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French Yearbook *of* Public Law

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Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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Subjective Rights in Relation to Climate Change

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Abstract:

This article tries to explore the compatibility of subjective rights with the social necessities imposed by the fight against climate change. Providing in-depth historical insights, the author retraces the evolutions of the concept of subjective rights and its adaptations to face different challenges where subjective rights have to be adapted to preserve the most vital interests of society. While considering a wide range of legal systems, this article especially focuses on the Italian case.

The author argues that different examples have shown that subjective rights are in fact compatible with the pursuit of social needs if they are adapted and sometimes tempered, and that such transformation is the key to a future-proof understanding of subjective rights. The Italian concept of legitimate interests could be especially useful to fuel a such transformation of subjective rights in the context of the fight against climate change.

Keywords:

Subjective rights, Climate change, Public interest, Emergency powers

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I. Introduction

One of the questions we, as jurists, must ask ourselves when reflecting on the topicality of the traditional notions and principles of administrative law is the following: are the notions of subjective right and legitimate interest, this last one typical in the Italian tradition, able to face the challenges deriving from the natural phenomena related to climate change? The scientific community, unanimously, considers the progressive increase in temperature as a phenomenon which can put at risk the very survival of humanity. Science also agrees that this increase has mainly been caused by human actions which pay little attention to scarcity of resources and the negative externalities of most economic activities. The constant emission into the atmosphere of greenhouse gases, owing to many causes (deforestation, indiscriminate increase in agricultural and livestock activities, the use of fossil fuels, just to name the best known) is producing an increase in temperature which may become irreversible within a few years, with disastrous consequences on human and non-human habitats. Some of these effects are already evident today: melting ice caps, rising sea levels and extreme climatic phenomena, are producing enormous damage to populations all over the globe; there are no places spared from such phenomena. This is the scenario that modern societies must, quickly, face. All the decisions which must be taken to deal with these phenomena require adequate legal equipment. Since the traditional concepts of law may not be adequate, it is essential to verify their ability to adapt and respond to current needs.

Amongst the traditional legal concepts, subjective rights play a central role: whether they are articulated as patrimonial (property, economic freedoms) or personal (right to health, freedom of movement, etc.) people's rights risk suffering a compression because of measures to respond and adapt to climate change. Changes in the relations between people, and between them and nature, as they have accrued over the centuries, have always entailed adaptation of organizations, institutions and laws.

This chapter aims at expounding the capacity of subjective rights as a legal institution to adapt to the social challenges, especially those regarding issues of policymaking, posed by climate change. This is an especially pressing issue since subjective rights, with their individualistic character and an aura of inviolability often grounded in constitutional and international charters, may appear at first sight inadequate to confront the issue: where policy responses to climate change require swiftness and flexibility, subjective rights may be thought as bound to respond with the deontological rigidity of constitutional law; where they demand community based solutions, with individualism; where they appeal to intergenerational concerns, with presentism. In response to this potential concern, the chapter will explore two cases – that of land-use planning and that of emergency law – in which the compression of subjective rights as a result of the public pursuit of some social good is deemed to be acceptable and not at all incompatible with the preservation of a strong legal role for subjective rights. This is because, it will be argued, the very motivation of law has always existed in a twofold dimension: the individual one the one hand, and the social on the other, and it has always sought to strike a fragile yet necessary balance between the two. The pendulum of history has oscillated between moments in which the individual dimension prevailed and moments in which the social one did. The question of where the balance between the two currently lies is thus fundamental to defining the adequacy of subjective rights as a legal tool to fight the today's challenges. One of the most prominent legal instruments to know the position of the pendulum in each historical phase is the observation of constitutions. Since the eighteenth

century, constitutions have shaped the structure of societies by means of principles and norms aimed at regulating the relations between people and between these and objects (or 'goods' according to legal-economic terminology). But constitutions alone are not enough to understand social dynamics. Rather, it is also necessary to analyze and study the administrative institutions of society, that is, those which enable the actual protection and guarantee of rights.

The action of public administrations is one of the factors which have contributed to making economic development strong and stable over time, and technological progress too has occurred partly thanks to the rules which have guided and facilitated its course: the protection of property; the protection of inventions; the notions of a legal person that has enabled the development of companies in all their manifestations; market rules are all legal instruments that have accompanied and strengthened the development of economic activities.[1] In other and related ways, law has spurred the development of societies by protecting and guaranteeing the rights of freedom and civilization especially since the XIX Century: civil rights and political participation, ethical-social rights, economic rights, the protection of health, physical integrity, protection, and conservation of cultural heritage up to the right to a healthy environment.

Today there is a need for a new balance between law and the economy whereby the former does not play a servant role or acts as mere infrastructure but, as it has been from the beginning, a fundamental structure of complex contemporary societies. Before delving into the main sections, it is worth noting that while this chapter will engage mostly with material from the Italian legal tradition, it will not shy away from comparative analysis and it will attempt to present its findings in such a way as to emphasize their relevance to the international debate. It will thus try to speak to the generalist international audience as well as to those interested in the developments of the Italian legal system.

II. The Genealogy of Subjective Rights and its Developments in Philosophical and Legal Thought

Throughout history, subjective rights have played a fundamental role in pushing the pendulum one way or another. Typically, they have been understood as paying a twofold role. On the one hand, they have contributed to define and limit the scope of the exercise of powers and freedoms which each person is endowed with and which they can claim both vis-à-vis other private persons and public persons. On the other hand, they represented the limit to the exercise of the powers vested in the public authorities. To explore the genesis and the durability of the notion over time, given its deep roots in philosophical and juridical thought, this section will follow its evolution and its ability to adapt to the changes of human societies.

