

SUSTAINABLE DEVELOPMENT, MORAL LAW AND LEGALITY IN DEFENSE OF CULTURAL AND LANDSCAPE HERITAGE

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1. An opportunity to reflect on the urgent challenge of managing integral sustainable development.

The “*Laudato Si*”¹ induces one to reflect on the situation regarding human resources, public institutions and individuals working in the field of the environment and protection of the land, with reference to disciplines objectively involving issues relating to environment, cultural heritage and territory, unique material evidence of the value of civilization.

They constitute the matrix for the “cultural program” outlined in the fundamental principles of the Italian Constitution (Art. 9) and focus on the significance of the human-culture and human-environment relationship. In this regard, the Republic is solemnly committed to promoting the development of culture and scientific and technical research.... and to protect Italy’s landscape and historical and artistic heritage [1].

Knowledge of environmental issues have highlighted the interdependence between territorial structures shaped by human activities and the multiplicity of historical and artistic finds, summed up in testimonies conferring civilization with a particular value. The synthesis of these testimonies make up the historical-artistic and environmental heritage that differentiates individual communities, an intangible heritage to defend that involves the promotion and valorization of the essential components of the relationship between humans, nature and territory from which derives the notion of the environment as “*ubi consistam*” [2-7].

It is interesting to note that even at the dawn of the 1900s, in the field of protection and valorization, the attention given to landscape, and unconsciously to the environment, centred mainly on legislative aspects relating to the use and containment of public and private waters, the development of irrigation channels, the reclamation of sites in unsanitary conditions, the exploitation of water resources for the production of energy and the construction and maintenance of highway and railway networks.

In urban centers municipal building regulations were applied with health and sanitary provisions for residential areas and road, public order and cemetery services.

One particular case that stood apart was the special law for the urban recovery of the city of Naples, characterized by the programming of public intervention.

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Environmental issues were merely viewed as a vaguely defined notion of the territory and linked for the most part to the exploitation of agricultural property under the rules of private law.

2. History of the protection and valorization of cultural-environmental-landscape heritage in the synthesis of land preservation

An interest in the value of the environment began to take shape in the laws on cultural heritage which codified the start of public interest, the obligation to preserve and the instrumental power of the government to protect and valorize art objects of historical and archaeological interest, together with monuments and buildings².

Later (1912), the protection of villas, parks, gardens and sites of “natural beauty” and “scenic beauty” were included among the heritage and objects subject to the protection and enhancement by the government in the legislation on cultural heritage and activities in the years from 1939-1940.

As a corollary, the first nature parks for the protection of flora and fauna and biodiversity were instituted³, which then led to a “cultural program” being outlined in the basic principles of the Constitution (Art. 9). It focused primarily on the significance of the relationship between people and culture, and people and environment, obliging the Republic to promote the development of culture and scientific and technical research and to safeguard the landscape and the historical and artistic heritage of the nation⁴.

Based on this unified vision of cultural and environmental heritage, a series of studies and investigations followed during the period from the fifties to the seventies. They were carried out by government commissions (Franceschini, Papaldo, Chigi and Fanfani) whose contributions in the field of nature conservation and its resources, as well as the protection of the compatible ecological balance of the environment and the atmosphere, took into consideration a more structured concept of environment, which could even be described as differential compared to the original idea of cultural value.

Since then, despite the institution of the single Ministry of Cultural and Environmental Heritage (1974), the environment has been seen not only and not so much as landscape cultural heritage shaped by human action, but rather as an area surrounding urban settlements and activities, to be defended and valorized against possible factors of aggression (upheavals, pollution and destruction) and so increasingly subject to regulations, both supranational and international, in all matters pertaining to the environment [8-10].

3. The activities of international organizations in the 70s and 80s to protect nature from human actions.

In fact, between the 70s and 80s, international organizations were busily engaged in preserving and protecting nature and defending the environment from human actions, repeatedly codified and acknowledged in the governmental statements of the participating countries [11-13].

