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Public Trust Doctrine in Comparative Environmental Law

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Introduction

If economic and financial crisis have been characterizing the last century, today the environment and its importance for humans' life can be placed on an equal footing with the economic well-being and the financial stability, as far as states priorities are concerned. Many attempts have been made over time, by both domestic and international political bodies, to legally grant effective protection-tools to the environment; this, on the one side, considering its value only in as far as much it is related to human beings and, on the other one, holding the environment as a set of goods and assets deserving protection as such. Exemplifying the latter two paradigms, an instance of the former "anthropocentric" approach would be the long-discussed acknowledgement of the fundamental right to a safe environment; on the other hand, giving to natural assets their own value – irrespective of their function for human beings – would mean, for example, protecting biodiversity or recognizing aesthetic worth to them.

The approach adopted in this thesis can be, arguably enough, deemed as an anthropocentric one. Indeed, the assumption which the public trust doctrine is based on is the fundamental function that natural assets have for humans' life. This, not only referring to basic life function (the indispensability of food, water and clean air), but also with reference to the possibility for communities to achieve development – which of course needs to be "sustainable" – throughout the settlement of family, economic activity and property. The statement – *i.e.* supposition – following this assumption is that states, indeed, bear a duty to protect natural assets and this duty is owned towards citizens.

From a technical legal point of view, the intellectual exercise made in this dissertation consists in reproducing a property law-theory in a public law scope of application. The trust finds, indeed, its origins in the Anglo-American legal tradition, with reference to private lands or, more generally, properties.

Shifting from private to public law entails the necessity to firstly identify the assets which shall be considered as object of trust; that is referring to different domestic legal systems and the legislation they provide for. For instance, it would be necessary to determinate whether the object of a public trusteeship can only be something material (e.g. a river, a forest) or, instead, immaterial assets can also be legally deemed as object of a trust (e.g.

aesthetic and recreational values, linked to the environment). So, basically, the question that needs here to be addressed is to what extent can the content – *i.e.* the object – of a trust be extended.

Subsequently, it would be the case of clarifying who the subjects forming part of the trusteeship are. That is to say, identifying who the trustees are, who the beneficiary is and who the settlor can be – if there is any. This investigation would obviously take into consideration the “classical” financial trust as guideline, in order to create the right “matchings” and to make the “shift” from private property law and public law possible. Once the subjects are identified, the study shall be shifted to the interconnections and relations which are present amongst the subjects. That is to say, analysing the rights and corresponding duties these subjects, bodies or entities are entitled, or borne, with.

According to property law tradition, any trusteeship needs at least one trustee and one beneficiary, in order to be established. The former is the one bearing obligations for the latter’s sake and interests, whilst the latter would be the one – or the ones – being entitled with rights related to the asset object of the trusteeship. Summing up, if the state is held as trustee and the community – *i.e.* the citizens living on the territory where the asset is located – as beneficiary, what kind of legal binding obligations are borne by the former? And, in addition, what kind of rights – both substantial and procedural – can be opposed to the failure of the state to fulfil its obligations? To this respect, the access to justice will represent an important issue in the dissertation too.

In order to address the above-described issues and questions, a comparison among three different legal systems will be made: the U.S., the Italian and the Brazilian orders will be here taken into consideration. The choice of considering only domestic legal orders, rather than considering broader regional legal order (e.g. the European Union) or even international law framework, is related to the nature of the legal institution here at stake. Being the concept of trusteeship born in the scope of national private property legislations, its transposition into a public law framework needs necessarily to be investigated within such borders and will, indeed, result clearer and easier to be understood.

The latter methodology will be applied both from a substantive and a procedural law’s point of view. That is to say, analysing each country’s main legal provisions (constitutional

and statutory), making reference to the doctrine at stake, on the one side, and addressing the question of the actual enforcement of them – *i.e.* the involvement of domestic courts – on the other one; similarities and differences will be then taken into consideration. The U.S. legal system will be the first “benchmark” for the application of this methodology, as, indeed, the trailblazer of the public trust doctrine and, to date, the most developed legal order when it comes to public trust doctrine case law. Brazil and its Constitution will be then taken into consideration, mainly due to the rather advanced legal framework it presents and to the particular attention it dedicates to the environmental issues, also referring to the public trust doctrine. As last basis for comparison, a special attention will be given to the Italian legal system and the rather unique attempt to modify the Constitution that the Parliament tried to deploy, in order to include references to the environment as a “common good” and to subsequent duties borne by the state.

In the first chapter, an overview of the public trust doctrine will be given. Starting from the U.S. doctrinal experience (mostly based on the work of J. Sax), the application of this typical private property law theory to public environmental law will be analysed. Accordingly, addressing questions about the object and the subjects of the public trusteeship will be the main concern of the chapter.

The second part will be entirely dedicated to the U.S. legal system. This, on the one side, considering the U.S.A. as the traditional pioneer of the public trust doctrine and, on the other one, acknowledging the advanced status of this theory, both in U.S. legislations and, above all, in case law – especially as far as the Supreme Court is concerned.

The third chapter of the paper will focus on the Italian attempts to implement this doctrine and to make of it an important part of the environmental legislation. Failures and achievements will, thus, be investigated, mainly considering their dogmatical and legislative framework.

The fourth and last chapter of the thesis will take Brazilian legal order into account. The state-of-the-art constitutional framework of the country will be compared to the rather limited practical response. Difficulties of putting into practice high developed environmental protection tools will be at stake; that is, addressing the issue of turning positive law into effective judicial results.

The comparison that will be here developed aims at giving a clear “snapshot” of the current progress of the public trust doctrine within those legal orders, which arguably present the most interesting characteristics – although from different perspectives and point of views. Shortcomings and achievements of U.S., Brazilian and Italian legal orders will be investigated and compared, as to address the question of how the doctrine at stake can enhance and make more effective the domestic environmental protection.

1. Public trusteeship in environmental law: main legal features

Pursuant to Roman law tradition, some things are common to humankind: the *res communes omnium*; those are, for instance, air, water courses, lands and seas.¹ The state, representing the people and pursuing their interests, is the one entitled to rights on the latter assets and to the subsequent duties. Such duties all aim at the preservation of the common good, granting, for instance, its availability for common use.² Thus, for example, the state must refrain from selling or transferring such properties to private parties. Furthermore, no one has the right to dispose of the good or to make a usage of it which can interfere with other people's entitlements. To this end, all users must be subjected to rules and restrictions, when handling with such common goods.

The public trust doctrine has been used over decades to grant people access to those resources held as fundamental for the life of a given community. Such legal approach has been adopted in order to prevent states from conveying those fundamental resources to private parties – e.g. enterprises – which would lead to the public access's hinderance. Natural resources shall be, indeed, held by a sovereign entity “in trust and on behalf of all citizens” and cannot be subjected to private ownership – in the private law-meaning of the term – irrespective of public or private.³

From a technical-legal point of view, the public trust doctrine sees a sovereign authority – such as a state can be – as trustee, bearing a “fiduciary duty of stewardship” of natural resources and other common goods. Beneficiary of such stewardship is the public – under which both present and future generations of a given community are understood. To this

¹ D. 1.1.1.3 (*Ulpianus libro primo institutionum*): “Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censerit”.

² SAX, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Michigan Law Review (1970), 471.

³ KAMERI-MBOTE, *The use of the Public Trust Doctrine in Environmental Law*, 3 Law Environment & Development Journal (2007), 197.

extent, the property must not be only used for “public purposes” – as eventually listed by constitutions or statutory acts – but it must be available for the, although restricted, usage of everyone. To this end, the asset must not be sold and it has to be maintained in optimum conditions, which make it suitable for being enjoyed by the public.⁴ In sum, the trustee has a loyalty duty towards the beneficiaries, whose interests are everything the state – or other authorities – shall aim at.

The different legal orders, which are going to be taken into consideration in this paper, have developed an interesting spectrum of terminology and concepts, when making reference to those assets held as fundamental for the communities life. The most common term, which is referred to when handling with the public trust doctrine, is, indeed, “common good(s)”. After being first introduced in the Anglo-American scope (especially in the U.S. legal system), this term has been spreading also within other legal orders. As it will be later dealt with, for instance, the Italian Parliament had introduced the proposal of including such terminology in the Constitution, in order to grant to those assets considered as “common goods” an effective legal protection. Accordingly, when reference is made to the common goods – or “beni comuni”, as the Italian translation would be – an implicit presence of a “public interest” has there to be detected. It is, indeed, this very kind of interest which the protection of the common goods aims at. To this extent, it will be shown how Italy and U.S.A. share the same concepts (although different in language).

One further notion, which is often referred to, is the one of “patrimonio”. In both Italian and Brazilian constitutional framework, this term is usually used to indicate the cultural heritage of the nation and for granting it an adequate legal protection. Yet, the practice has demonstrated how the broader interpretation of the “patrimonio” can lead to the inclusion of natural assets and resources under this concept, offering, thus, an adequate protection to the latter goods too. With particular reference to the specification of the above-described terms, a more developed terminology can be found in the Brazilian constitutional framework. Besides the reference to “beni comuni” and “patrimonio”, indeed, the Brazili-

⁴ KAMERI-MBOTE, *The use of the Public Trust Doctrine in Environmental Law* (cit.), 199.

an Constitution, when dealing with natural and cultural assets, refers to them as goods “de uso comun do povo” (of population common usage). Such specification of the function and of the importance of the constitutionally protected goods eventually grants them higher protection, on the one side, and an easier application by the courts in terms of interpretation of the constitutional wording, on the other one.

1.1 Public trust object: origins and further proposals

Regarding the doctrine here at stake, it is its content to be the most controversial aspect of it – *i.e.* the object of the public trust. To this extent, several questions can be put, such as, for instance, whether it is something material or immaterial. Further doubts are related to the wide concept of “safe environment” in all its declinations and aspects.

Historically, public trust doctrine has been used by referring to specific natural entities, such as seashores, sea beds and submerged lands. The scope of application was, basically, limited to those resources intended for navigation, commerce and fishing. To this extent, a crucial and trailblazing point of public trust doctrine history – as far as the environmental protection is concerned – was a law review article written by Joseph Sax. He argued – distancing himself from the view of public trust having a limited scope of application – that these resources, air and the sea, are to be considered as whole one, due to their importance for humankind and irrespective of commercial, industrial or transport interests.⁵

Furthermore, recently, both scholars and courts have been widening the object of trust definition: to date, we can include general concepts as “wildlife”, oceans and ecosystems into the category of those goods suitable to be held by states for everyone’s interest and use. The main difference in respect to the previous approach is that also non-exploitable resources, such as groundwaters, unnavigable rivers and wild migratory birds, are deemed as to deserve protection in the name of the public interest. The increasing common concern for the environmental crisis and the fact of valuing resources not only for their exploi-

⁵ SAGARIN, TURNIPSEED, *The Public Trust Doctrine: Where Ecology Meets Natural Resources Management*, 37 Annual Review of Environment and Resources (2012), 473.

tation-chances, but also for their ecological and aesthetical values, were at the basis of this expansion.⁶ One more reason behind such evolution is that the modern approach to natural resources undoubtedly refers nowadays more to sciences: they have revealed how all nature elements, irrespective of having any economic value, are important because of their interconnection. In fact, for instance, as a matter of common knowledge, unnavigable rivers are strictly connected with seas and apparently “unexploitable” groundwaters are linked to fundamental surface waters.

In sum, as societies needs have been changing over time, the concept of public interest – the inner core principle of the public trust – had to be updated. To the classical interests of fishing, navigation and commerce, new modern concerns such as biodiversity, aesthetics and recreation, as well as the above-cited atmospheric trust as a tool for challenging the climate change, have been added to the scope of application of public trust doctrine.⁷ If we take a look at the first and most important case concerning the public trust doctrine – *Illinois Central* case – it is clear how such doctrine cannot be limited to resources useful for fishing, commerce and navigation only. In the latter case, the Court had developed what has been later defined as the “public concern test”: whenever a natural resource or a part of territory’s property has a public character – being “subject of public concern” – it must be used for purposes in which the “whole people are interested”.⁸

As a clear and main example of the scope extension we have been talking about, a rather recent proposal deserves here our attention. Going a bit further in envisaging new objects of public trust, it is only a matter of logic to list atmosphere – understood as the air we all breath – among those elements which are suitable to be object of public trust. Accordingly,

⁶ *Ibidem*, 479.

⁷ WOOD, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift*, 39 *Environmental Law* (2009), 80.

⁸ *Illinois Central Railroad Co. v State of Illinois*, Supreme Court of the United States, 146 US 387 (1892).

as Wood states, “no one could seriously argue that the air is not a resource of ‘special character’ that serves purposes ‘in which the whole people are interested’.”⁹

To the latter concern, Peter Barnes has developed a project aiming at holding the Sky as object of public trust. Although it might seem extreme as proposal, it deserves our attention, because, amongst other things, it recalls climate change issues. According to Barnes, “the sky is a valuable asset and ought to have an appropriate owner”.¹⁰ Specifically, it is valuable in as much as it has capacity for carbon storage. What Barnes calls here “Sky Trust” is supposed to hold emissions rights and periodically sell them to subjects deemed as being polluters; dividends of the sales would be then redistributed amongst all citizens – the beneficiaries. The Sky Trust would preserve sky’s gasses composition and varieties. Trustee would be, to the latter respect, accountable to both alive and “yet unborn” generations. Such system is nothing but a so-called “cap-and-trade” one,¹¹ as environmental law has seen many, both in the European Union and in the U.S. legal system. Nevertheless, an important difference between Sky Trust and other “cap-and-trade” systems can be detected: in the former, the revenue obtained by selling emission rights are equally distributed amongst people and are not freely invested by governments; in other words, dividends’ are here subjected to a restriction of use.¹²

Sky Trust has been adopted by the U.S. Congress – by voting the Atmospheric Protection Act – and is nowadays in use. This system has, *inter alia*, demonstrated how nearly every common good, irrespective of being ocean, forests or, indeed, the sky can be object of a public trust; that is, even though such elements of the Earth have not an obvious and immediate economic value.

⁹ WOOD, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1)* (cit.), 81.

¹⁰ BARNES, *Who Owns the Sky? Our Common Assets and the Future of Capitalism*, Washington, DC, Island Press (2001), 62.

¹¹ A “cap and trade” system would entail the imposition of a limit (a “cap”) of permitted emissions, below which the latter can be “traded” amongst polluters.

¹² BARNES, *Who Owns the Sky?* (cit.), 64.

Of course, such far-reaching expansion can lead to both positive and negative effects. On the one side, indeed, it can bring to law development, as the recent challenge of climate change, for instance, requires, considering ecosystems as fundamental common goods. On the other side, yet, widening the object of public trust increases uncertainty about property idea and on how ownership rules shall be applied to environmental law.¹³

With particular reference to international environmental law, different ways of defining and identifying objects of public trust have been developed and experimented. Sand interestingly presents three of them, namely those main instances of trusteeships developed under the auspices of the United Nations.¹⁴ One first option to identify objects of a trust would be to comprehensively enumerate them. This is the case, for instance, of UNESCO World Heritage Convention, containing specific natural resources, protected areas and monuments. The latter are simply appointed – *i.e.* proposed – by states and eventually deemed as eligible for the List. A second possibility would be the signing of a treaty only referring to a specific class of resources, which deserves to be protected and conserved by all state parties to the treaty. An example for that would be the International Treaty on Plant Genetic Resources for Food and Agriculture (IT PGRFA), where a whole category of genetic resources is included.¹⁵ A third, and last, option would be extending rights and duties of the trusteeship to all states, irrespective of being them parties or not to a given treaty or convention. The main criteria would be, then, encompassing all common features of the elements object of the trust: whenever a natural resource or land has certain characteristics, it is automatically deemed as object of a given public trust.¹⁶

¹³ SAGARIN, TURNIPSEED, *The Public Trust Doctrine* (cit.), 478.

¹⁴ SAND, *Global environmental change and the nation state: sovereignty bounded?*, in WINTER (Ed.) *Multi-level Governance of Global Environmental Change*, Cambridge University Press (2006), 534.

¹⁵ International Treaty on Plant Genetic Resources for Food and Agriculture adopted by FAO Conference Resolution 3/01 at Rome on 3 November 2001.

¹⁶ SAND, *Global environmental change and the nation state* (cit.), 534.

Not only is the eligibility of elements for being object of trust controversial, but also the identification of the subjects and their duties, pursuant to the trusteeship relationship, can be a rather big obstacle towards public trust doctrine efficacy in the environmental scope.

1.2 The subjects: settlors and trustees

Once seen which elements – *i.e.* natural resources – are eligible to be objects of a public trust, it comes now to exactly define who the subjects, parts to such trusteeship, are.

To begin with, it might be useful to compare public trust doctrine in environmental law with the much more ancient – dating back to Roman Law – private law instrument of the fiduciary trust. Traditional private property law provides for a bilateral conception of the trusteeship. Subjects realizing the latter relationship are only two: a settlor, accordingly the owner of the property, giving it to a trustee, who bears fiduciary and loyalty duties amongst others. Now, bringing this model to public trusteeship – especially when environmental law is at stake – can be misconceiving and could lead to a wrong understanding of it. As a matter of fact, as Sand states, “analogies from private property law do not suffice to explain public trusteeship.”¹⁷ Indeed, a trusteeship founded on environmental public law is necessarily rather a trilateral relationship than a bilateral one: settlor, trustee and beneficiary are different subjects and need to be distinguished.

