] developed evaluation criteria that take into account both the private nature of the management activity and the publicistic purposes pursued. This ruling marked an important moment in Italian law as it marks a fundamental turning point in the conception of the liability of directors of public companies, introducing an interpretative approach that goes beyond the mere private dimension of management activity. The Court has in fact established that the assessment of directors' actions cannot be based solely on criteria of economic efficiency typical of private law, but must necessarily also take into account the public purposes pursued by the company; this latter aspect, as we shall see below, is of fundamental importance for the pursuit of the values of protection of the environment, health and the new generations. The thinning of the boundary between public and private law is also evident in the area of consumer protection, where the Civil Cassation in its judgment No. 21255 of 2013[40] highlighted how the protection of the weaker contracting party responds to public economic order requirements that transcend the merely private dimension of the contractual relationship. This evolution requires a rethinking of the

[38] Civil Cassation Sec. I Judgment No. 16741 of 23 July 2014.
[39] Civil Cassation United Sez. Order No. 25038 of 7 November 2013.
[40] Civil Cassation Sec. III Judgment No. 21255 of 17 September 2013.

traditional legal categories and instruments of protection. As emphasised by Rodotà, it is necessary to develop new forms of governance capable of combining market efficiency with the protection of collective interests, freedom of economic initiative with social responsibility, private autonomy with the requirements of public regulation. The process of hybridisation between public and private law should not be seen as a loss of identity of the respective spheres, but rather as a necessary evolution to respond to contemporary challenges. Indeed, the complexity of social and economic relations requires flexible and adaptable legal instruments capable of overcoming the rigidity of traditional categorisations in order to guarantee effective protection of the rights and interests at stake.

In this perspective, the role of the jurist becomes that of architect of innovative solutions, capable of combining public and private elements according to the objectives to be pursued. As the most recent case law has shown, this reconstruction work must be guided by the constitutional principles of solidarity and subsidiarity, which represent the balance between the different souls of the legal system.

5. *From dichotomy to dialogue: the evolution of the relationship between public and private law in environmental protection and the overcoming of merely restorative actions*

In the field of environmental protection, the Criminal Court of Cassation in its judgment No. 4675 of 2014[41] emphasised how environmental protection requires a synergy between public and private instruments, with an increasing role of private autonomy in the realisation of purposes of general interest. We see how the phenomenon of environmental protection is no longer confined to administrative law and, thanks also to the reform that took place with the introduction of Article 452 bis of the Criminal Code[42] environmental liability has also been given criminal rele-

[41] Criminal Cassation Sec. V Judgment No. 4675 of 30 January 2014.

vance. In the specific case of this judgment, it is important to mention it for the principle it states that will become subsequently an indispensable parameter for all those proceedings that will have an environmental implication. In fact, the pivotal principle established by the judgment concerns the need for a rigorous, punctual and analytical ascertainment, free of approximations in legal assessment. This methodological approach has become paradigmatic in subsequent environmental jurisprudence, where precision in the ascertainment of conduct detrimental to the ecosystem is crucial for effective environmental protection.

The evolution of the relationship between public and private law, therefore, finds in environmental protection one of its most significant and complex areas of manifestation. As highlighted by the Council of State's ruling No. 3041 of 2016,[43] the current legal system is characterised by a growing complexity in which the boundaries between public and private are becoming increasingly blurred, especially when it comes to environmental protection. This transformation manifests itself through a twofold dynamic: on the one hand, private instruments are used to pursue environmental protection goals of public interest; on the other hand, public entities are increasingly adopting private law operational forms in the management of environmental issues.

The Constitutional Court, with judgment no. 126 of 2016,[44] made a decisive contribution to this evolution, elaborating a conception of the environment as an autonomous and dynamic legal

[42] Article inserted by Law No. 68 of 22 May 2015, which inserted the entire Title VI-bis, as from 29 May 2015 regulating 'Crimes against the environment' (Articles 452-bis - 452-terdecies).

[43] Council of State Judgment No. 3041 of 2016. Importantly, "The notion of public entity in the Italian legal system is not fixed and immutable, but functional and changing. An entity may be qualified as a public body not in a static and formal manner, but in a dynamic and substantial manner, depending on the regulatory framework to which it is subject for the performance of certain activities. Therefore, the qualification of an entity as public does not depend on its formal status, but on the concrete subjection of the same to obligations and duties, or to prerogatives and powers, of a public nature according to the reference legislation."

[44] Constitutional Court Judgment No. 126 of 1 June 2016.

asset, which requires integrated and multilevel forms of protection where it is stated that 'the environment cannot be considered a mere material asset subject to public or private property, but must be qualified as a constitutionally protected value, which outlines a sort of transversal matter in relation to which different competences are manifested that may well be regional, with the State being responsible for the determinations that respond to needs deserving of uniform regulation throughout the national territory'. This view was further confirmed in the very recent judgment no. 105 of 2024,[45] where the Court extended the perspective of environmental protection to future generations, configuring it as an ethical and legal duty of preservation that transcends the traditional public-private dichotomy.

