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A HISTORICAL-COMPARATIVE ANALYSIS OF USI CIVICI AND DEMANI COLLETTIVI IN SICILY. MINIMAL SUGGESTIONS FOR PROTECTIVE MEASURES

Abstract: The research analyses models of land governance, focusing specifically on Sicilian *usi civici* and *demani collettivi*. By examining the historical *genotypes* and *phenotypes* of these institutions, the study identifies their foundational elements and explores their evolution in Sicily compared to the rest of Italy. Factors such as insularity, the late subversion of feudalism and the persistence of the latifundium estate have led to management phenotypes that are distinct from the participatory models typical of central-northern Italy, favoring an individualistic and sometimes predatory approach. Additionally, the transition to modernity and the abolition of feudalism in Sicily, including the liquidation of collective state property and *usi civici* in the early twentieth century, followed a distinctive path.

While the special status of the Sicilian Regional Statute played a role, the differing implementation of the 1927 law and principles of urban planning had a more significant impact on these processes.

In light of this historical-comparative analysis, the research explores the potential for renewing the management of the remaining *demani collettivi* in Sicily. It questions the assumption that the region's exclusive jurisdiction necessarily leads to a divergence from the organizational models of other Italian regions.

The methodology combines inductive and deductive approaches, case studies and analyses of legislative, judicial and doctrinal sources, supplemented by reports from state administrators and interviews with key actors. The ultimate objective is to propose solutions that focus not on the constitution or re-establishment of the *demani civici*, but rather on the management of what remains, to enhance the protection and conservation of the Sicilian territory, aligning it with contemporary needs for sustainability and preserving it in the interest of future generations.

* This study is the result of a common research and reflection of the two authoresses: however, with regard to research evaluations, Alessandra Pera drafted Section 2, while Nicoletta Pera drafted Sections 3 and 4. The Introduction and the conclusions were co-authored.



Keywords: usi civici; demani collettivi; land management; environmental sustainability; historical-comparative analysis

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1. Introduction and indication of the field and method of investigation

This study is part of the PRIN project, “Rural Commons Italy” (RuComItaly)¹, designed within the Framework of the actions proposed by the NextGenerationEU Recovery Plan and the transformations envisaged in the European Green Deal. It is based on the idea of sustainable development and environmental conservation across different EU policy sectors, including: a) the EU Biodiversity Strategy for 2030, bringing nature back into our lives, b) the new common agricultural policy 2023-2027, and c) the Farm to Fork Strategy.

As a matter of fact, even though at least 9 million hectares are considered to be under common use in 18 EU countries (Eurostat), nevertheless the EU’s above-mentioned sector policies do not explicitly acknowledge or address this relevant reality and potentiality.

Therefore, the Project aims to analyze the Italian case, as a model in which rural commons have long been legally recognized and have been providing the very ecosystem and food services that are envisaged in the three EU policy sectors mentioned above. It is in fact acknowledged that the common management of natural

¹ We acknowledge financial support under the National Recovery and Resilience Plan (NRRP), Mission 4, Component 2, Investment 1.1, Call for tender No. 104 published on 2.2.2022 by the Italian Ministry of University and Research (MUR), funded by the European Union – NextGenerationEU; Project Title ‘Valorising rural commons for a greener and fairer society. Insights from Southern and Northern Italy’, Grant Assignment Decree No. 968 adopted on 30.06.2023 by the Italian Ministry of University and Research (MUR), CUP B53D23010570006.



resources by localized communities conserves the natural patrimony for its transmission to future generations.

Since the national context is characterized by a strong North-South unbalance in the capacity of rural commons to contribute to good environmental governance, in this project we have adopted a comparative approach to understand the causes of this difference, through an interdisciplinary methodology including the juridical, economic, historical and anthropological perspectives. Regions from both northern and southern Italy have been selected for comparative analysis. Within them, localized case-studies have been chosen for in-depth qualitative field research, adopting a variable range of collaborative and/or ethnographic techniques according to the context. The ongoing field research is conducted in close collaboration with relevant stakeholders and represents a key phase of the overall project. The combined results of a regional-level literature review with the knowledge generated through the fieldwork enabled the project team to formulate policy recommendations at regional and national level.

In the interdisciplinary dialogue that characterizes this project and, more generally, with the goals and method of legal comparison, it would not be possible to ignore the historical analysis. And indeed, the scholar who uses an individualizing approach to the description of law cannot omit the historicization of the object of study. According to Gorla², in fact, the comparison is accomplished inductively, through the analysis of legal mechanisms in their concrete attitudes. Thus, historiography and legal comparison are two activities of pure knowledge in the search for a *quid proprium* of each event, of the construction of descriptive schemes of facts. The dialogue between historical analysis and legal science takes a step forward when the guiding line of investigation shifts from the legal discipline to the functional profiles and the context in which rules are conceived; when functional profiles and context become two lenses that look at social formations, enabling the scholar to describe a 'spatiotemporal object' that is the product of various factors.

To reconstruct the institution under investigation, we used the inductive and deductive method, as well as case studies and the analysis of the legislative, judicial and doctrinal formants³. In addition to the historical doctrine, we also referred to reports and to State Instructors, delegates of the various Kingdoms, Extraordinary

² G. Gorla, *Diritto comparato e diritto comune europeo*, Giuffrè, Milan 1981, p. 53. More recently, for all, M. Brutti, *Sulla convergenza tra studio storico e comparazione giuridica*, in M. Brutti, A. Somma, *Diritto, Storia e Comparazione*, Max Planck Institute for European Legal History, Frankfurt am Main, 2018, 74.

³ On the method and the concepts of legal formant, see the studies by R. Sacco, "*Legal formants: A dynamic approach to comparative law*" in *The American Journal of Comparative Law* II 39 (1991): 343-401; Id., voce "*Formante*" in *Digesto civ. IV*, Turin: Utet. 438 et seq.



Commissioners, and interviews with qualified actors, such as the managers of the *Commissariato per gli Usi Civici della Regione Sicilia*⁴, to whom go our heartfelt thanks for their collaboration in the interviews, their availability and the interest shown in the Project and in my questions.⁵

To provide the international reader (who is not Italian nor a civil lawyer) with a better understanding of these issues, we use footnotes in which we discuss the meanings of certain legal concepts, categories and institutions that cannot be translated exactly from Italian into English⁶. When referring to these concepts, we either use the Italian term or a roughly equivalent English term. Moreover, we seek to provide adequate definitions and explanations for each of the categories used, and for the functions of the legal concepts cited⁷.

Through the historical analysis, we will start from some remarks on land governance models and the study of what we consider the genotypes⁸ (models) of *usi civici*⁹ and rural collective properties. We will then describe the characterizing, pre-existing and

⁴ For the competences and organization of this entity, which is both part of the public administration apparatus and a jurisdictional body with adjudicating powers, see the institutional website https://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_Assessorato regionale delle Risorse Agricole e Alimentari/PIR_AzForesteDemaniale/PIR_Areematiche/PIR_Demaniale Usi Civici/PIR_2.

⁵ In particular, our special thanks to Dr. Fazzari for his time and attention during our meetings and interviews in the winter of 2023.

⁶ In this study, as a methodological choice, we will maintain the name of such legal categories in Italian, as they do not have exact equivalents in English technical language. Quite often they are translated with the word “common” or “rights of common”, even if in the common law experience this term refers to a wider range of types. S. Sarcevic, *New Approaches to Legal Translation*, in *The Hague: Kluwer Law International*, 1997, 145-160.

⁷ V. Jacometti and B. Pozzo, *Traduttologia e Linguaggio Giuridico*, Wolters Kluwer Cedam, Milan, 2019, 91-117.

⁸ For the distinction between genotype and phenotype in comparative law as a methodological instrument see R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)*, in *The American Journal of Comparative Law*, Winter, 1991, Vol. 39, No. 1 (Winter, 1991), 16; R. Sacco, *Introduzione al diritto comparato*, Utet, Turin, 1992, p. 16; A. Gambaro, R. Sacco, *Sistemi giuridici comparati*, Utet, Turin, 1996, p. 11; G. Ajani, D. Francavilla, B. Pasa, *Diritto comparato. Lezioni e materiali*, Giappichelli, Turin, 2018, p. 12.

⁹ *Usi civici* are rights of enjoyment of land in favor of a community of people generally coinciding with the inhabitants of a municipality. When those lands are not privately owned, we speak of *demanio civico*, otherwise we refer to *usi civici* rights over private lands. These rights have their roots in the agrarian-economic structures of the Ancien Régime, with feudal systems intersecting these practices – sometimes preserving or limiting them according to circumstances – and include activities such as grazing, gathering wood, sowing, quarrying, and collecting stones, as well as other marketable resources from the land. *Usi civici* rights often, but not necessarily, are settled by paying the owner (normally a municipality) a fee. Arbitrary occupations of the *demanio civico*, both for agrarian land and built-up land, may be legitimized, if the conditions provided by law are met, by the imposition of a fee of an emphyteutic nature in favor of the municipality. This definition is contextualized to the Sicilian experience and the praxes of the *Commissariato per gli Usi Civici della Regione Sicilia* https://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_Assessorato regionale delle Risorse Agricole e Alimentari/PIR_AzForesteDemaniale/PIR_Areematiche/PIR_Demaniale Usi Civici/PIR_1.



foundational elements of the *demanio collettivo*¹⁰, to better understand how these genotypes have been applied by the communities through pre-unitary customs, by the legislature, judges and - in the exercise of forms of private autonomy - by individuals. In this process and evolution, from that point on these genotypes became the phenotypes of common land - *demani* and *usi civici* - in the experience of mainland Italy and its islands, assuming different, unique aspects¹¹. We will try to sketch the historical, social, economic and cultural reasons why this "other way of owning"¹² was conceived differently in Sicily than in other Italian contexts¹³.

Many scholars have reconstructed and, in some ways, redirected the model of *demani collettivi* in Italy toward a dimension of *specialty* and *diversity* with respect to private, full, exclusive, exclusionary and individual property, and with respect to public

¹⁰ In particular, this general category can be considered as homologous to the common law "rights of common" intended as the right to appropriate all or part of the fruits of another's land, uncultivated and open, for the benefit of an individual or a number of persons; the right of members of a contiguous local community to use the land for various purposes, or even the land on which such rights rest. The term common, understood as a right, falls under the broader category of *profit à prendre*, which indicates a set of rights to the natural fruits of another's land. The main forms are common of pasture, estovers or legnatic, piscary or fishing. The acquisition of the right of common takes place by the 30-year unbroken exercise provided for in the *Prescription Act 1832*; a commoner is said to be one who has a right of common, which is to be distinguished from easement or tenancy. The matter is regulated by a complex set of written and case law rules and assumes particular importance in the life of English local communities, where the exercise of the mentioned rights finds its source in strong and deep-rooted historical traditions: the enclosure of commons. In the extensive legislation on the subject, mention is made of the various *Enclosures Acts*, which also include provisions to protect commoners, the *Commons Acts 1876 and 1899*, and the *Commons Registration Act 1965*. Under the latter, local authorities are required to establish registers of existing rights exercised on common land in England and Wales. Metropolitan commons, on the other hand, are the land on which a right of common exists by a local authority within a city or town, regulated, among other sources of law, by the *Metropolitan Commons Acts 1866 and 1898* and the *Law Property Act 1925*.

¹¹ On the use of the concepts of genotype and phenotype in legal science and comparative law, see R. Sacco, *Introduzione al diritto comparato*, Utet, Turin, 1992, 16; A. Gambaro, R. Sacco, *Sistemi giuridici comparati*, Utet, Turin, 1996, 11; G. Ajani, D. Francavilla, B. Pasa, *Diritto comparato. Lezioni e materiali*, Giappichelli, Turin, 2018, 12.

¹² P. Grossi, *Un altro modo di possedere. L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Giuffrè, Milan, 1977.

¹³ From the Alpine arc to the Latium plain, from the *Agro Pontino* to Tuscany and *Emilia Romagna*, and even to the other half of the Kingdom of the Two Sicilies i.e., the Neapolitan area. See S. Lorenzi, *La Comunità d'Ampezzo come modello di gestione del territorio: accordi e sinergie tra Regole e Comune per la tutela dell'ambiente e della popolazione locale*, in P. Nervi (ed.), *Cosa apprendere dalla proprietà collettiva. La consuetudine tra protezione e modernità*, Padua, 2003, 327 ss.; R. Louvin, *Un bene comune tra pubblico e privato. Profili giuridici del fenomeno delle consorterie valdostane*, LE CHÂTEAU EDIZIONI, Aosta, 2012; R. Volante, *I beni sociali di Levigliani. Una singolare esperienza di proprietà collettiva*, in *Archivio Scialoja-Bolla*, 2012, 1, pp. 175 ss.; Id., *Risorse comuni diritti collettivi. Un paradigma storico-giuridico*, in *Dirittolibero*, 2012; E. Romagnoli, *Regole dell'arco alpino*, in *Novissimo Dig.it.*, App. VI, Turin, 1986; S. Barbacetto, *Terre comuni e foreste tra Serenissima e comunità locali*, in *Domini collettivi e nuovi protagonismi per la promozione dello sviluppo locale*, Padua, 2002, 197 ss.



property in the form of a *demanio*¹⁴, such that *demani collettivi* throughout the Italian territory (but not in Sicily) represent a very particular model of dominium.