Taking a deeper look at the role of the settlor, it can be arguably affirmed that the whole community is the one playing such part. The community could be understood as both the global community – *i.e.* the humankind – and a specific community, corresponding to a state, a region or a population sharing a cultural heritage. In fact, communities all over the World are to be deemed as the real “owner” of lands and natural resources. Such conception has not to be understood referring to private property law, according to which communities could freely dispose of everything our Planet offers; rather, it is intended to deprive governments or administrative bodies from such ownership – which leads more than often to environmental damages caused by private subjects under the allowance of public

¹⁷ Ibidem, 532.

institutions. In sum, communities are those who bring the resource at the disposal of a public entity – *i.e.* the trustee – together with rights, duties and restrictions on the use of such resource, just as like as any private property law trust, in accordance with beneficiaries' interests.

As far as the role of the trustee is concerned, many questions can be raised when it comes to its determination. Are trustees, for instance, only national states or can intergovernmental and international institutions be considered as trustees too?¹⁸ Whilst the latter could remain an open question, we can affirm that a trustee can be any authority which derives, more or less democratically, its power from the people – *i.e.* a community. Similarly to a common financial trust, the trustee is the one who bears the obligation to protect the body of the public trust and, possibly, to dispose of it for beneficiaries' sake. The representative sovereign is, hence, the entity throughout which people exercise their interest and care towards ecosystems, lands and the environment as a whole.¹⁹ In other words, a community with interests in preserving land and resources on a given territory transfers such task to a legitimated authority operating on such territory. As Wood states, “[...] government trustees, who serve at the will of the public, may not allocate rights to destroy what the people legitimately own for themselves and for their posterity.”²⁰

As far as the role of the trustee is concerned, it might be necessary to specify what are governments' or other authorities' tasks, how those shall be carried out and, of utmost importance, to investigate how their failures to comply with such duties can be challenged.

Trustee's attributes and tasks are more of a limitative and negative nature, rather than an allocation of powers. Public authorities are, indeed, mostly called upon refraining from using – or letting use – the object of trust in a way that can affect beneficiaries' interests.

¹⁸ SAND, *Global environmental change and the nation state* (cit.), 534.

¹⁹ WOOD, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations* (Part 1) (cit.), 65.

²⁰ *Ibidem*, 69.

Unlike traditional financial trusteeships, for instance, the trustee has here neither a duty nor a power to get profits from the body of trust. The trustee could, for example, simply keep an acceptable level of a given resource. The trustee's goal and, at the same time, duty, as Scott stated, is hence to preserve rather than maximise: "Given the duty to preserve trust principal, trustees must indeed refrain from maximizing expected utility."²¹ In other words, the trustee is called upon finding a balance between the growth – if ever possible – and the preservation of the resource.²² The final goal is, therefore, to make it possible for future generations to have the same quantity of a given resource as present generations have.

What it has been said here does not prevent the trustee to make investments, when managing the assets object of trust. Yet, if ever such investments lead to assets' value decline, the trustee can be held as responsible and, therefore, liable for damages.²³ On the other hand, any "dividend" which can stem from the trust must be necessarily reinvested for the sake of beneficiaries and for future generations.²⁴

More generally speaking, trustees shall act as "ordinary prudent man". As traditional private property law shows, this kind of conduct refers to anyone handling, or having at disposal, someone else's property. Likewise – although it is here about "common goods" and not traditional concepts of property – a government shall always act prudently, as it is doing so on behalf of someone, that is, the beneficiaries of the public trusteeship.²⁵ To this respect – as it will be later on further investigated – an "ordinary prudent man"-kind of conduct might be even not enough. Indeed, when it is about pursuing and defending others' interests, the level of prudence and care must be higher than the one a "prudent man"

²¹ SCOTT, Trust law, sustainability, and responsible action, 31 *Ecological Economics* (1999), 145.

²² SAGARIN, TURNIPSEED, *The Public Trust Doctrine* (cit.), 486.

²³ SCOTT, Trust law, sustainability, and responsible action (cit.), 146.

²⁴ See next section about beneficiaries.

²⁵ Issues relating to prudence and standards of conduct will be further investigated in the following section, when dealing with judicial review opportunities at beneficiaries' disposal.

would take if considering only his own interest. In other words, as Scott puts it, “[...] decisions on behalf of others require a greater degree of risk aversion than employed when conducting one’s own affairs.”²⁶ The concepts explained so far have been synthesized by environmental literature and statutory law under the term “Safety Minimum Standards” (SMS): governments, when managing resources, shall avoid exploiting them to an irreversible degradation point. Such standards (SMS) usually apply to those very valuable and scarce natural assets, for which a higher level of care is required – *i.e.* higher than the “ordinary prudent man” one.²⁷

Deepening the analysis, governments’ duties, whenever they become trustees, can be both of substantial and procedural nature. One first important substantial obligation which states borne is to protect the *corpus* of the trust; that is, to avoid any damage to the natural resource, land or whatever the body of the trust is. As US-American case law has shown, such duty of protection not only imposes a “passive” approach of the government – *i.e.* simply refraining from causing or letting cause damages – but also entails affirmative and active tasks, which are to be carried out by the authority at stake.²⁸

A second substantive duty draws inspiration from the private-law financial trust. In the latter circumstance, the trustee would have a fiduciary duty to keep a certain level of performance of the trust body. Similarly, when it comes to natural resources, governments are called upon keeping a balanced and sufficient amount of “environmental services” (e.g. a given population of fishes, a certain yield of timbers, etc.) for future generations – *i.e.* the beneficiaries.²⁹ This same model, stepping back to the “Sky Trust” proposal, could be easily applied to atmosphere, providing for duties on governments, such as imposing emission

²⁶ SCOTT, Trust law, sustainability, and responsible action (cit.), 145.

²⁷ Ibidem, 150.

²⁸ City of Milwaukee v. State, 214 N.W. 820, 830, Federal Court of Wisconsin (1927), “The trust reposed in the state is not a passive trust; it is governmental, active, and administrative [...] and requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.”

²⁹ WOOD, Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance, 39 Environmental Law (2009), 95.

limitations or reducing fossils use. If we keep the focus, for a moment, on this very issue of environmental change and the challenge that it represents for present generations, it is clear how the current discretionary political approach characterizing negotiations for the environmental protection is not consistent at all, but rather in contrast with the trust-approach; the latter becomes, this way, an important final goal for both civil and political parties.

Lastly, whenever damages are caused to the natural trust body by third parties, the trustee is called upon bringing claims against them, in order to obtain restoration of environmental harms. Accordingly, a failure to seek restoration of the damages would be a breach of the trusteeship by the authority and, indeed, a violation of a substantial duty.³⁰ Furthermore, whenever it is not possible to seek restoration by third parties – due to any reason, such as procedural obstacles, insolvency or the material impossibility to restore environmental assets – the trustee itself shall bear costs of restoration, as to not violate beneficiaries' rights.

As far as procedural duties are concerned, these relate to the kind of conduct the trustee has to carry on, rather than to goals it has to reach. In other words, such duties refer to “how” rather than to “what”. According to Wood, two main procedural duties on trustees can be distinguished. The first one refers to the conflict of interest issue and basically entails loyalty from the trustee. That is to say, trustee shall not pursue personal interests, but rather the beneficiaries' ones. Accordingly, the best way to reach such balance would be get rid of any interest – irrespective of being it private or political – which could potentially be in contrast to those of the people.³¹ Summing up, any decision taken by the authority must be aiming at beneficiaries' sake. In contrast, anything made for a private – as it is often the case – or third party's interest would be a breach of the obligation and, therefore, of the trusteeship relationship. In addition, when it comes to protect the environment and

³⁰ WOOD, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II)* (cit.), 98.

³¹ *Ibidem*, 99.

challenge environmental change, it is even more important that governments keep their loyalty; a breach of the latter could bring, indeed, irreversible damages, since assets like natural resources, biodiversity or atmosphere are for the inherent nature “crucial and irreplaceable”. Thus, whilst it is most of the times true that governments shall balance private with public interests, when it comes to environmental trusts such basic rules can be disregarded, in order to always give precedence to people’s – the latter understood as a given community sharing natural resources – interests.³²

One last procedural duty, which appears much closer to private financial trusts, is to provide an accounting of how – in terms of expenses and benefits – the trust has been managed. A natural asset accounting would, hence, refer, for instance, to the state of health of a given land, resource or species population. Obviously enough, such accounting would be based on environmental law studies and surveys, with reference to every specific asset. As it will be further investigated in the next section, accounting is of vital importance to the beneficiaries. Indeed, thanks to such procedure, the latter subjects can evaluate the trustee’s conduct and, possibly, challenge – on a judiciary level – their actions. To the latter respect, Wood states: “[The climate] accountings, if subject to judicial oversight, may be used to hold governments at all levels accountable for carrying out their fiduciary obligation [...].”

1.3 Beneficiaries and stakeholders

Beneficiaries of public trusts represent the core subjects of such trusteeships and it is of utmost importance to exactly identify them, in order to investigate which rights they benefit from and how such rights can be claimed in case of violation. The purpose of this chapter’s third section is, therefore, to find out who a beneficiary can be, on the one hand, and how his rights can be claimed – as far as environmental matters are concerned – on the other one. By addressing such questions, the issue of future generations rights will be also taken into consideration.

³² Ibidem, 100.

As it has partially already been said, certain interests – due to their very nature – are “in- trinsically important for every citizen”.³³ Hence, the assets which such interests refer to shall be protected for the sake of the society considered as a whole. That is to say, the re- source shall be freely, but not exclusively, available for every citizen. It is indeed uncon- ceivable that a single person could claim property-related rights on common assets, such as navigable waters or an entire ecosystem can be. Accordingly, beneficiaries ought to be the population as a whole, rather than every citizen individually taken. As Sax argues, the own- ership on a shoe cannot be compared to the ownership on water – if one could be ever foreseen.³⁴ Yet, although the latter allegation looks rather obvious, it is everything but clearly and univocally arguable that the “population as a whole” can enjoy and, subse- quently, claim rights on certain natural assets or environment-related interests.

One could argue that granting a piece of land – *i.e.* the use of it – to an undefined number of citizens is the same as giving it to a private individual subject. Such equivalence has ac- tually been exercised in early stages of public trust doctrine and it entailed a linkage be- tween the concept of trusteeship and the fundamental right to property.³⁵ Yet, it is very unlikely that “transferring” a resource or a land to the general public – to citizens – could be held as granting a property to a private owner, in terms of the rights this would entail for the beneficiary. At most, the authority conveying the public land would limit and specify the allowed uses for the latter asset – *i.e.* restricting the use. To this respect, constitutions prevent states to take private owners’ properties and use them for public sake, without a right compensation. Yet, this cannot be said as far as the public, as “owner”, is concerned. It would be, indeed, rather difficult to argue that states shall be prevented from taking land, which are under their factual control but still owned by the public.³⁶ For the latter

³³ SAX, Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (cit.), 484.

³⁴ Ibidem, 485.

³⁵ SAX, Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (cit), 478.

³⁶ Ibidem, 479.

reason, when understanding who the beneficiaries of public trust are, the scope of analysis shall depart from private property law and traditional constitutional principles.

Summing up, beneficiaries can be all citizens, which refer to a given community – sometimes, the global community. Those citizens, due to their very legal and personal *status*, enjoy the right to benefit from a given resource, land or ecosystem. Such benefits can be of diverse nature: it can be an economic value, a vital and biological resource or even an aesthetic worth. Besides this, beneficiaries can be sometimes held as – borrowing an economic term – “stakeholders”. As Decker states, talking about wildlife protection, stakeholders can be those citizens who have specific interests – which can be also economic – or have made specific investments in wildlife management. Furthermore, stakeholders can be citizens who, due to specific life-conditions, are directly and more affected by a given resource management.³⁷

In conclusion, all citizens shall theoretically be held as beneficiaries, as for belonging to a given community, state or population; yet, their interests can be various and diverse, corresponding then to various and diverse trustee’s duties.

Beneficiaries can also be people who are not born yet: future generations. One core characteristic of the public trust doctrine is the prevention-approach, according to which present generation choices and actions must be consistent with future generations’ needs. In the environmental scope, the protection of certain resources or natural assets has the very goal to grant their availability to people yet to born. As a matter of fact, it has become clear how too often solutions are adopted by present generations to solve present problems, “with little thought given to the [future] consequences of those solutions”.³⁸ To this extent, beneficiaries of a public trust shall clearly enough also be future generations, albeit not born yet and, hence, not to able to enjoy or claim their rights.

³⁷ DECKER, Stakeholder Engagement in Wildlife Management: Does the Public Trust Doctrine Imply Limits?, 79 (2) The Journal of Wildlife Management (2015), 175.

³⁸ BRADY, “But Most of It Belongs to Those Yet to be Born”: The Public Trust Doctrine. NEPA and the Stewardship Ethic, 17 Boston College Environmental Affairs Law Review (1990), 622.

Irrespective of whom the beneficiaries are, it is important for them to have a role in regulatory and political decisions taken by the trustees. Such role can be played in several ways. Doctrine and legal traditions have made clear how citizens can influence governments – *i.e.* trustees – both by participating in decision-making procedures and, of utmost importance, by bringing claim in front of courts, whenever states violate their duties as trustees.

1.4 Participation and access to justice

Environmental public trusteeships have the very function to safeguard beneficiaries' rights. Such purpose also goes through granting to citizens a set of procedural rights, which mainly entails public participation.³⁹ The best way – probably the only possible one – to enforce the content of the trust against the trustees is enjoying procedural safeguards, such as access to information, right to participation in decision-making procedures and, finally, access to justice means.⁴⁰

Beneficiaries' engagement lies at the basis of the relationship between trustees and stakeholders. This is very important for both beneficiaries themselves – for the reasons explained above – and for trustees. Indeed stakeholders, when involved in decision-making procedures, can provide important information about an asset and the necessary measures related to it.⁴¹ Therefore, public participation of stakeholders has a double role. On the one hand, it is fundamental for beneficiaries, in order to grant their rights. On the other hand, understanding citizens' needs and social, political and economic impacts of a given trustees' act on society is very important for enhancing “the performance of the public trust administration” too.⁴²

³⁹ SAND, *Global environmental change and the nation state (cit.)*, 535.

⁴⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted by the United Nations Economic Commission for Europe (UN/ECE) at Aarhus, Denmark, on 25 June 1998.

⁴¹ DECKER, *Stakeholder Engagement in Wildlife Management (cit.)*, 176.

⁴² *Ibidem*, 177.

Besides participation to decision-making procedures and access, or contribution, to information collecting, public trust doctrine – as developed by legislators and courts – grants citizens access to justice means, in order to bring complaints whenever trustees disregard their duties and “abdicate their responsibility”.⁴³ Sax, already in the early Seventies, had in mind the importance of a justice-tool, in order to grant the efficacy of the public trust institution: “If that doctrine is to provide a satisfactory tool, it must meet three criteria. It must contain some concept of a legal right in the general public; it must be enforceable against the government; [...]”.⁴⁴

Judiciary involvement is, hence, a fundamental tool, in order to keep trustees – *i.e.* governments – stuck to their commitments. Courts should be a “last resort”, if executive institutions fail in protecting natural assets or even harm and deplete common natural resources.⁴⁵ If fiduciary obligations – arising from environmental trusteeships – would not be enforceable before courts, trustees would be free to exercise arbitrarily their power on beneficiaries’ properties for their own interest.⁴⁶ To the latter respect, courts hold an important power to protect environmental assets, throughout, for instance, injunctive relieves. Yet, such powerful tool of courts needs to be triggered: citizens must be provided with the right to access justice and bring complaints against governments’ failures and violations.⁴⁷

When dealing with environmental matters, yet, the approach which a court should assume is rather challenging. The fact that provisions about natural resources exist in some national statutory laws makes it difficult for judges to accept complaints which go beyond

⁴³ SAGARIN, TURNIPSEED, *The Public Trust Doctrine (cit.)*, 480.

⁴⁴ SAX, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (cit.)*, 474.

⁴⁵ WOOD, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II) (cit.)*, 117.

⁴⁶ WOOD, WOODWARD, Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last, 6 *Washington Journal of Environmental Law & Policy* (2016), 656.

⁴⁷ WOOD, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II) (cit.)*, 111.

“simple” law-violations, but refer rather to a general duty of the trustee to preserve natural assets for beneficiaries’ sake. As Woodward notices, most of judges would rather assume that such issues shall be dealt with by legislative and executive institutions, when fostering preventive programs: courts would, in fact, dismiss cases, “[...] on grounds of political question doctrine, pre-emption, or displacement [...]”.⁴⁸ Furthermore, on a judicial level, the main distinction between statutory law scope and obligations stemming from trusteeships is the freedom and the “deference” accorded by courts to trustees – *i.e.* governments and administrations; that is to say, whenever an obligation is clearly defined by statutory law, “[...] courts often give blind deference to the agency's determination of asset health and management”.⁴⁹ Therefore, one main question needs here to be addressed: how can a citizen – as beneficiary of a trusteeship – prove a violation, without relying on statutory law, but rather on general property law-derived principles?

What it is here most challenging is evaluating – *i.e.* proving – whether there has been a violation of the fiduciary obligation. Therefore, the court shall be able to preliminary define what a specific fiduciary obligation consists of. In the natural assets scope, obligations can vary according to the characteristic of the trust object. For instance, trustees’ obligation with regard to wildlife might be to keep its sustainability in terms of management and conservation or, indeed, obligations regarding the “atmospheric trust” can be related to greenhouse gas levels.⁵⁰ Sometimes, such standards of care are provided by statutory laws. Yet, firstly, this is not always the case and, secondly, the fact that the trustee has indeed complied with those statutory standards doesn’t always mean that they are consistent with their fiduciary obligations. Accordingly, in order to determine such obligations – and the eventual breach – an expertise scientific opinion is often needed. Courts need, indeed, to strictly collaborate with scientists, to set standards of care which a trust has to comply

⁴⁸ WOOD, WOODWARD, Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last (cit.), 658.