Indeed, the Court stated that 'the protection of the environment, biodiversity and ecosystems constitutes a primary and absolute constitutional value which, as such, must be regarded as a limitation on the exercise of other constitutionally guaranteed rights, including private economic initiative'. The Court also emphasised that 'the protection of the environment in the interest of future generations represents an imperative duty which transcends the individualistic dimension of rights and is projected into a diachronic dimension of collective responsibility'. In this ruling of 2024, it is evident how the constitutional semantics introduced and crystallised in our system by Constitutional Law no. 1/2022 has fully generated the constitutional language of environmental protection. 1/2022 has fully generated its scope in the environmental field.[46] The principle of integration between environmental protection and other public policies finds a full elaboration in the Council of State's ruling no. 1823 of 2023,[47]

[45] Constitutional Court Judgment No. 105 of 13 June 2024.

[46] It should be noted that the full implementation in the environmental field since, despite the important constitutional innovation and the jurisprudential evolution on the subject, the absence of a specific state law that fully implements the reservation of law provided for in Article 9 of the Constitution persists, leaving the animal protection system still fragmented and based mainly on sectoral and local regulatory interventions.

which emphasises the need to overcome a model of parallel protections in favour of an integrated approach that considers environmental needs as a transversal element of every public policy. The recent Constitutional Court ruling no. 152 of 2024[48] added a further piece to this evolution, highlighting how the subject of civil law necessarily has to deal with a dynamic conception of legal relations in which environmental protection assumes a central and transversal role.

As recalled several times in this chapter, Constitutional Law no. 1/2022 marked a momentous turning point in the relationship between environmental protection and economic initiative, profoundly redefining the constitutional framework by amending Articles 9 and 41 of the Constitution. As also highlighted by the Constitutional Court in sentence no. 105 of 2024,[49] this reform elevated the protection of the environment, biodiversity and ecosystems to a primary and absolute constitutional value, introducing an intergenerational dimension to environmental protection that transcends the traditional individualistic conception of rights. Article 9, as already highlighted, in its new formulation is no longer limited to the protection of the landscape, but explicitly includes the protection of the environment, biodiversity and ecosystems 'in the interest of future generations', while Article 41 has been amended to explicitly include the environment among the limits to private economic initiative. As emphasised by the Constitutional Court in its judgment no. 152 of2024. This evolution is not a mere formal change. It represents a structural rethinking of the relationship between economic initiative and environmental values. In this new constitutional paradigm, the environment is no longer an external limit to economic activity, but a founding value that must guide and qualify the entire economic system in the name of sustainability and intergenerational responsibility.

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[47] Council of State Judgment No. 1823 of 2023.

[48] Constitutional Court Judgment No. 152 of 26 July 2024.

[49] Constitutional Court Judgment No. 105 of 13 June 2024.

This regulatory and jurisprudential evolution outlines a process of progressive hybridisation between public and private law in which the environment takes on the role of an ordering and reconciling element. It is no longer an object of contention between opposing legal spheres, but a terrain of convergence and shared responsibility, requiring an overall rethinking of traditional legal categories in favour of collaborative and systemic models of protection.

This profound transformation of the regulatory and value framework necessarily reflects on the level of civil procedural protection, requiring a rethinking of traditional procedural tools to adapt them to the new constitutional dimension of environmental protection. Referring again to Judgment No. 105 of 2024, the elevation of the environment to a primary and absolute constitutional value requires a reconfiguration of the civil process in a systemic and preventive key, overcoming the traditional merely restorative approach. The procedural tools must now be interpreted and applied in the light of the principles of environmental action and sustainable development enshrined in Articles 3-ter[50] and 3-quater of the Environmental Code,[51] favouring forms

[50] Principle of environmental action.

1. The protection of the environment and natural ecosystems and the cultural heritage must be guaranteed by all public and private entities and public or private natural and legal persons, through appropriate action that is informed by the principles of precaution, preventive action, correction, as a priority at source, of damage caused to the environment, as well as the 'polluter pays' principle, which, pursuant to Article 174(2) of the Treaty of the European Unions, govern the Community's policy on the environment.

[51] Principle of sustainable development.

1. Any human activity that is legally relevant within the meaning of this code must comply with the principle of sustainable development to ensure that the satisfaction of the needs of present generations cannot compromise the quality of life and possibilities of future generations.

2. The activity of the public administration must also be aimed at enabling the best possible implementation of the principle of sustainable development, whereby in the comparative choice of public and private interests characterised by discretion, the interests of environmental protection and cultural heritage must be given priority consideration.

3. Given the complexity of the relationships and interferences between nature and human activities, the principle of sustainable development must make it possible to identify a balanced relationship, within the inherited resources, between those to be saved

of anticipatory protection and procedural mechanisms that allow a prospective assessment of environmental impacts. The intergenerational dimension of environmental protection also requires a broadening of the traditional categories of legal standing and interest in legal action, to allow for the procedural representation of future and widespread interests. The civil trial thus becomes no longer just a forum for the settlement of inter-subjective conflicts, but a tool for environmental governance and the preventive protection of ecosystem balances, in a perspective that goes beyond the public-private dichotomy to embrace an integrated and systemic vision of the judicial protection of the environment.

6. *Jurisprudence in the service of the environment: reflections on the qualification of damage*

The qualification of environmental and climate damage represents one of the most complex challenges in contemporary law, lying at the intersection of constitutional law and civil procedure, in a regulatory context profoundly renewed by the constitutional reform of 2022. The constitutional dimension of environmental protection has now been fully realised with the reform that took place with Constitutional Law no. 1/2022, which elevated the protection of the environment, biodiversity and ecosystems to a primary constitutional value, also introducing an intergenerational perspective in environmental protection.