Indeed, the locution *demani collettivi* describes legal forms, customary patterns which are also the product of very heterogeneous economic, legal and organizational choices. These require careful handling when studied, precisely because of their diversity, and because the choices referred to have given rise to a social order with very remote origins, to "minor" legal orders preserved by local populations until modern, contemporary times¹⁵.

What emerges, then, is a different definition and a redefinition of these genotypes and their concrete phenotypic declinations through the different seasons and changing social and economic customs which have accompanied the life of these minor legal orders.

The world of *usi civici and demani collettivi* - especially in Sicily - and the world of collective lands and commons are contiguous but, for the reasons we will explain, they should be considered as phenotypes today, tools for land and resource governance, whose essential characteristics do not result in a collective rather than an individual form of ownership, but with different forms because the founding values and the technical forms by which these values were preserved, protected or denied are different.

The methodological approaches and studies by scholars Paolo Grossi¹⁶ and Pietro Nervi¹⁷ - a legal historian and an economist, respectively - have been harbingers of

¹⁴ The word can be improperly translated with *Demesne*. Even if there is no legal regime in common law that is equivalent to the public or private domain of the state, as "There is no doctrine of the *domain public*. *Crown lands* are owned in the same way as private land and they are administered according to a law closely analogous to that governing land comprised in a family settlement. The only comprehensive account is in the article on Constitutional Law in Halsbury's Laws of England". See, A.G. Chloros, *A Bibliographical Guide to the Law of the United Kingdom, the Channel Islands and the Isle of Man*, University of London, Institute of Advanced Legal Studies, London, UK, 1973, 158. In the U.S., *public domain* refers to the real estate of the federal state and the individual states of the Union, also called *public lands*. In the latter case it is also referred to as state property. In the U.S. the expression *general public domain* is also used to refer to the vast federal real estate.

¹⁵ S. Romano, *L'ordre juridique*, Paris, 1975. See also the theory of parallel legal orders in H.P. Glenn, *Legal Traditions of the World. Sustainable diversity*, Oxford University Press, 2014, p362 ss.

¹⁶ P. Grossi, "Un altro modo di possedere". *L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Giuffrè, Milan, 1977; Id., *Assolutismo giuridico e proprietà collettive*, in *Quaderni fiorentini*, 19, Milan, 1990, 505 ss.; Id., *Il dominio e le cose, Percezioni medioevali e moderne dei diritti reali*, Milan, 1992, 701 ss.; Id., *La proprietà e le proprietà nell'officina dello storico*, Editoriale scientifica, 2° ed., Naples, 2006; Id. "Usi civici": una storia vivente, in *Archivio Scialoja-Bolla*, 2008, 1,19 ss.; Id., *I beni: itinerari fra 'moderno' e 'post-moderno'*, in *Riv. Trim. dir. Proc. Civ.*, 2012, 4, 1059 ss.; Id., *Gli assetti fondiari collettivi e le loro peculiari fondazioni antropologiche*, in *Archivio Scialoja-Bolla*, 2012, 1, 1 ss.

¹⁷ P. Nervi, *Aspetti economici della gestione delle terre civiche nella realtà attuale*, in *Dir. Giur. Agr. e dell'ambiente*, 1997, 363 ss.; Id. (edited by), *Il ruolo economico e sociale dei demani civici e delle proprietà collettive*, Padua, 1999;



extraordinary and very fruitful dialogues with other disciplines, such as sociology and anthropology, capable, like few others¹⁸, of embracing a pluralistic option of property: a genotypical "collective land arrangement" functional to establish *another* social order, which is distinguished not only on the level of the form of individual or collective appropriation, but which has a different anthropological foundation.

Personally, working on the Project with anthropologists has led us to understand that it is not just a matter of a (different) way of regulating the individual's relationship with the thing, i.e., the land, but it is a different way of conceiving the identity of those who exercise rights over the land, of the human being, his role within natural and historical reality, particularly his relationship with Mother Earth - mother because it is the primary source of survival¹⁹.

In turn, this means looking at phenotypes that have been established in much of the territory of continental Italy and are characterized by the primacy of the community over the individual, where the community represents the strength of the individual, the intergenerational community as an entity that outlives its members, an exponential entity, an intermediate body capable of preserving itself, albeit in its mutation, through the chain of generations and to last for a tendentially in(de)finite time²⁰.

Sustainable forms of land governance, where resources are exploited by present-day people who have received them from their ancestors and will want to pass them on to future generations, are at the heart of this study. These are environmentally-friendly forms of land governance, rooted in the work of human community and aimed at preserving and conserving the natural heritage.

Such models are the result of a long path of persistence and resistance to a political vision aimed at the suppression and liquidation of *demani collettivi* from the time of the

Id., *Istituti regolieri e protezione della natura*, in *Archivio Scialoja-Bolla*, 1, 2008, pp. 59 ss.; Id., *La nuova stagione degli assetti fondiari collettivi in un sistema evolutivo economia/ambiente*, in *Archivio Scialoja-Bolla*, 2014, 1, 87 ss.

¹⁸ For all, M. Agnoletti, *Italian Historical Rural Landscapes, Cultural values for the environment and rural development*, 2014; M. Bassi, *Nuove frontiere nella conservazione della biodiversità: patrimoni di comunità e assetti fondiari collettivi*, in *Archivio Scialoja-Bolla*, 2016, 1, 111 ss.; G. Carapezza Figlia, *Premesse ricostruttive del concetto di beni comuni nella civilistica italiana degli anni Settanta*, in *Riv. Dir. Civ.*, 2011, 4, 1061 ss.; P.M. Catalani, *La collocazione sistematica degli assetti fondiari collettivi in funzione del rapporto fra comunità e ambiente*, in *Archivio Scialoja-Bolla*, 2016, 1, 1 ss.;

¹⁹ P. Grossi, *Un altro modo di possedere (riflessioni storico-giuridiche sugli assetti fondiari collettivi in Italia)*, in *Diritto agroalimentare*, 3, 2020, 515.

²⁰ F. Marinelli, *Un'altra proprietà. Usi civici, assetti fondiari collettivi, beni comuni*, Pacini Giuridica, Pisa, 2018, passim; A. Germanò, voce *Usi civici*, in *IV Dig./civ.*, vol. XIX, Turin, 1999, 535; Id., *Terre civiche e proprietà collettive*, in *Riv. Dir. Agr.*, 2001, II, pp. 199 ss.; Costato, *Terre civiche e proprietà collettive. Problemi attuali delle normative sugli usi civici nella gestione e tutela dei territori*, in *Riv. Dir. Agr.*, 2005, 179 ss.



House of Savoy through to Act no. 1766/1927²¹ and, more recently, the 2017 reform that recognized them as “*domini collettivi*”, as “primary legal orders”²².

Between 1927 and 2017 there were alternating events and paradigmatic cases, which will not be reconstructed here, scholars’ contributions, Italian statutes on mountains and environmental assets, and very important rulings by the *Corte di Cassazione* and the Constitutional Court, which recognized *demani collettivi* as instruments to achieve a virtuous integration between man and the natural environment, rather than individual property. According to the Constitutional Court, the fact that these institutions appeared in multiple forms in various parts of Italy made a significant contribution to the protection and preservation of the landscape and the environment, concretizing “a specific unitary interest of the national community”²³, reiterated by said Court in other subsequent rulings.

Elsewhere in Italy, in Sicily in particular, phenotypes prevailed, neglecting the collective dimension in favor of the individualistic, in a perspective that was anti-latifundium - but often more predatory and *ad escludendum*²⁴.

The phases of the transition to modernity (sections 2-4) and the abolition of feudalism were experienced differently, as were the phases of the liquidation of *demani collettivi* and *usi civici*, conciliations and liquidations of the early 1900s (sections 4-5).

The specialty of the Sicilian Regional Autonomy, provided by a Special Statute²⁵, certainly played a role, but not as fundamental as one might think. What did determine a strong diversion, on the other hand, was the implementation of the national Statute of 1927 (Act No. 1766), whose *rationes* were primarily agrarian modernization and better land productivity, but which erred in proposing a single and organic discipline for all collective forms of rural *demani*. It was a mistake to assimilate “*usi civici*” - that is, collective rights, widespread especially in southern and insular Italy, over public and private latifundia, ascribable to the genotype of *iura in re aliena* - to all the other

²¹ Act No. 1766 of June 16, 1927, online at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1927-06-16>.

²² Act No. 168 of November 20, 2017, “Norme in materia di domini collettivi”, online at <https://www.gazzettaufficiale.it/eli/id/2017/11/28/17G00181/sg>.

²³ Constitutional Court No. 46 of 2 February 1995, online at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1995&numero=46>; Constitutional Court No. 345 of 13 November 1997, No. online at <https://giurcost.org/decisioni/1997/0345s-97.html>; No. 310 of July 18, 2006, online at <https://giurcost.org/decisioni/2006/0310s-06.html>; No. 103 of February 21, 2017, online at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2017&numero=103>; No. 113 of April 10, 2018, online at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=113>; No. 178 of July 4, 2018, online at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=178>.

²⁴ U. Mattei, A. Quarta, *Punto di svolta*, Aboca, Sansepolcro, 2018.

²⁵ Statute speciale della Regione Siciliana approved with R.D.L. No. 455 of May 15, 1946, and subsequent reforms, online at https://www.regione.sicilia.it/sites/default/files/2020-10/Statuto_0.pdf.



various forms of collective property, which socially and economically represented very different manifestations from the *usi civici*. And in fact, these "other forms" eschewed the application of the models of land transformation and governance proposed by the Statute of 1927; rather, they followed customary, pre-unitary rules, which are pre-civil code and pre-constitution. These are forms of collective property in which the community exercises *iura in re propria* and which the 2017 legislature finally recognized as primary legal orders. Moreover, they were deserving of constitutional protection, pursuant to Article 2 of the Constitution, since the community that exercises these collective rights in the form of an association, foundation, cooperative or other such group, is unquestionably one of the "social formations" in which the human person finds realization, and where one of the highest forms of "solidarity" is expressed and the "social function of property" is guaranteed (Article 42 of the Constitution).

So, regardless of the Constitution, regardless of the Civil Code, these are rules for governing the relations between the individual, the community and the land, resources and goods, which contribute to the "self-ordering of society", legal orders that arises through a bottom-up approach, showing the Italian legal system to be a plurality of legal orders²⁶.

In legal terms, globalization has undoubtedly entailed a reduction of state sovereignty in terms of the exercise of legislative power and political direction, due to the emergence of other channels of production and the flow of law headed not only by sovereign political wills, but by conspicuous social and cultural economic forces²⁷.

It is evident, in fact, that the legal is no longer identified with the normative and the normative with the legislative²⁸; that the formants of orders are multiple; that the living forces which concur to shape the formal and informal, expressed and mute rules²⁹ are multiple; that the relevant experiential dimension requires the jurist to change mindset, in the sense that the traditional juristic, positivist and normativist view is largely outdated³⁰.

The endurance and persistence of *demani collettivi* is proof of situations originating in ancient customs and private autonomy, of institutions and phenomena that have their origin and sources primarily in non-state rules.

²⁶ Santi Romano, *cit.*; Dani, *cit.*; on the constitutional relevance of *usi civici*, see also G. Di Genio, *Tutela e rilevanza costituzionale dei diritti di uso civico*, Turin, 2012.

²⁷ P. Grossi, *Globalizzazione e pluralismo giuridico*, in *Quaderni fiorentini*, 2000, p. 552.

²⁸ M.G. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, 2000; Mauro Bussani, *Il diritto dell'Occidente. Geopolitica delle regole globali*, Einaudi, 2010.

²⁹ R. Sacco, *Il diritto muto. Neuroscienze, conoscenza tacita, valori condivisi*, Il Mulino, 2015, *passim*.

³⁰ A. Somma, *Introduzione al diritto comparato*, Giappichelli, Turin, 2019, 3-18.



Thus, Act No. 168/2017 finds its founding *rationale* in constitutional legal pluralism and recognizes *demani collettivi* as *domini collettivi (iura in re propria)*, as minor and primary legal orders³¹, that is, which are not derived from the state legal system, but pre-existing and competing with it, distinguishing them from *usi civici (iura in re aliena)*. These are minor legal orders, experiences of community life founded on specific values that can be located well outside the official channels of the preponderant Western culture founded mainly on compact and individual property³². The legislative choice is, therefore, consistent with a centuries-long path and culturally in line with the values that should guide sustainable development³³, with an order capable of ensuring pluralism and governing complexity.

As the studies of Nobel laureate E. Ostrom³⁴ show, if community members establish behaviors centered on cooperation, common goods can be subject to direct management by the relevant communities themselves, through an act of autonomy. These goods, therefore, presuppose a community of stakeholders which, precisely, creates the commons through the sharing of activities and cooperation.

Goods thus take on a central value for community life and for the prospects of our societies, with a view to the sustainable enhancement of local development, social cohesion and the promotion of processes of “individual and collective capacitation”. The very idea of subsidiarity is oriented by capacitation to the governance of common goods, in terms of their use and care with a social function³⁵.

It is not so much the ownership or possession of the asset that matters, but its use. And in fact, multiple parties share the same asset, even though they do not all own it. This approach is opposed to the one that sees property rights as a right to exclude all those who are not owners from the use of a particular asset.

In doctrine, different definitions of property have been offered and different species of property have been catalogued that would be part of the broad *genus* “commons”³⁶.

³¹ On the theory of parallel legal orders, see again H.P. Glenn, *Legal Traditions of the World*, OUP, 2014.