⁴⁹ WOOD, Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II) (cit.), 112.

⁵⁰ *Idem.*

with, as for the protection of a given natural asset and eventually assess trustee's activities impacts on the environment.

The standard of care eventually required by the courts can be partially linked to the "ordinary prudent man" approach. Particularly, according to the latter doctrine, the trustee shall act as "an ordinary prudent man managing similar business affairs, as he employs in his own businesses".⁵¹ Yet, this might not be enough to grant a complete and satisfactory accomplishment with fiduciary obligations arising from trusteeships. Indeed, a trustee might not be exempted from responsibility only by arguing that he has been managing the trust just as he would have done with his own business: neither relying on "same skill and prudence-argument", nor stating that negligent actions occurred due to lack of possibility "to do better", nor arguing for a different intention in his actions, can excuse the trustee who causes damages to a natural asset object of trust. The "ordinary prudent man" standard of care is only a basis for trustees' actions to be deemed as "responsible": the trustee shall use all further skills, knowledges or resources at his disposal;⁵² the latter are, then, determined by courts, on the base of scientific contributions. In other words, any economic or technological resource shall be involved by trustees in the prevention of damages and protection of the natural asset, as for its fundamental function for beneficiaries.

An overview of the public trust doctrine, concerning environmental protection, has been presented in the present chapter. Procedural aspects related to citizens' complaints against trustees' failures and violations have proved to be particularly interesting and will be further investigated in the following chapters. The aim will be to determine how national laws and jurisprudence can provide for an effective mean for public trust beneficiaries in order to challenge governments' shortcomings.

⁵¹ SCOTT, Trust law, sustainability, and responsible action (cit.), 143.

⁵² Idem.

2. The U.S.A. as trailblazers of Public Trust Doctrine in the environmental field

A late Nineteenth century Supreme Court decision laid the foundations for a new tradition of case and statutory law in the U.S. legal system, relating the public trust doctrine to the environmental protection. After *Illinois Central case*,⁵³ a “whole generation of environmental law-making” and a long series of both federal and states courts decisions started.⁵⁴ This influenced the state-level legal tradition too, by prompting the inclusion of public trust doctrine-related provisions in constitutions.⁵⁵

Notwithstanding the fact that – as it has already been outlined in the first chapter – much of the trust doctrine legal tradition has to be deemed as stemming from Roman law, public trust doctrine with regard to natural common assets derives the majority of its rules from the Anglo-American charitable trusts. As a matter of fact, just as like as in the latter property law tool occurs, according to the public trust doctrine, beneficiaries of trusts are – or shall be – able to sue and hold accountable the trustee, whenever trusteeship’s duties are violated.⁵⁶ Yet, whereas Roman law tradition had “given” the ownership of the *res communes omnium* to the population, English legal tradition – *i.e.* common law – introduced the concept of state-ownership. Thus, according to the latter approach, the Crown had the very function and duty to protect natural assets, for everyone’s use and benefit of them.⁵⁷

Legal basis for the development of US public trust doctrine can be found in the U.S. Constitution too. This fundamental document has indeed laid down the foundations – albeit not explicitly referring to natural assets – for the concept of common good as opposed, and indeed more important, to the private interest. In line with Natural Law ideas, the Constitu-

⁵³ *Illinois Central Railroad Co. v State of Illinois*, Supreme Court of the United States, 146 US 387 (1892).

⁵⁴ SAND, *Global environmental change and the nation state (cit.)*, 522.

⁵⁵ See section 2.2.

⁵⁶ SAND, *Global environmental change and the nation state (cit.)*, 523.

⁵⁷ BADER, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 Boston College Environmental Affair Law Review (1992), 751.

tion, in its IX and X Amendments, makes it clear the role of “people”, as rights holders and power retainers.⁵⁸

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁵⁹

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁶⁰

Not surprisingly U.S. Constitution protects individual rights also from the state eventual appropriation,⁶¹ just as any other Constitution does; the property right is, indeed, something inalienable and of utmost importance in every democratic legal system. Yet, what it is here at stake and outlined in the IX and X Amendments is the necessity to balance individual fundamental rights with common interests, related to those assets held as “common goods”. By referring to “people”, U.S. Constitution gives a clear hint on how to deal with such balance and, although less explicitly, refers to the higher status of common interests as opposed to the private ones. In sum, Constitution “not only emphasizes individual property rights, but also recognizes the right of sovereign people to collectively determine the highest and best use of land and natural resources [and other common goods].”⁶²

In the last century, the public trust doctrine has been steadily enhancing and developing, mostly thanks to U.S. case law. In its early stages, the application of such legal approach

⁵⁸ SMITH II, SWEENEY, *The Public Trust Doctrine and Natural Law: Emanations with a Penumbra*, 33 Boston College Environmental Affair Law Review (2006), 315.

⁵⁹ U.S. Constitution, Amendment IX.

⁶⁰ U.S. Constitution, Amendment X.

⁶¹ U.S. Constitution, Amendment V.

⁶² SMITH II, SWEENEY, *The Public Trust Doctrine and Natural Law: Emanations with a Penumbra (cit.)*, 317.

was limited solely to valuable resources; thus, for instance, a water course only deserved a protection as object of public trust, if ever suitable for being navigated.⁶³ Later on, the U.S. public trust doctrine has been trying to expand as much as possible the access to natural resources for the community, regardless of the nature and the kind of value of the asset. Hence – mostly thanks to Sax’s 1970 contribution⁶⁴ - starting from the second half of the Twentieth century, courts have been progressively recognising the importance of the public trust protection for expectations different than the navigability one too: hunting, fishing, scientific research, swimming, maintaining biodiversity and even the aesthetic values were deemed as legitimated to be protected by trustee.⁶⁵

One last aspect of public trust doctrine in the U.S. law scope deserves here to be taken into consideration. In addition to such “geographical” expansion, with regard to the increasing number of natural assets which become objects of public trust, the doctrine at stake has been used and developed also along other parameters-lines.⁶⁶ One of them makes reference to the Constitution’s Fifth Amendment, in its part related to private property “takings” in name of public interest and usage.⁶⁷ Accordingly, the public trust doctrine has been used as defence against “inverse condemnation claims”. That is to say, the public trust doctrine has been used as an argument for dismissing private parties’ claims against eventual takings, in breach of the Fifth Amendment. Limitations of a land usage and, thus, of ownership’s rights, in fact, do not constitute a violation of the Constitution, in so far as the land belongs to a trust and, hence, is already part of common goods. Therefore, no taking could be ever argued and proved.⁶⁸ In sum, if an authority prohibits development

⁶³ *Martin v. Waddell's Lessee*, Supreme Court of the United States, 41 US 367, (1842).

⁶⁴ SAX, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* (cit.).

⁶⁵ BADER, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law* (cit.), 753.

⁶⁶ LUM, *How Goes the Public Trust Doctrine: Is the Common Law Shaping Environmental Policy*, 18 *Natural Resources & Environment* (2003), 74.

⁶⁷ U.S. Constitution, Amendment V, “[...] nor shall private property be taken for public use, without just compensation.”.

and restricts the usage on an asset object of trust, this cannot result in a taking, since the land is “already burdened with a public trust”.⁶⁹

As it was made sufficiently clear, due to its nature of common law legal system, U.S. have seen the development of the public trust doctrine as a natural consequence of courts – not only the Supreme Court – decisions evolution over time.

2.1 The role of case law in the evolution of the public trust doctrine

Progressively, as courts have understood the importance of certain natural resources and assets, they have been extending the scope of the public trust doctrine.⁷⁰ In the last century, U.S. courts – both states and federal – have been putting much effort in assessing whether a given commercial or industrial activity could negatively affect public trusts – *i.e.* natural resources fundamental for people’s life. Such inquiry-task has been – or ought to be – developed independently from statutory dispositions. That is to say, courts have had the hard task to evaluate whether a given activity, despite compliant with legislations, could still negatively affect public trusts.⁷¹

Initially, U.S. courts – states courts above all – were almost exclusively concerned with submerged lands and watercourses. The public trust doctrine, thus, was mostly applied for pursuing interstate commercial interests. For the very nature of the country, main commercial ways were waterways: navigability was, hence, the main concern of courts and politics.⁷² U.S. case law, though, has been evolving over time and currently offers a wide range of cases concerning public trust doctrine, which not only deal with navigability and

⁶⁸ *Esplanade Properties, LLC v. City of Seattle*, 9th Circuit 307 E3d 978 (2002).

⁶⁹ LUM, *How Goes the Public Trust Doctrine: Is the Common Law Shaping Environmental Policy (cit.)*, 74.

⁷⁰ See above section 1.1.

⁷¹ BADER, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law (cit.)*, 757.

⁷² SAGARIN, TURNIPSEED, *The Public Trust Doctrine (cit.)*, 475.

watercourses but also take into account biodiversity, ecosystems and, eventually, the atmosphere.

2.1.1 *Illinois Railway* (1892) and the *Mono Lake* (1983) cases: milestones of public trust doctrine-related case law

The two most famous instances of the tendency explained above, and also those ones which can be deemed as “fathers” of American public trust-based case law, are the *Illinois Railway* case⁷³ and the *Mono Lake* case.⁷⁴ The former – deemed as the milestone of public trust doctrine – was lastly submitted to the U.S. Supreme Court, whereas the latter remained on a state level (Supreme Court of California).

The late Nineteenth century-case *Illinois Railway* saw the local railway company suing Illinois state government, which had denied the use of Chicago waterfront for building railways. The Supreme Court, by not upholding the case, made it clear how under no circumstances the state has the right to alienate a trust – as Chicago waterfront was deemed – to third parties pursuing private interests. According to the Court, the state just cannot “divest” its power and authority on a land. The government had, indeed, to exercise its regulatory power on such lands, being navigation part of government’s competences: “regulatory obligations [...] are inconsistent with private ownership”.⁷⁵

⁷³ *Illinois Central Railroad Co. v State of Illinois*, Supreme Court of the United States, 146 US 387 (1892), full text at

<https://www.informea.org/sites/default/files/court-decisions/Trail%20Smelter%20Case.pdf>.

⁷⁴ *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), full text at <https://caselaw.findlaw.com/ca-supreme-court/1838643.html>.

⁷⁵ SAX, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* (cit.), 489.

The Court stated that the kind of trust which the state of Illinois held was not one as for lands intended to be sold: “[...] It is a title held in trust of the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interferences of private parties.”⁷⁶ Accordingly, any time a state disposes of land in order to restrict benefits for the people or to subject the common interest to private parties’ businesses, courts ought to be “sceptic” and, eventually, prevent governments to do so.⁷⁷ This was probably the World’s first instance of a court decision, declaring the content and the effects of the – at that time still embryonic – public trust doctrine; and, in fact, the decision influenced both legal literature and case law of the Twentieth century.

Nearly hundred years later, in 1983, Supreme Court of California was called upon ruling on a rather similar case, once again referring to water resources and their use. The issue at stake referred to diversions of Mono Lake waters, operated by the Los Angeles Department of Water and Power. The latter subject’s operations brought to the reduction of nearly one half of lake’s water volume. Furthermore, as plaintiffs claimed, such diversions caused damages to bird species and biodiversity in general. Environmentalists and several organisations, headed by the National Audubon Society, filed a suit, claiming a violation of the public trust doctrine.⁷⁸ The Supreme Court of California upheld the case and ruled in favour of applicants. Specifically, it stated that, although a limited amount of diversions shall be permitted, those cannot adversely affect Mono Lake’s biodiversity and its value as a public trust. Accordingly, the Supreme Court required, under the public trust doctrine, to limit diversions or any other usages that can affect trust’s value “so far as feasible”.⁷⁹

⁷⁶ *Illinois Central Railroad Co. v State of Illinois*, Supreme Court of the United States, 146 US 387 (1892), at 452.

⁷⁷ SAX, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (cit.)*, 490.

⁷⁸ BLUMM, SCHWARTZ, *Mono Lake and the Evolving Public Trust in Western Water*, 37 *Arizona Law Review* (1995), 4.

⁷⁹ *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), at 712.

One first immediate, positive effect of the *Mono Lake* ruling was the enhancing of the scope of public trust doctrine. Indeed, in this case, for the first time, non-navigable waters were held as object of public trust and, thus, as deserving protection.⁸⁰ As a matter of fact, yet, such expansion was a consequence of the broad-ranging reasoning of the Court. To this respect, non-navigable waters were protected in so far as their impairment could affect navigable waters, which are object of a state trust, instead.⁸¹ Furthermore, California Supreme Court brought an important contribution to the doctrine at stake, as far as the disposal of vested rights is concerned. In this decision, indeed, it was determined that a state had no power to convey rights, deriving from the trust, to subjects which can potentially harm the resource.⁸² In addition, the trustee bears, to the latter respect, duties of supervision when it comes to the resource usage. Therefore, for instance, before letting and permitting diversions of the lake to any private party, the state shall have taken into consideration all negative effects which they can have on trust resources.⁸³

As it was already made clear, U.S. case law tends to enhance the scope of application of the public trust doctrine. Starting from the only eligibility as trust for navigable waters, the Supreme Court and several state courts have reached the inclusion of fundamental natural element, such as tidelands, animal species and, in general, the biodiversity in ecosystems. Lately – in the Twenty-first century – the public trust doctrine has been involved in lawsuits concerning the most urgent issue our generation is facing: climate change. In the next section, the so-called “atmospheric trust” will be investigated, in order to analyse how the public trust doctrine can be an effective tool for challenging governments conducts.⁸⁴

⁸⁰ BLUMM, SCHWARTZ, *Mono Lake and the Evolving Public Trust in Western Water* (cit.), 5.

⁸¹ *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), at 721.

⁸² *Ibidem*, at 727.

⁸³ BADER, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law* (cit.), 753.

⁸⁴ WASHBURN, NUNEZ, *Is the Public Trust a Viable Mechanism to Regulate Climate Change*, 27 *Natural Resources & Environment* (2012), 24.

2.1.2 Enhancing and developing public trust doctrine: climate change and “atmospheric trust” in last decade-case law

A new people’s awareness of the important role that local courts, and generally the judiciary power, can play in response to climate crisis lies at the very basis of the “atmospheric trust”-movement. Only recently, indeed, citizens have “realized” how their fundamental rights – *i.e.* breaches of such rights – can be effectively claimed throughout the so-called “climate change litigations”.⁸⁵ By invoking the public trust doctrine, applicants of such litigations declare and pursue the recognition of duties, borne by governments (state⁸⁶ or national), to reduce carbon emissions or, in general, to fight climate change. Differently from previous environmental protection lawsuits, atmospheric trust litigations do not find their legal basis in statutory law – neither national nor international. The novelty brought by public trust litigation lies in the fact that duties to stop climate change are directly derived from the very nature of the trust and from the beneficiaries’ fundamental rights. To this respect, all nations are considered as trustee of the atmosphere, bearing duties to protect it and are, thus, suitable to be sued.

An emblematic litigation, having atmospheric trust as main issue, arose in 2014, in the State of Washington. Eight young people petitioned the State’s Department of Ecology (DOE) to adopt countermeasures, as proposed and suggested by scientific studies, against GHG emissions, causing climate change. Predictably enough, the DOE denied the petition. Thus, plaintiffs appealed such denial before the King County Superior Court, claiming the DOE’s failure to act based on the public trust doctrine.⁸⁷ The latter Court – represented by Judge Hill – ordered the DOE to reconsider the petition alleged by plaintiffs. After a second

⁸⁵ WOOD, WOODWARD, Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last (cit.), 643.

⁸⁶ See, for instance, *Chernaik v. Kitzhaber*, No. A151856, Oregon Court of Appeals (2014), where the Oregon governor Kitzhaber was sued for not having held natural resource in trust for Oregon citizens and called by the Court upon implementing and enacting a plan for carbon emission.

⁸⁷ *Foster v. State Department of Ecology* (Foster I), No. 14-2-25295-1 SEA, Washington Super. Ct. (2015), full text at <https://caselaw.findlaw.com/wa-supreme-court/1715367.html>.

denial of the Department, young applicants filed the suit to the superior court.⁸⁸ The aim of this further appeal was a declaration of their right, under public trust doctrine, to a “stable atmosphere”. The Court upheld the denial and declared the existence and the obligatory application “[of] strong parameters defining the State's duty to protect the atmosphere under the public trust doctrine”.⁸⁹

Yet, the Court’s statement hadn’t been followed and complied with by DOE. Therefore, plaintiffs had to go back to the same court, asking to retake jurisdiction on the case and, eventually, to impose factual remedies on the defendant. Finally, in 2016, the Court ordered DOE to follow rules on emissions reduction by the end of the year. It imposed, furthermore, a duty to submit recommendations – based on scientific notions – to the legislature.⁹⁰

Judge Hill, in the provided opinions, made it clear how the state responsibility – related to the atmospheric public trust – has a “constitutional magnitude” and is therefore surrounded by an urgent need of action. Such assertion made the *Foster* case being the first instance of case-law admitting the urge of action, due to the imminent threat to future generations’ life.⁹¹ Furthermore, the *Foster* case can be held as trailblazing as far as the court response to defendants’ allegations is concerned. As it has been widely demonstrated, governmental defendants typically allege that statutory law can well address climate change problems and that, therefore, regulatory processes can suffice. Accordingly, courts would very likely dismiss petitions on jurisdiction – *i.e.* political – grounds. In *Foster*, on the contrary, the Court made it clear how regulatory action by states is not sufficient at all and “[that] current rates of reduction mandated by Washington law cannot achieve the GHG

⁸⁸ *Foster v. State Department of Ecology* (Foster II), No. 14-2-25295-1 SEA, Washington Super. Ct. (2015).