The notion of subjective right, before it came to be considered a legally relevant concept which helped to define the position of people in their relations to one another and with public authorities, has been the subject of study by philosophers and jurists as one of the possible configurations of the relationships between individual freedom and power. In fact, in the European culture, the problem of the relationship between the exercise of individual freedoms and the growing need for rules regulating personal relations

1 Sandulli, A., *Il ruolo del diritto in Europa: l'integrazione europea dalla prospettiva del diritto amministrativo*, 2018, Franco Angeli, p. 92 ff.

and relations with the public authorities of the time had arisen already during the first millennium; the strong influence of Christianity, within which the norms had to be observed as 'god's law', together with the enduring use of Roman law, laid the foundations for the construction of modern law, with a distinction already being envisaged between the subjective sphere of law and the objective one. In the long medieval period 'the conception of subjective rights – public or private – was based on a particularistic idea of freedom, for which they were configured as special faculties of group or class' guaranteed by particular statutes.[2]

In the fourteenth-century, respect for the norm was no longer linked to divine law, rather, a humanistic conception of law as a free creation of human power came of age. The idea of the subjectivity of law is present in Ockham's theory, for whom the subjective will meets a limit only in the natural law, that is, in morality. The problem of reconciling the subjectivist conception of freedom and the free expression of the will, the moral quality of every person, with the authority and will of the institutions, is beginning to arise. With Hobbes, individual agency is lost by virtue of the social contract. Subjective rights come to mean the freedom to use force to achieve one's goals. In order to prevent the unconstrained pursuit of such goals from giving rise to a continuous state of conflict, advised by reason, persons enter the civil state which, endowed with the supreme strength, forces them to renounce, or else temper, the freedoms instantiated by subjective rights.

We move, therefore, from the state of nature to the civil status that for Locke had taken over when, not being there enough land for everyone, everyone was tempted to take possession of the property of others by force. It was therefore necessary to create an organization of power, that is, the state, capable of preventing mutual oppression and of protecting the property, freedom and equality of individuals while at the same time limiting the freedoms of individuals. The state thus becomes the keystone of the so-called public subjective rights in liberal states and the question of the relationship between objective law (the rule set by the state) and subjective right (the freedom to satisfy one's own interests) opens.

In the natural law approach, rights are innate and pre-exist objective law; subjective right becomes an essential component of theoretical individualistic conception of natural law.[3] In 1776, the Virginia Declaration of Rights[4] defined both the powers of the political community and personal freedoms which were therein codified as rights.

For over a century-and-a-half after the French Revolution, the Roman Catholic Church repudiated the revolutionary assertion of human rights as the fruit of atheistic individualism.[5] Prominent, during the Age of Enlightenment, are the theories of Rousseau, who identifies in the social contract the source of the renunciation of rights and freedoms by the associated individuals that is made 'by all in favor of all'. Law becomes an expression of the general will and collective freedom is an expression of private autonomy. Traditional natural law conceptualizes freedom as a fundamental right and as

2 Cavanna, A., *Storia del diritto moderno in Europa*, I, 1982, Giuffrè, p. 221.

3 Supported by the Calvinist component in which 'the Puritan' feels totally responsible only before God and totally free before earthly authorities; So Cesarini Sforza, W., *Diritto soggettivo*, in *Enc.dir.*, XII, 1964, Giuffrè, p. 662.

4 Inspired by the English Bill of Rights and the works of John Locke and in turn inspiring the subsequent United States Declaration of Independence of the same year and the United States Bill of Rights of 1789.

5 Biggar, N., "What's wrong with subjective rights?", *History of European Ideas*, 2019, vol. 45, nº. 3, p. 399.

independence, understood as the power to want without hindrance – so that the state becomes the ultimate guarantor of independence. Both the American Declaration of Rights and the French Declaration of 1789 are inspired by traditional natural law although in the new draft of 1795 the Declaration of the Rights of Man and of the Citizen together with the rights also includes duties.

Echoes of Kant's thought are also found in these Declarations, according to whom in every legislation there are two elements, the law (objectively necessary) and the impulse of the subject to determine the will; the set of two conditions 'the arbitrariness of one can be accorded with the arbitrariness of the other according to a universal law of freedom'.[6] Kant considers the contract, the original pact, as the result of a rational model: individuals surrender part of individual freedoms but conquer external, public, social freedoms, guaranteed by the state to which a power of general coercibility is assigned. For Hegel, father of ethical subjectivism, the personification of the state is historically the ultimate consequence of the abstract process by which the actions of men are legalized. The state is constituted as the realization of freedoms, the determination of individual wills is brought through the state to an objective existence and come to realization (Hegelian idealism).

Besides its various conceptions in the philosophical debate, it is to Savigny that we owe the notion of subjective right as the sovereign will of the holder of the right; but it will be necessary to wait until the end of the nineteenth and the beginning of the twentieth century to witness the formation of the most strictly juridical conceptions of subjective right, which comes to be understood as either deriving from an attribution or delegation or concession which the supreme power of the State grants to individuals,[7] or as the interest of the private legally protected by the legal system.[8] The theory of subjective public rights developed by Jellinek (1890) emphasizes that they are an interest protected by the recognition of the power of individual agency on the part of the State which, in this way, gives rise to subjective public rights.[9] Finally, for Kelsen, the law constitutes a single objective reality valid both as a general norm and as an individual norm; 'a subjective right is therefore a juridical norm within its relationship with the individual'. Such a right is inserted in the normative pyramid that starts from the *Grundnorm* and reaches up to the individual norm.[10] The German philosophical and legal doctrine is central to the construction of the notion, of which it deepens the analysis and which can be summarized via a set of dialectical couples: on the one hand, the will of the private, on the other, the power of the state; on the one hand, the right, on the other, the duty (to refrain from violating the right); on the one hand, the list of rights, on the other, the protections provided by the legal system.

6 Frosini, V., *Diritto soggettivo, Novissimo Digesto Italiano* 1968, Utet, p. 1048.

7 Windsheid, B., *Diritto delle Pandette*, 1930, Utet, Italian translation, p. 585.

8 See Jhiering (1921) - for whom the power or lordship of the will is *lent* by the legal system – i.e., the will of the state – to the individual subject, quoted in Monateri, P.G., *Diritto soggettivo*, in *Digesto delle discipline Privatistiche* 1990, IV, Utet, p. 414.

9 A theory that will be taken up in Italy, among others, by Santi Romano (see footnote 14) who will move away from it in favor of a less authoritarian and more pluralist conception of subjective public law, 1897.