In addition to planning commitments, this prompted the European Union and Italy into adopting regulations and directives and implementing them by paying particular attention to the protection and enhancement of natural resources and landscapes, as well as the safeguard of the environment, with increasingly stringent provisions for

conformity in human activities aimed at preventing environmental disasters and pollution beyond the limits of compatibility by means of a combination of permits, inspections, sanctions and reconstitutive actions [14-16].

After a decade, the specific nature of government action for the protection, preservation and enhancement of the environment resulted in responsibilities related to environmental issues being separated from the functional system originally attributed to the Ministry of Cultural and Environmental Heritage [17].

Hence, the Ministry of the Environment was created in 1986. It then became (1999-2006) the Ministry of the Environment and Protection of Land and Sea. Both names evidently reflect the evolution of environmental guidelines.

It must also be said that the latter was never separated from the provisions regarding the use of the territory and urbanism, leaving the intricate web of responsibility existing between local authorities, regions and central government unresolved and which extended, at a regional level, to include duties relating to the protection and valorization of landscape with cultural value [18-19].

4. The crushing of skills and the conflict between institutions

The complicated division and confusion of responsibilities at all levels of government led to the extreme difficulty, if not paralysis, of taking effective action in protecting and valorizing the landscape and environment.

Although attempts (2004-2006-2009) to codify the numerous laws (eventually reduced to unified texts) relating to areas of cultural, landscape and environmental heritage, gave some order, they did not resolve problems of fragmentation in the competences and related conflicts in which cultural, landscape and environmental heritage was still engulfed, due to the limit of the unfortunate constitutional arrangement in dividing power between the state and regions and the local authorities, outlined in the reforms of 2001 [20-34].

If you add the grim formalistic bureaucratism that the administration was increasingly becoming entangled in, in the interests of the community, and which Italian leaders had the illusion of redressing through repeated schizophrenic legislative interventions, it is easy to understand why the significant organizational and functional structures of the codifying were ineffective. The result was that any action towards solving problems slipped further and further away, mired in the exaggeratedly complex procedures, exposed to risks of inefficiency and inertia, and at worst, thwarted by the sluggish mesh of corruption.

Nevertheless, the question of cultural-environmental legislation was emerging in terms of positive law, since it took into account the objective relevance of the body of rules relating to natural law, as a moral standard for making judgments and as a scale of values in disciplining its use.

It therefore tended more toward preserving, protecting and valorizing the environment – cultural heritage, which goes beyond the juridical sphere of legitimacy, according to lines directed toward the concrete possibility of “legitimate use”⁵ and the responsible use of the cultural heritage environment by respecting the principle of preservation through its being used in a loving, responsible and prudent manner. The final result is aimed at ensuring its integral sustainable development to protect resources which must be passed on to future generations [35-37].

5. The “environmental code” of 2006, an opportunity compromised by corrupt ideological prejudices of cultural decline.

Unfortunately, when in 2006, implementation of the “environmental mandate” was revised, there were probably no grounds for the illusion of effectively solving environmental concerns with a fair regulatory body consistent with the primacy of man, according to rules and procedures for its use related to responsibilities, and basing it on the context of the values and principles enshrined in the *corpus* of natural law.

The idea that the environmental issue should be resolved in light of natural law as a moral founding law⁶ of values, a prerequisite to make laws aimed at being compatible with safeguarding, protecting and valorizing the environment at people’s disposal, was certainly the right approach.

And it was just as right to believe that full coherence in all its parts would open up a real possibility of “legitimate use”, a responsible use of the environment marked by the principle of conservation through caring for it and using it wisely in order to guarantee the preservation of these resources for future generations [38].

Unfortunately, the newly issued “environmental code” of 2006, was overridden by changes inspired by corrupt ideological prejudices of cultural decline that by falsely invoking community-based principles and values, were not long in obfuscating the fundamental canon of consistency in the order established by the laws of nature meant to protect its vital process and to act in the interest of the user and the object used whose balance is found in “common good.” Thus, the finalization in affirming human primacy was compromised⁷, sacrificed by environmentalist ideology, inspired by the concept of the environment as an absolute asset and end in itself.