⁸⁹ WOOD, WOODWARD, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last* (cit.), 671.

⁹⁰ *Foster v. State Department of Ecology* (Foster III), No. 14-2-25295-1 SEA, Washington Super. Ct. (2015).

⁹¹ WOOD, WOODWARD, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last* (cit.), 673.

reductions necessary to protect our environment and to ensure the survival of an environment in which petitioners can grow to adulthood safely”.⁹²

Lastly, avant-garde enough is also the relation, built by the Court, between climate change – *i.e.* GHG emissions – and navigable waters affection. Being the latter the classical asset of public trust in the U.S.-American tradition, putting these two elements into a strict relation means definitively admitting the enhancement of public trust doctrine scope of application.⁹³

The *Foster* case, with all its above-described positive implications, may have well influenced future applications and, in general, the judicial – rather than political and regulatory – approach to climate change issues. In such matters, such a renovated judicial approach to legislative power was, indeed, needed. As Woodward states:

“The approach-presumably made accessible to Washington's ATL litigation through Foster's declaration of a constitutional right to a healthy atmosphere-could provide guidance for judicial supervision of climate recovery plans in the future. [...] An equally vigorous degree of judicial supervision and engagement is warranted in the context of a climate emergency brought on by decades of legislative recalcitrance and delay in regulating GHG emissions.”⁹⁴

One last important case, currently pending, deserves here our attention and investigation, being probably the most known climate-change application in the global environmen-

⁹² *Foster v. State Department of Ecology (Foster II)*, No. 14-2-25295-1 SEA, Washington Super. Ct. (2015), at 5.

⁹³ WOOD, WOODWARD, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last (cit.)*, 675.

⁹⁴ *Ibidem*, 683.

tal protection scene. In September 2015, twenty-one young people from all over U.S.A. brought a petition against several agencies operating in Obama’s administration and government, under the name of *Juliana*.⁹⁵ Plaintiffs claimed violation of their constitutional rights as “youngest generation” and government’s lack of compliance, as far as the duties arising from the public trusteeship were concerned. Allegedly, applicants argued that, despite the common knowledge about GHG emissions and the damages the latter can cause to the environment, government kept allowing harmful policies and practicing fossil fuels unsustainable exploitation.⁹⁶

On their part, the defendants considered the application as not to be accepted by the court due to both substantial and procedural issues. The U.S. government claimed, *inter alia*, that putting under scrutiny the environmental policies before a court could constitute a violation of the principle of the separation of powers. Indeed, the determination of the policies is something which the Constitution entrusts to the legislative and executive branches; thus, letting such outcomes and decisions to a court would be a violation of the constitutionally granted separation of powers. This, also considering the whole issue at stake as a state-related question rather than a national one, which, therefore, had to be addressed on a state level – without bringing the national government and authorities into play.

In April 2016, the application was accepted and the Court stated that the petition could go forward, potentially being the first ever litigation able to put under scrutiny American fossil fuels policies.⁹⁷ According to the Court, indeed, application had to be upheld on the basis of due process-principle, as well as of public trust doctrine principles.⁹⁸ At present,

⁹⁵ *Juliana v. United States*, No. 6:15-cv-01517-TC, District of Oregon (2015), full text at <https://biotech.law.lsu.edu/cases/environment/Juliana.htm>.

⁹⁶ *Ivi*, at 1.

⁹⁷ WOOD, WOODWARD, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last* (cit.), 647.

⁹⁸ *Juliana v. United States*, No. 6:15-cv-01517-TC, District of Oregon (2015), at 17.

the petition has actually gone forward but it is still pending. Yet, some important and revolutionary arguments brought by plaintiffs can be here already pointed out.

In *Juliana* case, applicants portrayed a potential irreparable damage to future generations' entire life. To this respect, the litigation has no precedent "[...] in terms of human interests at stake and the expediency with which court rulings must issue with a time of urgency."⁹⁹ The broadness of the application, in terms of violated principles and rules involved, is, indeed, rather unique. Basically, plaintiffs seek to prove how federal government's energy policies can be held as in breach of fundamental constitutional rights, the duties deriving from the public trusteeship and the "put-forward" right to a stable climate system. Due to this very fact, this has to be held as a rather unusual lawsuit, since common environmental applications usually try to challenge single statutory law provision, or violation of such provisions: the entire American fossil fuel policy had never been under such a broad scrutiny before.¹⁰⁰ *Juliana* case represents, indeed, a big opportunity to investigate in which measure governments are challenging climate change, if ever at all.

The fact that the case has actually been brought before a court will make government face an unusual fact-finding trial, which could have never been possible in a normal political forum.¹⁰¹ One more outstanding difference – with respect to previously filed suits – lies in the kind of procedure that the *Juliana* case foresees. More than often, indeed, applications pursuing environmental protection are alleged under administrative law and before administrative courts, as for challenging statutory acts. On the contrary, the litigation at stake falls under "normal" judicial review. This entails, for instance, that the burden of per-

⁹⁹ BLUMM, WOOD, No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine, 67 *American University Law Review* (2017), 26.

¹⁰⁰ *Ibidem*, 54.

¹⁰¹ BLUMM, WOOD, No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine (cit.), 55.

suasion – and eventually of proof – on defendants would be the same as in a civil law trial – *i.e.* more difficult to be dealt with for the defendants.¹⁰²

Waiting for a definitive decision on *Juliana* case, the latter lawsuit will certainly influence present and future applications seeking environmental protection. Likely enough, for instance, future atmospheric trust litigations (ATLs) will be “inspired” by the fact-finding approach which the District Court had, when ruling on the application here at stake. Similarly, such litigation could have positive effect on other fields-related lawsuits. For example, proving the fact that oil companies carry on dangerous activities, although being aware of environmental damages, could affect investigations on the latter companies’ actual compliance with security laws.¹⁰³

Lastly, a decision in favour of environmentalists will undoubtedly influence the public opinion. The involvement of the society and its opinion of governments’ policies could turn out as effective tools for the future climate-change challenge. The market could be furthermore affected by a deterring effect on fossil fuel-investors and by people’s decreasing confidence in energy companies’ conducts.

2.2 US environmental policies managing public goods: a statutory law overview

As it was already determined, the public trust doctrine is, at its very basic form, a common law “tool”. That is to say, *inter alia*, most of its proliferation and growth has become possible thanks to case law – especially the U.S. one.¹⁰⁴ This phenomenon could be held as a typical instance where the doctrine and courts influence the legislator, rather than the other way round. Indeed, as a matter of fact, legal doctrines often “catch” societies changes in their needs and help the legislator in developing and updating statutory law. This is even more true, when dealing with environmental matters: scientific knowledge about

¹⁰² *Ibidem*, 56.

¹⁰³ *Ibidem*, 62.

¹⁰⁴ See section above concerning U.S. case law.

possible environmental harms usually precedes actual legislative regulations.¹⁰⁵ To this respect, the public trust doctrine has pointed out and highlighted how current U.S. legislation isn't adequate at all, when it is about addressing certain fundamental issues such as climate change can be.

Arguably enough, the public trust doctrine could see its positive influence increasing if it would ever be "upgraded to a statutory law".¹⁰⁶ The first important and immediate effect of an eventual transposition into legislative terms would be the approach of courts towards the public trust doctrine. Indeed, tribunals would, undoubtedly, give more credit to the trusteeship approach in environmental matters.

Starting from the late Sixties,¹⁰⁷ U.S. congress has developed statutory act containing "public trust doctrine language". Interestingly, Sagarin and Turnipseed have noted how, within U.S. environmental policy acts, the public trust doctrine is referred to in two alternative ways. One first option would be directly mentioning the latter doctrine within the broad scope of the act at stake; alternatively, the trusteeship-approach to environmental matters can be made clear by establishing the factual responsibilities of the government and its agencies, in case of environmental harms.¹⁰⁸ In this section, two different main instances of federal statutory acts will be discussed and investigated; this will be done especially referring to the way they incorporate – and eventually endorse – the public trust doctrine.

¹⁰⁵ SAGARIN, TURNIPSEED, *The Public Trust Doctrine* (cit.), 484.

¹⁰⁶ *Ibidem*, 485.

¹⁰⁷ The National Environmental Policy Act of 1969, as first example of federal statutory law referring to the public trust doctrine; full text at

https://www.whitehouse.gov/sites/whitehouse.gov/files/ceq/NEPA_full_text.pdf.

¹⁰⁸ SAGARIN, TURNIPSEED, *The Public Trust Doctrine* (cit.), 485.

2.2.1 The National Environmental Policy Act of 1969 – N.E.P.A.

Following a chronological line, the above-mentioned N.E.P.A. could be considered the first statutory effort of U.S. congress to provide for environmental protection, also making clear reference to the public trust doctrine. The Nation Environmental Policy Act was developed in order to impose onto national agencies an environmental impact assessment of each activity they would proceed with or, alternatively, allow to third parties.¹⁰⁹ In its preamble a clear reference to the public trust doctrine, as it was explained so far, is made: “[government has the duty to] fulfil the responsibilities of each generation as trustee of the environment for succeeding generations”.¹¹⁰

Albeit not listing or clearly referring to natural resources of the country, N.E.P.A. can be considered as the first “codification” of the public trust doctrine, in so far as it refers to the duty to bear in mind future generations’ needs. This statute “embodies all-encompassing statutory delegation of public trust duties”, by mandating that government shall protect all public trust properties for present and future generations.¹¹¹ Deepening in more details, N.E.P.A.’s main tool – if not the only one – as for environmental protection is the Environmental Impact Statement (E.I.S.), which, accordingly, must accompany every federal action potentially dangerous for the environment.¹¹²

Nevertheless, N.E.P.A. efficacy has been consistently limited by Supreme Court’s interpretation of it. Indeed, the latter Court has given to the act at stake a limited virtue of effect, deeming it as imposing mere procedural duties, rather than granting substantial rights.¹¹³ In the decisions following the adoption of N.E.P.A., the Supreme Court has made

¹⁰⁹ SAGARIN, TURNIPSEED, *The Public Trust Doctrine* (cit.), 485.

¹¹⁰ The National Environmental Policy Act of 1969, Sec. 101 [42 USC § 4331(b)(1)].

¹¹¹ BAER, *The Public Trust Doctrine--A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 *Boston College Environmental Affairs Law Review* (1988), 398.

¹¹² The National Environmental Policy Act of 1969, Sec. 101 [42 U.S.C. § 4332 (c)].

¹¹³ BRADY, *“But Most of It Belongs to Those Yet to be Born”*: *The Public Trust Doctrine. NEPA and the Stewardship Ethic* (cit.), 637.

it clear how all judicial review can do is to verify whether a given agency has actually provided the E.I.S.: no court's scrutiny on the content of the latter document would be requested or relevant to the decision.¹¹⁴ For this reason, any later attempt to hold N.E.P.A. as an effective substantive law tool would have had to face Supreme Court's orientation and, thus, failed.¹¹⁵ In conclusion, if N.E.P.A. was supposed to be a codification of the public trust doctrine, courts should be aiming at imposing on agencies – *i.e.* government and agencies – the duty to act for the sake of future generations, whose rights are actually declared in the act at stake.¹¹⁶

2.2.2 The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 – C.E.R.C.L.A.

Subsequent to N.E.P.A., U.S. legislator focused its attention on more technical legal issues, such as liability and compensation. In 1980, the Comprehensive Environmental Response, Compensation, and Liability Act was adopted, with the specific aim to provide for liability systems, for both private and public – *i.e.* agencies and government – polluters.¹¹⁷ Furthermore, the Act at stake provides for compensation mechanisms, for those properties damaged by hazardous activities. Yet, well limiting its effects, the responsibility-regime in C.E.R.C.L.A. is restricted to cases of “malfeasance” or “misfeasance”.¹¹⁸

Basically, the Congress enabled federal and states governments – or public agencies on behalf of it – to recover environmental damages caused by hazardous substances, possibly by asking polluters for compensation. C.E.R.C.L.A. comprehends in the scope of public trust

¹¹⁴ *Kleppe v. Sierra Club*, Supreme Court of the United States, 427 U.S. 390 (1976).

¹¹⁵ BRADY, “*But Most of It Belongs to Those Yet to be Born*”: *The Public Trust Doctrine. NEPA and the Stewardship Ethic (cit.)*, 639.

¹¹⁶ *Ibidem*, 643.

¹¹⁷ The Comprehensive Environmental Response, Compensation, and Liability Act (1980), full text at [https://legcounsel.house.gov/Comps/Comprehensive%20Environmental%20Response,%20Compensation,%20And%20Liability%20Act%20Of%201980%20\(Superfund\).pdf](https://legcounsel.house.gov/Comps/Comprehensive%20Environmental%20Response,%20Compensation,%20And%20Liability%20Act%20Of%201980%20(Superfund).pdf).

¹¹⁸ NASTICH, SMITH, *Can You Trust a Trust - The Potential CERCLA Liability of Trustees and Beneficiaries*, 23 *Journal of Environmental Law & Litigation* (2008), 403.

everything pertaining to air, water, land and wildlife “belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States”.¹¹⁹ Although this statute does not impose on federal and states governments the specific duty to protect natural assets object of trusts, it specifically mandates that the latter subjects shall be acting, as trustees, on behalf of people, by seeking compensation for environmental damages. This entails, though, also an important limitation to the power of the executive branch: it can only act when a damage has already occurred, not being any preventive duties contained in the Act.¹²⁰

In sum, C.E.R.C.L.A. has overtime proved to be a mere deterrence-instrument, rather than a mean of providing both procedural and substantial rights to the citizens. What this Act could at most be useful for, is “discouraging responsible parties from permitting injurious releases of hazardous substances”.¹²¹ Albeit asserting and making once more clear the public trust doctrine principles concerning environmental matters, this legal instrument – just as like N.E.P.A. has proved to be – present various and severe shortcomings, which have prevented it to become an effective tool for citizens willing to sue governments and agencies in order to seek compensation.

2.3 Federal states’ constitutional framework: the case of Pennsylvania

Some federal states adopted rules referring to the public trust doctrine, by including them directly into their constitutions. This “constitutional” approach also provides for a sort of rule-independence from the federal government, when it comes to environmental protection regulation.¹²² Such independence has been, indeed, expressed by states pos-

¹¹⁹ The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(16) (1982),

¹²⁰ NASTICH, SMITH, *Can You Trust a Trust - The Potential CERCLA Liability of Trustees and Beneficiaries (cit.)*, 397.

¹²¹ NASTICH, SMITH, *Can You Trust a Trust - The Potential CERCLA Liability of Trustees and Beneficiaries (cit.)*, 397.

¹²² MUMBY, *Trust in Local Government: How States’ Legal Obligations to Protect Water Resources Can Support Local Efforts to Restrict Fracking*, 44 *Ecology Law Quarterly* (2017), 209.

sessing common law rules and sometimes constitutional provisions, asserting people right to healthy natural resources.¹²³ In this section, one specific instance of the described paradigm will be object of investigation, also with reference to an important decision, based on constitutional provisions.

Article 1, Section 27 of the Pennsylvania Constitution – subsequently to a 1971 amendment – provides that:

“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”¹²⁴

In this provision, two different rights can be clearly distinguished. On the one hand, people have the right to “clean air, pure water” and to the general preservation of the environment. On the other one, both present and future generations have the right to have the state – as trustee – conserving all those resources. The second seems to be, thus, a specification of the first one, as to impose positive duties on the state.

More broadly speaking, Pennsylvania has developed a rather complex and articulated environmental protection regime. This proves how constitutional-based right to a safe environment together with public trust doctrine duties can add value and “strength” – from a judicial point of view – to one state’s environmental policy.¹²⁵ As part of a constitution,

¹²³ *Ibidem*, 198.

¹²⁴ Pennsylvania Constitution, Art. 1 sec. 27, as amended in 1971.

¹²⁵ DERNBACH, *The Potential Meanings of a Constitutional Public Trust*, 45 *Environmental Law* (2015), 468.

rights cannot be indeed easily amended, nor arbitrarily disregarded by the legislator or the executive branch, making them “permanent in the legal system”;¹²⁶ this, especially when those rights are inherently linked and interdependent with a classical, well-rooted doctrine, as the public trust one is.

In order to give a clear overview on how Pennsylvania’s constitutional framework has to be deemed – concerning environment protection – as an advanced and innovatory one, a recent case ruled by Pennsylvania Supreme Court will be taken into consideration. *Robinson Township v. Commonwealth* represents, indeed, the first case where the Constitution and its Article 1, Section 27 have been used to challenge a legislative act, making the Court holding it unconstitutional.¹²⁷

The action at stake was filed in 2012 by Robinson Township, together with other municipalities and a group of environmentalists, against the state. Object of the claim was an act reforming the gas-exploitation policy within Pennsylvania territory. According to the plaintiffs, the latter act – the so-called “Act 13” – wasn’t consistent with constitutional provisions, contained in Section 27 of Article 1. In December 2013, the Supreme Court indeed held as unconstitutional Act 13 provisions. In short, the legislator was deemed as not complying with the Constitution, as it took away – or limited – the power and the duty of local entities to carry out their tasks as trustees of public natural resources.¹²⁸ Within the scope of natural resources, the Supreme Court also included all those assets which don’t form part of any private properties – such as “ambient air, wild flora and fauna”.¹²⁹

The Supreme Court, by reasoning its decision, made it clear how rights contained in the Constitution – which create obligations borne by the state – shall be interpreted as entail-

¹²⁶ *Ibidem*, 471.