The Constitutional Court, with the aforementioned judgment no. 126 of 2016,[52] made a fundamental contribution to the qualification of environmental damage, defining it as an injury to

and those to be passed on, so that the principle of solidarity to safeguard and to improve the quality of the environment in the future as well is also included in the dynamics of production and consumption.

4. The resolution of issues involving environmental aspects must be sought and found from the perspective of ensuring sustainable development, so as to safeguard the proper functioning and evolution of natural ecosystems from negative modifications that may be produced by human activities.

[52] Constitutional Court Judgment No. 126 of 1 June 2016.

a fundamental public interest that transcends the merely patrimonial dimension to place itself in a perspective of collective protection. This approach was further confirmed in subsequent case law, which progressively elaborated a three-dimensional conception of environmental damage, encompassing the personal, social and public dimensions.

On a regulatory level, Article 300 of the Environment Code[53] provides an articulated definition of environmental damage, qualifying it as any significant and measurable deterioration of a natural resource or the utility provided by it. This definition is further specified by Article 306-bis,[54] which introduces spe-

[53] Environmental damage.

1. Environmental damage is any significant and measurable impairment, direct or indirect, of a natural resource or the utility provided by it.

2. Within the meaning of Directive 2004/35/EC, environmental damage is the deterioration, in comparison with the original conditions, caused:

a) alle specie e agli habitat naturali protetti dalla normativa nazionale e comunitaria di cui alla legge 11 febbraio 1992, n. 157, recante norme per la protezione della fauna selvatica, che recepisce le direttive 79/409/CEE del Consiglio del 2 aprile 1979; 85/411/CEE della Commissione del 25 luglio 1985 e 91/244/CEE della Commissione del 6 marzo 1991 ed attua le convenzioni di Parigi del 18 ottobre 1950 e di Berna del 19 settembre 1979, e di cui al decreto del Presidente della Repubblica 8 settembre 1997, n. 357 of 8 September 1997, on the regulation implementing Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, as well as the protected natural areas referred to in Law No. 394 of 6 December 1991, and subsequent implementing rules;

(b) inland waters, through actions that have a significantly negative impact on:

(1) the ecological, chemical or quantitative status or ecological potential of the waters concerned, as defined in Directive 2000/60/EC, with the exception of adverse effects to which Article 4(7) of that Directive applies, or

(2) the environmental status of the marine waters concerned, as defined in Directive 2008/56/EC, to the extent that particular aspects of the environmental status of the marine environment are not already addressed in Directive 2000/60/EC;

(c) coastal waters and waters within the territorial sea through the above actions, even if carried out in international waters;

(d) to land, through any contamination that creates a significant risk of harmful effects, including indirect effects, on human health as a result of the introduction of substances, preparations, organisms or micro-organisms harmful to the environment into the soil, ground or subsoil.

[54] Determination of measures for the compensation of environmental damage and environmental restoration of sites of national interest.

1. Unless the settlement takes place in court in accordance with article 185 of the

cific criteria for the determination of remedial measures, divided into primary, complementary and compensatory.

The Civil Cassation, with Order No. 23647 of 2020,[55] consolidated the principle of strict liability for environmental damage, establishing that it exists regardless of the subjective element, provided that the causal link between the conduct and the damage is proven. This approach was further reinforced by Judgment No. 8468 of 2019,[56] which outlined important procedural profiles, including the need to allege and prove concrete environmental damage.

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code of civil procedure, in compliance with the criteria set forth in paragraph 2 and taking into account the common framework to be complied with as set forth in annex 3 to this part six, the subject against whom the Ministry of the Environment and of the Protection of the Land and the Sea has started the procedures for the reclamation and restoration of environmental damage of polluted sites of national interest pursuant to article 18 of law no. 349 of 8 July 1986, article 17 of legislative decree no. 22 of 5 February 1997, and pursuant to title V of part four and part six of this decree, or has taken the relevant legal action, shall be entitled to receive the settlement. 349 of 8 July 1986, Article 17 of Legislative Decree no. 22 of 5 February 1997, and pursuant to Title V of Part Four and Part Six of this Decree, or has commenced the relevant legal proceedings, may make an administrative settlement proposal.

[55] Civil cassation Sec. III order no. 23647 of 27 October 2020. Specifically, let us see how environmental damage, as a lesion of a public good of constitutional relevance, entails the civil liability of the person who caused it, by way of fault or danger, based on the principles set forth in Articles 2043 and 2050 of the Italian Civil Code and Article 18 of Law no. 349/1986. This liability also extends to the managers and employees of the company owning the polluting plant, by reason of their causal contribution, and translates into the obligation to compensate the damage in a specific form or by pecuniary equivalent, depending on the possibility of restoring the state of the places. The judge, in assessing the gravity of the damage and the extent of the compensation, must take into account the constitutional relevance of the good of the environment, the duration and extent of the pollution, as well as the possible intentional or grossly negligent conduct of those responsible. The precautionary principle also requires consideration of potential and future damage that has not yet actually occurred, provided that it can be foreseen on the basis of available scientific knowledge. The ascertainment of liability and the quantification of the compensation must be carried out with rigour and on the basis of a complete technical investigation, without any prescriptions or limitations of liability provided for by the sector legislation being relevant, since environmental damage constitutes an autonomous and prevailing case of tort under civil law with respect to special disciplines.