³² P. Grossi, cit., in *Diritto agroalimentare*, 3, 2020, 520.

³³ F. Capra, U. Mattei, *The Ecology of Law*, 2015, Barrett-Koehler Pub., Oakland.

³⁴ For all see, E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, 1990, 2015; Id., *The Future of the Commons: Beyond Market Failure and Government Regulations*, IEA Ed., 2015.

³⁵ C. Donolo, *I beni comuni presi sul serio*, May 31, 2010, online at <https://www.labsus.org/2010/05/i-beni-comuni-presi-sul-serio/>, viewed on February 17, 2020.

³⁶ In Italy, the manifesto and theoretical-dogmatic reconstruction are by U. Mattei, E. Reviglio, S. Rodotà, *Invertire la rotta. Idee per una riforma della proprietà pubblica*, Il Mulino, Bologna, 2007. The debate awakened by this proposal has seen contributions from many authors, among whom, for all, see A. Lucarelli, *Introduzione: verso una teoria giuridica dei beni comuni*, in *Rassegna di diritto pubblico europeo*, 2007, 3 ss.; Id., *Note minime per una teoria giuridica dei beni comuni*, in *Quale Stato*, 2007, 87 ss.; E. Reviglio, *Per una riforma del regime giuridico dei beni pubblici. Le proposte della Commissione Rodotà*, in *Politica del diritto*, 2008, 531-536; M.R. Marella, *Il diritto dei beni comuni. Un invito alla discussione*, in *Riv. Crit. Dir. Priv.*, 2011, 103 ss.; U. Mattei,



However, it is not possible to delve into this issue in these brief reflections, which are very much related to the PRIN project on rural *demani collettivi*. Suffice it to state that the nature of common property does not exclude the fact that it may also have a utility for parties other than the members of the community of reference - for the indistinct community - since it may also be an asset for public use³⁷, or for a private individual, such as the owner might be.

Going back to the topic of this study - *usi civici* and *demani collettivi* in Sicily - we wonder:

- Is a different form of ownership in today's Sicily possible for those few areas where *demani civici* still exist?
- Is there any way to overcome the idea that the Region's exclusive competence, under Article 14(c) of the Regional Statute, must necessarily result in a gap in organizational models?
- Is it possible to imagine a Regional Statute or, at any rate, virtuous instruments of land governance, including those of a participatory nature which, without disowning and not being able to erase the historical datum and its current bearing, would implement the national Act of 2017³⁸, its rationale and the constitutional values it aims to achieve in terms of protection and preservation, of safeguarding for the benefit of future generations?

Sicilian insularity, the very late feudal subversion, the persistence of the single-owner latifundium-large estate and other factors determined the choice of technical forms of government of the estates that were very different from the participatory forms of government in central and northern Italy.

As Emanuele Carnevale observed³⁹, even before the Act of 1927, and as can be seen from the *Atti della Giunta Parlamentare per l'inchiesta sulle condizioni dei contadini nel Mezzogiorno, Sottogiunta per la Sicilia, 1910*, (Proceedings of the Parliamentary Council for the Inquiry into the Conditions of Peasants in the Mezzogiorno, Subcommittee for Sicily, 1910):

Beni comuni. Un manifesto, Laterza, Rome, 2011; A. Lucarelli (ed.), *Beni comuni. Dalla teoria all'azione politica*, ESI, Naples, 2011; C. Salvi, *Beni comuni e proprietà privata*, in *Riv. Dir. Civ.*, 2013, 209 ss.; L. Nivarra, *I beni comuni uni e trini ed il capitalismo proprietario*, in www.juscivile.it, 2013, 599 ss.; A. Vesto, *I beni. Dall'appartenenza egoistica alla fruizione solidale*, Giappichelli, Turin, 2014.

³⁷ A. Di Porto, *Res in usu pubblico e "beni comuni". Il nodo della tutela*, Turin, 2013.

³⁸ Act No. 168 of November 20, 2017, "Norme in materia di domini collettivi", online at <https://www.gazzettaufficiale.it/eli/id/2017/11/28/17G00181/sg>.

³⁹ E. Carnevale, *I demani e gli usi civici in Sicilia*, Rome, Tipografia Nazionale di G. Bertero e C., 1910, 3. Translation into English by the author. The same feeling was shared with reference to the rest of Italy by G. Veniceni, *Reliquie della proprietà collettiva in Italia*, Camerino, 1888, now in *Opere giuridiche di Giacomo Veniceni*, 1920, t. II, Studi sui diritti reali.



The scholar and politician cannot deal with this subject, cannot just think about it without a feeling of sadness or discouragement; for if there is a field in which the best intentions of reformers and princes have obtained the worst results, in which a great idea of social renewal, despite having at its disposal the most copious means, has failed miserably, if there is a field in which the action of the state, although affirming itself in the name of a high ideal, has proved more vain or more impotent, it is this one.

2. The customary sources, existence, persistence and semi-extinction of demani collettivi in Sicily

The specificity of the Sicilian experience with civic domains has remote origins, depending on the different ways in which the relations between powers, functions and structures⁴⁰, between sources⁴¹ and formants⁴² of law are articulated, and on the peculiar relationship between customs and regulatory interventions by the public powers and authorities.

We will try to identify the characters that we consider to be essential through a rereading of works by predominantly southern historians and jurists, through the Middle Ages⁴³ and the modern age, with a focus on the mid-sixteenth century, and then on a jusnaturalistic interpretation, which made the *demanio* an ancient and immemorable possession by the people⁴⁴, also with the aim of limiting the powers of feudal lords.

⁴⁰ According to the methodological approach by P.G. Monateri, *Methods in Comparative Law: An Intellectual Overview*, in P.G. Monateri (ed.) *Methods of Comparative Law*, 2013, Edward Elgar Pubbl., 9-24; Id., *Geopolitica del diritto. Genesi, governo e dissoluzione dei corpi politici*, Laterza, Rome, 2013; Id., *Advanced Introduction to Comparative Legal Methods*, 2021, Edward Elgar Pubbl., 3-10

⁴¹ According to the methodological approach by R. David, *I grandi sistemi giuridici comparati*, Cedam, Padua, passim.

⁴² On the method and the concepts of legal formant, see the studies by R. Sacco, particularly R. Sacco, "Legal formants: A dynamic approach to comparative law" in *The American Journal of Comparative Law* II 39 (1991): 343-401; Id., voce "Formante" in *Digesto civ.* IV, Turin: Utet. 438 et seq.

⁴³ A. Lepre, *Storia del Mezzogiorno d'Italia nell'età moderna e contemporanea*, Naples 1986, I, 51-57.

⁴⁴ G.I. Cassandro, *Storia delle terre comuni e degli usi civici nell'Italia meridionale*, Bari, Laterza, 1943, 222-277; E. Cortese, "Domini collettivi", in *Enciclopedia del diritto*, 13, 1964, 913-927; L. Bussi, "Terre comuni ed usi civici: dalle origini all'alto medioevo", in *Storia del Mezzogiorno*, Rome, Editalia, 1990, vol. III, 211-255.



For historians of the modern age, there is no doubt that the collective customs attested between the 16th and 18th centuries are the remnants of much more widespread practices in earlier centuries⁴⁵.

As is known, the *Regnum Siciliae* was divided into two kingdoms as from 1282, both endowed with different bureaucratic and administrative apparatuses, forms of government and procedures for the exercise of legislative, judicial and executive powers. Those powers at that time were exercised almost indistinctly⁴⁶. Therefore, regarding the rights of citizens over *demanio universale* and feudal vassals, a different discipline and arrangement developed in the kingdoms of Naples and Sicily.

Caravale's studies on royal legislation⁴⁷ have shown that the provisions of the Norman and Swabian kings aimed at spatial planning to ensure the unity of the territory. This was not so much through the exercise of *ius dare*, but rather through *ius dicere* intended as judging through a case-by-case approach.

The Assizes of Roger II⁴⁸ were an instrument through which the king of Sicily and southern Italy administered justice and applied the law already in force in the various regions of the kingdom, intervening to make up for its shortcomings or correct it in cases of serious "injustices" and distortions⁴⁹. In other words, the activities of *ius dicere* and *ius dare* coincided with and were functional to protect the law in force and the peace of the kingdom, through the protection and respect of the law of the communities residing in the territory, which viewed local customs as the primary source of legal authority.

With reference to land management and governance, the Assizes of Roger II ordered all lords (both the powerful and the less so, secular and ecclesiastical) to use restraint in demanding services from the freemen of their lands⁵⁰.

⁴⁵ See Maine, Henry Sumner. 1917. *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*. London: J. M. Dent & Sons, New York; E. P. Dutton & Co. For an anthropological analysis, refer to M. Bassi, *Possessing or Living? Collective Domains as a Normal Mode of Interaction between Community and Territory* (forthcoming), provided with the kind permission of the author.

⁴⁶ R. Trifone, *Alcuni caratteri dell'antica legislazione del Regno delle due Sicilie*, in *Atti della Regia Accademia di scienze morali e politiche*, 1910, pp. 25 ff.; D'Alessandro, *La Sicilia dal Vespro a Ferdinando il Cattolico*, in D'Alessandro e Giarrizzo, *La Sicilia dal Vespro all'Unità d'Italia*, vol. XVI of *Storia d'Italia* diretta da Galasso, Turin, 1989, 33.

⁴⁷ M. Caravale, *La monarchia meridionale. Istituzioni e dottrina giuridica dai Normanni ai Borboni*, Rome - Bari, 1998.

⁴⁸ Zecchino (ed.), *Alle origini del costituzionalismo europeo: le Assise di Ariano 1140-1990*, Rome - Bari, 1996.

⁴⁹ M. Caravale, *ult.cit.*, p. 6.

⁵⁰ See M. Caravale, *Royal Justice in the Twelfth Century in England and Sicily*, in *La monarchia meridionale*, *cit.* p. 64, note 110.



Frederick II's *Constitutio Puritatem*⁵¹ also gave royal magistrates the power - or rather obliged them – to enforce royal provisions to “correct” and amend unjust customs, and that applied to the entire territory of the kingdom. Thus, there is no doubt that the primary - that is, the quantitatively preponderant - source of law was custom: that behavior consistently repeated over time, deemed correct by the community that followed it and judged worthy of protection by the sovereign.

As it was in England with the arrival of William the Conqueror in 1066⁵², in Sicily the land was all in the domain of Roger, who kept a part of it for himself (the so-called *demanio regio*⁵³), and granted a part to his faithful knights who had accompanied him in the enterprise, in *uti frui* (the so-called *demanio feudale*⁵⁴), reserving direct dominion and respecting any *allodium*⁵⁵ existing therein⁵⁶.

⁵¹ F. Calasso, *La const. “Puritatem” del Liber Augustalis e il diritto comune nel Regnum Siciliae*, in *Introduzione al diritto comune*, Milan, 1951, p. 236.

⁵² On the peculiarities of land property in the English common law experience, see Lawson, *Introduction to the Law of Property*, Oxford, 1958; Riddal, *Introduction to Land Law*, London, 1988; Megarry's, *Manual of the Law of Real Property*, VII ed., London, 1968, vol. I; Megarry's and Wade, *The Law of Real Property*, V ed., London, 1984; Merryman, *Ownership and Estate (Variations on a theme by Lawson)*, in 48 *Tulane L. Rev.*, 1974; Pollock and Wright, *An essay of possession in the Common law*, Oxford: Clarendon Press, 1888. Among the Italian comparative law scholars see LUIPOI, *Appunti sulla real property e sul trust nel diritto inglese*, Milan, 1971; M. Graziadei-Rudden, *Il diritto inglese dei beni e il trust dalla RES al FUND*, in *Quadrimestre*, 1992, p.458; A. Gambaro, *Il Diritto di proprietà*, in *Trattato di diritto civile e commerciale*, diretto da Cicu e Messineo, continuato da L. Mengoni, Milan, 1995; L. Moccia, *Il modello inglese di proprietà*, in AA.VV. *Diritto Privato Comparato. Istituti e problemi*, Rome, 2004; Pugliese, *voce Property*, in *Enciclopedia giuridica italiana Treccani*, vol. XXIV, Rome, 1991; C. Zendri, *Sir Henry Sumner Maine e la lezione della proprietà collettiva*, in *Archivio Scialoja-Bolla*, 2003, 1, pp. 103 ss.

⁵³ From the feudal era and thereafter, in the English model the Lands of the Crown or the Crown Lands means all land belonging to the crown as a public legal person. The rents derived from such lands flow into the Consolidated Fund, i.e., the Treasury, under a grant from the Crown at the beginning of each king's reign in exchange for the civil list. However, this terminology should not lead to the assumption that this has given origin to a regime similar to that of state property in the Italian legal system.

⁵⁴ *Demesne* or *demeine* or *deman* from the Latin *terrae dominicales* or from Norman *demeine*, means that it belongs to someone who is the owner. Those lands that were not sub granted by the lord but that were part of the manor and reserved for his direct use (*estate* or *tenure*) were so called in the feudal system.

⁵⁵ According to the Oxford Dictionary, the Latin *allodium* is the English *allod*: “Land held by allodial tenure (see *allodial*, adj. A.1); tenure of, or title to, such land. In later use frequently as in *allod*”. See <https://www.oed.com/search/advanced/Meanings?textTermText0=allod&textTermOpt0=WordPhrase&dateOfUseFirstUse=false&page=1&sortOption=AZ>. *Allodium* or *allodial* land is intended as held absolutely in one's own right, and not belonging to any lord or superior. But the system of English property rights, and those derived from it, has retained many of its origins on a technical level: the concept of allodial property and the correlative dominium, understood as absolute ownership typical of civil law systems, is unknown. No-one can be the absolute owner of property, as the King (or the Queen) is nominally the absolute lord. In the common law model, the object of the right is not a material immovable good, but an estate. The maximum extent of property law is the estate in fee simple or freehold, which, for practical purposes, corresponds to the property right recognized in civil law systems.