¹²⁷ *Robinson Twp. v. Commonwealth*, (Robinson Township), Supreme Court of Pennsylvania 83 A.3d 901 (2013).

¹²⁸ DERNBACH, *The Potential Meanings of a Constitutional Public Trust* (cit.), 483.

¹²⁹ WOOD, WOODWARD, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last* (cit.), 655.

ing a right to seek their enforcement as well. For the latter reason, the enforceability of constitutional rights made the action fully acceptable by the Court.¹³⁰ On a more substantial level, the Supreme Court made then it clear how the words of Constitution entailed duties on the state, stemming from the public trust doctrine. In particular, the state would be called upon “[refraining] from performing its trustee duties respecting the environment unreasonably”,¹³¹ on the one side, and “[acting] affirmatively to protect the environment, via legislative action.”,¹³² on the other one.

The *Robinson Township* case has spread its fame all over the country, due to its innovativeness and for showing how the inclusion of the public trust doctrine within a constitutional framework can be more effective than any other attempt on a statutory level. Obviously enough, Pennsylvania Supreme Court’s decision cannot bind other states; yet, it could be a pattern, which all other states recognizing environmental rights – at any level – can follow and pursue.¹³³ A clear instance of such “potential” influence-effect is undoubtedly given by *Foster* case,¹³⁴ where plaintiffs made reference to Article 1 of Washington Constitution bringing their claims against the D.O.E.¹³⁵

¹³⁰ *Robinson Twp. v. Commonwealth*, (Robinson Township), Supreme Court of Pennsylvania 83 A.3d 901 (2013), at 974.

¹³¹ *Ivi*, at 957.

¹³² *Ivi*, at 958.

¹³³ MUMBY, *Trust in Local Government: How States’ Legal Obligations to Protect Water Resources Can Support Local Efforts to Restrict Fracking* (cit.), 198.

¹³⁴ *Foster v. State Department of Ecology* (Foster I-II-III), No. 14-2-25295-1 SEA, Washington Super. Ct. (2015).

¹³⁵ WOOD, WOODWARD, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last* (cit.), 678.

3. Italian environmental protection tradition: centrality of State's role

In the Italian legal framework, the environmental protection finds its basis in the Constitution as well as in several regulatory acts. Furthermore, the doctrine has brought an important contribution to the development and the enhancement of the already-existent provisions. Although the Italian legal system doesn't provide for such a broad range of acts, statutes and case law as the U.S. one does, it is interesting to investigate how an environmental protection-system mainly based on administrative justice has been developed towards more effective civil property-law tools.

Early approaches to the environmental matters see the environment as being under the public authority; this, also entrusting the state with management and protection tasks.¹³⁶ For centuries, Italian law – “suffering” from a strong Roman law influence – has held environmental resources as *res communes omnium*. Regarding the latter goods one could detect an objective impossibility – rather than an explicit prohibition, as the case of *res publicae* could be – for private parties to “seize” them.¹³⁷ Everyone could indeed take benefits from *res communes omnium*; yet, no one can have any kind of ownership on them. This was once more made clear in the late Eighties by Italian Constitutional Court (*Corte Costituzionale*), by stating that the environment has to be deemed as a collective good which is not suitable to any public or private appropriation.¹³⁸

For what it has been said, it is clear how environmental protection is considered, in the Italian legal framework, as a public interest. Thus, any harms occurred to such common good is held as a damage suffered by the whole community, represented by the state (as trustee). When it comes to environmental damages, hence, the term “collective” – or

¹³⁶ FRANCIARIO, *Danni ambientali e tutela civile*, Napoli, Jovene Editore (1990), 80.

¹³⁷ *Ibidem*, 85.

¹³⁸ *Corte Costituzionale*, ruling n. 641/1987 of 30th december 1987.

common – refers to the kind of good suffering the harm, rather than to subjects whose interests have been violated (*i.e.* the community as beneficiary).¹³⁹

3.1 The categorization of environmental goods: the doctrine of “common goods” in the ‘*Commissione Rodotà*’ parliamentary work session

Determining the nature of environmental goods, as deemed by a given national legal framework, is a must-taken step towards the understanding of the means of protection provided for the environment. Such an analysis, within the Italian legal system, could reasonably enough be started from constitutional provisions.¹⁴⁰

One first general reference to the environment as common heritage is made in Article 9 of Italian Constitution. In the latter provision, mention is made to the landscape which officially receives its protection as for being part of the national community’s natural asset.¹⁴¹ A much more important provision, when it comes to define the nature of environmental goods, is the one contained in Article 42 of the Constitution.¹⁴² In its paragraph 2, this Article clarifies the concept of private and public property and makes it clear how, regardless of its nature, the property must be protected and managed for citizens’ needs and interests.¹⁴³ A specification of the latter general rule can be found in Article 44 of the Constitution, which – despite mainly referring to the soil and its exploitation – well exemplifies what private and public properties’ use shall be aiming at.¹⁴⁴ The Article at stake, indeed,

¹³⁹ FRANCIARIO, *Danni ambientali e tutela civile (cit.)*, 217.

¹⁴⁰ As contained in the *Costituzione Repubblicana* of 1948.

¹⁴¹ Art. 9, Italian Constitution “*La Repubblica promuove lo sviluppo della cultura e la ricerca scientifica e tecnica [cfr. artt. 33, 34]. Tutela il paesaggio e il patrimonio storico e artistico della Nazione.*”

¹⁴² Art. 42, par. 2, Italian Constitution “[...] *La proprietà privata è riconosciuta e garantita dalla legge, che ne determina i modi di acquisto, di godimento e i limiti allo scopo di assicurarne la funzione sociale e di renderla accessibile a tutti.*”

¹⁴³ FRANCIARIO, *Danni ambientali e tutela civile (cit.)*, 72.

¹⁴⁴ Art. 44, Italian Constitution “*Al fine di conseguire il razionale sfruttamento del suolo e di stabilire equi rapporti sociali, la legge impone obblighi e vincoli alla proprietà terriera privata, fissa limiti alla sua estensione secondo le regioni e le zone agrarie, promuove ed impone la bonifica delle terre, la trasformazione del latifondo e la ricostituzione delle unità produttive; aiuta la piccola e la media proprietà. [...].*”

imposes on the legislator to pursue the “rational exploitation” of the soils, having in mind the community’s interest.¹⁴⁵ Lastly, and consequently to what it has been said so far, it is worth to highlight how no direct reference to the protection of the nature as such is made in the Italian Constitution.¹⁴⁶ What is here at stake, in fact, is a rather anthropocentric approach to the environmental protection, in so far as much it is only functional to the community’s – *i.e.* citizens – interests.¹⁴⁷

Further specifications on the nature of goods and property in the Italian legal system are given by the Civil Code.¹⁴⁸ The latter explicitly lists goods which are object of public property – *i.e.* state’s property – distinguishing them from those suitable to be object of private property instead.¹⁴⁹ Article 822 of the Civil Code exhaustively enumerates those goods which form part of state property and cannot be alienated or transferred; these are, for instance, shores, beaches, rivers, lakes and other “public waters”: all these goods are held as part of the “*demanio pubblico*” (public domain).¹⁵⁰ Thus, all assets which form part of the *demanio* pursuant to the law are, at most, suitable to be object of concessions to private use – which can be exclusive or not.¹⁵¹ Due to the very nature of goods object of concessions, terms and duration of the latter are determined under the arbitrary decision-making power of the state, rather than according to the parties’ bargaining power. The finality of the concession could also – and, indeed, it is most of the times – be private and in line with *cessionario’s* (*i.e.* the one benefitting from the concession) interests. Yet,

¹⁴⁵ FRANCIOSI, *Danni ambientali e tutela civile* (cit.), 73.

¹⁴⁶ *Ibidem*, 77.

¹⁴⁷ FRANCIOSI, *Danni ambientali e tutela civile* (cit.), 78.

¹⁴⁸ Codice civile italiano of 1942.

¹⁴⁹ MONTINI, *Property and environmental protection in Italy*, in WINTER (Ed.), *Environmental and property protection in Europe*, Europa Law Publishing (2015), 202.

¹⁵⁰ Article 822, par. 1, Italian Civil Code “Appartengono allo Stato e fanno parte del demanio pubblico il lido del mare, la spiaggia, le rade e i porti; i fiumi, i torrenti, i laghi e le altre acque definite pubbliche dalle leggi in materia; le opere destinate alla difesa nazionale.”

¹⁵¹ MONTINI, *Property and environmental protection in Italy* (cit.), 205.

the usage and the administration of a natural asset must be consistent with the community's needs and interests, as provided by the law.

Second, and widest, goods category – according to the Civil Code regulation – is an open one: assets (potentially) object of private property. No enumeration is given for the latter “class of goods”: they can just be whichever asset not considered by the law as property of the state; on any of such assets a private entity can have, transfer, alienate and freely dispose of rights *in rem*.

Technological, environmental and economic transformations occurred in the last decades required an adequate response from the legislator, as far as a categorization of goods was concerned. The two above-described categories of goods proved not to be sufficiently covering all new assets, legally considered as goods. Furthermore, the conflict between public domain protection and economic development necessity, characterizing the state's management of *demanio pubblico* – *i.e.* public goods – made the protection of environmental assets not adequate, if the latter would be ever included in the “public goods category”.¹⁵² Thus, the need for a reform of the Italian Civil code brought to the establishment of a parliamentary commission in 2007: the “Common goods commission” (the so-called ‘*Commissione Rodotà*’). Main goal and objective of the Commission was a significant reform of the two already existing categories of goods – *i.e.* private and public – and, indeed, the introduction of a third new one category: the common goods.¹⁵³

Common goods' category is based on intergenerational equity and solidarity principles, as contained in the Constitution.¹⁵⁴ Assets belonging to this group are not to be deemed as a specification of the broad category of public goods, since they neither belong to private citizens nor to the state. Common goods are, instead, those whose utility gives a response to community's collective needs, deriving from the fundamental rights contained in the

¹⁵² MONTINI, Property and environmental protection in Italy (cit.), 203.

¹⁵³ Ibidem, 202.

¹⁵⁴ Art. 2, Italian Constitution.

Constitution (e.g. right to health).¹⁵⁵ Furthermore, from a purely economic point of view, they are non-rival goods, being at the disposal of everyone. Indeed, the usage of common goods shall be made available for everyone, in as far as much it is consistent with the higher value of intergenerational equity – *i.e.* as long as assets' preservation is assured.¹⁵⁶ This new category comprises all waters, the air, forests and parks, as well as mountains, glaciers and protected fauna and flora.

From a judicial and procedural point of view, then, the state and other public authorities have, reasonably enough, legal standing for claiming compensation, in case of damages occurred to common goods.¹⁵⁷ Yet, private citizens are entitled with procedural rights too. According to the proposal made by the Commission, the latter subjects could, indeed, claim the violation or the enjoyment's limitation of their fundamental rights and ask a court to release an injunction, in order to make all limitations and violations to their rights ceasing.¹⁵⁸

Conversion of the Commission's proposal into effective statutory law has not happened yet. Nevertheless, the approach adopted to regulate environmental assets seem to be the right one, for its limiting and regulating privatisations of common goods and it has, at least, given rise to debates, both on doctrinal and judicial level. However, having said this, some scholars have recently argued the outdatedness and inadequacy of the above-described proposal – despite recognizing the step forward made by the *Commissione Rodotà*. That is, in other words, arguing that privatisations *inter alia* shall be completely banned, in order to restore and bring to life again Italian natural heritage.¹⁵⁹

¹⁵⁵ Ivi, Art. 32.

¹⁵⁶ REVIGLIO, Per una riforma del regime giuridico dei beni pubblici. Le proposte della Commissione Rodotà, 3 *Politica del diritto* (2008), 534.

¹⁵⁷ *Ibidem*, 535.

¹⁵⁸ *Idem*.

¹⁵⁹ See, for instance, comments on the proposal of the Common goods commission by MADDALENA (former Constitutional Court's president), La inattualità del disegno di legge sui beni comuni della Commissione

Summing up, although the debate remains open and for sure new legal developments would be required, Common goods commission experience brought a new light in the Italian constitutional and parliamentary scope of action concerning environmental goods and their protection.

3.2 Legal standing for claiming environmental damages – the state as trustee in the ‘Codice dell’ambiente’ of 2006

Italian law leads back to environmental goods a plurality of interests which can only be claimed by super individual entities – such as state and other administrative bodies; and it is indeed for the state, as trustee, to pursue the restoration in case of environmental harms. The state is, in fact, the only subject entitled to represent the entire national community; thus, according to the Italian approach to environmental interests, it is the one having the legal standing to claim for compensation.¹⁶⁰

Possible means of legal protection, when it comes to environmental damages, will be investigated in this section. Objects of analysis will be two fundamental statutory acts adopted over considerable time (the first in 1986¹⁶¹ and the second in 2006¹⁶²) and, therefore, well showing the evolution of the Italian legal system concerning environmental protection. An evolution, though, which seems not to be completed or at least not enough developed for current environmental emergencies.

The ‘*legge 349/86*’ provided for a both reparatory and sanctioning (punitive) protection for environmental goods – irrespective of being the subject judicially pursuing it private or public. Article 18, Paragraph 1 of the above-mentioned statutory act, explicitly stated that

Rodotà, in <https://www.attuarelacostituzione.it/2019/01/24/la-inattualita-del-disegno-di-legge-sui-beni-comuni-della-commissione-rodota/>, last visited 14/05/19.

¹⁶⁰ FRANCIOSI, *Danni ambientali e tutela civile* (cit.), 225.

¹⁶¹ Legge 8 luglio 1986, n. 349 – Istituzione del Ministero dell’ambiente e norme in materia di danno ambientale.

¹⁶² Decreto legislativo 3 aprile 2006, n. 152 – Norme in materia ambientale.

any environmental damage shall be restored, by its author, in favour of the state – *i.e.* the Ministry of the environment.¹⁶³ Following the entry into force of the above-mentioned latest Environmental Code – which partially supplemented the previous ‘*legge 349/86*’ – the Ministry of the environment, when claiming for restoration, can act in two different ways.¹⁶⁴ One first mean of justice would be to act on an administrative level, strictly cooperating with the Court of Accounts.¹⁶⁵ In such a case, the Ministry of environment would have an advisory role, rather than being entitled with legal standing and being plaintiff in the legal action.¹⁶⁶ It would, for instance, evaluate the damage and propose restoration means which the Court of Accounts would later ask to the subject held as responsible for the harm.

A second role the Ministry of the environment could play is the one of the civil party; this, though, only when criminal law comes into play.¹⁶⁷ This would be the case of asking for a complete restoration of the damage – or alternatively a money compensation – as “side-request” to the main criminal procedure, whose competence belongs to the public prosecutor.¹⁶⁸ The Ministry of the environment, in such cases, would act on behalf of public interest, in order to pursue the recovery of the environmental damage – as for having violat-

¹⁶³ Legge n. 349/86 is indeed the one establishing for the first time a Ministry of the environment (Ministero dell’ambiente), within Italian institutional framework.

¹⁶⁴ Articles 306 and 311 of d.lgs. 152/2006 (‘Environmental Code’).

¹⁶⁵ Corte dei Conti. Governmental-related judicial body, having jurisdiction in reviewing the public spending and, generally, public goods management of administrative bodies. The functioning and the powers of the latter body, when acting as trustee, will be further investigated in section 3.2.1.

¹⁶⁶ MADDALENA, L’ambiente e le sue componenti come beni comuni in proprietà collettiva della presente e delle future generazioni, 25 federalismi.it (2011), 40.

¹⁶⁷ To this respect, it is worth noting that in 2015 the Italian Parliament approved a statutory act (legge 68/2015) containing a set of new crimes against the environment: ‘environmental pollution’ (inquinamento ambientale), ‘death or injuries as a consequence of environmental pollution’ (morte o lesioni come conseguenza del delitto di inquinamento ambientale), ‘environmental disaster’ (disastro ambientale), ‘criminal offence against the environment committed with negligence’ (delitti colposi contro l’ambiente).

¹⁶⁸ Article 311 of d.lgs. 152/2006 (‘Environmental Code’).

ed a fundamental constitutional right.¹⁶⁹ As noted, the latter action is not a direct civil law – *i.e.* tort law – action, aimed at claiming compensation; rather, it is only a subsidiary claim to the criminal main one. This makes the new Environmental Code by far more restricting than the previous *legge 349/1986*, as far as the power of the Ministry of the environment of asking damage restoration as trustee is concerned.¹⁷⁰

Although, as it is for today, the Ministry of the environment retains a sort of exclusive competence, when it comes to claim environmental damages, the mentioned Article 18 of *legge 349/86* specified further rights and duties, referring to subjects different than the Ministry of the environment. Those were, for instance, territorial administrative entities, whose very legal standing concerning environmental-related litigations had been first explicitly recognised by the act at stake (*legge 349/86*).¹⁷¹ As far as the latter entities are concerned, Paragraph 3 of Article 18 entitled them of the right to claim damages and compensation, whenever the object of the damage is physically located on the territory under their control. It could be said, hence, that territorial authorities were co-entitled with the Ministry of the environment to claim compensation, in case of environmental damages.¹⁷² This power has been, to date, totally encompassed by the Ministry of the environment's competences.¹⁷³

Interestingly, before the entry into force of the Environmental Code,¹⁷⁴ in the case where the above-mentioned local authorities did not claim for compensation, environmental as-

¹⁶⁹ As stated, *inter alia*, by the Court of Cassation (Corte di Cassazione), Section iii, 21 June 2011, ruling n. 34761.

¹⁷⁰ MADDALENA, *L'ambiente e le sue componenti come beni comuni in proprietà collettiva della presente e delle future generazioni* (cit.), 41

¹⁷¹ FRANCARIO, *Danni ambientali e tutela civile* (cit.), 230.