Even if with the new “environmental code”, the entire complex system of laws relating to the environment issued over the years were put in order for the first time, it should be reported that suppression of the fundamental principles which through statements of positive law expressly inspired the new regulations, it seriously jeopardized its correct application; in particular the validity and effectiveness of the provisions that were amended in accordance with criteria of misrepresented EU guidelines (e.g.: in the protection and valorization of water resources, the use and disposal of waste as well as in the field of configuring environmental damage and the recovery of compromised resources).

The extreme difficulty in applying them has become evident, also due to the complexity in articulating the subject matter, outlined in drafts with a high coefficient of rigidity and the bottom line directed at a formalistic abyss, to the point where the underlying principle of protection is put aside (as in the extremely cumbersome nature of the procedures relating to reclamation and rehabilitation), and becomes even more fragmented by the division of responsibilities among the different institutional levels [39].

It is consequently evident how the repeated modifications caused the progressive loss of spirit of sincere cooperation which had marked the original provisions in the Environment Code.

It had, on the contrary, ensured its application (in the context of strict precautionary and prudential provisions for the protection and valorization of environmental resources naturally guaranteed by the regulations of loving, responsible and prudent use, according to necessity and with sound reason) through the positive mark of importance attributed to the principle of good faith for all recipients, thus united in the pursuit of the common good, precisely through the attention given to the welfare of the user and what is used.

It should also be noted that the evolution towards the current status of environmental and cultural legislation reflects the culmination of the cultural decline with respect to the values and principles that should be the basis for the legitimacy of present-day legal systems.

Even with the original position on *jus naturale*⁸ laws aimed at the prevention and solution of environmental problems through the grading of values according to accepted canons due to their ability to function successfully in ensuring correctly arranged relations, a very different frame of reference was achieved, almost completely detached from the *jus naturale* and far removed from the fundamental principle which, in *re ipsa* implies compatibility solely with values inspired by full recognition and reciprocal alterity⁹.

This process resulted in the progression and consolidation of the idea according to which the legitimacy of regulating inter-subjective relationships and the composition of interests can refer to (in the context of changing habits and practices in social relations involving the grading of changing values over time in line with the evolution of morals, and thus regardless of absolute references) recognition of the characteristics of the legislation (authority for spontaneous compliance and / or coercion) and its application on the sole ground that it wavers from the formation that governs the production of the source.

The same can be said of institutions regulating environmental protection and valorization, which have increasingly intensified their formalism by making procedures even more complex and reducing their sphere¹⁰ of proper application.

After the relativization of values and the gradual anchoring of the legitimacy of the rules based on acknowledging the formal correctness of the process of production of the source, there followed the adversely negative effect of their ethical self-referentiality (justifying the adaptation of the reference principle which is no longer absolute).

This placed the legislature and government institutions in a position, possibly even with the need, to constantly adjust the regulatory framework to adapt it to actual needs rather than assisting social needs in line with the fundamental rights of the person and the established rules of civil coexistence – as regards the Italian legal system – in the first part of the Italian Constitution.

6. The loss of natural moral law and the fall of legality

This situation has led to the specific problems that have emerged in recent years in promulgating decrees and laws, as well as in statements of illegality sanctioned by the Constitutional Court, an aspect that is evident in proceedings concerning jurisdictional conflict between state powers, particularly those relating to environmental and cultural heritage legislation which are far too numerous and harsh [40-43].

In the increasingly confused and contradictory legislative framework of the degenerative parliamentary system, the Constitutional Court, while acting within the restricted area deriving from the principle of popular sovereignty and being prohibited from making “political” decisions on behalf of the legislator, sought to rationalize the system by playing a role that was more central and important, the less important the rationality or reasonableness of the legislative decisions appeared, i.e. Parliament’s ability to be a key player in designing the legislation [44-46].

But the haziness of these elements, gradually separated from a regulatory development, by this time, had affected the entire legislation, which increasingly suffered from

a state of precariousness, as evidenced – amongst other things – by the repeated and contradictory reforms on the subject of environmental and cultural heritage.