10 Cesarini Sforza, W. (1964), op. cit., p. 662.

A different approach is that of Common Law jurists - who prefer the perspective of remedies rather than that of rights; the English tradition is shaped to a great degree by the heritage of the 'forms of action' system which, despite having been abolished in the nineteenth century, still represent one of the reference models: subjective rights are not enshrined in statutory law as much as they are remedies of protection which are proposed to be asserted before the courts.[11] In fact, even in the countries of Common Law a mixed system is adopted today: in the United States, due to the fact that the Constitution includes a list of rights, these are familiar to jurists (and judges); in the United Kingdom, despite the abolition of the forms of actions system, 'in the nineteenth century it was restated in terms of a system of rights and duties'.[12]

III. Rights and Interests in Administrative Law

In France and Italy, subjective right takes different paths. Certainly, the influence of the German doctrine is strong, however both the French and the Italians elaborated their own and original theories that mitigate the scope of the notion of subjective right.[13] In Italy, more than on the rights, the doctrine focuses on the notion of interest which underlies them; above all, scholars of administrative law distinguish between the relation between two or more private subjects (individuals) on the one hand, and that between an individual and their subjective rights (also understood as the lordship of the will) and the public power, on the other. This strand of juridical scholarship is particularly relevant to the scope of this paper in that it explicitly recognizes the possibility that subjective rights and the underlying legitimate interests may come to be compressed as a result of the necessity for the public power to ensure that some public good is attained, and it may thus shed some interesting light on the problem of the adequacy of subjective right in dealing with the problems posed by climate change.

For Santi Romano 'subjective rights are only those interests which are protected by a juridical norm through the recognition of the individual will: only, that is, when for the satisfaction of an interest the individual will has decisive value, it is said that one has a right'.[14] For the author, in the field of administrative activity, the protection of individual interests may derive from the fact that, in order to look after public interests, it is necessary to reconcile the various private interests: that is why the notion of interest is relevant in administrative law. The public interest, assessed more or less at the discretion of the administration, affects the standing of the rights and interests of private individuals which can be attenuated or made to cease definitively or temporarily; these private interests 'have been designated by the name of legitimate: the concept as outlined and regardless of any application, seems exact. [...] We must not conceive of them as antithesis to subjective rights, but as a special category of the latter [...] legitimate interests fall within the class, to use the German expression, of so-called weakened rights.' The notion

11 Di Maio, A., *La tutela civile dei diritti*, 4°ed., 2003, Giuffrè, p. 14 ff.

12 Pound, R., Review Work(s): "A Text Book of Roman Law from Augustus to Justinian by W. W. Buckland", *Harvard Law Review* 1922, vol. 36, n° 1, p. 119.

13 There are those who, like Leon Duguit, who reject the notion as metaphysical, reported in Monateri, P.G. (1989), op. cit., p. 415; Frosini, V. (1968), op. cit., p. 1049, speaks of a radical negation of the notion by Duguit and Kelsen.

14 Romano, S., *Principi di Diritto amministrativo italiano*, 1901, Sel, p. 37.

of legitimate interest dates back to Ranelletti[15] but in addition to the doctrine it was the history of Italian statutory law which eventually characterized subjective rights and legitimate interests.

In fact, the Italian shift from rights to interests must be framed within the broader issue of the protection of legal situations. It has been said that the subjective right carries with it the problem of its protection. This does not pose problems when the relationship is between two subjects holding the same 'lordship of the will' since the protection will be ensured by the ordinary judges; but who, and how, protects the subjective right in the systems of administrative law? V.E. Orlando, by defining the subjective right as 'the faculty that in the individual derives from a given objective norm ensuring the achievement of his personal advantage' enhances the aspect of his protection since the legal protection of the right would be a necessary attribute 'the interest is not a right as it is defended but is defended as it is right.'[16]

Certainly, the birth and development of jurisdictional dualism are the result of ideological categories which today, if not completely overcome – because at the base of the relationship between administration and citizen there always is the use of a public power necessary to pursue a public interest –, are nonetheless understood in radically different terms. It would be impossible to present a complete reconstruction of the theories of legitimate interests, so we will only recall some notions pertinent to the scope of this chapter. De Tocqueville rejected the very idea of juridical and jurisdictional dualism because it was tainted with authoritarianism and far from his preferred guarantor model centered on impartiality, independence and contradiction 'between the State and the citizens there is the image of justice, not justice itself.'[17] The Italian events are well known: the law abolishing administrative litigation, in 1865, led to an outcome opposite to that hypothesized by the legislator. The assumption that citizens' rights can only be protected by the common courts is transformed, in fact, into an absolute power of the administration which, either because of the timidity of ordinary judges, or because of the lack of an administrative judge, forces the citizen to resignation and subjection. The abolition of the administrative court, much discussed and criticized, however, conceals a reasonable idea, which is that of the primacy of the law and its correct application by the administration. In fact, the emphasis on individual law and the creation of a legal situation of mere interest, combined with the institution of the single judge, leave persons in contact with the administration without protection.

No less ideological are the positions of those who, like Spaventa, contributed to the creation of a judicial section within the Council of State. Of Hegelian culture, Spaventa sees the State as a source of production not only of norms but also of values. The State has an ethical value, and for this reason it is not necessary to create a new, third and independent judge, but it is enough to add a judicial section to the Council of State.[18] What is obtained is justice in the administration, consisting of a sort of procedural review on legitimacy (or in limited cases on substance) but not of *judgments* in case of a dispute between administration and citizen. The recognition of the judicial nature of the Fourth

15 Ranelletti, A., "A proposito di una questione di competenza della IV Sez.", in *Foro it.*, 1893, p. 470.

16 Armanni, L., quoted in Orlando, V.E., *Principi di diritto amministrativo,* 1910, Barbera, p. 306.

17 De Tocqueville, A., *Democracy in America,* now in *Scritti politici,* II, 1969, Torino, p. 803.

18 Fioritto, A., *Gli interessi legittimi come fonte dell'ingiustizia amministrativa,* in Catelani, E., Fioritto, A., Massera, A. (eds.), *La riforma del processo amministrativo,* 2012, Es, p. 36.