¹⁷² FASOLI, *The Possibilities to Claim Damages on Behalf of the Environment under the Italian Legal System*, 13 *Journal for European environmental & planning law* (2016), 79.

¹⁷³ MADDALENA, *L'ambiente e le sue componenti come beni comuni in proprietà collettiva della presente e delle future generazioni* (cit.), 40.

¹⁷⁴ Decreto legislativo 3 aprile 2006, n. 152 – Norme in materia ambientale.

sociations could do so acting on behalf of the administrative local bodies.¹⁷⁵ This shifts the focus on private-law subjects, pursuing community's environmental interests.

Referring to private environmental associations – despite the disposal of the role they used to play, when acting on behalf of local administrative authorities¹⁷⁶ – Paragraph 5 of Article 18¹⁷⁷ provides them with the right to take part in both criminal and civil litigations brought by the above-mentioned public subjects, on the one hand, and, on the other, to bring their own lawsuits before administrative courts (although claims would have been limited to unlawful administrative acts challenges).

Concerning environmental associations' intervention in criminal prosecutions, a rather known case – at date still under the scrutiny of the court – is here worth to be mentioned: the *ILVA* case. Lately, high amounts of pollutants in the soil, water as well as in the air were detected in the region surrounding the city of Taranto (south-east Italy). Emissions of such substances were attributed to the ILVA steel factory, indeed operating in that area. A criminal prosecution was commenced and, besides Ministry of environment's compensation claims, the court preliminary accepted associations' civil claim for damages too;¹⁷⁸ this was due to the broad geographical representation on the territory as well as to the official recognition by the Ministry of environment which the associations benefitted from. The latter circumstance shows, amongst others, how not every environmental association's claim for compensation would be accepted; this is the case, not only with reference to the actual and direct damage which they have to prove (see below), but also referring to the pre-requisite concerning the recognition of the latter subjects.

¹⁷⁵ As indicated by Court of Cassation (Corte di Cassazione), Section iii, 24 March 2009, ruling n. 19081.

¹⁷⁶ Provision contained in Article 9, par 3 of d.lgs 267/2000, now replaced by the new Environmental Code.

¹⁷⁷ Paragraph 5 – regarding environmental associations – is the only one which had “survived” the abrogation-process, involving the entire Article 18 of legge 349/1986.

¹⁷⁸ FASOLI, *The Possibilities to Claim Damages on Behalf of the Environment under the Italian Legal System* (cit.), 73.

Taking a closer look at the provisions contained in the Environmental code, it appears rather clear how environmental associations – as well as “any other subjects that has been injured in their health or their properties”¹⁷⁹ – can autonomously act for protecting their rights.¹⁸⁰ This doesn’t mean, though, that environmental associations can bring claim “on behalf of the environment” for general harms suffered by the latter. Just as like as any other private subject, indeed, associations can only pursue restoration in as far as much they have been “directly and individually” injured in their rights.¹⁸¹ Suffered damages can be, to this respect, both material (such as damage to an activity undertaken by the association or to its property) and non-material (e.g. whenever, due to the harm, the association fails in pursuing environmental objectives, as eventually expressed in the statute).¹⁸² Lastly, pursuant to the new Environmental Code,¹⁸³ private associations can furthermore “[...] submit information and complaints asking the [Ministry of environment] to take action regarding an alleged environmental damage.”¹⁸⁴

3.3 Concluding remarks: a critical comparative assessment

As it has been investigated, chances for individuals to claim environmental damages are rather limited in the Italian legal system; that is with reference to the understanding of the good-environment as such, eventually relying on public trust doctrine-reasonings. What it has been made clear in the previous sections, indeed, is the fact that any harm to the environment necessarily needs to correspond to a legal provision-violation too. That is to say, in the Italian legal framework an activity causing damages to the environment cannot be

¹⁷⁹ Article 313, par. 7 of d.lgs. 152/2006 (‘Environmental Code’).

¹⁸⁰ FASOLI, *The Possibilities to Claim Damages on Behalf of the Environment under the Italian Legal System* (cit.), 70.

¹⁸¹ *Ibidem*, 71.

¹⁸² *Ibidem*, 72.

¹⁸³ Article 309, par. 1-2 of d.lgs. 152/2006 (‘Environmental Code’).

¹⁸⁴ FASOLI, *The Possibilities to Claim Damages on Behalf of the Environment under the Italian Legal System* (cit.), 69.

challenged by any public or private party, as long as it is consistent with current legal provisions.¹⁸⁵ This, basically, leads to an overlapping, a matching of the environmental damage – *i.e.* action or omission against environmental values – with a given domestic legal provision violation.

The characteristics described above, arguably, place the Italian environmental protection-system at variance with the American one¹⁸⁶ – which has proved to be the most developed and advanced, as far as the public trust doctrine for environmental protection-purposes is concerned.¹⁸⁷ The Italian legislation,¹⁸⁸ as it has been already investigated, needs the violation of a specific provision, so that the environmental harm can acquire legal significance. U.S. system, instead, only requires that the release of any pollutant substances (hazardous substance) – as preliminary qualified by the law – has been detected, irrespective of the lack of consistence with legal provisions of the activity concerned.¹⁸⁹

Yet, despite the relevant above-described differences, the two legal systems here at stake – Italian and American – share, at least from a doctrinal and theoretical point of view, a rather similar approach concerning the evaluation of the environment as a common good. Both legal orders, indeed, hold the environmental assets as a common good. Subsequently to this approach, states are considered as “residual owners” of the environment.¹⁹⁰ That is

¹⁸⁵ SOMMA, Il risarcimento del danno ambientale nelle esperienze tedesca e nordamericana: Geschäftsführung ohne Auftrag e public trust doctrine, 5 *Rivista giuridica dell'ambiente* (1999), 603.

¹⁸⁶ See Chapter 2.

¹⁸⁷ SOMMA, Il risarcimento del danno ambientale nelle esperienze tedesca e nordamericana: Geschäftsführung ohne Auftrag e public trust doctrine (cit.), 610

¹⁸⁸ Legge 8 luglio 1986, n. 349 – Istituzione del Ministero dell'ambiente e norme in materia di danno ambientale.

¹⁸⁹ SOMMA, Il risarcimento del danno ambientale nelle esperienze tedesca e nordamericana: Geschäftsführung ohne Auftrag e public trust doctrine (cit.), 610

¹⁹⁰ REHBINDER, Fortentwicklung des Umwelthaftungsrechts in der Bundesrepublik Deutschlands, *Natur + Recht* (1989), 162 „Dogmatisch wäre es zwar nicht völlig undenkbar, ein Residualeigentum der öffentlichen Hand an privatrechtlich nicht eigentumsfähigen Naturgutern oder hinsichtlich nicht privat beherrschbarer Attribute des Privateigentums zu schaffen. Im italienischen Recht [...] ist man diesen Weg gegangen“, cited by

to say, the state shall act – and indeed does – on behalf of the “principal” owner of environmental assets: the community as a whole. What it is undoubtedly clear is the central role of the state – as “state-community” and not as “state-person” with its own legal personality – in the Italian legal order, when it comes to pursue remedies to environmental damages.¹⁹¹

Concerning the kind of remedies the state – on behalf of the community – shall be asking for to polluters, the Italian legislator has made a clear choice, also consistent with other European legal orders.¹⁹² In the Italian legal system, preference seems to be accorded to the restoration of the damage (*risarcimento in forma specifica*), rather than to the compensation (*risarcimento per equivalenza*). Bearing in mind that the “common goods”-concept entails both a “fruition-right” and a “management-conservation-right”, it is for the state to pursue the protection of the latter.¹⁹³ In case of environmental damages, indeed, what it shall be object of the claim is the harm to the common asset, rather than the loss of use for the single citizens. As Maddalena exemplifies, if a river portion has been polluted, what really matters it is not to financially compensate people living on riverbanks, but rather to depollute – *i.e.* the restoration – the river itself; that is, indeed, for the whole community’s sake.¹⁹⁴

One last element which needs here to be considered is the “influence” European Union has on Member States; that is also with particular reference to legal provisions and doctrine’s development. Indeed, the constant law-making process on the Union level can in a way limit domestic legal development of single Member States. Despite the reference to

SOMMA, Il risarcimento del danno ambientale nelle esperienze tedesca e nordamericana: Geschäftsführung ohne Auftrag e public trust doctrine (cit.), 611.

¹⁹¹ SOMMA, Il risarcimento del danno ambientale nelle esperienze tedesca e nordamericana: Geschäftsführung ohne Auftrag e public trust doctrine (cit.), 604.

¹⁹² Idem. Reference is made to the German legal order – Paragraph 249 BGB.

¹⁹³ MADDALENA, Il diritto all’ambiente e i diritti dell’ambiente nella costruzione della teoria del risarcimento del danno pubblico ambientale – Danno pubblico ambientale, Rimini (1990), 480.

¹⁹⁴ Ibidem, 481.

the concept of environment as a “common good” can be actually found in few European Union’s legal instrument,¹⁹⁵ the general policy-trend is still far from basing the whole environmental liability-system on the doctrine of public trust. An emblematic instance of such an influence could be the Directive on environmental liability (ELD).¹⁹⁶ Besides elevating the “polluter pays-principle” to the edge of dogmas concerning the environmental liability, the ELD provides for a rather limited range of possibilities for third parties – *i.e.* private citizens and associations – to pursue judicial reviews and eventual compensation.¹⁹⁷ Indeed, pursuant to the Directive’s wording, the latter subjects, when willing to claim environmental damages, would be called upon prove a direct injury or harm to their individual interests.¹⁹⁸ Undoubtedly, the ELD has prompted a response to the environmental crisis which the Globe is experiencing and it has, indeed, brought relevant positive novelties to the European environmental protection framework. Yet, it is undeniable how in the ELD no reference is made to the concept of “common goods” and to the need to protect the environment as a community’s interest and not only as an eventual individual right.¹⁹⁹

Summing up, with specific reference to the public trust doctrine, this private property law-based theory may experience difficulties in spreading, in an “uniformed” legal environment such as the European Union. This is even more true if the content of European environmental provisions is taken into consideration, being these – as it was briefly explained – far from holding natural assets as common goods. Being Italy part of the Union since its very foundation Treaty, in the opinion of who is writing, the European Community’s influence may have limited or at least slowed down the development of the public

¹⁹⁵ See, for instance, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

¹⁹⁶ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (ELD), full text at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02004L0035-20130718>.

¹⁹⁷ *Ivi*, Article 13.

¹⁹⁸ MONTINI, CIACCI, *In the Name of “Common Interest”: Framing Environmental Goods as Common Goods*, in WINTER (Ed.), *Environmental and property protection in Europe*, Europa Law Publishing (2015), 332.

¹⁹⁹ *Ibidem*, 333.

trust doctrine within Italian legal framework, as well as in other legal orders part to the European Union. Far from being the latter an excuse for Italian “backwardness” in the field of environmental protection, this statement tries to give an explanation to the setback Italian legislation has lived after the auspicious ‘Commission on common goods’ work session.

4. Brazil's approach to natural resources – Constitution and public institutions

4.1 The environment as a common good in the Brazilian constitutional and regulatory framework

The Brazilian 1988 Federal Constitution²⁰⁰ presents as a general characteristic a “secondment” for the previous liberal approach to public law. The latter paradigm had been orienting for a long time every aspect of law towards the fundamental right of properties and its economic functions.²⁰¹ As the Article 193 of the Constitution states, main objective of the latter shall, instead, be to ensure social justice and well-being.²⁰² The latter “well-being” couldn’t help, according to the drafters of the Constitution, being pursued towards an adequate environmental healthiness and, thus, protection. For this reason, an entire chapter of the Federal Constitution is now dedicated to the environment (*o meio ambiente*).²⁰³

Besides granting a legal acknowledgement in the constitutional scope to the environment, the Federal Constitution introduced both substantial and procedural important principles, aiming at a complete and effective legal protection of natural assets.²⁰⁴ On the one side, the natural goods are deemed as parts of an organic system (the “biosfera”) and put into an *omni* comprehensive relationship of rights and duties, giving birth to an *ordem publica ambiental*.²⁰⁵ Moreover, a clear reference to the concept of “intergenerational equity” is also made in Article 225. This, by stating – similarly to many other legal orders’ approach

²⁰⁰ Constituição da República Federativa do Brasil de 1988.

²⁰¹ DE VASCONCELLOS E BENJAMIN, O Meio Ambiente Na Constituição Federal De 1988, 19 (1) Informativo Jurídico da Biblioteca Ministro Oscar Saraiva (2008), 41.

²⁰² Art. 193 Constituição da República Federativa do Brasil de 1988 “A ordem social tem como base o primado do trabalho, e como objetivo o bem-estar e a justiça sociais”

²⁰³ Capítulo VI Constituição da República Federativa do Brasil de 1988, in particular Article 225.

²⁰⁴ DE VASCONCELLOS E BENJAMIN, O Meio Ambiente Na Constituição Federal De 1988 (cit.), 42.

²⁰⁵ “An environmental public order”.

to environmental matters – that the environmental protection cannot be pursued making distinction between present generations’ interests and future generations’ ones.²⁰⁶

On the other side, then, procedural aspects of the environmental protection have been here introduced for the first time.²⁰⁷ To this respect, the Constitution entrusts citizens with legal actions (such as the *ação popular*). Moreover, administrative and penal sanctions are foreseen, or at least referred to, as well as civil tort law liability remedies. That is to say, an environmental damage can lead to civil, criminal and administrative sanctions, separately and cumulatively. This has been done with the aim not to leave the protection of the environment solely to the legislative power and its arbitrariness – which can, indeed, be considered as one of the main causes of the current environmental crisis – but, rather, to involve courts in this complicated achievement.²⁰⁸

As it was said before, Article 225 of Brazilian Constitution is the one devoted to environmental protection regulation and, indeed, forming the whole Chapter VI of the Constitution – the latter carrying the name of “do meio ambiente”.²⁰⁹ The provision at stake can be held as the “mother” of all further regulations and acts characterizing Brazilian legal framework. The latter find, indeed, their basis in the principle of “the primacy of the environment” (*primariedade do meio ambiente*) and in the one of a “limited exploitability of the property” (*explorabilidade limitada da propriedade*)²¹⁰ –along with the community’s environmental interests²¹¹ - as inferred from Article 225.²¹²

²⁰⁶ The issue has been already investigated in the previous chapters of the paper, referring to the U.S. system, and will not be here further discussed.

²⁰⁷ Specific legal provisions regarding possible legal actions (e.g. *ação popular* and *ação pública*) will be further investigated in the chapter.

²⁰⁸ DE VASCONCELLOS E BENJAMIN, *O Meio Ambiente Na Constituição Federal De 1988 (cit.)*, 42.

²⁰⁹ Article 225, *Constituição da República Federativa do Brasil de 1988*.

²¹⁰ DE VASCONCELLOS E BENJAMIN, *O Meio Ambiente Na Constituição Federal De 1988 (cit.)*, 54.

²¹¹ See, *inter alia*, the social function of the private property, described above referring to the Italian legal system.

Article 225, on the one side, states a general principle of environmental protection pointing out the fundamental right to a safe environment and the subsequent duties borne by the state and the community;²¹³ on the other side, it clearly lists more specific obligations, particularly referring to the “public subject”.²¹⁴ This entity shall be deemed as comprising the executive and the legislative branches, as well as the judiciary one.²¹⁵

Concerning the latter branch, it has already made clear how an effective implementation of constitutional provisions cannot be realized without a parallel work and integration of the courts, especially the Supreme Court.²¹⁶ The Brazilian *STJ – Superior Tribunal de Justicia* has, for instance, underlined how giving efficacy to the Federal Constitution entails adopting adequate legislative provisions, on the one side, and enforcing administrative decisions and acts accordingly, on the other one.²¹⁷ This concept has been further specified by Milare, who expressively talks about “*policia administrativa*”, referring to the peculiar power public subjects have to limit private interests and to privilege community’s ones.²¹⁸ In addi-

²¹² DE VASCONCELLOS E BENJAMIN, *O Meio Ambiente Na Constituição Federal De 1988 (cit.)*, 55.

²¹³ Art. 225, *Constituição da República Federativa do Brasil de 1988*. “Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de vida, impondo-se ao Poder Público e à coletividade o dever de defendê-lo e preservá-lo para as presentes e futuras gerações”.

²¹⁴ Art. 225, par.1, *Constituição da República Federativa do Brasil de 1988*

²¹⁵ LEME MACHADO, *Direito Ambiental Brasileiro (cit.)*, 157.

²¹⁶ MORAES, MOREIRA, VENANCIO, SILVEIRA, *O poder-dever constitucional de proteção ambiental do poder público: comentários ao agravo regimental no recurso especial n. 1.183.279 – PA*, 237 *Revista do Superior Tribunal de Justicia* (2015), 312.

²¹⁷ Superior Tribunal de Justiça. Agravo Regimental no Recurso Especial Nº 1.183.279 - PA. Relator: Min. Humberto Martins. Brasília, 16 de agosto de 2012.