On the contrary, in these sectors one should keep as far as possible to the co-natural, apparent immutability of codification required for the system to be reliable; incompatible with the frequent shocks and upheavals, that in most cases are unnecessary, as there is no coherently established connection with the resources and organizational methods of the administration.

All the above, were to calm the flow of incessant legislative action on substantial subjective situations, on relationships, on the autonomy of the private sector¹¹, as well as on the protection of rights and interests in all fields of human action, thereby exacerbating the already worrisome uncertainty of the law.

Despite the description of the institutes that the legislator's intention was to harmonize the principles and provisions of Community directives, insights emerge, however, that lead to considerations that confirm the somewhat unreassuring presentation made up to now.

There is the procedural complexity of the institutions, the even more extensive impact of the restrictive rules of the subjective situations related to economic interests and the multiplication of overlapping, in some cases even duplicated, procedures, obligations primarily aimed at consolidating some privileged positions (e.g. consortia), instead of simplifying functions by eliminating them, in addition to the competences of the administration.

On closer inspection, a deep crisis permeates today's public institutions and relations between states, there is a deterioration of interpersonal relationships, inadequate protection of human rights, the uncertainty of implementing laws, increasingly lacking the authority to spontaneously execute due to the inadequacy of legislative sources and the criticality of verifying issues when faced with international, EU and internal jurisdiction.

Among other factors, this is due to the decreasing importance that is attributed to the respective values at the basis of civil society, far removed from the principles of natural law based on the recognition of the primacy of the person and aimed at promoting the individual and the common good; consequently, the legitimacy of laws, based on the mere acknowledgment of the formal correctness of the production process of the sources, means it involves ethical self-referentiality.

The democratic debate, moreover, tends to anchor the dialectics of power relations merely at a procedural level, rather than in seeking shared values, coherent in respecting people and protecting fundamental rights and duties, as well as correlative freedom, according to the civilizational tradition of our society [47].

The present-day risk of formalism is therefore natural, even in the field of environmental laws and cultural assets¹², at the expense of the protection of goods and people, based on shared standards.

All these elements aggravate the precariousness of the legislation. This critical aspect also explains the shortcomings in implementing the laws and decrees promulgated in recent years; as mentioned previously, followed by an increase in issues of constitutional legitimacy due to jurisdictional conflict between government bodies, as well as in proceedings concerning the constitutionality of the compatibility of national law with EU law.

These critical issues are common to all areas of standardization, from laws on the organization and functioning of institutions and administrations, in the fields of politics,

culture, environment, education, health, civil rights, the regulation of the human, financial and economic, public and private activities.

The cultural decline was naturally followed by the weakening of substantive law, which strongly softened the authority and certainty of the law.

Moreover, the sterility of the debate confined to procedural positivism¹³ far-removed from extensions to metalegal aspects into which sink the roots of ethical principles and absolute values has become aware of the stalemate from which it has been impossible to move forward.

One simply has to think of the endlessly unsuccessful debates on the reform of political institutions, on the various rearranging of the forms of government, on the rules that should solve the problems of bioethics, of the beginning and the end of life.

Debates in which the most extravagant opinions are recorded and which are characterized by the denial of the call to the roots and traditions of civilization of which our society should be the highest expression, in a measure corresponding to the capacity of the cultural heritage on which it is based, also watching with a careful eye and a calm mind Europe's Christian roots.

Substantive legality is a class of spirit that is extremely difficult to regain; and it does not seem, in the mentioned context, that the humus is one where you will have the first shoots: the problematic nature of law-making is still too full of ideological prejudices and does not seem to be sufficiently manageable in the state of cultural defaultance in which the institutions find themselves and which they should make provision for.

7. A glimmer of hope

Some grounds for hope may be seen in the Community legislation to harmonize the protection and valorization of the environment, particularly in disciplining the activities of public administration, where the main purpose as a guarantee for future generations will mean/involve legislative processes characterized by provisions rooted in the ethics of the natural moral law, under the bastion of sincere cooperation and good faith, protected by a legal system and severe sanctions, but also tempered by recourse to equity, in those cases where general interest prevails.