⁵⁶ F. Lauria, *Demani e feudi nell'Italia meridionale, Naples 1923*, 295.



With the enfeoffment, the feudal lord simply acquired enjoyment and not ownership; he had “*dominio utile*”⁵⁷ over the feudal demesnes to the extent that the grantor had it before, so that the usages on the feudal demesnes enjoyed by the people were to be respected⁵⁸. The *uti frui* of the feudal lord “returned in full” once the people had exercised their “*usi civici*” and met their needs⁵⁹.

As mentioned above, Roger II recognized and affirmed the rights and uses of the people who already lived in both feudal and royal *demanio* areas. This was another *demanio*, temporally and logically preceding the others, called the *demanio universale*⁶⁰: the *iura civitatis*, functional that *ne cives inermem vitam ducant*, which *nec per legem nec per regem tolli [poterant]*.

The jusnaturalistic conception of *usi civici* in the 17th and 18th centuries derived from the nature and characteristics of this “ancient way of possessing”, which reinforced the need to fight against the usurpations and abuses of the barons. In the era of feudal subversion, the generalized existence of *usi civici* in favor of the populations living in the fiefs was based on the absolute presumption that civic rights (of citizens) should be considered as reserves, by natural law, of the original “*demanialità universale*” of all lands. Consequent to this thesis were the principles of the absolute intangibility of the peoples’ demesne rights which, therefore, *in aeternum durare videntur*, and of their imprescriptible nature. Through the numerous decisions of the 1808 Feudal Commission, this thesis passed into the case law of the Courts and resulted in the persistence of the validity of the Latin brocard *ubi feuda ibi demania, ubi demania ibi usus*.

In practice, with the stabilization of communities in the territory and the exercise of settled agriculture, each member of the group, in addition to the land used by him personally and individually, had the right to take his livestock to graze, and to collect the wood he needed for his house and hearth, in the less fertile part of the territory that had not been divided into lots or parcels⁶¹, also for economic reasons. Thus, it was the right to life and livelihood itself that was the legal asset protected by the rules (customary and others) governing civic rights and uses. Hence their inalienability and

⁵⁷ The feudal distinction between *dominio eminente* and *dominio utile*, typical of continental Europe feudal systems (Italy, France, Germany, etc.), has no exact correspondence in the common law experience, as “*eminent domain*” is used more often in the U.S. to describe the power of eminent domain or expropriation by the state or other public agencies.

⁵⁸ F. Lauria, *Demani e feudi*, cit., 296.

⁵⁹ Ibid., 297.

⁶⁰ Guarani, *Ius feudale neapolitanum ac siculum*, Naples, 1792, vol. I, p. 86.

⁶¹ In particular, on the Sicilian context, see P. Corrao, *Per una storia del bosco e dell’incolto in Sicilia fra XI e XIII secolo*, in M. Montanari, and B. Andreolli, eds., *Il bosco nel Medioevo*. Bologna, 1988. pp. 351-368.



imprescriptibility⁶², since everyone is born invested with rights to physical and moral preservation and improvement⁶³.

The recognition of the *universitates* (communities of people, which are the antecedents to municipalities) as entitled of the rights to use and administer the *royal demanio*, had implied that the forests and pastures "owned" by them and called *bona publica* were in common use by citizens for their life needs⁶⁴. This was the original *demanio universale*⁶⁵, which in Sicily included woods and pastures, but also agricultural lands cultivated alternately by the *cives* in accordance with the distribution made by the city's magistrates. In simplified terms, while eminent or overarching authority rested symbolically with the Crown, *demani universali* were owned by the *universitas* or municipality, serving the collective interests of the local community. Depending on the type of land, useful domain might belong to feudal lords or directly to the *cives* (inhabitants) in cases of communal land.

Even on the feudal domain "owned" by the feudal lords, the inhabitants enjoyed *iura civitatis* or *usi civici*, because when the territory had been enfeoffed, the sovereign had transferred it with the reservation of the subsistence needs of the population settled there⁶⁶.

It should be added that, especially with the Aragonese, the *universitates* themselves could obtain their own territory as a fief⁶⁷. This happened often, mainly because it allowed the relative populations to escape the baron's bullying. The lord, in fact, *uti civis non ut baro*, was entitled to *usi civici* and abused of them, taking advantage of the power he possessed, operating closures and reservations even though they were prohibited by custom, later transfused in the *Prammatica de baronibus*⁶⁸.

At the beginning of the 16th century, the Sicilian territory was characterized by the concentration of populations in large towns, often cities, and the abandonment of vast wetlands⁶⁹.

⁶² Inalienability is the quality of being inalienable, the incapability of alienation. It means that those rights cannot be transferred *inter vivos* through any agreement, contract or other ways, see Oxford dictionary online at <https://www.oed.com/search/dictionary/?scope=Entries&q=inalienability>. Imprescriptibility means that they are not subject to prescription; they cannot in any circumstances be legally taken away or abandoned; esp. See Oxford dictionary online at <https://www.oed.com/search/advanced/Meanings?textTermText0=imprescriptible+right%28s&textTermOpt0=Definition>.

⁶³ Lombardi, op. cit., p. 36

⁶⁴ See D. Winspeare, *Storia degli abusi feudali*, Naples, 1811, p. 286.

⁶⁵ For a comprehensive distinction of the "five species" of demesnes Lauria, op. cit., p. 347-352.

⁶⁶ Trifone, op. ult. cit., p. 9, and Lauria, op. cit., p. 131.

⁶⁷ Genuardi, op. cit., p. 68.

⁶⁸ See Lauria, op. cit., p. 308 see Genuardi, op. cit., p. 63.

⁶⁹ D'Alessandro, op. cit., p. 65.



At the end of the 16th century, there was a spontaneous repopulation of the old inland urban hamlets that remained particularly tied to the mother-city. In feudal demesnes the barons, also with a view to conveniently converting uninhabited areas, or those previously used for grazing, to the cultivation of wheat, invoked *licentia populandi* from the royal authority, thus giving rise to a massive phenomenon of the colonization of their feudal lands. The clearing of virgin lands far from the *universitates demaniali* and feudal towns, however, required the on-site presence of a labor force, which was solicited to move there in various ways, including - and this is the aspect that interests us - through the recognition of the right of *usi civici* on lands in common⁷⁰. In such a case, the *usi civici* are an expression of a concession by the feudal lord⁷¹, and not of the *universal demanio* which, in the natural law conception, "preceded" even the *royal demanio*⁷².

The pattern is also familiar in the common law world, in the feudal experience of the regime of "open fields". In the relationship between unfenced land and the system of crop rotation, the poorest and most deprived families were allowed to harvest the remaining product of the land after the actual harvest by the lord's organization. It is also seen in the practice whereby the lords, although they did not remunerate the settlers for their labor, left some land to the villagers - common land - for grazing and wood gathering⁷³.

With the same philosophy in mind, it is necessary to recall King John of England's *Charter of the Forest* of 1215, which regulated the collective use of the forest and was also enshrined in the *Magna Charta* of the same year, whereby "every free man" enjoyed the right of access to the forest, even if the land was owned by one of the tenants (barons or priests). In fact, it was configured as a form of legal protection for members of the community to access and use the commons. However, this practice, constitutionalized with the *Magna Charta* and the *Charter of the Forest*, was abrogated with the advent of the Tudors and the political choice to enclose the land, consolidating the system centered on private property.

⁷⁰ Benigno, op. ult. cit., p. 100.

⁷¹ According to Giarrizzo, op. cit., p. 279, either through the allocation of a house built or planned by the lord and then sold or given in fee to the new inhabitants or - most importantly - through the granting of plots of land in emphyteusis or in rent. In our opinion, as the common law's technical lexicon ignores the legal category of emphyteusis, in terms of economic content, the closest homologous figure is the long lease. In a building lease, the relative annuity is called ground rent and is analogous to the emphyteusis annuity.

⁷² Genuardi, op. cit., p. 65; Lauria, op. cit., p. 369.

⁷³ C.A. Ristuccia, *Alla ricerca di un buon modello per l'uso delle risorse. Comuni: Una verifica storica tra Open Fields System, regole Ampezzane e partecipanze emiliane*, introductory essay to E. Ostrom, *Governare i beni collettivi*, Venice, 2006, IX; W.N. Parker, L. Jones (ed.), *European peasants and their markets. Essays in agrarian economic history*, Princeton University Press, 1975.



The historical excursus on the salient moments urges us to take a Pindaric flight into the 18th century, when the French physiocrats' ideas emerged on agriculture as the source of peoples' wealth and economic considerations on the efficiency of models of agriculture practiced on land under individual ownership, rather than through the model of uses exercised by collectivities on the lands of others. Theories were transformed into practice, legislation and acts of administration when, in Sicily in 1787, Giovanni Pomar Naselli, advisor to the government, proposed the incorporation of all "state-owned common lands" into the Royal Court, so that the Court would then grant them in fee to the classes of burgesses and cultivators.

Hence, after the favorable resolution of the Court of Royal Patrimony on August 5, 1787, the viceroy, Prince of Caramanico, ordered the *Maestro Razionale del Tribunale* (the official controller of the state budget)⁷⁴, Marquis Tommaso Natale, to fractionate the common lands of *usi civici* in favor of the inhabitants into small lots on December 5, 1789. These were granted to individuals in emphyteusis, thus preventing mixed uses, that is, the practice of exploiting the same fund for several uses, both individual and collective, exercised in various capacities. In this way, uncultivated land would be cleared and intensively cultivated⁷⁵.

The *Prammatica de Administratione Universitatum* of February 23, 1792, common to both parts of the Kingdom, also intended to pursue the same economic policy design, with the goal of contributing to the progress of agriculture and redistributing wealth in favor of the poorer classes.

Thus, from the 18th century onward, the crucial issue was the distribution of land ownership within a framework of reform policies put in place by the monarchy.

On the level of the "declaimed rule", the abolition of feudalism was sanctioned with the Sicilian Constitution of 1812, which aimed at the extinction of all the various kinds of personal benefits that the possessors of fiefs used to collect from the population, and imposed the division of the demesnes between the baron and the population, in relation to the type of uses exercised, with a census of the lands suitable for cultivation. However, Sicily experienced some very particular events, since the reforming intentions of the *Napoleonides* and Giacchino Murat were not well received. Unlike the Kingdom of Naples, there was no provision in Sicily for a body such as the Feudal Commission or *Commissione delle gravezze* (established by the Decree of November 9, 1807), whose case law represents a sort of guide book to understand the nature of the

⁷⁴ D'Alessandro, op. cit., p. 51.

⁷⁵ V. Murena, *Cenni sopra la genesi e le vicende di promiscuità dei campi*, vol. 2 of the *Raccolta delle Ordinanze dell'Intendente della provincia di Catania intorno all'abolizione dei diritti ed abusi feudali e scioglimento delle promiscuità*, Catania. 1843, vol. II, 370.



so-called *usi civici* in southern Italy and to interpret the laws of the *Napoleonides* on the abolition of feudality in the Kingdom of Naples⁷⁶.

Indeed, if one looks at the operational rule, the reform in Sicily helped to protect the interests of the barons, who sought to free their fiefs from any burden, rather than to redistribute wealth⁷⁷.

Through the distorted use of some of the instruments provided precisely by the feudal subversion legislation, the reactionary currents and the barons found ample room to make conciliations in breach of the law, with obvious damage to "the public thing", the *universitates*, the municipalities and less well-off classes⁷⁸. Moreover, the governing bodies of the municipalities were composed of individuals from the aristocracy, landowners and local lords (aristocratic or bourgeois), who decided "collegially" on such conciliations, with obvious conflicts of interest.

Furthermore, the 1817 provisions on the elimination of mixed uses were applied and enforceable only after the Royal Decree of 1841. Many thousands of hectares were then assigned to municipalities in execution of this decree and in 1860 they were recorded as mostly divided into shares of individual properties.

These events contributed to the demise of the Sicilian *usi civici*, understood as *demani collettivi*. In fact, according to the reconstruction offered by Romeo⁷⁹, the ownership and governance of landed property remained the prerogative mainly of the old landowning classes, while particularly favoring certain sectors such as the Church and, within narrower limits, the minor or provincial aristocracy⁸⁰. This thesis is confirmed in several archival studies of specific sources⁸¹, which also show that the reform did not have the full support of either the bourgeoisie, which had supported it from an anti-aristocracy perspective, or the aristocracy, whose privileges, wealth and interests had been severely affected.

However, if we look at the changes in the land market in a broad sense, the Bourbon dynasty's measures made it more dynamic and pluralistic by increasing, for example, the possibilities of access to land, or by revitalizing the market for buying and selling with the transfer of land ownership for a fee. So, in terms of the extent and economic

⁷⁶ On the feudal commission, see R. Trifone, *Feudi e demani. Eversione della Feudalità nelle Provincie Napoletane. Dottrina, Storia, Legislazione e Giurisprudenza*, Milan, 1909; Lauria, op. cit., 223 ff. and 466 ff.