[56] Civil Cassation Sec. III Judgment No. 8468 of 27 March 2019.

In terms of procedural legitimacy, Article 313 of the Environment Code[57] gives the Ministry of the Environment exclusive jurisdiction for the action for compensation for environmental damage, while Article 299[58] defines the ministerial competences according to a collaborative model with the territorial entities. The quantification of environmental damage is one of the most complex aspects of the matter. Article 1226 of the Civil Code[59] on the equitable assessment of damage assumes particular relevance when specifying the amount is particularly difficult. The Lombardy Regional Administrative Court, in its judgment no. 1957 of 2013,[60] emphasised the 'off-the-shelf' nature of the environment, which must be assessed in its collective use value.

The Civil Cassation, in its judgment no. 9012 of 2015,[61] has definitively sanctioned the shift from a merely compensatory logic to a restorative one, establishing that environmental damage can only be repaired through primary, complementary and compensatory remedial measures. This evolution reflects the growing awareness of the need for an integrated approach to environmental protection, which considers not only the economic

[57] Cf. paragraph 5: within the time limits laid down in paragraphs 1 and 3 of Article 2947 of the Civil Code, the Minister for the Environment and the Protection of Land and Sea may take further measures against subsequently identified offenders.

[58] Ministerial competences in the first 3 paragraphs of the article:

1. The Minister for the Environment and the Protection of Land and Sea shall exercise the functions and tasks incumbent on the State with regard to the protection, prevention and repair of damage to the environment.

2. Ministerial action normally takes place in cooperation with the regions, local authorities and any public law entity deemed appropriate.

3. Ministerial action shall be carried out in compliance with the existing Community legislation on the prevention and remedying of environmental damage, the competences of the regions, the autonomous provinces of Trento and Bolzano and the local authorities with the application of the constitutional principles of subsidiarity and loyal cooperation.

[59] Equitable assessment of damages.

If the precise amount of the harm cannot be proven, it shall be assessed by the court on an equitable basis.

[60] Regional Administrative Court of Lombardy - Milan Judgment No. 1957 of 2013.

[61] Civil Cassation Sec. III Judgment No. 9012 of 6 May 2015.

but also the ecological and social aspects of damage. The qualification of environmental and climate damage is thus an evolving legal institution, which requires an interdisciplinary approach and constant attention to the new challenges posed by the climate crisis and the need to ensure effective protection of the environment for future generations.

The evolution of environmental protection in civil proceedings is part of the broader context of the transformation of the interpretative role of common judges, who through constitutionally oriented interpretation have contributed to redefining the boundaries between public and private law. This evolution finds its historical roots in Calamandrei's thought and has developed through a path that has progressively eroded the rigid separation between models of constitutional justice.[62]

In fact, "the well-established practice of constitutionally adequate interpretation by common judges of legislative source norms probably has its remote cause in Article 2 of Piero Calamandrei's report on judicial power and the Supreme Constitutional Court presented to the Commission for the Constitution – Second Subcommittee, which provided: 'Judges in the exercise of their functions depend only on the law, which they interpret and apply to the concrete case according to their conscience, insofar as they find it conforms to the Constitution'".[63]

The constitutionally oriented interpretation by ordinary judges has produced a significant transformation in the Italian constitutional justice system. As Mauro Cappelletti[64] pointed out as early as 1968, there has been a progressive hybridisation between the Anglo-Saxon *judicial review* model[65] and the cen-

[62] M. Cirulli, *Sull'interpretazione costituzionalmente orientata delle norme proceduali civili*, in *JUDICIUM*, 2024, 1-21.

[63] *Ibidem.*

[64] The anastatically reprinted 1968 edition is cited here: M. Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato*, Rome TrE-Press, Roma, 2024.

[65] On this point see, *ex multis*: M. Gobbo, *La funzione consultiva delle Corti negli ordinamenti anglosassoni*, vol. 9, CLUEB, Bologna, 2007.

tralised control system of Kelsenian matrix.[66] While in *common law* systems the control of constitutionality has progressively been concentrated in the *Supreme Court* through the binding nature of precedents, in the Italian system common judges have acquired an increasingly active role in constitutional interpretation.[67] Consequently, while the system formally maintains a centralised model of control, ordinary judges can, in fact, "disapply rules deemed unconstitutional through the adaptive interpretation, without necessarily referring the matter to the Constitutional Court".[68] While this development has made the protection of constitutional rights more flexible and immediate, it has also raised questions about legal certainty and the uniformity of constitutional interpretation, leading in more recent years to a partial refocusing of constitutionality review. This evolution of constitutionality review assumes relevance in the area of environmental protection, where the constitutionally oriented interpretation of civil procedural rules has made it possible to develop more effective and immediate means of protection. In fact, the dialogue between common judges and the Constitutional Court has helped to shape a procedural system in which environmental protection, elevated to a primary constitutional value by the 2022 reform, finds concrete ways of implementation through the adaptive interpretation of procedural rules. This process highlights how the re-centralisation of the review of constitutionality does not represent a return to the past, but rather a new phase of balancing the need for interpretative uniformity with the need to ensure effective and timely protection of environmental rights, in a perspective that increasingly looks to the protection of future generations.