It is evident then, that in laws of transposition, the previously mentioned institutions have complicated things with restrictive rules concerning the subjective situations related to economic interests and procedural rules with added obligations, rather than simplifying them.

It may be assumed that these negative aspects are not preventing the process of recovery of substantive legality from beginning. It could however be initiated through the reacquisition of the fundamentals of legitimacy of the rules on natural moral law (discussed in detail above), re-establishing the legal conception of right as "ars juris": in the sense of correlating right and art because they represent reality, including the common good, intended as its symbol.

If inspired by values and perspectives that diverge, or at least, exclude the person's own good, because they do not engage in its full valorization and the protection of the natural condition and its sphere of rights, right and art degrade to unnecessary or harmful superstructures, divorced from the sublime spirit of the person, of their feelings and their knowledge¹⁴.

Notes

¹ Encyclical Letter ‘*Laudato si*’ of the Holy Father Pope Francis on the care of “our common home”, Libreria Editrice Vaticana Copyright 2015, 00120 Vatican City, Italy.

² Since the Roman Empire, edicts and *senatus consulta* expressly contemplated the protection and conservation of works of art, which was the responsibility of the special judiciary “*comes nientium rerum*”. It is also interesting to note that the protection of art objects in the interest of the community, was also pursued with recognition of the “*actio popularis*” which, in order to assert the rights of the State, legitimized any “*cives*” (see: D’Urso, *Tutela dell’ambiente e pianificazione urbanistica*, Padua, 1990, p. 23). Without going into detail here, it is important to note the strong tendency to recognize the fundamental importance inherent in people’s interest in works of art, to the point of allowing any citizen to replace the function of exercising the protection which the state was expected to carry out. This did not mean – with the expected implications of the “*actio popularis*” and the particular subjective situation of the “*cives*” with regard to the “magistrature”- that the imperial legislation expressly recognized the category of intangible heritage of artistic and cultural interest, according to the classifications found in modern legal systems. It undeniably appears, however, that the publicizing of heritage, by reason of the connection with the community in its interest in preserving it so it can be enjoyed, perhaps even as a heritage of the artistic and historical tradition of the Roman people.

³ The three parts of the legislation of 1939, together with that on cultural activities (credit and subsidies to the theater and cinema activities – Royal Decree Law n.1150 / 1938. Law n.1143/1935), perceived only at a liminal level, the problem of a possible configuration of the separate category of cultural and environmental heritage, of an intangible nature and public relevance also as regards enjoyment, legitimizing the canonization of the functions and attribution of powers instrumental to public administration in view of the preservation and valorization of those things subject to protection. Some timid attempt consequently emerged, for example, with the provision of territorial landscape plans in which Art. 5, Law n.1497/1939, which in my opinion projected the preservation and valorization of the “things” toward the configuration of environmental intangible property, even if falling under the limited aesthetic notion of scenic beauty (see also Immordino, *Vincolo paesaggistico e regime dei beni*, Padua, 1991, pp. 40 et seq., and *passim*). In general, it should be noted that though these rules proved to be incompatible with respect to recognition by the doctrine (see Giannini, *I beni culturali*, in RTDP, 1976 pp. 3 et seq.) and by acceptability, even in legal terms, of the notion of cultural property as a material testimony of the value of civilization, founded on the connotation of immateriality of the heritage, the legislator of 1939 was strongly anchored to an elitist conception of culture, using emphatically celebratory traditional references predominantly characterized by rhetorical elements, rather than to the awareness of the spiritual patrimony of values of civilization. This approach involved the prevailing recognition of the aesthetic value of things of art-historical and landscape interest, to induce the attention of the sphere of protected interest toward their materiality rather than toward the “mark” of the testimony they represent. From this false expounding, which today has finally been overcome, derived all those theories designed to put the definition of a legal nature into categories and classifications that were incompatible with the essence of cultural and environmental heritage. From the original framework of “goods of public interest” proposed by Grisolia, *La tutela delle cose d’arte*, Rome, in 1952, followed by Biscotti, *La tutela giuridica delle cose di interesse storico-artistico*, Padua, 1957, then, again by Piva, *Cose d’arte*, EdD, and recently adjusted by Palma, *Beni di interesse pubblico e contenuto della proprietà*, Naples, 1971, with the proposal of assimilation into the category of goods as functionalized property, a long search started that ended only recently – through an analysis of the objective interest relating to these assets as carriers of the traditional value of being a material testimony having the value of civilization – in the distinction of cultural property from “things”, as an intangible good of spiritual and collective relevance, heritage of the spirit of the people (cf. Giannini, *I beni culturali*, cit., pp. 23 et seq.). The evolution of the elaboration, more than anything doctrinal, is reported by all authors who have dealt with the matter. Finally, Alibrandi - Ferri, *I beni culturali e ambientali*, cit., pp. 15-24; Alibrandi, *Beni culturali e ambientali*, in EG.