Chamber by the Court of Cassation in 1893 did not solve the problem of independence and impartiality. The new section is differently interpreted as 'imperfect jurisdiction'[19] or as super-jurisdiction.[20] Even in recent times, for the centenary of its constitution, Alberto Romano considered the Council of State as 'pertinent to the administration as an institution'.[21]

Beyond the problem of the truly jurisdictional nature of the Fourth Chamber, a refined theoretical elaboration of the notion of legitimate interest comes to life beginning from the end of the nineteenth century: the same adjective 'legitimate' is not present in the bill restoring administrative jurisdiction. Practically all legal science in the twentieth century has engaged with the notion, which comes to be understood at once as a formalistic legal situation useful for the purposes of the division of jurisdiction, and a substantive legal situation. The theoretical starting point to pin down the notion of legitimate interests is often found in a comparison with that of rights. Indeed, for Borsi, legitimate interests are reflected rights or weakened rights.[22] For Miele it is a position of advantage which emerges only as a reflection of the rules which regulate the exercise of power; in this way 'the position of advantage is the result of the rules that require the holder of a power to observe certain methods and conditions in the exercise of it.'[23] From a substantialist perspective, Zanobini argues that the legitimate interest is 'a principle of a general order' usable not only in administrative law but also in private law.[24] Starting from this predication, the author concludes that 'the subtraction of rights from judicial action has not had the effect of transforming them into mere interests'. On the contrary, 'if some legitimate interests were attributed to the competence of the judicial authority, they should not be considered as many subjective rights.'[25] From whatever perspective one chooses, legitimate interest seems to remain the point on which the impossibility of the administrative process to be construed as a process of parties is based. Giannini himself argues that the legal position asserted in a judgment is that of a mere right to legitimacy and the judge's investigation is limited to verifying the correspondence between the act and the normative attribution of power.[26] From the same perspective, Capaccioli maintains that the will of the administration is not formed in a legal relation but originates from power.[27] The administration is not part of the legal transaction but exercises a power, albeit within the purview of juridical legitimacy, which entails, as Giannini also points out, the capacity to exercise administrative discretion.[28] In this sense, an administrative court would also be necessary because of its proximity to the administration and its direct knowledge of it.

19 Vacchelli, G., *Difesa giurisdizionale dei diritti dei cittadini verso l'Autorità amministrativo*, in Orlando, V. E., *Primo trattato completo di diritto amministrativo italiano*, III, 1901, Sel, pp. 223 ff.

20 In a declared parallelism with the Nichian superman: Romano, S., *Le giurisdizioni speciali amministrativi*, in Orlando, V. E. (1901), *Primo trattato completo di diritto amministrativo italiano*, op. cit., p. 507.

21 Romano, A., *Le caratteristiche originali della giustizia amministrativa e la sua evoluzione*, in *Cento anni di giurisdizione amministrativa*, 1996, Jovene, pp. 57 ff.

22 Borsi, U., *Giustizia amministrativa*, 1934, Cedam, pp. 120 ff.

23 Miele, G., *Principi di diritto amministrativo*, 1960, Cedam, p. 56.

24 Intuition subsequently developed by scholars of Civil Law such as Bigliazzi Geri (see footnote 31).

25 Zanobini, G., *Interessi legittimi e diritto privato*, in AA.VV., *Studi in memoria di F. Ferrara*, II, 1943, Giuffrè, pp. 707 ff.

26 Giannini, M.S., "Discorso generale sulla giustizia amministrativa", II, in *Riv. Dir. Processuale*, XIX, 1964, p. 18.

27 Capaccioli, E., *Manuale di diritto amministrativo*, 1980, Cedam, p. 267 f.

28 Giannini, M.S., *Il potere discrezionale della pubblica amministrazione. Concetto e problemi*, 1939, Giuffrè, p. 1939.

Fabio Merusi offers a particularly lucid rendition of the problem, free from prejudices and ideologies, where he clarifies that 'legitimate interest is a right different from others only in the object and not in the substance [...] if there is a need for a different judge, it is not because the subjective legal situations are different but because the power of the public administration is materially different from the private power.'[29] Fortunately, this non-ideological approach has become prevalent thanks to European law, so that even before the recent reform of the administrative process (Legislative Decree no. 104/2010) the possibility of compensating the legitimate interest had been recognized, the means of investigation and the adversarial procedure had been expanded and the cases of exclusive jurisdiction of Administrative Judges had increased.

In conclusion, the notion of legitimate interest seems to have conquered its own legal and theoretical space and has spread to other jurisdictions outside of Italy: understood not as a criterion for the distribution of jurisdiction but as one of the possible legal situations within the legal system, it is now used in France, Great Britain and the United States.[30]

Certainly, legitimate interest has lost one of its essential and original connotations: it is no longer the single criterion, essential for the division of jurisdiction between the ordinary and administrative courts. But if we set aside its procedural function for a moment, legitimate interest still seems to perform a useful function as a general category common to administrative law and private law in that it represents a useful alternative to subjective right: '[...] Even at the beginning of the sixties, nothing – if not the interim figure of expectation – was opposed in private law to that sort of monolith that was the category of subjective right: either an interest deserved such qualification or it ended up practically in the limbo of the interests of mere fact. Interests which were unable to assume the guise of subjective right for their being confronted with "powers" considered by definition totally free were thus excluded from the list of protected situations.'[31]

IV. Limits and Criticism to Subjective Rights

The concept of subjective right inevitably carries with it, besides its technical and juridical nature, an ethical and ideational quality which is not easily disentangled from the broader concept. All constitutions, starting from the first declarations of rights, accept the notion of subjective right sometimes quoting them directly (such as the Italian Constitution, arts. 24, 28, 113), some other times limiting themselves to their listing. In addition to rights, the duties of citizens are also mentioned and, in some cases, limits on the exercise and enjoyment of rights are explicitly provided. Exemplary, in this regard, is the Italian Constitution, which devotes its entire first part to the rights and duties of citizens (Articles 13 - 54) listing them directly and, for some, indicating their limits. It must also be said that the Constitution makes an explicit reference to the inviolable rights of individuals in Article 2, accepting the modern tendency (but already present in the first declarations) to assigning the nature of ethical values to rights, marking almost a return to the naturalistic jurisprudence conceptions which had fallen out of favor in the previous century.

29 Merusi, F., Sanviti, G., *L'ingiustizia amministrativa*, 1986, il Mulino, pp. 30 ff.

30 Massera, A., *Il contributo originale della dottrina italiana al diritto amministrativo*, in Aipda, *C'è una via italiana al diritto amministrativo?*, 2011, ES, pp. 41 ff.

31 Bigliazzi Geri, L., *Interessi legittimi: diritto privato*, in Digesto delle discipline privatistiche 1993, Utet, pp. 527 ff.