²¹⁸ MILARE, *Princípios fundamentais do direito do ambiente*, 181/184 *Revista Justitia* (1998), <<http://www.egov.ufsc.br/portal/sites/default/files/anexos/31982-37487-1-PB.pdf>>. Last access on May, 31st 2019.

tion to being contained in the Federal Constitution,²¹⁹ a reference to the latter duty-power of the state can also be found in the *Lei nº 7.347/85*, concerning the *ação civil pública*.²²⁰

The positive intervention – and its binding nature – of the state when it comes to protect the environment seems, indeed, to be a *condicio sine qua non* for the well-being of the Brazilian constitutional order.²²¹ Such interventions would then, most of the times, become concrete in factual restrictions of private economic initiatives, being the latter the main risk-sources for the environmental healthiness and integrity. The Brazilian Supreme Court clearly expressed itself to the latter concern, stating the “positive” duties which the state has to carry out, on the one hand, and literally “imposing” acts aiming at the protection, restoration and recovery of the “ecologically-balanced environment”, on the other one.²²² This was also made clear by an early – and fundamental – legislative act, which affirms the importance of the role of the “public subject” in both keeping the environmental healthiness and monitoring – *i.e.* managing – potential polluting activities.²²³ *O Poder Público*, as the state in all its specifications and branches is defined by the Federal Constitution,²²⁴ has

²¹⁹ Art. 225, § 1, V, *Constituição da República Federativa do Brasil de 1988*.

²²⁰ Art. 5, § 6, *Lei nº 7.347/85 – Disciplina a ação civil pública de responsabilidade por danos causados ao meio-ambiente, ao consumidor, a bens e direitos de valor artístico, estético, histórico, turístico e paisagístico e dá outras providências*. This will be further discussed, when dealing with the role of the *ministerio público* and the means of justice granted to his position for the environmental protection. See section 4.2.1. for further details on this particular kind of action.

²²¹ MORAES, MOREIRA, VENANCIO, SILVEIRA, *O poder-dever constitucional de proteção ambiental do poder público* (cit.), 311.

²²² Superior Tribunal de Justiça. Recurso Especial Nº 1163524 - SC. Rel: Min. Humberto Martins. Brasília, 05 de maio de 2011.

²²³ Article 2, *Lei da Política Nacional do Meio Ambiente n. 6.938/1981*, “A Política Nacional do Meio Ambiente tem por objetivo a preservação, melhoria e recuperação da qualidade ambiental propícia à vida, visando assegurar, no País, condições ao desenvolvimento sócio-econômico, aos interesses da segurança nacional e à proteção da dignidade da vida humana, atendidos os seguintes princípios: I - ação governamental na manutenção do equilíbrio ecológico, considerando o meio ambiente como um patrimônio público a ser necessariamente assegurado e protegido, tendo em vista o uso coletivo; [...]; V - controle e zoneamento das atividades potencial ou efetivamente poluidoras; [...]”.

²²⁴ Art. 2, *Constituição da República Federativa do Brasil de 1988* “São Poderes da União, independentes e harmônicos entre si, o Legislativo, o Executivo e o Judiciário.”

not, indeed, to be deemed as the owner of natural assets, but instead as a mere “manager” for the common use and benefit of the population (“uso comun do povo”).²²⁵

The obligations which are borne by the state can be distinguished into positive and negative ones. Generally speaking, as Benjamin states, the aim of the provisions specifying the latter duties is to make the state refraining from a “*laissez-faire* approach” to environmental problematics, throughout the imposition of factual and concrete obligations.²²⁶ Indeed, besides the general duty not to harm natural assets, the state shall be correctly fulfilling its obligations, as borne by both the legislative branch – throughout the implementation of efficient environmental protection regulations – and the judiciary branch. The latter shall be giving effect to legislations, also and above all, by making citizens’ legal actions not only possible but also not vain.²²⁷ On the other side, referring to the legislative branch, Benjamin stresses the eventual violation of the Constitution, in as far as the state does not comply with its obligation to create and apply legislation adequate and consistent with Article 225.²²⁸

Besides the violation of constitutional provisions, Brazilian law has foreseen and regulated cases of “administrative responsibility” of the state. This kind of liability has been first introduced by the *lei 6938/81* – which, *inter alia*, has to be deemed as the fundamental statutory act regarding the environment and its protection.²²⁹

Later on, as it has been already mentioned, principles regarding the administrative responsibility – resulting from the state’s lack of consistency with its obligations – were in-

²²⁵ LEME MACHADO, *Direito Ambiental Brasileiro* (cit.), 140.

²²⁶ DE VASCONCELLOS E BENJAMIN, *O Meio Ambiente Na Constituição Federal De 1988* (cit.), 70.

²²⁷ *Ibidem*, 68.

²²⁸ *Ibidem*, 69.

²²⁹ Article 9, *Lei da Política Nacional do Meio Ambiente n. 6.938/1981*, “São instrumentos da Política Nacional do Meio Ambiente: [...] IX – as penalidades disciplinares ou compensatórias ao não cumprimento das medidas necessárias à preservação ou correção da degradação ambiental.”

troduced in the Federal Constitution too.²³⁰ Pursuant to Brazilian law, any violation of both a statutory and regulatory act – irrespective of being the latter federal, national or municipal – as well as the mere failure to observe and respect technical standards set by the law, might constitute an administrative illicit.²³¹ To this respect, Article 70 of *lei 9.605/98* holds as administrative violation any action or omission related to legal norms of “usage, enjoyment, promotion, protection and restoration of the environment”.²³² Concerning the causation, differently from civil liability – where a strict liability regime is in force – in the doctrinal scope regarding administrative procedures it is not clear, whether such violations shall be supported by a strict liability regime or a by a fault-based liability one, requiring a subjective element.²³³ On the other side, yet, the Supreme Court jurisprudence seems to be oriented towards an “objective” responsibility, instead, not requiring any degree of fault.²³⁴

4.2 The access to the “environmental justice”

However developed the legal framework of a country could be in terms of substantial principles and rights, these would have no practical response if not supported by adequate means of access to justice. As it was made clear above, as a matter of fact, it is for the courts to make the legal provisions “alive”, applying and enforcing them when so requested by citizens – this, not only, indeed, with reference to environmental matters. Thus, the

²³⁰ Art. 225, § 3, Constituição da República Federativa do Brasil de 1988 “As condutas e atividades consideradas lesivas ao meio ambiente sujeitarão os infratores, pessoas físicas ou jurídicas, a sanções penais e administrativas, independentemente da obrigação de reparar os danos causados.”

²³¹ STEIGLEDER, Comentário ao Recurso Especial 1.251.697-PR: O regime de imputação da responsabilidade por infrações ambientais, 237 *Revista do Superior Tribunal de Justicia* (2015), 528.

²³² Article 70, Lei 9.605/98 – Dispõe sobre as sanções penais e administrativas derivadas de condutas e atividades lesivas ao meio ambiente, e dá outras providências. “Considera-se infração administrativa ambiental toda ação ou omissão que viole as regras jurídicas de uso, gozo, promoção, proteção e recuperação do meio ambiente.”

²³³ STEIGLEDER, Comentário ao Recurso Especial 1.251.697-PR: O regime de imputação da responsabilidade por infrações ambientais (cit.), 528.

²³⁴ See, inter alia, Superior Tribunal de Justiça, Resp. n. 442.586-SP, 1ª Turma, Rel. Min. Luiz Fux, 26.11.2002 and Resp. n. 467.212-RJ, 1ª Turma, Rel. Min. Luiz Fux, 28.10.2003.

well-constructed Article 225 of the Brazilian Constitution would have barely an effectiveness, if it were not accompanied by provisions – both in the Constitution itself and in statutory law – granting the availability of means of justice for public and private parties.²³⁵

In this section, two important instances of justice “tools” against environmental harms will be investigated. On the one side, the duty to act of the *ministério público* will be taken into consideration – the *Ação Civil Pública* – and, on the other one, the question of whether private citizens do really have the chance to legally challenge environmental damages and their perpetrators will be addressed.

4.2.1 *Ação Civil Pública*: the role of the *Ministério Público* in the environmental protection

The figure of the *ministério público* has always been present in the different versions of Brazilian Constitutions, since its very first draft in 1891. In the current text, the entire Article 127 is dedicated to this very subject and to its powers and duties: “The Attorney General's Office is a permanent institution, essential to the jurisdiction function of the State, and it is incumbent upon it to defend the juridical order, the democratic regime and indispensable social and individual interests”.²³⁶ Further paragraphs of the latter Article, then, enhance – if compared to previous versions of the Federal Constitution – and specify the powers and the obligations of the *ministério público*.

Concerning the single power the latter body is entitled with, Article 129, Paragraph III, attributes to the attorney general's office the specific authority of undertaking the *Ação Civil Pública*,²³⁷ with the very aim to grant to the environment a “guardian”, which must be enti-

²³⁵ LEME MACHADO, *Direito Ambiental Brasileiro* (cit.), 159.

²³⁶ Art. 127, *Constituição da República Federativa do Brasil de 1988* “O Ministério Público é instituição permanente, essencial à função jurisdicional do Estado, incumbendo-lhe a defesa da ordem jurídica, do regime democrático e dos interesses sociais e individuais indisponíveis”.

²³⁷ *Id.*, Art. 129, III “promover o inquérito civil e a ação civil pública, para a proteção do patrimônio público e social, do meio ambiente e de outros interesses difusos e coletivos”.

tled with the power to file legal actions in case of harms to common natural assets.²³⁸ This particular type of action has been first introduced by *lei 7.347/85* – indeed, before the entry into force of the current Federal Constitution.²³⁹ Previously, pursuant to the general environment-related statutory act (the above-mentioned *lei 6.938/1981*), only criminal and tort liability actions were foreseen and attributed to the figure of the *ministério público*.

The *ação civil pública* is the legal mean throughout which the attorney general’s office represents – *i.e.* defends – all those interests deemed as common and collective. In fact, besides the reference to the environment, *lei 7.347/85* includes other assets and goods deserving protection, such as all goods forming part of the cultural, artistic, historic and aesthetic heritage.²⁴⁰ The mention of the term “*pública*” makes, indeed, reference to the nature of the interests, whose protection is pursued through the action at stake. The attribute “*civil*”, then, concerns the kind of courts which such suits should be brought before.²⁴¹

As far as the “authors” of such action are concerned,²⁴² as it has been already made clear, the main entitled subject is the attorney general’s office, as being the body which better represents common and public interests.²⁴³ More than this, though, Brazilian law

²³⁸ LEME MACHADO, *Direito Ambiental Brasileiro (cit.)*, 162.

²³⁹ *Lei nº 7.347/85 – Disciplina a ação civil pública de responsabilidade por danos causados ao meio-ambiente, ao consumidor, a bens e direitos de valor artístico, estético, histórico, turístico e paisagístico e dá outras providências.*

²⁴⁰ Art. 1, III, *Lei nº 7.347/85 – Disciplina a ação civil pública (cit.)*.

²⁴¹ It is important, here, to note that Brazilian system doesn’t provide for administrative court: civil and criminal prosecution are the only jurisdictions possible.

²⁴² It is here important to remark that the *ministério público* is not the sole subject entitled to the *ação civil pública*. Despite being the latter the main one and also the entity having more budget at its disposal, other public bodies could indeed commence such a legal action, such as, for instance the *Defensoria Publica* (public defence). In the present section, yet, only the scope of activity of the *ministério público* will be considered; this, both for space and clarity reasons.

²⁴³ LEME MACHADO, *Direito Ambiental Brasileiro (cit.)*, 435.

provides that the *ação civil pública* can be brought in front of a court by federal states, municipalities and environmental associations – thus, enhancing the scope of such a justice mean to private subjects too. Concerning the latter, Article 5 of *lei 7.347/85* – in order to be able to bring such claims – requires them to be founded since at least one year and, reasonably enough, to have among their finalities the protection of the environment and the cultural and artistic heritage.²⁴⁴

As it was already the case for the Italian legal system,²⁴⁵ Brazilian law places in the legal action at stake the objective of restoring the environmental damage, rather than compensate the victims – individuals or properties – of the harm. That is to say, the goal *ação civil pública* aims at is to recover the cultural, natural or aesthetic valuable assets which have been damaged.²⁴⁶ In a theoretical procedural scheme, the *ministério público* – or whichever entity is claiming the action – would be asking the court to release an injunction, in order to make the harming activity stop. Alternatively, or simultaneously, a positive action of restoration – if it ever possible, considering the conditions of the natural asset object of the harm – would be asked to the author of the damage.²⁴⁷

Brazilian legislation actually provides for the possibility to ask for a monetary compensation too. Yet, in case this would be granted, the amount of money obtained would not to be allocated for the victims, but devolved to the *Fundo de Defesa dos Direitos Difusos* (*F.D.D.*), instead.²⁴⁸ Such a fund has as main objective the restoration of the natural or cul-

²⁴⁴ Art. 5, V, *Lei nº 7.347/85* “[Têm legitimidade para propor a ação principal e a ação cautelar] a associação que, concomitantemente a) esteja constituída há pelo menos 1 (um) ano nos termos da lei civil; b) inclua, entre suas finalidades institucionais, a proteção ao patrimônio público e social, ao meio ambiente, ao consumidor, à ordem econômica, à livre concorrência, aos direitos de grupos raciais, étnicos ou religiosos ou ao patrimônio artístico, estético, histórico, turístico e paisagístico.”

²⁴⁵ See, for a comparison, the “risarcimento in forma specifica” in the Italian system, analysed in Chapter 3.

²⁴⁶ LEME MACHADO, *Direito Ambiental Brasileiro (cit.)*, 434.

²⁴⁷ *Idem.*

²⁴⁸ “Common Rights Protection Fund”.

tural assets which have been damaged: any other spending would be secondary to this fundamental goal.²⁴⁹

4.2.2. Procedural rights and means of justice at citizens' disposal: the *Ação Popular*

Article 5, LXXIII of the Brazilian Federal Constitution recites as follows:

“any citizen is a legitimate party to file a people’s legal action with a view to nullifying an act injurious to the public property or to the property of an entity in which the State participates, to the administrative morality, to the environment, and to the historic and cultural heritage, and the author shall, save in the case of proven bad faith, be exempt from judicial costs and from the burden of defeat”²⁵⁰

Such a general and comprehensive provision is rather unique in the global constitutional scope, as far as the concession of procedural rights is concerned. The reference to “any citizen” makes it clear how Brazilian legal system wants any subject entitled with political rights – *i.e.* right to vote and to be elected²⁵¹ – to be able to bring such a claim before a court.²⁵² Notwithstanding the requisite of the political rights, the standing for the action at stake seems to be furthermore extendible even to foreign citizens, having their residency within Brazilian territory.²⁵³ That is due to the fact that they are sharing the territory, the

²⁴⁹ LEME MACHADO, *Direito Ambiental Brasileiro (cit.)*, 437.

²⁵⁰ Art. 5, LXXIII *Constituição da República Federativa do Brasil de 1988* “qualquer cidadão é parte legítima para propor ação popular que vise a anular ato lesivo ao patrimônio público ou de entidade de que o Estado participe, à moralidade administrativa, ao meio ambiente e ao patrimônio histórico e cultural, ficando o autor, salvo comprovada má-fé, isento de custas judiciais e do ônus da sucumbência”.

²⁵¹ Art. 1, § 3 *Lei 4.717/65 - Regula a ação popular* “A prova da cidadania, para ingresso em juízo, será feita com o título eleitoral, ou com documento que a ele corresponda.”

²⁵² LEME MACHADO, *Direito Ambiental Brasileiro (cit.)*, 427.

²⁵³ Art. 5 (*Caput*) *Constituição da República Federativa do Brasil de 1988* “Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a

environment and the need for the latter to be safeguarded, just as like as Brazilian citizens do.²⁵⁴ Moreover, whenever it comes to the participation to social life of the country, it is important not to exclude those who are not citizens – in the narrowest legal sense of the word – but, still, living in Brazil.²⁵⁵ Summing up, the right to the *ação popular* belongs to all those persons – and, indeed, not only Brazilian citizens – who enjoy the fundamental right to a safe environment.²⁵⁶

Reasonably enough, all the rules for the above analysed standing have also virtue of law as far as the *litisconsortio* intervention is concerned. That is to say, any citizen can later on join the action commenced by another one.²⁵⁷ Such “intervention” can be made in order to “assist” the main plaintiff in the process (*assistente*), as well as to be an equal-level claimant before the court (*litisconsorte*).²⁵⁸ Finally, it is worth to remind that legal persons are not entitled to bring the *ação popular* before a court, not having those political rights required by the law.²⁵⁹

The *ação popular* firstly found its legal basis in the above-cited *lei 4.717/65*, earlier than the last version of the Constitution entered into force. The main goal of the institution of this action was to create an effective tool to have the administrations activity controlled and eventually corrected.²⁶⁰ From a substantial point of view, the *ação popular* can be re-

inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes”.

²⁵⁴ LEME MACHADO, *Direito Ambiental Brasileiro* (cit.), 161.

²⁵⁵ PAES, POLESSO, A *ação popular ambiental* como forma de participação social na defesa do meio ambiente, 6 (1) *Revista Brasileira de Políticas Públicas* (2016), 195.

²⁵⁶ *Ibidem*, 197.

²⁵⁷ *Idem*.

²⁵⁸ Art. 6, § 5 *Lei 4.717/65* “É facultado a qualquer cidadão habilitar-se como litisconsorte ou assistente do autor da *ação popular*”.

²⁵⁹ PAES, POLESSO, A *ação popular ambiental* como forma de participação social na defesa do meio ambiente (cit.), 196.