⁴ The proposed approach to reading the text goes beyond the interpretations focused on the thematic dichotomy reported separately, on the one hand to promote the development of culture

through teaching and scientific research and technology, on the other, to protect the landscape and cultural and environmental heritage, as if the constitutional foundations of the principles and action plan of the public authorities aimed at developing and protecting the entirety of intangible heritage promoted by Art. 9 of the Constitution, present different significance and scope, since they relate to education and scientific research, in other words, the protection of environmental and cultural heritage.

This orientation, from which the scientific reflection extends (see Merusi, Comm. Branca, pp. 434 et seq., Bologna, 1982; Crisafulli - Paladin, Commentary on the Constitution, sub-section Art. 9, pp. 51 et seq., Padua, 1990, and references in this document), has undoubtedly led to remarkable advances in the recognition of the constitutional foundations related to the two paragraphs of Art. 9, correctly highlighting the evolutionary interpretation profiles: both as regards what is related to the organizational and institutional implications of the principles of freedom and autonomy in Articles. 33 and 34 of the Constitution for the promotion of culture and research; and also as regards the reference, in the second paragraph, of the materials areas of environmental protection and cultural and environmental assets in correlation with the principles and provisions of Art. 2 and 32 of the Constitution, for the development of the personality and the protection of human health. However, at least in my opinion, it has without reason neglected the opportunity to interpret the two paragraph in one whole in the resulting hendiadys, where the protection of environmental and cultural assets is a function and factor in the promotion and development of culture. According to this classification, it is likely that this section header of the cultural section of the constitution allows for a reading geared to a much wider horizon of the constitutional principles and precepts directed at the recognition, protection and valorization of the complex of intangible assets, not only in relation to training and personality development, its cultural and scientific background, together with the safeguard of environmental salubrity, with full freedom of research and teaching, but also directly in relation to the construction of the universal heritage of values of civilization, a part of the spirit of the people.

⁵ In this respect, and because “*legitimate use*” must be consistent with the natural process of life of all components, and thereof draws from the good of the user and the used, appears in full agreement with the opinion of those who (Crepaldi Giampaolo, Togni Paolo, *Ecologia ambientale ed ecologia umana – Politiche dell’ambiente e Dottrina sociale della Chiesa*. Ed. Cantagalli, Siena 2007) have recognized the contiguity of the concept of “human ecology,” with that of the common good, to be understood (with high magisterium appeal) as “the sum of those social conditions which permit and foster in human beings the integral development of their person” (John XXIII - Mater et Magistra, 51).

⁶ Natural moral law outlines its scope as “... the true guarantee offered to everyone in order to live free and respected in his dignity” (Benedict XVI, *Address to the International Congress on “natural moral law”*, promoted by the Pontifical Lateran University, in “*L’Osservatore Romano*”, 14 February 2007, p. 6).

⁷ The primacy of man cannot be seen as a source of arbitrary production compared to the design of nature and its laws. Indeed, for the vocation of knowledge and the ruling which forms the basis of user enjoyment, it is clear that its task, within which a culture of science and technology is conceived according to the acquisition of knowledge and the instruments of enjoyment, is also aimed at responsibly establishing the rules for its consistent and compatible use with all environmental and cultural components.