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[66] On this point see, *ex multis*: L. Pegoraro, *'Political' and 'jurisdictional' a hundred years after the Verfassungsgerichtshof*, in *Comparative and European Public Law*, 22/4, 2020, 903-930.

[67] M. Cirulli, *op. cit.*

[68] *Ibidem.*

7. *Conclusion: reimagining Legal Boundaries in the Globalized Era with a Focus on Environmental Imperatives*

The exploration of the fluid boundaries between public and private law in the context of globalization reveals a profound and ongoing transformation in the legal landscape. Hans Kelsen's early critique of the ontological distinction between these two spheres, once considered radical, has gained renewed relevance as contemporary legal systems grapple with the complexities of modern society. Kelsen's assertion that the division between public and private law is an artificial construct rather than an intrinsic reality of law resonates strongly today, as the boundaries between these domains continue to blur.

This erosion of traditional legal boundaries is evident across various dimensions. The constitutionalization of private law, the public regulation of markets, and the increasing use of private instruments in administrative actions all contribute to this phenomenon. Moreover, the growing influence of supranational legal sources further complicates the distinction, challenging the rigid categorizations that have historically defined legal systems. This shift reflects a broader trend towards hybridization, where public and private elements intertwine to address the multifaceted challenges of contemporary governance.

Central to this transformation is the imperative of environmental protection, which has emerged as a critical axis around which legal systems are reorienting. The integration of environmental considerations into legal frameworks underscores the necessity of transcending traditional dichotomies to address the pressing global challenges of climate change, biodiversity loss, and ecological degradation. The recognition of the environment as a primary constitutional value, as seen in recent legal reforms, highlights the need to balance individual rights with collective responsibilities, ensuring sustainable development for future generations.

Recent case law, particularly in Italy, illustrates this transformation. Judicial decisions have increasingly recognized the dy-

namic and functional nature of legal entities, moving away from static categorizations. The Italian Supreme Court's emphasis on substance over form in qualifying entities and activities exemplifies this shift. Additionally, the integration of environmental protection into legal frameworks highlights the need for a holistic approach that transcends traditional dichotomies. The recognition of the environment as a primary constitutional value underscores the imperative to balance individual rights with collective responsibilities, ensuring sustainable development for future generations.

This evolution is not without its challenges. The complexity of social and economic relations demands flexible and adaptable legal instruments capable of overcoming the rigidity of traditional categorizations. The role of jurists, therefore, becomes crucial in crafting innovative solutions that harmonize public and private interests. This requires a dynamic interpretative approach guided by constitutional principles of solidarity and subsidiarity, fostering a legal system that effectively protects the rights and interests of the community.

The transformation of legal boundaries also necessitates a rethinking of the role of law in addressing contemporary issues such as environmental protection, economic inequality, and digital governance. As legal systems evolve, they must adapt to the realities of a globalized world, where traditional distinctions between public and private spheres are increasingly inadequate. This calls for a new legal grammar that embraces the complexity and interconnectedness of modern society, allowing for a more nuanced and responsive approach to governance.

In conclusion, the fluidity of legal boundaries in the age of globalization represents a necessary adaptation to the complexities of modern society. The hybridization of public and private law is not a loss of identity but a response to the evolving needs of governance. As legal systems continue to navigate this transformation, the focus must remain on developing a cohesive and integrated framework that addresses contemporary challenges while safeguarding fundamental rights and promoting social co-

hesion. The journey from dichotomy to dialogue marks a pivotal moment in legal history, offering a path towards a more inclusive and responsive legal order. This reimagining of legal boundaries is essential for ensuring that law remains a relevant and effective tool for addressing the pressing issues of our time, fostering a more just and equitable society for all.

Abstract

This article offers a comparative analysis of the evolving relationship between public and private law across different legal traditions in the context of globalization and environmental challenges. By examining the historical development from Roman law to contemporary jurisprudence, it contrasts the European-continental approach, which traditionally maintains a rigid separation between these spheres, with the common law perspective, where the distinction rests primarily on the nature of protected interests. The study compares different models of constitutional review – the Anglo-Saxon judicial review and the Kelsenian centralized control – highlighting their progressive hybridization in systems like Italy's. The comparative framework extends to environmental protection approaches, juxtaposing compensatory and restorative models while analyzing how various legal systems have constitutionalized environmental values. The article further explores the methodological shift from formalistic to functional interpretative approaches across jurisdictions, demonstrating how contemporary legal systems are converging toward hybrid solutions that transcend traditional categorizations. This comparative perspective reveals that the erosion of boundaries between public and private law represents not a crisis of legal identity but rather a necessary adaptation to the complex challenges of modern governance, particularly in addressing environmental imperatives that require integrated regulatory frameworks.

Keywords: Comparative legal system; hybridization of law; environmental regulation; environmental damage; constitutional environmental protection.