⁷⁷ F. Cordova, *Atti della Giunta per l'inchiesta agraria*, Rome, 1885, vol. XV, 104.

⁷⁸ L. Bianchini, *Storie economica-civile della Sicilia*, Palermo, 1841, vol. II, 98.

⁷⁹ R. Romeo, *Il Risorgimento in Sicilia*, Bari, Laterza, 1950, 169.

⁸⁰ R. Romeo, cit., p. 165.

⁸¹ M. Rizza, *La rescissione delle soggiogazioni in forza del decreto 10 febbraio 1824. Primi risultati di un'indagine archivistica*, in "Archivio Storico Siciliano", Serie IV, vol. VII (1981), 323-326.



value of the re-allocated land, the bourgeoisie benefitted significantly from the reform⁸².

Through the dissolution of the feudal system, the bourgeoisie aspired to take the land monopoly away from the aristocracy. However, this often resulted in the exclusion of peasants from the distribution of the land that should have accrued to them, in the quotient, as compensation for the suppressed *usi civici*.

The operational rule, therefore, took the form of a stripping of the civic domain to the detriment of the peasantry. This was one of the issues that fueled the social crisis in Sicily and prompted the peasant class to participate in uprisings and bloody revolts in several agricultural centers in 1848⁸³ and 1860⁸⁴.

This demolition of Sicilian *usi civici* was confirmed with the ensuing Restoration⁸⁵ and under the Kingdom of Italy⁸⁶, with the Act generally known as the one aimed at liquidating *usi civici*⁸⁷.

In the Kingdom of Italy, the state's operations proceeded with discontinuity and irregularity. In fact, when the Ministry asked the Prefectures for various news about the state's estates in 1879, the Palermo Prefecture replied that it could not give any "since they were ancient slopes, left abandoned after 1860," the Caltanissetta Prefecture replied that "there had been no state operations" in the province, and it was the same for the others⁸⁸. The causes that had disrupted and frustrated the great land reform of the beginning of the century still persisted.⁸⁹

Numerous qualitative and quantitative studies were carried out to ascertain the "state of the art" and the progress of the state's operations throughout the 1800s.

However, the data collected regarding Sicily can be taken into consideration only from 1889, when reports and prospectuses began to distinguish the situations and contexts

⁸² O. Cancila, *Vicende della proprietà fondiaria in Sicilia dopo l'abolizione della feudalità*, in *Cultura, società, potere. Studi in onore di Giuseppe Gianrizzo*, Naples, Morano, 1990, 221-231.

⁸³ G. Fiume, *La crisi sociale del 1848 in Sicilia*, Messina, Edas, 1982.

⁸⁴ D.M. Smith, *L'insurrezione dei contadini siciliani nel 1860*, in *Quaderni del Meridione*, 1958, 2, 132-155, 253-275.

⁸⁵ LAURIA, op. cit., 231.

⁸⁶ While the Lieutenant Decree of January 1, 1861, had value only for the Neapolitan provinces, Act No. 2248 of March 20, 1865, Annex E (Art. 16) also covered Sicily: LAURIA, op. cit., p. 233. The first is online at <https://www.demaniocivico.it/wp-content/uploads/2013/05/408.pdf>. The second is online at <https://www.gazzettaufficiale.it/eli/id/1865/04/27/065U2248/sg>.

⁸⁷ The approach had then been established by Act No. 1766 of June 16, 1927, converting Royal Decree No. 751 of May 22, 1924, on the reorganization of *usi civici* throughout the Kingdom.

⁸⁸ *Atti della Commissione reale per i demani comunali nelle provincie del Mezzogiorno, istituita con regio decreto 4 maggio 1884*, Rome, 1892, pp. 15 ss.

⁸⁹ *Atti della Giunta per l'Inchiesta agraria*, Rome, 1884, Forzani e C.Tip., vol. XIII, tome I, fasc. I., p. 103.



of the different provinces. Nevertheless, as Carnevale notes, the data and figures are not always commensurable and do not have an unambiguous meaning⁹⁰.

Emanuele Carnevale's Report provides a merciless picture of what happened between 1841 and 1901, through the analysis of various sources and the distinction into various time periods and areas of interest, divided by provinces and then by municipalities. This is a very important work because the mapping by province and municipality took place in 1910 and, therefore, predates the 1927 Act by only 17 years. Considering the topic, the real and effective changes that can occur in such a time span are almost negligible. The only two periods of "notable and regulated activity"⁹¹ were the one beginning with the implementation of the 1841 Instructions and Inghilleri's Commissariat, 1895-99. The former gave rise to the state's case law, which is also a most important source of study⁹², while the latter is evidenced by decisions and reports that are also the backbone of Carnevale's Report.

Carnevale worked through the rereading and analysis of Commissioner Inghilleri's Reports to the Minister after 1860, from news collected and inquiries made at Prefectures and Municipalities, based on extensive documentation and direct and personal knowledge. He reconstructed an overall picture relating to the years between 1889 and 1904-7, in which the mass divisions and the elimination of mixed uses demonstrate the lack of attention paid by the public bodies competent to claim the land in the interests of the inhabitants who were entitled to it. Public action was inadequate in a region where the network of *usi civici* was so dense and where the work of paying compensation for them was delayed, hindered and undermined⁹³, while the work of fragmentation and dispersal was swift. Nevertheless, more than 37,000 hectares on the island remained reserved for *usi civici*. This figure was far less than it should have been, but it was still considerable for those in the early 1900s who, like Carnevale, hoped for a policy and legislative choices aimed at the concrete possibility of the exercise, enjoyment and preservation of such uses in a collective form.

⁹⁰ E. Carnevale, op. cit.1910, p. 13.

⁹¹ E. Carnevale, op. cit.1910, p. 14.

⁹² *Ordinanze e provvedimenti emessi dall'Intendente della provincia di Catania intorno all'abolizione dei diritti ed abusi feudali e scioglimento delle promiscuità*, Catania, 1843; *Raccolta di Ordinanze sulla promiscuità, dell'Intendente di Messina*, Tip. Capra, 1843; *Decisioni della Gran Corte dei Conti di Palermo per lo scioglimento della promiscuità*, Palermo, Tipografia Virzi, 1844-52.

⁹³ Carnevale E., op. cit., 1910, p. 19



3. Legal nature, ownership and models

At this point in the historical analysis, it is necessary to focus on a dogmatic issue with very significant practical implications concerning the ownership of the *demani collettivi* lands and rights of *usi civici* over feudal lands.

According to one thesis, the *demanio civico* belonged to the municipality by way of ownership and to the citizens by way of use⁹⁴. Another thesis claimed that the collectivity had the right over the *demanio universale*, and the municipality acted only as an exponential body and on behalf of the collectivity⁹⁵. In other words, while it is certain that in Sicily the *demanio universale* was managed by the *universitates*, who were also entitled to a right of use over the lands in question within the limits set by custom, what is not clear is whether the *universitas* acted as the owner or as a representative (body) of the collectivity. The discussion, which is not whether the municipality can have legal personality, has a very important implication: if the property belonged to the collectivity, we would have a hypothesis of collective property; if, on the other hand, it belonged to the entity-*universitas*-municipality, state property would be nothing but individual property, that is, belonging to the entity-*universitas*-municipality as an individual, thus perfectly conforming to today's system envisaged in the Italian Civil Code, which only recognizes individual property.

A further consequence would be that there would not have been - nor would there be - a relevant practical difference between the hypothesis of universal civic lands and that of *usi civici* on feudal or private lands, because in both cases the *cives* would have enjoyed - and would enjoy - the utilities as users, both of the lands imputed to the *universitas* and of the private lands.

This last consideration allows us to make a clarification on the meaning of the expression "*usi civici*", which seems all-encompassing but in fact demands differentiation: basically, three distinct phenomena of enjoyment by communities: (a) in the strict sense, i.e., those rights to withdraw only certain utilities - especially those necessary for life - from a land that belongs to others; (b) civic lands, i.e., lands that are accessible to all local *habitatores*, from which the collectivity withdraws all the utilities they are capable of giving, precisely because these pertain to that collectivity; (c) collective lands, similar to civic lands, but characterized by the fact that they are

⁹⁴ See A. Rinaldi, *Le terre pubbliche e la questione sociale*, Rome, 1896, 88; A. Palermo, *Enfiteusi, superficie, oneri reali, usi civici*, Turin, 1963, 767.

⁹⁵ Santi Romano, *Il Comune*, in Orlando V.E. (ed.), *Trattato di diritto amministrativo italiano*, vol. II, part I, Milan, 1907-1932, 624-625. With different conceptions, V. Cerulli Irelli, *Proprietà pubblica e diritti collettivi*, Padua, 1983, 60-61, 263 ss.; Id. *Verso una nuova legge nazionale sugli usi civici: i problemi aperti*, in *Gli usi civici. Realtà attuale e prospettive*, Milan, 1991, pp. 51 ss.; L. Fulciniti, *I beni d'uso civico*, 2° ed., Padua, 2000, 109; P. Grossi, *Un altro modo di possedere*, cit.; P.M. Catalani *Riflessioni intorno alla cosiddetta demanialità dei beni soggetti ad uso civico*, in *Archivio Scialoja-Bolla*, 2007, 1, 13 ss.



"closed," i.e., belonging only to the descendants of the original ancient inhabitants, with the exclusion of outsiders. The latter were present and are still present in alpine Italy⁹⁶; the first two types are discernible mainly in the experience of southern Italy, where *usi civici* in the strict sense corresponded to the "common" lands within the fief, i.e., in the so-called feudal demesnes, while civic lands corresponded to the *bona communia* of the collectivities of the universitates regie, i.e. the so-called universal demesnes. This difference, in all its peculiarity and relevance, appeared at the time of the laws subversive of feudality, because for feudal demes it was first necessary to "separate" the share due to the collectivity from the remaining territory of the feudal lord, and then to proceed with the division of the allotted share among the citizens; while for universal demesnes the "lands capable of cultivation, even though [at that time they were] held for other use" were immediately divided into shares, while "woods, flooded and swampy lands, and the too steep slopes of the mountains" remained reserved for the *demanio*⁹⁷.

Later, the Italian legislation of 1924-1927 was drawn on the models of southern legislation, with the intention of being a comprehensive framework for the liquidation of so-called collective property⁹⁸.

The intent of the 1927 legislature was, on the one hand, economic: to free landed property from the burden of the rights of use of collectivities and to favor individual ownership as a form of *dominium* more consistent with the productivism principle of the Fascist regime. On the other hand, it was political: to hinder, reduce and abolish associations of citizens as co-owners of civic lands or users of *usi civici* - where they existed - because the Statutes (agreements of a contractual nature, associations, etc.) that governed them were an expression of private autonomy and democracy. And in fact, the legislature of the years 1924-27, after declaring the uses of collectivities on private lands extinct if they were not declared within six months of the enactment of the law, had various goals, including freeing a large part of the private lands from the *usi civici* that encumbered them, assigning a part of them in ownership to the universitas to then be divided into shares (if arable) or managed by the municipality (if woodland or pasture). The legal framework rarely allowed for collective lands consisting of woods and pastures to be open to all natives or residents and more often legitimized the usurpation of such commons by private individuals, especially in the

⁹⁶ E. Romagnoli, *voce Regole dell'arco alpino*, in *IV Dig./civ.*, vol. XVI, Turin, 1997, 532.

⁹⁷ Art. 21 Decree of December 3, 1808, by Gioacchino Murat. Translation by the Author. Online at <https://www.demaniocivico.it/normeabrogate/norme-abrogate-e-preunitarie-regno-di-napoli-e-sicilia/291-decreto-3121808/>.

⁹⁸ G. Curis, *Gli usi civici*, Rome, 1928; U. Petronio, *Usi civici*, in *Enc.dir.*, XLV, Milan, 1992, p. 930; Id., *Rileggendo le legge sugli usi civici. Ieri e oggi*, Padua, 2007, 84



south of Italy, for the management of forestry, agricultural and grazing, sometimes suppressing the original associations and management bodies that appeared useless or harmful.

Fortunately, the customary rootedness of the collective institutions in question prevented the extinction of the “collective way to possess”, at least in part of the peninsula⁹⁹. The political objective was not achieved, so that a different historical congeries, imbued with other values¹⁰⁰, has ensured that the *demani civici*, with their characteristics of indivisibility, inalienability and non-susceptibility to usucapion¹⁰¹, and their designation as perpetual agricultural, wood and pastoral land, can now participate in the protection of the environment and the agrarian landscape.

In a sense, the citizens who enjoy the land should be considered as usufructuaries rather than owners, as the asset belongs not only to the present community but also to future generations. Therefore, it must be preserved for the latter so that the future community may derive the same or additional benefits from it.

However, for Sicily, the initial question in this paragraph has limited practical value in the strict sense for *usi civici* (almost all of which have generally been “redeemed”) and for lands suitable for cultivation (all or most of which have been dutifully redeemed in the meantime), while it has some relevance for forest and pasture lands, which in Sicily were attributed to municipalities (including in the land registry).

Nevertheless, in our opinion - since the Act of 1927 and the related regulations of Royal Decree No. 332 of February 26, 1928¹⁰² and Act No. 278 of April 17, 1957¹⁰³ - the ownership of *usi civici* and *demani collettivi* belongs to the community in the form of collective property, and not to the entity-municipality. It is only by recognizing that the ownership of commons is vested in the community and not in the entity-municipality that we can explain the issue of the possible non-coincidence of the community entitled of the right to use and the municipality territory, as well as the old provisions whereby the administration of *usi civici* and *demani collettivi* estates situated in the hamlets was the responsibility of a Prefectural Commissioner (State

⁹⁹ D. Quaglioni, *La consuetudine come costituzione*, in *Domini collettivi e autonomia*, Padua, 2000, 21.