⁸ It is worth recalling some ideas expressed by De Bertolis O.S.J., *Etica, religione e diritto secondo G. Zagrebelsky*, in *La civiltà cattolica*, 2009, IV, pp. 54-63, where the debate inherent in the foundation of law among different sources, designed to reveal its essence in the “mediation between politics and ethics, where ethics is understood as the whole context of what is, in society, effective ethos” even though within the context of legislation on allegedly non-measurable values on natural law and even less on divine law, the right reduced to mere historical and human experience, it is not only recognized that in this experience there is some sense in speaking of natural law, even though the expression is certainly equivocal in the way it has been used in the course of the history of legal philosophy by decomposing its meaning, but the relevance of its full value is also found to be the element of construction and elaboration of culture of which it claims to be the matrix of the law where beliefs and faiths together with other factors converge (see pp. 57-58).

⁹ It is important to underline the reference to the substantial link represented by the correspondence between the legislative position and the position of interest of the subject – that the essence of order normally tends to realize, exactly in the sapiential meaning of the word, according to which it is precisely knowledge which gives order, of which justice also consists.

Legislation therefore, is not that in the absence of attribution and potential, which must be its own, to concretely implement the order in which it places the abstract criterion: this occurs only when it implies the correct structure of the inter-relationships corresponding to values underlying the duty to cooperate, and thus legitimize the claim of the individual's cooperation, on full and mutual recognition and on protection of alterity. In this respect, and to go to the origins, it should be noted that already in the Bible the parameter of justice "has its roots in ethics, which defines man as a being able to relate in truth to another person. Being fair or unfair is to be not so much by obedience to a set rule, but the ability to recognize in the other's face one's own dimension of a fair person" (FSJ Occhetta, *Le radici morali della giustizia riparativa in La civiltà cattolica*, 2008 IV, pp. 445 et seq.).

¹⁰ Similar considerations are found in writings dating back to P. Grossi, *Pagina introduttiva*, in *Quaderni Fiorentini*, Giuffrè Editore, Milan, 1999, pp. 1-9. These pages, rich in ideas and strongly critical of the notion that the law hesitates merely from the formation process that regulates the explanation of the source, report the profound detachment from the community of associates, expropriated the sublime prerogative being itself at the same time a substantial matrix and reference of the formation process of the legal system, to the point that popular sovereignty is mortified and reduced to the rank of the community of recipients or users of laws whose "formation process is reserved for the 'palace' in a fully functional legalistic and formalistic vision to ensure the effectiveness of the expropriation perpetrated". As a result, law is perceived as something foreign and unpleasant, almost a "risk to be avoided for life"; a far cry from the vision that captures "the legal dimension – such as the religious, economic, political – innate in our social everyday life, a part of this normality". According to A. the falsity of the notion for which, firstly includes the law in its written form, and then outside it, its application through the practice of a judge, a notary or a lawyer seems contradicted by the formation process of commercial law where the mercantile practices with its mechanisms of adjustment and invention of instruments suited to market demands anticipates the legislators who are limited to certifying in an official legal text the new rules of society on the move, regaining the substantial matrix of the source, a denial of alleged absolute reserve in favor of the law in the law-formation process. These reflections lead to recalling the passages [G. Tucci, *L'equità del codice civile e l'arbitrato di equità in Contratto e impresa*, XIV, Vol. 2 (1998); F. Galgano, *Equità del giudice e degli arbitri*, in *Contratto e impresa*, VII (1991); id., *Dialogo sull'equità (fra il filosofo del diritto e il giurista positivo)*, Ibid, XII (1996)] on issues of fairness that, in the tension of overcoming the traditional conception of identification of the law with the statutory law of the state, present compatibility within the overall context of the law matrix, incompatible with the positivism relating to the legitimization only of state law.