It is evident how the shock of the two world wars of the twentieth century influenced the constitutional and international norms of the time. In 1948, the United Nations General Assembly approved and proclaimed the Universal Declaration of Human Rights, which lists the fundamental rights and freedoms that must be guaranteed to all mankind. Even in European law, both the founding Treaty (Article 2) and the Charter of Fundamental Rights of the European Union (notably after the Treaty of Nice, 2001) contain a strong reference to values of universal humanity. In these declarations, both the individual and the Community orders of value are incorporated, even if a prevalence seems to be granted to individual rights; on this point it is useful to recall how, to justify China's abstention on the vote on the Universal Declaration, the philosopher Lo Chung-Shu argued that '[t]he basic ethical concept of Chinese social political relations is the fulfilment of the duty to one's neighbor, rather than the claiming of rights. The idea of mutual obligations is regarded as the fundamental teaching of Confucianism. [...] Instead of claiming rights, Chinese ethical teaching emphasized the sympathetic attitude of regarding all one's fellow men as having the same desires, and therefore the same rights, as one would like to enjoy oneself.'[32]

Around the mid-20th century, theories which assign moral and absolute values to rights reappear, especially in American philosophical and legal thought: individual rights must thus take precedence over other social purposes except in the case of a clear prevalence of the latter and the law must include in itself moral values.[33] To justify subjective rights, without recourse to natural law, one may refer to basic human rights, enshrined in international charters, but a relevant place has been assumed today by the school of economic analysis of law, which asks which legal instruments are the most suitable in order to find an optimal allocation of resources. This is an unquestionably pragmatic approach, although it crucially depends on the arbitrary adoption of either one of these points of view: whether the 'best' allocation of resources is that which is favorable to private subjects or that most favorable to the promotion of social.[34] The particular relationship between people and environment poses the problem of the so-called 'negative externalities': these can be defined as the result of the disinterest of private economic operators with regards to the environmental impact of their actions. From this point of view, the intervention of public powers can be framed in a broader perspective consisting in the need for the administration to take into consideration the handling of negative externalities. The result of this new necessity is that the administrative power must internalize an element that the market does not consider (at least initially) to be relevant.[35]

Whatever the legal basis of subjective right, a possible and useful definition of it could be that which describes it as 'a situation in which the legal system has wanted to ensure a person the freedom and power to behave, within certain limits, as he prefers for the protection of his own interests [...] this does not, of course, imply unlimited individu-

32 Chung-Shu, L., *Human Rights in the Chinese Tradition*. Available at: https://en.unesco.org/courier/2018-4.

33 Dworkin, R., *Taking Rights Seriously*, IX, 1977, Harvard University Press, quoted by Hyland, R., *Diritti soggettivi nei paesi di Common Law*, Digesto delle discipline privatistiche 1989, Utet, p. 437; on the same topics, Stewart, R., Sustein, C., *Public Programs and Private Rights*, 1982, Harvard Law Review, Vol. 95, p. 6.

34 Di Maio, A. (1993), op.cit., pp. 16 ff.

35 Some considerations about this perspective are developed in Napolitano, G., *La logica del Diritto amministrativo*, 2020, Il Mulino, pp. 207 ff., who refers to an administration which has to 'ensure that private activity does not generate negative externalities or that these are in any case contained within the limits set by the law'.

alism, nor is it in antithesis with the social character of all law. It means precisely that, in addition to taking into account the well-being of the community, it is well estimated that [...] the individual has the possibility to act freely.'[36] This realist conception seeks to find a balance between freedom and authority and between the individual and society, the calibration of which must however be carried out on a case-by-case basis and not in the abstract. Contemporary jurists have defined and catalogued many types of subjective rights, whether personal or patrimonial, absolute or relative, but all can be subject to limits: their social function (e.g. for property or economic freedoms) is directly recognized in constitutions, but this social function can take various forms and respond to different needs.

In any case, in all legal systems, limitations on rights which may lead to their suspension or cancellation are allowed. These limitations can be foreseen both in ordinary situations and, a fortiori, in emergency situations. The next two sections explore two such cases: land-use planning and emergency administrative acts.

A. Limits on Property Right imposed by planning

Many of the limits concerning property rights are enforced by plans which are used in all legal systems, even those where the protection of the right to property is greatest, and which consist in assigning different functions to the land, which thus becomes exploitable only towards the end expressed in the plan. Modern town planning equally includes the regulation of private and public constructions and environmental protection. Even though these are strictly connected, they are traditionally dealt with separately, for several reasons. They have a different historical origin and have had a different regulatory evolution: public works and private construction were the subject to specific regulations from the very beginning, whereas town planning and environmental protection are a relatively recent development.

The construction of buildings, regardless of their purpose – that is public or private usage – has historically been seen as one of the most direct and clearest signs of the state of advancement of a society. Along with the construction of buildings came the adoption rules aimed at regulating construction. In both Roman law and in the law of the Middle Ages, for instance, legal institutions and regulatory instruments were designed to allow for and regulate constructions. Some of them still exist today, such as the expropriation for public use and construction works regulations. A long while later, between the 19th and the 20th century, town planning and ecology developed as autonomous subject matters.

Three reasons led to the development of town planning: firstly, a high increase in population due to an improvement in hygienic-sanitary conditions and in agricultural and food production techniques; secondly, the shift from agricultural to industrial economy; thirdly, the gradual moving of vast populations from countries to towns and cities. The huge growth of towns and cities made it necessary to plan their development to ensure a rational usage of space and the harmonious coexistence of the various functions which inhabit the space of urban settlements (economic and productive functions, housing functions, social and political functions). From towns and cities, planning subsequently expended to the whole of States' territory and was rendered more specialized

36 ROSS, A., *Diritto e giustizia*, 1965, Einaudi, p. 167.

depending on the functions it was required to carry out.[37]

In the second half of the 20th century, town planning experienced a further evolution. This becomes particularly evident in Kenneth Boulding's 1966 essay 'The Economics of the Coming Spaceship Earth' in which he describes a shift 'from the cowboy to the astronaut' economy. The former refers to unspoiled plains, unlimited resources, and the tendency to exploitation and colonization. The latter symbolizes a closed system economy, wherein the earth is compared to a spaceship without unlimited resources.[38] The development of ecological and environmental sciences has set a new global agenda topped by issues concerning the shortage of resources and the sustainability of economic development strategies.

Even though, town planning and public works are both characterized by the same conflict between public power and private property, they differ in structure and nature. In the subject of public works, a conflict exists between public authorities and individual private proprietary rights, which can be superseded by means of expropriation to realize useful infrastructure for society. Administrations, which here acts as contracting authorities, do not act in a particularly different way to individuals who intend to realize a construction facility to satisfy their own interest: they express the need for public works, verify the capacity to fund them, introduce them into planning acts, select which contracting businesses will realize them, oversee their execution, and assess the outcomes.