¹⁰⁰ P. Grossi, *Un altro modo di possedere. L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Milan, 1977.

¹⁰¹ The *usucapione* in Roman Law and in contemporary civil law systems is the acquisition of ownership by long use or enjoyment, by virtue of continuous undisturbed possession. Ownership of *demani civici* land cannot be acquired by usucapion. On the use and possession of land in *usi civici*, see A. Masi, *Il possesso degli usi civici*, in *Gli usi civici. Ieri e oggi*, Padua, 2007, p. 21; Id., *Usi civici e circolazione del possesso*, in *Archivio Scialoja-Bolla*, 2007, 27 ss.

¹⁰² Online at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:regio.decreto:1928-02-26;332!vig=>.

¹⁰³ These are, respectively, the above-mentioned *Regulations for the Execution of the Act of 1927*, and the Act on the “costituzione dei comitati per l'amministrazione separata dei beni civici frazionali”, online at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1957-04-17;278>.



administration) rather than a Delegate of the Mayor (municipal administration)¹⁰⁴. Moreover, there is a well-rooted case law according to which each *civis* has active legitimacy for the defense of common rights¹⁰⁵.

Thus, it is possible to conclude that the common *usi civici* and *demani collettivi* lands are the property of the people, while the municipality - even when it is the owner according to the land registry - is only the administrator, with no real ownership and unable to dispose of the property.

At judicial formant level, the *Corte di Cassazione* in its plenary composition has defined the Venetian Fishing Valleys as "common and public" insofar as they are functional for the realization of the fundamental rights of the communities of reference¹⁰⁶

4. Current Sicilian insularity and specificity

Before examining the legislation of the Sicilian Region currently in force with regard to *usi civici* imputed to municipalities, the "heirs" of the ancient *universitates*, it seems appropriate to recall the profound socio-economic changes that have occurred in Italy since the end of World War II and that have affected the "vision" of the problem and the state property issue. Indeed, one cannot fail to consider that industrial development and rapid urban expansion, especially since the mid-1950s, have transformed swaths of land by changing their intended use in terms of building and tourism.

On the other hand, marginal areas have tended to become depopulated, with agriculture, especially mountain agriculture, losing a significant share of its workers, while new possibilities arise for the use of land that had remained naturalistically and scenically intact¹⁰⁷.

¹⁰⁴ See Art. 26 of the 1927 Act and Art. 64 of the 1928 Royal Decree, both mentioned above.

¹⁰⁵ See, for example, *Commissario usi civici di Bari*, August 11, 1928, in Riv. demani, 1929, 321, which admitted the intervention of the citizens of a municipality acting to obtain the declaration of the existence of *usi civici*, since they had an interest *uti singuli*. In the same sense, *Commissario usi civici di Roma*, February 4, 1930, in Riv. demani, 1930, 261.

¹⁰⁶ See Cass. Civ. SS.UU., No. 381316 of February 2011, <https://www.demaniocivico.it/giurisdizionisuperioriocassazione/22-cass-civ-sez-unite-sent-16-02-2011-n-3813/>. For scholarly writings see F. Cortese, *Dalle valli della pesca ai beni comuni: la Cassazione rilegge lo statuto dei beni pubblici?* in *Giorn. Dir. Amm.*, 2011, 11, 1170 ss.

¹⁰⁷ F. Carletti, *I demani collettivi e i diritti civici oggi in Italia*, in *Quaderni di ricerca del Centro studi e documentazione sui demani collettivi e le proprietà collettive di Trento*, issue no. 10, Trento, 2001, p. 5 ff.



The regionalization of agriculture and land management was inserted, especially with Presidential Decree No. 616 of July 24, 1977, in a changed socio-economic situation, which seemed to make the uses assigned by the 1927 legislature to civic lands no longer relevant. Some regions have legislated on the subject of *usi civici*, especially with regard to the institute of the legitimation of usurpations¹⁰⁸, interweaving state and town planning regulations. This trend has been followed by the Region of Sicily, which has exclusive competence to legislate on *usi civici* under the Regional Statute¹⁰⁹; other regions have also legislated on the management of civic lands, identifying new ways of carrying out productive activities more in keeping with the times.

Since the 1980s, the trend of environmental protection has led to the re-discovery of the importance of collective lands, their indivisibility, inalienability and non-susceptibility to usucapion, and their intended use as perpetual agricultural, wood or grazing land. Since that time, the legislature, at national level, has elevated them to "environmental assets"¹¹⁰ and has again taken them into consideration in order to enhance their potential, not only in terms of production, but also "in terms of environmental protection", delegating the regions "to the reorganization of mountain organizations, including those united in communes, however denominated", that is, to the reorganization of mountain family communes, *Regole*, *Consorzio* and associations of the provinces of the former Papal State¹¹¹.

The Region of Sicily has legislated on the subject of *usi civici* with a series of acts and decrees: Regional Legislative Decree No. 6 of October 29, 1955¹¹², by which the inventory of all state and patrimonial property was arranged at each municipality, providing for a separate census for *usi civici* properties pertaining to the hamlets; Regional Act No. 46

¹⁰⁸ P. Federico, *Codice degli usi civici e delle proprietà collettive*, Rome, 1995; PETRONIO, voce *Usi civici*, cit., p. 938; M.A. Lorizio, voce *Usi civici*, in *Enc. giur.* Treccani, vol. XXXII, Rome, 1994, par. 3.3.2.1.; Germanò, voce *Usi civici*, cit., 552. The application under Art. 9 of the Law of 1927 to obtain the *legitimation* produces the transformation of the state property into *allodium*, meaning that the lands become private but are burdened by a fee of an emphyteutic nature (Art. 10). Such legitimation procedure is a regional competence. Three factual prerequisites are requested for legitimacy: possession for more than ten years, non-interruption of the continuity of state land and the contribution of substantial and permanent improvements.

¹⁰⁹ See Article 14(c) of the Sicilian Statute, online at https://www.regione.sicilia.it/sites/default/files/2020-10/Statuto_0.pdf.

¹¹⁰ Act No. 431 of August 8, 1985, (known as Legge Galasso, from the name of the drafter) and Legislative Decree No. 490 of October 29, 1999, Art. 146(h), lists "areas encumbered by *usi civici*" among the properties protected by law. The first is online at <https://www.gazzettaufficiale.it/eli/id/1985/08/22/085U0431/sg>. The second is online at <https://www.gazzettaufficiale.it/eli/id/1999/12/27/099G0542/sg>.

¹¹¹ Act No. 97 of January 31, 1994, containing provisions for mountain areas, online at <https://www.gazzettaufficiale.it/eli/id/1994/02/09/094G0108/sg>. See Costato (ed.), *Commentario alla nuova legge sulla montagna*, in *Riv. dir. agr.*, 1994, I, p. 554.

¹¹² Online at https://www.ars.sicilia.it/sites/default/files/downloads/2020-07/Norme_di_%20attuazione_dello_Statuto_7_2020.pdf.



of September 13, 1956¹¹³ containing the application of the agrarian reform to the lands of public entities, by which such lands, insofar as they were used or usable for agricultural cultivation, were assigned in perpetual emphyteusis to the agricultural workers who were in effect cultivating them, even if encumbered by *usi civici*; Act no. 1 of January 2, 1979¹¹⁴, by which the supervision of the administration of properties in *usi civici* regime was assigned to the municipalities; Regional Act No. 37 of August 10, 1985¹¹⁵, containing new rules on the control of urban building activities, urban reorganization and the amnesty of illegal buildings.

According to the information provided to us by the officials of the *Commissario Regionale per gli Usi Civici della Sicilia* during an interview in winter 2023, a crucial rule is contained in Regional Act No. 10 of April 27, 1999¹¹⁶, as amended by Regional Act No. 28 of December 23, 2000¹¹⁷, Article 26 of which provides for the possibility of the legitimation of "common lands of *usi civici*" if they "fall in areas that, before December 31, 1997, as a result of urban planning instruments or construction, were no longer designated as agricultural, forest or pasture land". However, "in the event that, as a result of urban planning instruments, state-owned lands have, as of December 31, 1997, been designated as artisanal or industrial areas, [they] cannot be the subject of legitimation and become part of the municipal heritage even if they have been the subject of use by private individuals as a result of acts of availability."¹¹⁸.

Therefore, the Sicilian Region assumes that *usi civici* assets are assets of the municipality, albeit non-patrimonial - if it is true that the allocation of civic land to artisanal or industrial areas by urban planning instruments makes them municipal disposable assets - but assets on which urban planning has a strong impact, capable of causing their *sdemanzializzazione* (the loss of their common-collective-public nature), without it being transparent, for example, through public participation of the user community.

¹¹³ Online at https://www.edizionieuropee.it/LAW/HTML/140/si3_04_042.html.

¹¹⁴ Online at <https://www2.regione.sicilia.it/beniculturali/dirbenicult/normativa/leggiregionali/LR2gennaio1979n1.htm>.

¹¹⁵ Online at https://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_AssInfrastruttureMobilita/PIR_Diptecnico/PIR_GenioCivileCatania/PIR_NormativaRegionale/LEGGE%2037-85.pdf.

¹¹⁶ Online at <https://www.gazzettaufficiale.it/atto/regioni/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2000-01-22&atto.codiceRedazionale=099R0633>.

¹¹⁷ Online at https://www.edizionieuropee.it/law/html/140/si3_02_124.html.

¹¹⁸ Thus Article 5 of Act No. 28/2000, amending Act No. 10/1999, online at <https://www.gazzettaufficiale.it/eli/id/2000/02/22/000G0066/sg>



It would seem, then, to be a matter of property considered as individual and not collective, although somewhat subject to those constraints that first custom, then the *prammatiche* of the Kingdom of Sicily and finally the aforesaid national law of 1927 recognized in favor of users. These are, however, constraints that yield in the face of the urban planning instruments of the municipalities, that is, of those public entities that arrogate to themselves the ownership *quoad proprietatem* and not *quoad iurisdictionem* according to custom.

Nor can Article 117 of the Constitution¹¹⁹ be invoked to justify the exercise of regional competence over agriculture with respect to the issue of the individual or collective nature of the ownership of civic demesnes "against" the recognition of pre-unification and post-unification tradition and legislation for their collective nature.

Indeed, the subject matter here, in our opinion, is the right to property, i.e., an aspect of a civil law that is still referred to state legislation in deference to constitutional principles, referred to in Article 3 - the principle of equality among all Italian citizens, whatever the Region in which they live - Article 42 - the social function of property - and the new Article 41, which recognizes the constitutional value and protection of the environment as a legal asset, to which private initiative must be functional and by reason of which the latter can be limited.

Thus, if the state is still entrusted with the protection of the environment and the ecosystem, and if it is true - as it is - that, because of its intrinsic and most essential characteristics, collective property is considered capable of preserving the environment and the ecosystem¹²⁰, in our opinion the regions, in their concurrent or even exclusive legislation - devoted to enhancing the value of environmental assets - cannot go so far as to change the proprietary imputation of *usi civici* and *demani collettivi*¹²¹.

It is not, however, a matter of pitting collective property against individual property as the opposite of it, but of grasping its otherness because of its own connotations. In this sense, the limit of the property's unavailability, established by the 1927 law and reconfirmed by the 2017 law, does not represent a mortification of the absoluteness of the right, but the essential connotation of the property. Once again, it is the nature of the asset that dictates the regime of its use and circulation; an asset that is relevant for

¹¹⁹ Article 117 of the Constitution defines the division of powers between the state and the regions in various matters, including agriculture, forests, landscape and environment. Online at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

¹²⁰ See Constitutional Court, No. 46 of February 20, 1995, online at <https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1995&numero=46>.

¹²¹ See F. Cortese, 'Sulla definizione di uno statuto costituzionale per le proprietà collettive' in *Archivio Scialoja-Bolla*, 2004, 1, 17; E. R. Basile, *Proprietà collettiva e formazioni sociali*, cit., 364-367; Flick G.M., *La vita del bosco e il diritto*, in *Riv.dir.civ.*, 2011, 248 ss



its agricultural, wood or grazing use, not already limited to its immediate users, but rather in an expanded perspective over time that binds past and future generations in a temporal solidarity and that makes the present generation a usufructuary. This right over civic lands has little in common with aspects of individual ownership. It is colored by a sociality that is guaranteed by its permanence over time to the point of acquiring, in that sense, public value.

It is difficult, in our opinion, to think that any Italian region - with all due respect for differentiated autonomy - can legislate on the "substance" of the institution of collective property, while it would be more realistic and achievable for a region to have the competence to envisage management models to keep track of it through modern economic exploitation.

5. Sicilian future ways forward

The national 2017 Act recognizes the *Regole*, *Consorterie*, associations, cooperative organizations, foundations and other intermediate bodies/bodies representing the collective interests and rights of the dominium holders on rural commons (*demani collettivi*) as "primary legal entities".

The debate over legal nature and ownership fades given the recognition of primary legal entities. Populations have original rights over the territories; the legal form can be new if it is functional to the original right. In Sicily, however, the historical reasons that have been analyzed and, only in part, the special autonomy from the State provided by the Regional Statute (constitution), have led to the substantial extinction of the collective property model.