Questo articolo propone un'analisi comparativa dell'evoluzione del rapporto tra diritto pubblico e privato nelle diverse tradizioni giuridiche nel contesto della globalizzazione e delle sfide ambientali. Esaminando lo sviluppo storico dal diritto romano alla giurisprudenza contemporanea, contrappone l'approccio europeo-continentale, che tradizionalmente mantiene una rigida separazione tra queste sfere, alla prospettiva di common law, dove la distinzione si basa principalmente sulla natura degli interessi tutelati. Lo studio confronta diversi modelli di controllo di costituzionalità – il *judicial review* anglosassone e il controllo centralizzato kelseniano – evidenziando la loro progressiva ibridazione in sistemi come quello italiano. Il quadro comparativo si estende agli approcci di tutela ambientale, giustapponendo modelli risarcitori e ripristinatori e analizzando come vari ordinamenti giuridici abbiano costituzionalizzato i valori ambientali. L'articolo esplora inoltre il passaggio metodologico dall'approccio interpretativo formalistico a quello funzionale nelle diverse giurisdizioni, dimostrando come i sistemi giuridici contemporanei stiano convergendo verso soluzioni ibride che trascendono le categorizzazioni tradizionali. Questa prospettiva comparativa rivela che l'erosione dei confini tra diritto pubblico e privato rappresenta non una crisi dell'identità giuridica ma piuttosto un necessario adattamento alle complesse sfide della governance moderna, in particolare nell'affrontare gli imperativi ambientali che richiedono quadri normativi integrati.

Parole chiave: Sistema giuridico comparato; ibridazione del diritto; regolamentazione ambientale; danno ambientale; protezione ambientale costituzionale.

La CoP29 di Baku, fra illusioni ottiche e diserzioni*

Pasquale Viola

Il consolidamento del regime di diritto internazionale relativo alle misure per contrastare il cambiamento climatico antropogenico è caratterizzato da un'alternanza di successi e fallimenti, fra i quali può emergere, senza un pattern riconoscibile, un "*half success*", come nel caso del Protocollo di Kyoto[1]. Non è un inutile esercizio di stile, però, distinguere quest'ultimo da un *half unsuccess*, in quanto, almeno emotivamente, il secondo induce a pensare alla concretizzazione di una traiettoria tesa al fallimento.

Anche in vista della definizione e dell'invio delle prossime *nationally determined contributions*[2], il 24 novembre 2024 si è

* Articolo sottoposto a referaggio.

[1] P. Viola, *Climate Constitutionalism Momentum: Adaptive Legal Systems*, Springer, Cham, 2022; B. Mayer, *The International Law on Climate Change*, Cambridge University Press, Cambridge, 2018; V. Popovski (ed.), *The Implementation of the Paris Agreement on Climate Change*, Routledge, London-New York, 2018.

[2] Sul NDC system vd. R. Weikmans *et al.*, *Transparency requirements under the Paris Agreement and their (un)likely impact on strengthening the ambition of nationally determined contributions (NDCs)*, in *Climate Policy*, vol. 4, n. 20, 2020, 511-526; C. Carraro, *A Bottom-Up, Non-Cooperative Approach to Climate Change Control: Assessment and Comparison of Nationally Determined Contributions (NDCs)*, in *Journal of Sustainable Development*, vol. 5, n. 9, 2016, 175-186; B. Mayer, *International Law Obligations Arising in relation to Nationally Determined Contributions*, in *Transnational Environmental Law*, vol. 2, n. 7, 2018, 251-275; W.P. Pauw *et al.*, *Conditional nationally determined contributions in the Paris Agreement: foothold for equity or Achilles heel?*, in *Climate Policy*, vol. 4, n. 20, 2019, 468-484.

conclusa la 29ª Conferenza delle Parti[3] (Conference of the Parties - CoP), tenutasi a Baku in un clima di forti contrasti fra i sostenitori di un impegno volitivo – e decisivo – e coloro i quali avrebbero preferito un andamento costante ma senza misure straordinarie.

Uno dei risultati principali dei negoziati riguarda il New Collective Quantified Goal on Climate Finance (NCQG), che ha portato a triplicare i finanziamenti per i Paesi in via di sviluppo, arrivando, così, a 300 miliardi di dollari annui entro il 2035, ribadendo l'impegno nel raggiungere 1,3 trilioni di dollari entro il 2035.

Appaiono rilevanti anche le decisioni relative al Paris Agreement Crediting Mechanism, che implementa l'art. 6 dell'Accordo di Parigi mediante un sistema accentrato di verifica per il monitoraggio e la trasparenza nella produzione e gestione dei dati[4]. Questo sistema prevede, inoltre, controlli obbligatori e un organismo, in qualità di Supervisory Body ai sensi dell'art. 6(4), che permette di presentare reclamo o ricorso contro una decisione che incide negativamente sui diritti umani – anche relativi a questioni ambientali.

Le Parti hanno ribadito l'importanza del *transparent climate reporting*, sono stati accolti con favore gli strumenti dell'Enhanced Transparency Framework (ETF) e l'avvio del processo di revisione. Entro il 2024, infatti, le Parti sono tenute a inviare i Biennial Transparency Reports (BTR) e i National Inventory Report (NIR, quando non inclusi nel BTR), ad eccezione dei Paesi meno sviluppati (Least Developed Countries - LDCs) e dei Small Islands Developing States (SIDS). Ad oggi, alcuni Paesi hanno già adempiuto: Andorra (BTR), Australia (NID), Azerbaijan (BTR), Canada (NID), Unione Europea (BTR), Germania (NID, BTR), Guyana (BRT), Italia (NID), Giappone (NID,

[3] La chiusura dei lavori, originariamente prevista per il 22 novembre, è stata posticipata al 24, al fine di appianare le numerose divergenze sul contenuto della decisione.