Since public works are one of the methods whereby certain public functions (education, culture, health care, transports) are carried out, such works can be realized by all entities and bodies to which law assigns one or more public purposes. Furthermore, the execution of public works is a mandatory activity, so that it is required that administrations find adequate financial resources at their disposal and pinpoint a proper location for them.

Town planning is the expression of a wide discretionary power, which enables administrations to subject private property to functions and restrictions by assigning use destinations to soils, determining the relations between public and private spaces, singling out plots subject to special destinations, identifying the location of urbanization works.[39]

In Italy, for instance, such wide powers are said to be vested in administrations (especially municipalities) by the provisions contained in Article 42 of the Constitution, under which laws may establish restrictions to private property to ensure its social functions. Even the European Court of Justice, which does not always operate a distinction between personal and *res* related rights, agrees that property can be limited (Article 17 of the European Charter of Human Rights itself admits the possibility of its limitation and conformation in the name of the general interest); for the Court, the protection of property is a principle which 'must be taken into account in relation to its function in society'.[40] In the Italian legal system, however, legal provisions endowing administrations with the power to curtail private property already existed before the promulgation of the Constitution in 1948. In particular, the power to regulate the use of land through planning was stipulated – in a limited way – by the 1865 law on expropriations and – in a more systematic

37 As is the case, for example, with territorial supramunicipal plans, territorial landscape plans, natural parks plan.

38 Fioritto, A., *Introduzione al diritto delle costruzioni*, 2013, Giappichelli, pp. 2 ff.

39 Astengo, G., *Urbanistica*, in *Enc. univ. dell'Arte*, XIV, 1966, Sansoni, p. 541.

40 CJCE, 2008, C-402/05 P and C-415/05, *Kadi v Council* and *Commission*, ECLI:EU:C:2008:461. A commentary in Navarretta, E., *Costituzione, Europa e diritto privato*, 2017, Giappichelli, p. 81.

way – by the first Italian urban planning law (*Legge urbanistica nazionale*, No. 1150/1942), still in force, which establishes a system of land use and urban planning. In this subject, the Constitution restricts itself to acknowledging the existence of a phenomenon which was already under way, elevating it to the status of primary rule within the sources of law system.

However, the power to plan land use is characterized by such a broad discretion that can lead to arbitrary choices. Town planning techniques themselves are not grounded in scientific calculations, but on often questionable aesthetic and functional standards.

The topic of land use planning touches upon the power of public administrations to oversee the activity of real estate construction, which is itself one of the faculties contained within the landowner's property right. The landlord, be them of private or public nature, may not exercise such power without limits. Instead, they have to comply on the one hand with planning decisions made by administrations and, on the other, with the specific rules contained both in general administrative acts, such as technical implementation rules of planning acts and construction regulations, and the civil code. Indeed, the rules on construction are established to protect not only the general (public) interest but also the pertinent private interests: to realize a construction by virtue of a land proprietary right entails a modification in the former's relationship with the proprietary rights of neighboring landowners (including those not directly adjacent to the one executing the construction).

B. Emergency power and individual rights

Following the analysis of the limits on the exercise and enjoyment of rights, another useful example is the use of emergency powers. Even though those powers were originally reserved to face exceptional and extraordinary situations as wars, social and economic crisis, natural disasters and pandemics, the increasing frequency of those phenomena request an ordinary recourse to them.

A comparative analysis of constitutions highlights the existence of two different models in the regulation of emergency powers. The model of strong regulation (established in France, Germany, Spain and Canada, as well as in the post-Socialist constitutions of Central and Eastern European countries) grants wide and much-encompassing powers and, in the most recent constitutions, the attempt to typify and differentiate emergencies. The model of weak regulation (which is found, for example, in the Italian and US constitutions), is instead limited to the definition of some extreme cases of public emergency, such as the state of war, and to assigning generic powers to the executive in cases of necessity and urgency. History, especially recent history, shows that the explicit constitutional definition of 'emergency powers' is not, in practice, a precondition for the emanation of extraordinary rules in the face of extraordinary events, because an emergency imposes itself beyond the norm, and, indeed, it does not depend on it.

The science of administrative law has seldom addressed the specific case of emergency powers, rather, it has focused on the study of the ordinances of necessity and urgency which represent its most typical and consolidated expression.[41] In reality, emergency powers seem to have foundations, characteristics and ways of exercise so peculiar that they constitute a sui generis category within the broader landscape of administrative

41 A wide survey on the use of emergency powers in Fioritto, A., *L'amministrazione dell'emergenza*, 2009, il Mulino.

powers. While they are, of course, legal powers, their foundation lies not exclusively in the law but also in the state of affairs, i.e., the necessity itself, which sparks their activation and the production of the effects of their exercise. As for the means of such exercise, the legal system has identified the typical act of emergency powers: the ordinance of necessity and urgency. Such ordinances, although of administrative nature, affect subjective rights, whose discipline the law reserves instead to the law.

Although with obvious differences, scholars agree on some points: the necessity, a circumstance in which something is necessary and urgent, cannot be addressed with existing norms, either because they are missing or because they are not sufficient; there is a pressing need to preserve the stability of legal system from descending into disarray; necessity can become a source of law.[42] For what concerns the duration of emergency administrative powers, case-law has on several occasions stated that, precisely as a result of the inherent unpredictability of an emergency situation, it is not always possible to lay down exact time limits. In the case of a health emergency, for example, judges stated that 'the phenomenon [...] certainly could not be evaluated in advance in its temporal evolution, so that an intervention for an undetermined period could well be established.'[43]

As René Chapus recalls, 'the law does not exist for itself': its purpose is the organization of social life; accordingly, the predicament by which one is bound to its observance even when this ends up damaging the very interest it serves in the first place is not plausible. For this reason, both legislators and judges have acknowledged the need to unburden, in certain circumstances, public administrations from the strict observance of the rules which they are normally required to respect. The principle of legality must, therefore, be adapted to the circumstances.[44] In France, the Council of State proceeded with two judgments in 1914 and 1918, both linked to situations of war, to form a theory of exceptional circumstances which allows the administration to extend its powers '*autant qu'il le faut*' so that they can take all the necessary measures imposed by the circumstances, provided that judicial review is ensured. According to the French jurisprudence (applicable to most of the European legal systems), for the activation of these extraordinary powers, three conditions must exist: the real exceptionality of the event that can have various and different origins (such as, for example, insurrections, natural disasters, strikes and service blocks) but which allows such powers only for and in the times and places strictly necessary; the impossibility of acting through ordinary instruments in accordance with the principle of legality; the relevance of the interest to be protected by exceptional powers. Once these requirements have been verified and met, the administration may adopt the measures imposed by necessity even if these elude the rules of procedure, form and jurisdiction.