¹¹ The theme of the freedom of individuals, which actually corresponds to the part more correctly relating to the subject of freedom of negotiation in the context of the broader field of what is known as "the right of private individuals", has always been studied by scholars of commercial law, from which it originates, and the general theory elaborated. Assuming that the debate, which has only recently subsided, is well-known, it will be sufficient to remember that the line of thought is predominantly on recognizing the right of the private individual to the matrix function, according to rules of conduct and relations, particularly in the field of property and economic rights relating to commerce (once known as "merchant law"), precursors and appositions of a legal order with respect to their codification by the legislature, in respect of which, it cannot but be recognized as the recognition function of the law, aimed at guaranteeing the effectiveness of the regulatory statute in the exercise of freedom of negotiation, postulating its originality and therefore the ability to create, modify, extinguish subjective legal situations regardless of the ex lege effect for which the latter is responsible, but rather, what it contributes to the effectiveness of the guarantee, within the limits of judicial protection. These considerations are made to encourage reflection on the problem of the legislative exasperation determined by its very own formalism regarding the criterion of legitimacy, related to finding the right procedural path rather than establishing substantive values. This results in the inadequacy of the rules in regulating relations that are in line

with the guiding principles of freedom of negotiation, for which any legislative measures intended to introduce conformations or restrictive amendments according to the law in specific situations, should be considered with extreme caution, if not with suspicion, since they are probably signs of criticality involving the foundations of the substantive legitimacy of the legislative intervention. For an exhaustive description and detailed study of these issues, consult Roman A., *A proposito dei vigenti artt. 19 e 20 della l. 241 del 1990: divagazioni sull'autonomia dell'amministrazione*, in *Dir. Amm.*, 2006, 02, pp. 489 *et seq.*, which, despite the conversational tone of a seminar meeting, proposes the systematic reconstruction of the notion of freedom, clarifies elements, in an extremely original manner, which are drawn from the distinction, in the context of freedom of negotiation, between the genetic profiles of private law and those of the autonomy of public authorities (covered later on).

¹² In specifying the types of formalism, including the formalism of the science of the law, of positive legislation or rights, and the formalism of legal procedure, the latter is held to be the most (cf.: Giannini M.S., *Il formalismo giuridico*, op. cit., p. 197), which gives the example of the magistrate who applies the law in a formal way in good faith, because for example he may "not realize he is being conservative", (...) may well justify his choice by saying he cannot substitute the legislator" (referred to above, loc. cit.).

¹³ On the issue of legal dualism, in which positivism of the law on the one hand and natural law on the other are compared, together with the reactions of the law which should act as interpreter, it is worth noting the contribution by Zagrebelsky G., *Il giudice delle leggi artefice del diritto*, cited above, where, through a documented excursus on the dual spirit of the law, he reinforces the shared view that it is the task of the judges of the law to oppose set *jus* against *lex* and invalidate it because it is "unable to be assisted by any plausible reason" surpassing the traditional concept of the Constitution as a super-standard that is expressed in the idea of the hierarchy of those sources in favor of "an idea of supremacy or, possibly, temporal hierarchy: the constitutional *jus* prevails over the ordinary *lex* because the former is the law of stability and stability prevails over the volatility of occasional manifestations of power expressed by the law". In the relationship between constitution and law, the criterion of *lex posterior* is not valid because the Constitution is the norm for its duration, which is obviously also subject to certain changes, but whose forces are deeply rooted in social aspects of a cultural nature. The *lex* is the law of change, but change in a constitutional state, must take place within a context of continuity."

¹⁴ Cf.: De Bertolis O. S.J., *Analogie insospettate tra diritto e arte*, in *La civiltà cattolica*, 2010, II, pp. 23-32. It is useful to report the synthesis in notebook n. 3835, where the essay is published: "The article reports on some elements that law and art have in common. The law is not a simple application of an abstract rule to a particular situation, but imposes the search for a solution to the individual case; as in any legal judgment, each work of art is unique and unrepeatable. Furthermore, law and art are representations of human existence. Finally, *lex* is related to other disciplines – economics, morals, religion –, with which there is a mutual influence: what is "symbolic" is the mark of recognition of shared values; art also, has a symbolic value, as it is a representation of the hidden world that unites".

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