Moreover, from the interviews conducted at the *Commissariato per gli Usi Civici della Regione Sicilia* and from the analysis of a series of recent rulings by the Court of Appeal of Palermo, the *Tribunale Amministrativo Regionale* and the *Consiglio di Giustizia Amministrativa*¹²², the presence of intermediate bodies performing the same function as the *Regole*, *Consorterie*, Communities, Foundations or other organizations in collective form typical of the rest of Italy, seems irrelevant in Sicily. In other words,

¹²² The Courts mentioned here represent the different levels of jurisdiction which are competent on the subject matter of *usi civici* and *demani collettivi* in Sicily. For a deeper analysis on the special jurisdiction, see F. Marinelli, *Apologia degli usi civici e del loro Giudice*, in *Rass. Dir. Civ.*, 2016, 3, 872 ss.; F. Marinelli, C. Federico, *Il processo d'appello in materia di usi civici dopo la riforma*, in *Archivio Scialoja-Bolla*, 2014, 1, 293.



these bodies are either not present in Sicily or it seems not to have had access to the judicial circuit for the protection of collective interests and rights¹²³.

This *absentia* of collective bodies or groups as plaintiffs, not in the form of a class action against the public administration-municipality, before the Courts in Sicily might demonstrate their non-relevance. In other words, from their absence in court as parties and the absence of judgments published in *Pluris, Juris data* and other relevant databases, one can infer the qualitative and quantitative non-relevance of collective entities, foundations and associations in the Sicilian territory.

An exception can be found in the case of the Municipality of Mistretta, where the “Comitato 24 maggio per gli Usi Civici Amastratini” sought to establish itself as a representative entity for the community to protect rights of *usi civici*¹²⁴. The Committee requested the precautionary seizure of certain parcels of *usi civici* land identified in an old official report, claiming that the municipality had violated the community's rights by issuing public tenders for the rental of rural land without prioritizing residents. They argued that these tenders opened up the land to external parties, potentially harming the interests of the local community. Although the complaint was dismissed, primarily because the Committee had not yet been formally constituted as a collective body, as required by Act No. 168/2017 in the form of a “dominio collettivo”, with Articles of Association or in other forms, the relevant point is that the Commissariato per gli Usi Civici della Regione Sicilia acknowledged the abstract legitimacy of the formation of the Committee within the legal framework governing collective domains, referencing the provisions of Law 168/2017. This demonstrates that even in Sicily, despite the historical and procedural challenges that have largely hindered the formation of such entities, the legal framework provided by the 2017 Act opens the door to the potential establishment of collective bodies for the management of rural commons.

It also remains to be seen whether customary governance practices, which might not emerge through formal legal channels, could be identified through ethnographic research. Such practices may operate informally, escaping formal legal recognition but still playing a role in local land management and communal resource use. This

¹²³ Eventual collective bodies do not intervene in the jurisdictional context in order to protect the common use of the land not even after the 2017 reform, see for all, Consiglio di Giustizia Amministrativa per la Regione Siciliana, SS. UU., No. 191 of 22 April 2022, online at https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza?nodeRef=&schema=cgacons&nrg=202100087&nomeFile=202200191_27.html&subDir=Provvedimenti; TAR Sicilia, Palermo, No. 1598 of May 24, 2021, online at https://www.osservatorioagromafie.it/wp-content/uploads/sites/40/2021/05/tar-palermo-1598-2021.pdf?_waf=1, where the Regional administration, which is the institutional defendant, stood alone against the plaintiffs.

¹²⁴ Decisione commissariale No. 42498, 19/01/2021, not published.



suggests that further investigation, particularly through ethnographic methods, could provide a more nuanced understanding of governance in the Sicilian context¹²⁵.

In actual fact, Act No. 168/2017 does not provide for a specific procedure to constitute a new collective body entitled of common rights. It is more focused on the recognition of those entities which already exist on the territory. This is an open problem, because the Act assumes the existence and recognition of those who were already exercising the common rights under previous Regole, Consorterie and well-established rules and statutes. It does not exclude the constitution of newer ones, but only if the inhabitants are able to provide evidence of the immemorable use and customary nature of their rights¹²⁶.

This is why the Region of Valle d'Aosta approved a Regional Act¹²⁷, in application of the national act, providing also for a specific procedure for the constitution, or better recognition, of new (but also ancient) collective rights.

However, given the imprescriptibility, non-susceptibility to usucapion and originality (in the sense of ancestral and ancient origin) of the rights in question, they could be formed *ex novo*, in accordance with the 2017 Act, to manage and administer portions of territory in the forms of associations, foundations, cooperatives or other¹²⁸. The idea is that the territory as a whole is a common and that we can consider a juridic use of nature for democratic and public functions, an ecological use of the law that is able to generate common utilities and environmental protection¹²⁹.

Particularly for forested areas, this could be a chance to protect them and preserve them from fires, involving municipalities and hamlets in concrete actions and policies. In the north of Italy, volunteer fire departments have been organized in the Alps, where the volunteer firemen are the inhabitants themselves, who have a direct interest in

¹²⁵Ethnographic surveys are indeed planned as part of the project, allowing for a deeper exploration of these customary forms of governance and their ongoing relevance.

¹²⁶In the near future the research team is going to investigate whether the group of plaintiffs from Mistretta has constituted a collective body under Art. 3 of Act No. 168/2017 and whether they were in time to appeal against the decision of the Commissariato.

¹²⁷See the Valle d'Aosta Regional Act "Norme in materia di consorterie e di altre forme di dominio collettivo. Abrogazione della [legge regionale 5 aprile 1973, n. 14](#)." No. 19/2022 online at https://www.consiglio.vda.it/app/leggieregolamenti/dettaglio?tipo=L&numero_legge=19%2F22&versione=V%20).

¹²⁸This approach was also followed in Northern Italy. For an examination of the role of statutes in shaping these models of collective governance, Caliceti, E., Iob, M., Nervi, B. 2019. *Beni e domini collettivi: La nuova disciplina degli usi civici*. Milan: Key Editore.

¹²⁹N. Irti, *L'uso giuridico della natura*, Rome-Bari, 2012; A. Lucarelli, *La democrazia dei beni comuni*, Rome-Bari, 2013; F. Macario, *Aspetti giuridici e forme di tutela della proprietà collettiva tra categorie del passato ed esigenze attuali*, in *Archivio Scialoja-Bolla*, 2012, 15 ss.; P. Maddalena, *Il territorio bene comune degli italiani. Proprietà collettiva, proprietà privata e interesse pubblico*, Rome 2014.



protecting the neighborhood and the forest, from which they extract wood and fruits and which they use as grazing areas¹³⁰.

Regarding the former *Regie trazzere*, which are countryside paths originally - and still sometimes –

used for the transhumance of livestock¹³¹, the *Parco Tratturi* (Sheep-track Park) project in Puglia could be a paradigmatic model.

The Puglia Region - State Property and Heritage Section, in collaboration with the Polytechnic University of Bari (Dicatech Department) and the University of Foggia, has promoted a project that aims to enhance regional state property, such as the sheep tracks, a cultural heritage of the Puglian community. With this in mind, the Puglia Region has developed the Regional Valorization Document¹³², a tool that on the one hand pursues the goal of protecting, recovering and preserving the naturalistic, historical and cultural values of the regional sheep tracks and promoting their use, and, on the other, aims to promote and develop tourism, sports and recreational economic activities, compatible with the aforementioned values, contributing to the improvement of the quality of life of the local communities of the *Parco Tratturi*. An appropriate valorization strategy can be an important opportunity not only for the sheep tracks, but also for the territories they cross¹³³.

Puglia Regional Act No. 4/2013¹³⁴ codifies a complex planning process for the “sheep track network”, divided into three phases, each substantiated by a specific elaboration. The first phase pertains to the formation of the “Framework of Layout”¹³⁵, which aims to classify the areas crossed by sheep tracks according to the three uses identified by the law; the second phase saw the drafting of the Regional Valorization Document, which sets the rules within which the Local Enhancement Plans of municipal competence must be prepared, as acts of “detail” of the planning process (third phase).

¹³⁰ However, it is important to consider the difference in Sicily, where forests are managed directly by the regional government, limiting the role of local communities. Unlike in the North, where collective entities manage and reinvest profits from forest resources, fostering a sense of common interest, Sicilian communities do not benefit directly from forest management.

¹³¹ Germanò, *I tratturi del tavoliere*, in *Riv. dir. Agr.*, 2001, II, 246.

¹³² The DVR was adopted on March 4, 2024; to view all relevant documents, please refer to <https://www.regione.puglia.it/web/istituzione-e-partecipazione/-/documento-regionale-valorizzazione-adozione>.

¹³³ See <https://itratturidellapuglia.wordpress.com/category/progetto-di-ricerca/>.

¹³⁴ The Act is a consolidation called “Testo unico delle disposizioni legislative in materia di demanio armentizio e beni della soppressa Opera nazionale combattenti”, on line at https://trasparenza.regione.puglia.it/sites/default/files/norma/L.R.%20%20n.%204_2013.pdf.

¹³⁵ In application of Art. 6 of the above-mentioned Act, the Framework of Layout was approved by the Puglia Regional Council with DGR No. 819 of 2019.



The working group¹³⁶ in charge of drafting the Regional Valorization Document established guidelines for the valorization of the sheep tracks, considering the variety of territorial contexts they cross in Puglia's landscape and the specificities that derive from the natural, ecological, historical, archaeological and cultural characteristics of each of them. The core idea resides in a vision projected towards the redevelopment of the *demanio armentizio* (the one used for grazing), in a multifunctional key, in its ecological and cultural dimension and in the definition of the city-countryside relations and the soft mobility project.

The same dynamic vision is also reflected in the methodology used to define the guidelines and project actions that are included in the Regional Valorization Document which provides, in parallel with the analysis of the entire regional sheep track network, in-depth studies on some study areas representing different geographical areas of Puglia, located in very different contexts of the regional territory, which highlight how the sheep tracks cross heterogeneous landscapes and, for this reason, require differentiated forms of protection, enhancement and redevelopment.

The drafting phases of the Document were accompanied by meetings and participatory activities that gave rise to a dialogue between the working group in charge of drafting the it, the institutional bodies involved, active associations and citizens interested in the process and the stakeholders of the sheep tracks falling within the identified areas of investigation.

Looking at the Sicilian context and trying to imitate the model, it must be kept in mind that only a few areas of *demani collettivi* for agricultural or breeding and grazing use have survived the accidents of history described in the first part of this work and, in any case, of no significant size, while the so-called "*regie trazzere*" or "*ex regie trazzere*" used for the transhumance of livestock in rural areas from the sea to the mountains and vice versa still exist.

With regard to the *demani collettivi* for agricultural or breeding and grazing use, the municipalities on whose territory they exist grant them in use to individual operators for relatively short periods of time and with more or less objective criteria of rotation. These are agricultural and breeding enterprises, in the form of individuals, cooperatives or associations, that exercise rights through the paradigm of private ownership and *ad escludendum*¹³⁷, which has been considered more rational and

¹³⁶ Composed by the State Property and Patrimony Section - Servizio Amministrazione Beni del Demanio Armentizio, ONC and Riforma Fondiaria of the Region of Puglia, the DICATECh Department of the Polytechnic University of Bari and the University of Foggia.

¹³⁷ S. Rodotà, *Il terribile diritto*, 2° ed., Bologna, 1990; Id. *Beni comuni una strategia contro lo Humane divide*, postfazione a M.R. Marella, *Oltre il pubblico e il privato*, Verona, 2012.



functional for access to regional contributions of various kinds in support of agriculture, CAP, ERDF, social cohesion, etc.¹³⁸

At national level, Act No. 440/1978¹³⁹ provided for the right of young farmers, organized into cooperatives, to apply to the relevant local authorities to cultivate parcels of land identified as unoccupied. This model was most recently taken up with the intervention on the Land Bank¹⁴⁰.

More generally, a renewed role of the communities was also created around these goods, which is particularly relevant in an era of crisis for the so-called intermediate bodies (political parties, social and religious institutions, etc.). It becomes necessary, however, to identify shared decision-making systems, inspired by representation but also by forms of deliberative and participatory democracy¹⁴¹, as well as forms of control by the public administration, which must create the conditions for effective cooperation within communities and, at the same time, intervene to safeguard the asset and its use when the community does not work.

In addition to the principle of the social function of property, the principle of so-called horizontal subsidiarity¹⁴², referred to in Article 118(4) of the Constitution, states that “The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity”¹⁴³. The choice of the verb “promote” implies an “obligation of positive

¹³⁸ G. Capograssi, *Agricoltura, diritto, proprietà*, in *Riv. dir. agr.*, 1952. For a different perspective, F. Merusi, *I domini collettivi tra l'interesse della collettività territoriale locale e il pubblico interesse*, in *I domini collettivi nella pianificazione strategica dello sviluppo delle aree rurali*, Padua, 2002.

¹³⁹ In particular, Art. 5, online at <https://www.gazzettaufficiale.it/atto/regioni/caricaArticolo?art.progressivo=0&art.idArticolo=5&art.versions=1&art.codiceRedazionale=13R00126&art.dataPubblicazioneGazzetta=2013-04-13&art.idGruppo=1&art.idSottoArticolo=1>

¹⁴⁰ For Sicily, See Article 21(1) of Regional Act No. 5 of January 28, 2014. For further discussion, see https://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_AssessoratoRegionaleDelleRisorseAgricoleeAlimentari/PIR_DipAgricoltura/PIR_AreeTematiche/PIR_Altricontenuti/PIR_BancadellaTerradiSicilia.