In essence, the principle of legality cannot be invoked in matters 'where urgency and necessity impose supplementary powers in respect of deficiencies or shortcomings in the legal system'.[45] As some scholars have acutely pointed out, the principle of legality 'has undergone an extension in correspondence with the expansion of the rules concerning the administration', so that the administration is also subject to the general principles of law, to Community law, to international law, as well as 'to the same rules imposed by

42 Ibid, p. 77.

43 C. Stato, sez. V, 29 May 2006, n. 3264/2006.

44 Chapus, R., *Droit Administratif général*, 1987, Montchrestien, pp. 758 ff.

45 Bartolomei, F., *Potere di ordinanza e ordinanze di necessità*, 1979, Giuffré, p. 141.

the public administration'.[46] This expansion must also be considered in the case of emergency powers where, on the contrary, there is a stronger need to delimit, both positively and negatively, the scope of action of the administration.

Through the principles, the system has the possibility of expressing a value judgment, which allows to ascertain the compatibility of the contents of the power of ordinance with positive law. The function of such general principles, which is normally to integrate and interpret the administrative powers as they are generally understood, is particularly relevant when compared to the power of ordinance, whose content is not predefined. Compliance with the general principles of the legal system represents, therefore, one of the main limits to emergency powers. On this proposition there is full agreement between scholars, jurisprudence and norms.[47]

It is thus fundamental to explore what such principles there are, starting with those which operate under the international and European legal orders and which are concerned with the guarantee of fundamental rights. At the international level, fundamental rights are protected by numerous conventions, one of which, the European Convention on Human Rights (ECHR), ratified in Italy by Law No 848 of 4 August 1955, is equipped with particularly effective administrative (The Council of Europe) and judicial instruments (the European Court of Human Rights).[48] The European legal order is supplemented by numerous rules on fundamental rights which have been incorporated into the Charter of Fundamental Rights of the European Union adopted in 2000 and transfused into Part II of the Constitutional Treaty of 29 October 2004. However, the same EU Treaty specifies, at Article 6, that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. The same article also refers to the respect for the fundamental rights which are guaranteed by the European Convention on Human Rights 'and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. By virtue of the explicit normative reference, the rules of the ECHR must be considered, therefore, as akin to the principles of the European legal order.[49]

The general principles of the legal system are, then, principles derived from legislation and jurisprudence which are placed at the foundation of the European institutions' activity and which, due to the peculiarity whereby these acts mainly through the national institutions and administrations, have morphed into norms directly applicable at national level. These, in turn, have overlapped and integrated with national principles, constitutional and otherwise, resulting in the incremental creation of a complete and unitary *corpus* which regulates the organization and functioning of public administrations.

Amongst such general principles, the following few are of notable relevance: the principle of legality and conformity with the law (which also addresses issues relating to attri-

46 Cassese, S., *La costruzione del diritto amministrativo: Francia e Regno Unito,* in *Trattato di diritto amministrativo a cura di S. Cassese*, 2003, vol. 1, I, p. 50.

47 Fioritto, A. (2009), op. cit., pp. 240 ff.

48 Cassese, S., *Le basi costituzionali,* in Cassese, S. (2003), *Trattato di diritto amministrativo*, op. cit., p. 237.

49 Critical of the possibility of considering fundamental rights as a real limit in situations of risk and emergency is Stelzer, M. in his *The Positioning of Fundamental Right Within Governmental Policies of Risk Management*, EGPA, 2002 Conference, 8, wherein he argues that the verification of the fact that the restriction of rights is in the public interest would presuppose a precise knowledge of what is 'the best' for a society.

bution and competence); the principles of equality, impartiality and non-discrimination and judicial protection (which relate to the protection of rights and freedoms); the principles of good performance, reasonableness, proportionality, information and adversarial procedure (which relate to the activity of the administration).

Emergency administration is a unitary phenomenon, an expression of a corresponding power that finds in the rules its source of legitimacy, subject to controls and limits like any other form of administrative activity.

Its main characteristics are the great extension of the scope of possible interventions and the derogatory scope, with respect to the normal regulatory framework, of the acts through which it is exercised; it is precisely these characteristics which make it essential to define the controls and limitations set to guarantee their legitimacy.

The broadest and most thorough form of control is that carried out by the courts, that is, judicial review. In Italy, it is the jurisprudence of the Constitutional Court which has helped define boundaries with respect to the *contents* of emergency measures, beginning with case in which they engender the suspension or limitation of individual freedoms. According to the Court, these can be split into civil liberties on one hand and personal freedoms on the other. According to the Italian Parliament and the Judiciary, the core of these freedoms may never be suspended by the Executive Power. As for economic freedoms and social rights, their individualistic character allows for their suspension in the event of an emergency, aimed at the protection of collective interests. Personal freedoms and rights have been the subject of numerous judgments, all of which have addressed the issue of balancing their protection with the protection of the general interests in exceptional situations. It was considered, for example, that health risks (in particular the risk of infection) could give rise to a restriction of personal freedoms consisting in the imposition of compulsory medical treatment. One famous case is that of mandatory vaccinations as a measure to prevent health risks. For what concerns Italy, this case in point has been addressed in two judgments of the Constitutional Court, No 307/1990 and No 118/1996. Even recently, the Constitutional Court affirmed the legitimacy of mandatory vaccination:

> *"the jurisprudence of this Court on vaccinations is firm in affirming that Article 32 Cost. postulates the necessary balancing of the right to health of the individual ... with the coexisting and reciprocal right of others and with the interest of the community .... In particular, this Court has specified that the law imposing a health treatment is not incompatible with Article 32 Cost.: if the treatment is aimed not only at improving or preserving the state of health of those subject to it, but also at preserving the state of health of others".*[50]

Economic freedoms may also be subject to restrictions, as in the case of measures to deal with economic emergencies or to allow for the alignment of state budgets with the parameters required at the European level.