[4] Per ulteriori approfondimenti si rinvia a G. van Calster, L. Reins (eds), *The Paris Agreement on Climate Change: A Commentary*, Elgar, Cheltenham, 2021.

BTR), Kazakhstan (BTR, NID), Liechtenstein (NID), Maldive (BTR), Malta (NID), Monaco (NID), Paesi Bassi (NID, BTR), Nuova Zelanda (NID), Norvegia (NID), Panama (NID e BTR), Polonia (NID), Russia (NID), Singapore (BTR, NID), Spagna (NID, BTR), Svizzera (NID), Turchia (BTR, NID), USA (NID)[5].

Altro argomento al centro dei negoziati riguardava la definizione di un programma di supporto per la stesura dei Piani nazionali di adattamento (National Adaptation Plans - NAPs). Durate i negoziati, ministri delle LDCs e dei SIDS hanno intrapreso un dialogo sulla necessità di strumenti finanziari innovativi, nonché l'urgenza nel fornire supporto tecnico per accelerare la definizione e l'implementazione dei NAPs. Pur rinviando alla CoP30 per ulteriori determinazioni, le Parti hanno rinnovato il mandato del Facilitative Working Group (FWG)[6], che unisce Parti, popolazioni indigene e comunità locali. Di rilievo, inoltre, è l'adozione del Baku Workplan, incentrato su sei "collective approaches":

Gathering of knowledge holders
Regional engagement
Seventh-generation roundtables
Collaborating with UNFCCC bodies and workstreams
Enhancing engagement with Parties
Overall strategic planning[7]

Ulteriori risultati della CoP29 riguardano la partecipazione della società civile e le questioni di genere legate al cambiamento climatico antropogenico. In merito a quest'ultimo punto, le Parti hanno esteso per ulteriori dieci anni il Lima Work Programme on Gender and Climate Change[8], anche in vista dello sviluppo di un

[5] Elenco aggiornato al dicembre 2024. *https://unfccc.int/first-biennial-transparency-reports*.

[6] *https://lcipp.unfccc.int/facilitative-working-group-fwg/facilitative-working-group*.

[7] Per ulteriori aggiornamenti si rinvia al sito ufficiale della UNFCC: *https://unfccc.int/BW*.

[8] *https://unfccc.int/topics/gender/workstreams/the-enhanced-lima-work-programme-on-gender*.

nuovo piano di azione per la prossima CoP. Per quanto riguarda l'ampliamento della partecipazione alle attività delle Parti durante i negoziati, alla CoP di Baku si è registrato l'intervento di 55.000 persone fra privati cittadini, imprenditori, popolazioni indigene, filantropi, giovani e organizzazioni internazionali. In questa occasione, è stato ribadito l'impegno per la promozione dell'Action for Climate Empowerment (ACE), al fine di garantire un ruolo agli *stakeholders*, anche in vista dell'implementazione di azioni concrete su base nazionale, da includere nelle NDCs. Da sottolineare, inoltre, il 2024 Yearbook of Global Climate Action[9] per rimarcare l'importanza e l'impegno dei *non-Party stakeholders*.

Al di là dei risultati direttamente riconducibili all'implementazione dell'Accordo di Parigi, senza dubbio sono da segnalare alcune posizioni delle Parti o di loro rappresentanti. Un dato riguarda i "grandi assenti", ossia Xi Jinping, Joe Biden, Emmanuel Macron, Olaf Scholz, Lula da Silva, Dick Schoof, Ursula von der Lyen, scelte legate a – intuibili – motivi riconducibili alle tensioni di natura diplomatica con il Paese ospitante (come nel caso della Francia, circa la crisi diplomatica con l'Azerbaijan per le recenti vicende riguardanti il Nagorno-Karabakh)[10] o a questioni politiche interne (come nel caso degli Stati Uniti o dell'Unione europea).

Non sono mancati gli scettici, ma questa volta non dell'impatto delle attività antropiche sul sistema climatico, ma dei risultati dei negoziati. Di rilievo appare la critica della rappresentante dell'India, che ha parlato di "illusione ottica" per descrive l'impegno, a suo avviso insufficiente, dei paesi sviluppati. La Papua Nuova Guinea ha disertato la Conferenza, come già pubblicamente annunciato dal Primo ministro James Marape nell'agosto del 2024, in segno di protesta per l'insufficienza delle misure adottate dei paesi sviluppati.

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[9] Per accedere al '2024 Yearbook of Global Climate Action: Marrakech Partnership for Global Climate Action': *https://unfccc.int/documents/642847*.

[10] J. Follorou, E. Grynszpan, *COP29: An unprecedented crisis between France and Azerbaijan*, Le Monde, 11 novembre 2024, disponibile al seguente link: *https://www.lemonde.fr/*.

Una posizione di segno opposto, invece, è data dalla partecipazione di Pedro Sanchez poche settimane dopo l'alluvione di portata storica che ha colpito la Comunità Valenciana. Il Premier spagnolo ha sottolineato il senso di emergenza e la richiesta di efficacia nelle misure per contrastare il cambiamento climatico, anche alla luce di nuove opportunità, poiché non si tratta di decrescere, ma crescere diversamente, in quanto la transizione ecologica può essere pensata come una forma di modernizzazione.