¹⁴¹ U. Mattei, A. Quarta., cited, *Turning Point*, 86. F. Marinelli, *Miti e riti della proprietà*, L'Aquila, 2011; Id., *Usi civici e beni comuni*, in *Rass. Dir. Civ.*, 2013, 2, pp. 406 ss.; Id., “*In direzione ostinata e contraria*”. *La proprietà collettiva e il diritto civile*, in *Archivio Scialoja-Bolla*, 2016, 1, 23 ss.

¹⁴² There is a vast amount of literature on the principle of horizontal subsidiarity. For all, see T.E. Frosini, *Profili costituzionali della sussidiarietà orizzontale*, in *Riv. giur. Mezzogiorno*, 2000, 15 ff.; G.U. Rescigno, *Principio di sussidiarietà orizzontale e diritti sociali*, in *Dir. Pubbl.*, 2002, 23 ff; P. Ridola, *Forma di Stato e principio di sussidiarietà*, in Associazione italiana Costituzionalisti (ed.), *La riforma costituzionale* (atti del convegno 6-7 novembre 1998), Cedam, Padua, 1999, pp. 177 ff; A. Rinella, L. Coen-R. Scarciglia (eds.), *Sussidiarietà e ordinamenti costituzionali. Esperienze a confronto*, Cedam, Padua, 1999.

¹⁴³ An official translation of the Italian Constitution is online at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.



action" for the state, which must create suitable conditions for citizens to assume the exercise of activities of general interest¹⁴⁴.

Mattei and Quarta note that within the Western legal tradition, by contrast, jurists have hardly ever formulated theories designed to build "generative structures of property, based on the regulation of exclusionary power and the creation of rights" aimed at resource sharing. However, as shown by the many cases in recent years, the life of law generated from below runs faster than the theories of legal doctrine, and access has become practice¹⁴⁵. The work of jurists, therefore, is to identify the principles and institutions that can be used in a counter-hegemonic way, capable of justifying and dogmatically framing these phenomena, of ensuring their discipline and giving them citizenship in the world of law and legality, rather than marginalizing them and making them illegal¹⁴⁶.

In this regard, it has been noted¹⁴⁷ that the principle of horizontal subsidiarity can be implemented, in practice, through the involvement of private nonprofit entities, which generally act in the form of associations, cooperatives, foundations and the like¹⁴⁸. These subjects of the so-called third sector are institutions which are positioned between the state and the market, but are not referable to either¹⁴⁹. It has been suggested by several parties that the use of nonprofit organizational models for the management of common goods by communities of reference does not mean that such management cannot be economically oriented, with the redistribution of profits in the form of remuneration of workers (according to the social enterprise model, for example)¹⁵⁰. It is also possible to assume forms of diffuse financing (crowdfunding) or third-party funders.

As Sicilian jurists, our proposal is to consider three options. The choice of one over the others is essentially a policy decision.

¹⁴⁴ G. Arena, *Cittadini attivi. Un altro modo di pensare l'Italia*, Laterza, Rome-Bari, 2006..

¹⁴⁵ P. Donati-R. Solci, *I beni relazionali. Che cosa sono e quali effetti producono*, Bollati Boringhieri, Turin, 2011.

¹⁴⁶ Carbonnier J., *Flexible droit – Pour une sociologie du droit sans rigueur*, Xed., Paris, 2001; Zagrebelsky G., *Il diritto mite. Legge, diritti, giustizia*, Turin, 1992.

¹⁴⁷ G. Fidone, *Proprietà pubblica e beni comuni*, ETS, 2017.

¹⁴⁸ G. Fiorentini, *Impresa sociale e sussidiarietà. Dalle fondazioni alle S.p.a., management e casi*, Franco Angeli, 2006; S. Gatti, *Fondazioni ex bancarie: protagoniste di una nuova sussidiarietà*, in *Giustizia civile*, 2004, pag. 511 – 518; I. Colozzi, *L'applicazione del principio di sussidiarietà*, in *Impresa sociale*, 2001, 44 ss.; G. Ricoveri, *Beni comuni fra tradizione e futuro*, Emi Editore, Bologna, 2005.

¹⁴⁹ G. Resta, *Le persone, i soggetti, le formazioni sociali: note a margine del pensiero di Stefano Rodotà*, in *The Cardozo Electronic Law Bulletin*, Spring-Summer 2019.

¹⁵⁰ Regarding social enterprise and the so-called third sector, see A. Bonomi, *Sussidiarietà, sviluppo e corpi intermedi della società*, in www.federalismi.it; C. Borzaga, A. Ianes, *L'economia della solidarietà. Storia e prospettive della cooperazione sociale*, Donzelli, Rome, 2006; C. Borzaga-F. Zandonai, *L'impresa sociale in Italia. Economia e istituzioni dei beni comuni*, Donzelli, Rome, 2009; A. Fici, *Impresa sociale* (voce), in *Digesto delle discipline privatistiche*, sez. civ., aggiornamento, 663-668.



The first option is to maintain the specialty of the model, continuing to neglect collective forms of governing and managing the assets, which has worked through the centuries in the rest of Italy.

The second is to suggest that the Sicilian legislature approves a regional Act to effectively enforce the national Act No. 168/2017 and provide procedures to constitute collective bodies and recognize them as entities with the legitimation, agency and capacity to be owners of common lands in *usi civici* and to administer and govern those assets under specific internal corporate regulations, as happens in the rest of Italy. This option has been chosen by the Valle d'Aosta Region¹⁵¹, which is a Region with a special regime of autonomy from the State similar to Sicily, but with a strong tradition of *Consorterie* and *domini collettivi*.

The third option relies on the premise that the political regional choice is to insist on considering such assets as the property of the municipalities, but with the observation that such assets are, moreover, strongly and undeniably linked to a community of reference which is created around them and which, as a function of shared use, tends to be strengthened through a sense of participation and solidarity.

One could make a paradigm and a model of the experience of some municipalities, which, taking up some suggestions from the academic world, have endowed themselves with a "Regulation on collaboration between citizens and administrations for the care of the commons". This has helped to give a legal form to the activities of care of the commons hitherto carried out spontaneously by active citizens, regulating in detail the roles and responsibilities of citizens and administrations, but also the duration in time of the negotiated legal relationship, having as its object precisely the activities of care, development and regeneration of the commons concerned¹⁵².

This type of agreement (Collaborative Agreement), from a contract law point of view, is peculiar because it goes beyond "classic" axioms and categories of administrative/public law and private law and assigns the management of a public good to private parties (individuals, groups, informal collectives, cooperatives or even squatters) outside the competitive procedures of concession or contract that are typical of national and European administrative law. Thus, a competitive, typically

¹⁵¹ See the Valle d'Aosta Regional Act No. 19/2022 cited above.

¹⁵² On the cooperation of different stakeholders on *usi civici*, see A. Simonati, *La partecipazione nella gestione degli "usi civici": cooperazione fra diversi livelli istituzionali e coinvolgimento delle popolazioni locali*, in *Archivio Scialoja-Bolla*, 2016, 1, 93 ss.; G. Vetrutto, F. Velo, *Una lezione per le politiche pubbliche: il governo delle realtà sociali complesse tra pubblico e privato*, Introduction to Ostrom E., *Governare i beni collettivi*, Venice, 2006, p. XXIX; C.A. Ristuccia, *I domini collettivi nei rapporti con gli enti locali*, in *Domini collettivi e autonomia*, Padua, 2000, 71. For a contrasting perspective, see E. Vitale, *Contro i beni comuni – Una critica illuminista*, Rome-Bari, 2013 and the well-known G. Hardin, *The tragedy of commons*, in *Science*, 1968, 1243 ss.



neo-liberal approach is replaced with a cooperative one, as the parties promote the public interest, to a certain extent overcoming the model of rent accumulation¹⁵³.

The cooperative approach, which is common to the second and third options, realizes a lasting and structured link between the community of active citizens and the tangible and intangible commons that are the object of their intervention. This makes the essential link that it is created between a given community and a given common good evident and codified in the "contract". This link is crucial for the care of the good because, although common goods are both local and global, only the community of the territory in which that good is located can concretely take care of it, to improve its own way of life, but also to allow others (including future generations) to eventually enjoy that good. Therefore, it is the community which, by initiating an activity of shared care of that good, identifies it as "common" (whether public or private), that is, capable of producing the effects identified in the Constitution on people's lives.

Both in the hypothesis of an Act which expressly recognizes the collective entities (as in the new Valle d'Aosta model) and in the Regulation for Collaborative Pacts, there will be room to regulate how different interests will be coordinated around the same resources, outside the logic of competition between parties. All the stakeholders, i.e., the parties (public administrations and private entities) and those who may be involved in the activity in the future, contribute and will contribute, each for his or her part and according to his or her abilities, to the "ecologically desirable" general interest¹⁵⁴.

Making a further effort at the level of synchronic comparison, we would like to recall the legally relevant concept of "access to nature"¹⁵⁵, recognized in both the English¹⁵⁶ and Scandinavian experiences¹⁵⁷ and the experience of the community land trust, common to some European and U.S. cities, which have enabled the rehabilitation of assets in a state of abandonment or decay, through the transfer of property rights over extensive areas to some communities and of exclusive rights over certain parcels to individuals, in order to redevelop them.

The administration of the trust is entrusted to trustees, appointed in various ways, usually by a community assembly. In this way, the community enjoys the property and

¹⁵³ L. Nivarra, cited above, *La funzione sociale delle proprietà: dalla strategia alla tattica*, passim.

¹⁵⁴ U. Mattei, Quarta A., *cit.*, *Punto di svolta*, p. 175; A. Pera, "One House for €1: Case Studies on the Governance of Abandoned Properties in Small Villages" *Global Jurist*, vol. 21, no. 3, 2021, pp. 537-560. <https://doi.org/10.1515/gj-2021-0076>.

¹⁵⁵ F. Valguarnera, *Accesso alla natura tra ideologia e diritto*, Giappichelli, Turin, 2013.

¹⁵⁶ J.L. Anderson, *Britain's right to roam: redefining the landowner's bundle of sticks*, in *Georgetown International Environmental Law Review*, 2007, 375.

¹⁵⁷ Mattei U.-Quarta A., *cit.*, *Punto di svolta*, 76-77.



the individuals have exclusive rights of use, with some limitations with respect to the ability to dispose of it, but coexisting with the common use¹⁵⁸.

By becoming common, a good changes the way it is useful to the community and its function becomes one of general interest, according to the rationale of Article 118 (last paragraph) of the Constitution. The nature of the good changes as its use changes: the community's action of care transforms the abandoned public good into a common good, through an assumption of responsibility towards the public administration, towards the good and towards itself (the community), which lasts over time.

Moreover, the "ritualized form of civic engagement" can also have positive effects in terms of employment and the development of bottom-up welfare models, social inclusion and redistribution in favor of economically weak segments of the population. So, through the contractual form of the "Covenant of Cooperation", it is possible to implement a "generative" contractual model aimed at increasing the social value of common goods¹⁵⁹. We are referring to assets such as rivers, lakes, the air, beaches, natural parks, forests, environmental assets, wild fauna, cultural heritage, etc. which, regardless of their public or private ownership (almost always public, a part of the cultural heritage), have functional utility for the exercise of fundamental rights and the free development of people¹⁶⁰. These can undoubtedly include the goods and rights of enjoyment vested in and exercised individually or collectively by the local resident community, either directly or by availing itself of a municipality, and constituting the community's primary legal order. Such goods and rights have the capacity for self-formation in any administrative sphere and the capacity for management of the natural, economic and cultural heritage belonging to the territorial base of the *demani collettivi* and having the character of intergenerational co-ownership.

The law must guarantee the collective function also for the benefit of future generations. This is even more so when such assets and rights:

1. enable the life and development of local communities;
2. ensure the conservation and enhancement of the national natural heritage;
3. are stable components of the environmental system;
4. are territorial bases of historical institutions of cultural and natural heritage preservation;

¹⁵⁸ A. Vercellone, *Urban commons e modelli di governo. Il community land trust*, in A. Quarta-M. Spanò (eds.), *Beni comuni 2.0. Controegemonia e nuove istituzioni*, Mimesis, Milan, 2016.

¹⁵⁹ A. Pera, N. Patti, *Sustainable private law tools for the regeneration of abandoned properties in Sicily. Cases and models*, in A. Bartolacelli (ed.), *The Prism of Sustainability. Multidisciplinary profiles: law, economics and ethics*, in the Series of the Department of Law, University of Macerata, Editoriale Scientifica, Naples (forthcoming).

¹⁶⁰ U. Mattei- E. Reviglio-S. Rodotà, *Invertire la rotta. Idee per una riforma della proprietà pubblica*, Il Mulino, Bologna, 2007.



5. are eco-landscape structures of the national agricultural/wood/grazing landscape;
6. are a source of renewable resources that benefit the original communities.

This appears to fit perfectly in the groove, which L. 168/2017 itself is inspired by, and the constitutional values set forth in Articles 2, 9, 42(2) and 43 of the Constitution.

Specifically, that Article 9, after the 2022 reform, obliges the Republic to promote the development of culture, scientific and technical research; the protection of the nation's landscape and historical and artistic heritage; the protection of the environment, biodiversity and ecosystems, including in the interest of future generations; and points to the law of the State as the main instrument to regulate the ways and forms of animal protection.