²⁶⁰ *Ibidem*, 198.

lated, and brought against, to an harm to public assets (*patrimònio pùblico*), to a violation of the administrative loyalty or fairness (*moralidade administrativa*), and, finally, to the damage occurred to the environment (*meio ambiente*) or to the cultural and historical heritage of the nation (*patrimònio històrico e cultural*).²⁶¹

Unlike the above described *ação civil pública*, though, the legal action at stake doesn't seem appropriate at all for pursuing prevention and restoration of environmental damages. Moreover, this action can only be successful – and, actually, available for the citizens – when an administrative act is found not to be consistent with whichever statutory or even constitutional provision.²⁶² Administrative acts, pursuant to Article 2, *lei 4.717/65*, can be claimed as void for five different reasons: lack of competence of the authority which released the act; violation of formalities; the object of the act is not consistent with the law; no valid reasons for the act are to be detected; the act is not consistent with the correct – according to the law - finalities.²⁶³ Such violations can apply not only to administrative act, but also to contracts stipulated by public authorities with private parties pursuant to private contract law (e.g. procurement contracts).²⁶⁴

As a matter of fact, the *ação popular* is not suitable for obtaining an “anticipatory” protection (or prevention) – that is, before an actual damage has occurred. The plaintiffs – *i.e.* the citizens – would have, indeed, to demonstrate an already-occurred harm to the envi-

²⁶¹ QUEIROZ JUNIOR, *Ação popular, sò direito ou também dever?*, 4 *Revista Direitos fundamentais & democracia* (2008), 3.

²⁶² MIRRA, Álvaro Luiz Valery. *Participação, processo civil e defesa do meio ambiente no direito brasileiro*. 2010. 715 folhas. Tese (Doutorado em Direito) - Universidade de São Paulo, São Paulo, 2010. p. 216-217, cited by PAES, POLESSO, *A ação popular ambiental como forma de participação social na defesa do meio ambiente (cit.)*, 198.

²⁶³ Art. 2, *Lei 4.717/65* “São nulos os atos lesivos ao patrimônio das entidades mencionadas no artigo anterior, nos casos de: a) incompetência; b) vício de forma; c) ilegalidade do objeto; d) inexistência dos motivos; e) desvio de finalidade”.

²⁶⁴ QUEIROZ JUNIOR, *Ação popular, sò direito ou também dever? (cit.)*, 7.

ronment or to any other public and common asset.²⁶⁵ Notwithstanding the difficulty represented by the burden of proof, the *lei 4.717/65* offers an interesting “support” to the citizens, by introducing an exception to the “*erga omnes* efficacy” rule of the court’s decision. Pursuant to Article 18, indeed, if the court has based its rejection on proof-related reasons, any other citizen can bring later on the same action – with the same substantial and procedural assumptions.²⁶⁶

Finally, a remark seems to deserve the role that the *ministério público* can have in this kind of claim besides its own duties and powers related to the *ação civil pública*. The latter body can, indeed, enter the process and collaborate on the citizen’s side, as for granting the respect of the law.²⁶⁷ Furthermore, the attorney general’s office has also the power to become the main plaintiff in the action, simply by replacing the original applicant. This, for instance, would be the case, pursuant to Article 9 of the *lei 4.717/65*, of a plaintiff abandoning the action.²⁶⁸

The *ministério público* can furthermore play an important role in the enforcement of a court’s decision. Articles 16 of the above-mentioned act provides for a specific obligation, borne by the latter subject, to enforce the ruling of the court.²⁶⁹ That is, due to the nature of the interests whose protection is pursued throughout the *ação popular*: even if the deci-

²⁶⁵ SILVA, José Afonso da. *Ação popular constitucional: doutrina e processo*. 2. ed. São Paulo: Malheiros, 2007. p. 216, cited by PAES, POLESSO, *A ação popular ambiental como forma de participação social na defesa do meio ambiente (cit.)*, 198.

²⁶⁶ Art. 18, *Lei 4.717/65* “A sentença terá eficácia de coisa julgada oponível “*erga omnes*”, exceto no caso de haver sido a ação julgada improcedente por deficiência de prova; neste caso, qualquer cidadão poderá intentar outra ação com idêntico fundamento, valendo-se de nova prova.”

²⁶⁷ QUEIROZ JUNIOR, *Ação popular, sò direito ou também dever?* (cit.), 11.

²⁶⁸ Art. 9, *Lei 4.717/65* “Se o autor desistir da ação ou der motiva à absolvição da instância, serão publicados editais nos prazos e condições previstos no art. 7º, inciso II, ficando assegurado a qualquer cidadão, bem como ao representante do Ministério Público, dentro do prazo de 90 (noventa) dias da última publicação feita, promover o prosseguimento da ação”.

²⁶⁹ Ivi, Art. 16 “Caso decorridos 60 (sessenta) dias da publicação da sentença condenatória de segunda instância, sem que o autor ou terceiro promova a respectiva execução. o representante do Ministério Público a promoverá nos 30 (trinta) dias seguintes, sob pena de falta grave”.

sion had been ruled in favour of the plaintiff, its enforcement corresponds to the community's interest and right and it is for the attorney general's office, thus, to ask its execution.²⁷⁰

The mention of the figure of the *minisério público* leads to the analysis of one last important issue: the practical and actual usage of the *ação popular*. It is worth noting, indeed, that the latter mean of justice hasn't been utilized by citizens as it was expected – or at least hoped – at the moment of the corresponding legislation drafting.²⁷¹ Undertaking an autonomous legal action is, as a matter of fact, something burdensome for every citizen, both on an economic and responsibility level. Due to this very reason, the trend to somehow shift such burdens on public subjects has been encountered: this public subject would be, indeed, the *ministério público*.²⁷²

Arguably enough, any citizen would prefer to “provoke” the action of the attorney general's office – by, for instance, reporting a given environmental damage – rather than to hire himself a lawyer and borne costs and risks of a legal action. Logical consequence of this tendency is the increase of the *ação civil pública* and the scarce usage of the *ação popular*.²⁷³ Besides the practical reasons – *i.e.* costs and risks – another cultural reason can be found at the basis of the above-described phenomenon. As Paes and Polesso note, a rather scarce rate of confidence and trust in public institutions can be detected amongst Brazilian citizens. Thus, in order to claim environmental damages, they would more likely entrust the

²⁷⁰ PAES, POLESSO, A ação popular ambiental como forma de participação social na defesa do meio ambiente (cit.), 199.

²⁷¹ PAES, POLESSO, A ação popular ambiental como forma de participação social na defesa do meio ambiente (cit.), 198.

²⁷² MARIN, Jeferson Dytz Marin; BRANDELLI, Ailor Carlos Brandelli. O Controle da Administração Pública pela Ação popular: a legitimidade do cidadão para a fiscalização dos atos do governante. Revista de Informação legislativa, Brasília, a. 47, n. 185, p. 135-144, jan./mar. 2010. p. 143, cited by PAES, POLESSO, A ação popular ambiental como forma de participação social na defesa do meio ambiente (cit.), 198.

²⁷³ MARIN, Jeferson Dytz Marin; BRANDELLI, Ailor Carlos Brandelli. O Controle da Administração Pública pela Ação popular: a legitimidade do cidadão para a fiscalização dos atos do governante. Revista de Informação legislativa, Brasília, a. 47, n. 185, p. 135-144, jan./mar. 2010. p. 143, cited by PAES, POLESSO, A ação popular ambiental como forma de participação social na defesa do meio ambiente (cit.), 198.

ministério público – a subject which seems to be trusted enough, instead – with the charge to represent them.²⁷⁴

4.3 Concluding remarks. When the positive law anticipates citizens' legal culture: the developed, though scarcely exploited, Brazilian environmental protection system

In the previous sections, it has been shown how developed and advanced Brazilian legal framework, concerning environmental protection, can be. Given the Federal Constitution of 1988 as the most visible instance of such a development, many statutory acts – both previous and subsequent to the Constitution – have proved that environment represents for Brazilian politics a rather high concern. Nearly no other countries in the World can dispose of explicit provisions in the Constitution – both referring to individuals' fundamental environmental rights and to the duties borne by the state – on the one side, and of effective legislation entrusting citizens with actual access to justice, on the other one.

For what it has been said, it springs to mind the question about the scarce utilisation of those legal provisions. Undoubtedly, one reason behind this phenomenon – which has been briefly mentioned in the previous section – has to be detected in the Brazilian citizens' cultural approach to public institutions, *i.e.* the relation they have built towards public bodies. As Queiroz Junior makes it clear, citizens in Brazil have started mistrusting legislative and executive powers – as well as the judiciary one – due to the big scandals occurred in the country in the recent years.²⁷⁵ Besides this, a sort of resignation can be detected amongst citizens, probably due to the abuses and harassments to their rights which they have been suffering over time.²⁷⁶

Yet, the reasons explained before have to be taken into consideration together with a general inaction, or lack of interest, as far as social and political rights, and indeed duties,

²⁷⁴ PAES, POLESSO, *A ação popular ambiental como forma de participação social na defesa do meio ambiente (cit.)*, 200.

²⁷⁵ QUEIROZ JUNIOR, *Ação popular, sò direito ou também dever? (cit.)*, 2.

²⁷⁶ *Idem.*

are concerned. The critic of Queiroz Junior is again sharp and addressed to every individual: “It is for the citizen to rise his democratic soul and put into action his civic duty, not only waiting for political miracles and adequate legal responses, ‘sitting and waiting’ is not the democratic solution to the protection of the public heritage”.²⁷⁷

No mention has been made in this chapter of the concept of public trusteeship as an environmental protection tool. Yet, it has been demonstrated that Brazilian legal framework explicitly recognises duties which have to be borne by the state as trustee for the whole community. No further interpretation of the provisions would, indeed, be needed – as, for instance, would have been the case for Italian legal system: everything one would need is to read Paragraph 1 of Article 225 of the Federal Constitution. Such an advanced and modern legal system, when it comes to the environment and its value for the wellbeing of the citizens, can be seldom detected. On the other hand, the almost complete lack of legal suits brought by the citizens against the state as trustee is just an undeniable fact. This, yet, doesn’t mean that claimants seeking natural assets protection are absent at all.²⁷⁸ Rather, it is just the way and the legal basis throughout which such actions are brought that seem not to be exploited at their fullest potential, as it was auspicated by the Constitution drafters.

Taking a closer look at this “scene”, what appears to an outside observer is that, uncommonly enough, the legal provisions have preceded people’s legal culture and awareness of the importance of the environmental protection, not to mention the otherwise long-seek and struggled fundamental right to a safe environment, which, indeed, has become part of the Federal Constitution of Brazil.

²⁷⁷ Ibidem, 11.

²⁷⁸ See, for instance, S.T.J., REsp No. 604.725/PR (2d Panel), Relator: Min. Castro Meira, 21.06.2005 (Aug. 22, 2005) and S.T.J., REsp No. 1.071.741/SP (2d Panel), Relator: Min. Antonio Herman Benjamin, 24.03.2009 (Dec. 16, 2010) (Braz.) – both of them brought by public prosecutor as *ação civil pública*. For a deeper analysis of the cases, see BRYNER, *Brazil's Green Court: Environmental Law in the Superior Tribunal de Justica (High Court of Brazil)*, 29 Pace Environmental Law Review, 470-537 (2012).

Conclusion

The dissertation and the analysis here conducted seek to give an overview of the current *status* of the public trust doctrine. This, with particular reference to three different domestic legal orders (U.S.A., Italy and Brazil), deemed as those presenting the most interesting – albeit due to different reasons – features. The methodology adopted for the research, as it has been already made clear at the beginning of the thesis, is a comparative one. The reasons behind such methodology-choice could be said as belonging both to substantial and procedural order (the latter not being understood in the narrow legal scope of the term).

On the one side, as it has been already pointed out, comparing different domestic legal orders was deemed as necessary in order to comprehend to the best the evolution of the public trust doctrine. Being the latter traditionally a private property law tool, there are no legal production and development scopes other than the national ones, where this very legal institution and its growth can be best inquired and understood.

On the other side, the fact that the environment and its protection can be typically labelled as “transnational concerns”²⁷⁹ entails the need to address the issues related to them adopting a methodology which in a way suits to transnational law, which indeed is the comparative law-study approach. Besides being a useful method in order to understand legal cultures and their development, a comparison between different legal orders can also turn out to be a way to propose and result in a reciprocal influence amongst different legal systems. It is out of the question, indeed, that this can do nothing other than improving each legal order’s environmental protection-system, in so far as they can be reciprocally “inspired” and positively influenced by other states’ legal experiences and traditions. Summing up, in the opinion of who is writing, comparing, sharing and being reciprocally

279 As a matter of fact, an effective response to environmental crisis cannot be given solely keeping a “national focus”. Due to the very nature of natural assets and of the damages they might suffer, it is necessary to address environmental protection-issues on a “transnational level”. As it has been made reference to in the first chapter, international organisations have, indeed, progressively started to hold natural and cultural heritages as belonging to the World community and, thus, deserving an international protection. There is no way to give a concrete response to climate change, for instance, without having a broad and comprehensive view of all global legal systems and orders.

influenced can finally lead to cooperation, which is exactly what is needed in order to give a global, concrete response to the environmental crisis and, specifically, to the climate change.

The results of the comparison conducted between these three legal orders have proved to be in line with the expectations, as far the progress and the legal development-status is concerned, albeit revealing some interesting and rather surprising elements, particularly referring to the actual and tangible effects of the implementation of the public trust doctrine.

Generally speaking, the U.S.A. have proved to provide for a more advanced and developed system, concerning public trusteeships, if compared to Italian and Brazilian – but not only these ones – legal orders. This can be explained referring to two main causes, which are both related to the legal and cultural tradition of the country. On the one hand, indeed, one main reason for such an advanced status of progress is the fact that the public trust doctrine is based on the fiduciary trust institution, which, as a matter of common knowledge, has its roots in the Anglo-American legal scope, where it has found its highest success and spread. On the other hand, then, the well-rooted liberal tradition of the U.S.A. and the rather high rate of awareness U.S. citizens have towards their rights, have undoubtedly played a role in the public trust doctrine diffusion and development, both in terms of social pressure on the government – and the administrations – and considering the high number of cases brought by U.S. citizens before state and national courts.

This very issue of the “social awareness” and of the legal culture spread in a given country has, in the course of the research about the Brazilian legal order, turned out to be as important as in the U.S. scope, but rather for the complete lack of it than for its important role. The inquiry has, indeed, revealed how the incredibly advanced Brazilian constitutional and statutory system - Brazil’s Federal Constitution provides for a whole specific section referring to the environment and its protection – has not found an adequate response on the citizens’ side, particularly concerning legal applications and environmental claimants.

Whilst, for instance, Italian and U.S. constitutions don’t make any straight reference to the importance of the environmental protection and a widening interpretation of the provisions would be always needed, Article 225 of the Brazilian Federal Constitution – in its

last version of 1988 – clearly refers to the duties of the state, as, indeed, trustee for the natural assets. Concerning the latter, it is interesting to note, for example, how the achievement of the classification of environmental goods as “common goods” had in the case of Brazil come straight from constitutional provisions, where the natural assets are referred to as “bens comun” or “de uso comun do povo”. Italy, for its part, has actually made an attempt to classify the environment as a “common good” (“bene comune”), through the work of the *Commissione Rodotà*. Yet, this hasn’t brought to any further legislative result, partially due to the less flexible and adaptable Italian constitutional framework.

Concerning the procedural aspects of the public trust doctrine – that is to say, the ways and the means throughout which this can be applied before courts in favour of the citizens – relevant differences have been detected between the legal orders object of the investigation, as far as both the legitimated subjects and the practical causation-proof processes are concerned. Once again, U.S. have proved to be the most advanced system, not only in terms of procedural rights granted to the citizens, but also concerning the positive responses given by the courts – irrespective of the level (if national or state) of them. The high number of cases have demonstrated how in the U.S.A. citizens have at disposal and do exploit their chances to bring claims against the administrations, whenever their environment-related rights are violated.

On the contrary, pursuant to Italian law, the Ministry of the environment is the only one entitled to bring claims, in order to seek restoration and compensation. The Brazilian legal order, on its part, does provide for means of justice at the citizens disposal – such as the *ação popular*. This, yet, doesn’t seem to be enough for the desirable spreading of legal applications before the courts. Besides the socio-cultural reasons explained above, indeed, the causation seems to be a rather big obstacle for the citizens seeking legal protection, since they would have to prove the violation of a specific legal provision in order to get the polluter (public or private) held as responsible.

Lastly, concerning the remedies eventually released by the courts, a common tendency shared by the analysed legal systems has been noted. Reasonably enough, when environmental damages occur, the main concern shall be the restoration of the natural asset

which has been harmed rather than the financial compensation of the victims of the harm. The present study has confirmed how Brazilian, Italian and the U.S. legislations, indeed, contain provisions making clear how, when bringing environmental claims before a court, precedence shall be given by the plaintiffs to the seek of restoration of the site – if ever possible, considering the characteristics of the natural asset – rather than to the victims compensation.

Leaving aside the comparison and taking a broader sight of the public trust doctrine and its *status* as binding legal provision, what the research has revealed is a rather ominous picture. Apart from few isolated cases – mostly detected in the U.S. legal framework – the public trusteeship as an environmental protection-tool hasn't reached the desired results. Two specific and fundamental concerns would, indeed, need to be further developed, in order to grant to this doctrine more effectiveness.

On the one hand, the public trust doctrine could be developed through all state branches. That is to say, contrary to what it has been demonstrated talking about the U.S. legal system (where a rather developed case law is opposed to very few legally binding provisions) or the Brazilian order (where, on the contrary, to the many constitutional and statutory provisions doesn't correspond any involvement of the courts), all the branches of the state – the legislative, executive and judiciary – should be actively involved.

On the other hand, finally, the public trust doctrine could be further invoked and implemented in order to seek “transboundary” environmental protection and, subsequently, to define transnational responsibilities. Damages unceasingly occurring to oceans, to atmosphere and, generally, to all those assets in which every single state and citizen share common interests, would indeed need to receive an adequate response from international law. To this respect, it has been demonstrated how the public trust doctrine presents all characteristics to be the most adequate tool to face the environmental matters, particularly the climate change.

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