Interpretare i risultati della CoP29 non appare un compito facile, a mio avviso, per due ordini di ragioni strettamente connessi: l'abitudine ai successi a seguito dell'Accordo del 2015 e la base essenzialmente volontaria nella definizione delle misure da adottare. Circa il primo punto, è possibile argomentare riconoscendo il 'punto di partenza' fissato dalla CoP28, che aveva già impostato una traiettoria di discussione su questioni di natura prevalentemente finanziaria e operativa, che hanno allontanato risultati declamatori e mediagenici di facile discussione, definizione, accettazione e condivisione. D'altra parte, l'impostazione di un sistema '*bottom-up pledge and review*'[11] lascia scontenti coloro i quali sono abituati a determinare valutazioni sulla efficacia in base a un sistema obbligazionario e chi, come i paesi in via di sviluppo, le LDCs e i SIDS, si aspettava un impegno intenzionale maggiore. Nello spazio che residua dal conflitto fra *hard* e *soft law* sulle misure relative al cambiamento climatico[12], si inserisce l'impressione di un diritto che, per estensione rispetto alle considerazioni di Daniel Bodanski sull'ipotetica esistenza di una costituzione ambientale internazionale, fa i conti con un contenuto "*weak and vague*"[13].

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[11] S.T. Zaman, *Exploring the Legal Nature of Nationally Determined Contributions (NDCs) under International Law*, in *Yearb Int Environ Law*, vol. 1, n. 26, 2015, 98-126; D. Bodansky, *The Legal Character of the Paris Agreement*, in *Review of European, Comparative & International Environmental Law*, vol. 2, n. 25, 2016, 142-150.

[12] V. Popovski, *'Hard' and 'soft' law on climate change: Comparing the 1997 Kyoto Protocol with the 2015 Paris Agreement*, in Id. (ed.), *The Implementation of the Paris Agreement on Climate Change*, cit., 19-41.

[13] D. Bodansky, 'Is There an International Environmental Constitution?', in *In-*

Probabilmente, questi due fattori hanno creato eccessive aspettative, peraltro confortate da dati scientifici e dalla singolarità della situazione attuale in merito agli effetti del cambiamento climatico antropogenico, che ci porterebbero a pensare in termini di *half unsuccess* della CoP29.

Rimane da chiedersi, a conclusione di queste brevi considerazioni, quale sia il ruolo del diritto pubblico comparato. Di certo, senza riserve si può affermare che è tutt'altro che marginale. Come chiarito da Alexander Zahar, "L'accordo di Parigi è bloccato […] a livello di azione collettiva. Non ha modo di gestire nulla al di sotto di quel livello. In effetti, questo è esattamente ciò che il progetto del trattato impone. Lascia la determinazione dell'azione individuale (statale) interamente a ogni stato e non fa alcun tentativo di valutarla"[14], in quanto ha come obiettivo la definizione di meccanismi (con particolare riferimento alle NDCs) che spingono verso una maggiore ambizione nazionale, che modernizza la differenziazione sulla base di disposizioni tematiche dalla differente natura giuridica[15]. Tuttavia, "poiché nessuno stato è in grado di dire se, aumentando la sua ambizione di mitigazione di una determinata quantità, ci sarà una riduzione assoluta delle emissioni globali, ogni stato decide di fare ciò che ritiene nel proprio interesse, in conformità con il pensiero imperscrutabile che entra in tali calcoli"[16]. Il discorso si sposta, quindi, al piano nazionale, per affidarsi alla sensibilità politica e alle risultanti normative e giuridiche.

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diana J Glob Leg Stud, vol. 2, n. 16, 2009, 565-584, 580. Per ulteriori considerazioni sul *Global Environmental Constitutionalism* e sul costituzionalismo ambientale si rinvia a D. Amirante, *Costituzionalismo ambientale. Atlante giuridico per l'Antropocene*, il Mulino, Bologna, 2022.

[14] A. Zahar (ed.), *Optimism and pessimism about the Paris Agreement*, in Id. (ed.), *Research Handbook on the Law of the Paris Agreement*, Elgar, Cheltenham, 2024, 1-20, 8.

[15] R. Bodle, S. Oberthür, *Legal Form of the Paris Agreement and Nature of Its Obligations*, in D. Klein *et al.* (eds), *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford University Press, Oxford, 2017, 91-103.

[16] A. Zahar (ed.), *op. cit.*, 8.

Abstract

The contribution critically addresses some relevant outcomes of the 29th Conference of the Parties (CoP) in the light of the commitments arising from the NDC system. After highlighting some of the most significant positions, the analysis points out some factors leading to excessive expectations, with the aim of explaining reasons that underline a sort of 'half-unsuccess' of the CoP29.

Keywords: Anthropogenic Climate Change; UNFCCC; Nationally Determined Contributions; CoP29; Paris Agreement.

Il contributo esamina, con approccio critico, alcuni rilevanti risultati della 29ª Conferenza delle Parti (CoP) alla luce degli impegni derivanti dal sistema NDC. Dopo aver illustrato le posizioni più significative, l'analisi mette in luce i fattori che hanno portato ad aspettative eccessive, al fine di spiegare le ragioni che sottendono una sorta di '*half-unsuccess*' della CoP29.

Parole chiave: Cambiamento climatico antropogenico; Convenzione Quadro delle Nazioni Unite sui Cambiamenti Climatici; Contributi determinati a livello nazionale; CoP29; Accordo di Parigi.

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