50 Court. Cost., n. 5/2018.

V. The Impacts of Climate Change on Subjective Rights

The Reports by the Intergovernmental Panel on Climate Change (IPCC) are one of the most salient scientific sources in order to understand the causes and effects of climate change. From the most recent Report,[51] it appears that climate change requires two discreet types of responses: the former can be framed in terms of adaptation, the latter in terms of resilience (former 'mitigation'). In short,

> *'adaptation plays a key role in reducing exposure and vulnerability to climate change [...]. In human systems, adaptation can be anticipatory or reactive, as well as incremental and/or transformational. [...] Resilience [...] describes not just the ability to maintain essential function, identity, and structure, but also the capacity for transformation.'*[52]

The Report also expounds the meaning of the term 'climate justice' which can be understood as including three principles:

> *'distributive justice, which refers to the allocation of burdens and benefits among individuals, nations and generations; procedural justice, which refers to who decides and participates in decision-making; and recognition, which entails basic respect and robust engagement with and fair consideration of diverse cultures and perspectives.'*[53]

It can be inferred from the consultation of scientific literatures on the topic[54] that adaptative and resilient responses will mostly affect three kinds of legal rights: property rights, economic liberties and personal liberties. All of them are subjective rights.

As a matter of fact, the range of possible policies to respond to climate change is very wide. Just in order to keep global warming within the acceptable targets of 1.5° or even 2°, global policy makers are urged to tighten rules on greenhouse gasses emission, increase clean energy production, curb private transport, partly by improving public energy efficient transportation, increase the energetic efficiency of private and public buildings. These policies can be legislated separately, as individual measures, or considered as complementary and included in comprehensive plans (town and district plans). Measures to mitigate the impact of climate change related emergencies, such as coastal and fluvial floods, soil erosion, desertification and fires, resulting in increasingly severe direct and indirect social losses and other unwanted effects such as forced migrations, also need to be taken into account.

The relevant questions are: can jurists propose adequate and up-to-date legal tools to face these phenomena? Given, their fundamental balances, essential principles, tech-

51 IPCC, *Climate Change 2022: Impacts, Adaptation, and Vulnerability*, Pörtner, H.-O., Roberts, D.C. et a. (eds.), Cambridge University Press. In Press.

52 ICCP (2022), op cit.

53 ICCP (2022), op cit.

54 ICCP (2022), op cit.

niques, and the way they apprehend the reality they intend to discipline, can European and other liberal-democratic systems of public laws be deemed capable of addressing the challenges of climate change? An optimistic answer would stress the long lasting civil and public legal tradition of liberal democracies, which has been capable to resist and adapt to many and diverse manmade disasters over the course of centuries.

Subjective rights are a substantive part of this history: as we have emphasized above, they were first promoted as a means to establish a legally protected scope for the free exercise of the individual will, thus enshrining the notion of individual autonomy, and to protect people from invasive and authoritative power. Over the centuries, such individualistic vision of subjective rights has been tempered, and their normative and legal standing has been rendered compatible with the pursuit of social needs. Limits to individual rights have a legal, *constitutional*, base; even expropriation is legal as long as it is accompanied by compensation, and so are, in times of emergency, limitations on personal liberties or personal obligations, as many of us have experimented fist hand during the recent pandemic, when measures as extreme as curfews and mandatory vaccinations were taken. Climate resilient development involves not only legal questions but also issues of 'equity and system transitions in land, ocean and ecosystems; urban and infrastructure; energy; industry; and society and includes adaptations for human, ecosystem and planetary health.'[55] Legal tools such as town and district plans can be used to mitigate the negative impact of climate change and to increase the resilience of cities; economic programs can be used to help private enterprises down the path towards more sustainable business models. All these measures have been adopted in the past – and will be adopted in the future – without infringing subjective rights, especially when these are understood via the Italian-style notion of legitimate interests.

Looking at subjective rights as a more technical tool, jurists should consider three connected issues: the notion of corresponding duty, that of accorded protection and that of duration. Each right produces a corresponding duty: in the case of property rights, it is widely accepted that the that law protects the owner by creating a corresponding duty which excludes all others from making use of the property. In the same way, a personal right creates the duty for anyone else to refrain from harming the good or faculty protected by the right.

From an individualistic point of view, it could be said that the relationship between right and duty concerns only the persons strictly affected by it at a specific moment in time. But if rights and duties are instead construed as a chain of continuous and multiples relationships, the purview of subjective rights is stretched in such a way as to produce protection and benefit for the entire society and gain collective value. In this view, even the protection accorded to subjective rights has a positive impact on society at large.

Some scholars have focused their attention on yet a different perspective, which can be represented as a switch in the vantage point from which the relation between humankind and the environment. The history of subjective rights suggests – as it was pointed out in this paper – that when they were strengthen, a corresponding concern toward the dimension of duties lacked. This state of affairs came to be in tandem with the pursuit of the 'emancipation' of the private sphere from administrative power. A different and new perspective is that which emphasizes the existence of a duty of protection towards the environment and nature.[56]

55 ICCP (2022), op cit.

56 See Fracchia, F. *Sulla configurazione giuridica unitaria dell'ambiente fondata sull'art. 2 Cost., on Il diritto*

The protection accorded to a person in a single case can be used every time a right is violated.

A more complex issue is that of the duration of a subjective right: in the classical definition, rights belong to the person throughout their life (and even longer, considering that property can be transferred to heirs for generations); but if we consider rights as social value and, consequently, posit that a right can belong to a collectivity, it should then be accepted that a right can belong, even, to the next generations. This rings particularly true after considering that the consequences of what we do today will be borne out by future generations.

In conclusion, the notion of subjective right is still current and useful for the future, especially if we view it through the prism of legitimate interests (which, by definition, allow for a compression of the subjective right on which they supervene). Subjective rights must however be construed as collective values and not only as individual legal positions: only by recalling that rights correspond to duties, that the protection granted by them may concern each member of the community and that rights belong not only to us but also to future generations, may subjective rights be still considered a strong pillar of modern democracies.

dell'economia, 2002, pp. 215 ss., spec. 258-259, who have pointed out that a duty of environmental solidarity precedes any other duty and right, since it is necessary first of all to preserve the human living environment.