

*3rd International Conference on environment
Biodiversity: engine of life on Earth
Rome 13th – 14th November 2018*

*First Panel: “The value of Biodiversity”
13th November 2018*



The legal value of biodiversity

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Is the legal system on biodiversity adequate to its protection?

- The great deterioration linked to biodiversity raises the issue for the legal scholar on whether the “*multi-level*” legal system (international conventions, European legislation, national laws and regional rules) can be adequate to its protection.




Two different perspectives

- With respect to the area of biodiversity, the legal system has to be analyzed from two different perspectives to give an answer to the above question:
- 1. Biodiversity as the **direct subject of protection**;
- 2. Biodiversity as an element to be followed in the study of economic activities and therefore as a **key parameter of “sustainable development”**.
- These two perspectives **correspond to two techniques** applied to the legal protection of the environment.




Biodiversity as the direct subject of protection

- ▶ This first perspective – which can be summarized as “**total protection**” - concerns **special sectors** of the territory (natural parks, sites included in the Natura 2000 Network) or the ecosystem (protected habitats, wild fauna or flora species) that **convey values of the utmost relevance**; therefore they are subject to **primary protection, overriding other interests** (such as economy, and sustainable development).



The protection of biodiversity through “command and control” instruments

- The main characteristics of the “total protection” of biodiversity is represented by the use of typical “command and control” instruments, such as **prohibition** of behaviors causing harm to biodiversity and **strict regulation relating to allowed activities**.
- Their violation leads to the **enforcement of sanctions** – usually criminal sanctions – and the provision relating to the **obligation of environmental restoration**.



The criminal sanctions provided by the European legislation

The European legislation (Directive 2008/99/EC) provides the obligation for member States to introduce criminal sanctions to protect biodiversity, but **does not refer:**

1. to conducts that concern a negligible quantity of specimens and have a negligible impact on the conservation status of the species,
2. or conducts that do not cause a significant deterioration of a habitat within a protected site.



The two limits of criminal sanctions provided by the European legislation

- A.** **Below** the anticipated level from the European legislation, the punishments for the capture, the killing and the damage of the single sample of protected habitats, wild fauna or flora species **are generally light and therefore they are not sufficiently dissuasive.**
- B.** **Problems** for judges and legal scholars in **identifying the level of protection** under this criminal law.



A. The “anthropocentric” conception in the legal system protecting biodiversity

- ▶ The lack of a duty to impose more serious criminal punishments even on illegal activities related to the single samples of the fauna or the flora, but with no negative impact on the state of preservation of endangered species or habitats confirms the “**anthropocentric conception**” in biodiversity protection that is **justified mainly for the essential services deriving from it for all people**.
- ▶ This conception is clear in the **2011-2020 Strategic Plan of the Rio Convention**, as approved in the Nagoya meeting in Japan on 18-29 October 2010, that literally states: «*By 2050, biodiversity is valued, conserved, restored and wisely used, maintaining ecosystem services, sustaining a healthy planet **and delivering benefits essential for all people***» (see also the “**Communication on the EU Biodiversity Strategy to 2020**” (COM/2011/244) entitled “***Our life insurance, our natural capital***”).

B.1. The criteria of penal protection of wild fauna or flora species

Legal scholars, on the basis of the conservation status of a species definition in Article 1, letter i) of the Council Directive 92/43/EEC, affirm:

1. the **protected interest** is the survival of the species (either animals or plants);
2. the **crime does not exist** if the conservation of the protected species is not at risk;
3. we must refer to **criteria** such as gender, age and reproductive capacity of an animal for the purposes of a negative impact on the conservation of a protected species;
4. therefore, we can speak of an offence even in the event of the killing, taking, etc ... of **just one (or a few) specimens**, *when a protected species is in danger of extinction.*


B.2. The criteria of penal protection of a natural habitat

Legal scholars, on the basis of the conservation status of a natural habitat definition in Article 1, letter e) of the Directive 92/43/EEC, affirm:

1. needs to be considered the **impact of the conduct on the ecological function** represented by the habitat, more than on the quantity of habitat involved;
2. for example, it is possible to consider deteriorated the state of conservation of **a forest where the birds of protected species nest**, when many – but not all - the trees have been cut down and the birds, even in part, refuse to utilize this site as a place of rest and reproduction.

B.3. The consequences in criminal trials

- It seems clear that the approach contained in the Directive 2008/99/EC and the corresponding Italian rules leave **considerable uncertainty** in identifying the threshold for criminally relevant offences.
- By the way, a satisfactory assessment can only be made if we are aware with certainty of the **previous environmental site situations**, which must be accompanied by the collection of adequate proof that highlights the violations following the general principles of presenting evidence in criminal trials.
- Thus, it is **important for the administrative bodies** of management and control **be prepared to carefully monitor and document the state** of preservation of the species or the protected habitat, so that **sure elements of proof** relating to the impact of alleged unlawful conduct can be presented in criminal trials.




Biodiversity as a key parameter of “sustainable development”

- The **second perspective** has to be framed in a totally different scenario: biodiversity has to be respected within the framework of economic activities and therefore as a key parameter of “*sustainable development*”.
- In this case, biodiversity protection is accomplished according to the typical pattern of the second technique of biodiversity protection, which can be summarised in the expression “***comparative protection***”.
- Several **balance tools** between the environment and the market make reference to it, with the purpose of the implementation of “*sustainable development*”, namely **environmental impact authorizations and assessments, emission standards, environmental certificates, agreements, planning instruments.**

The implications of plans or projects for the protected site

1. Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (art. 6, par. 3)

- ▶ «3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the **competent national authorities** shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public».



The implications of plans or projects for the protected site

2. The European Court of Justice 7 September 2004

- a) An appropriate assessment of the implications for the site concerned of the plan or project **implies that**, prior to its approval, **all the aspects** of the plan or project **which can**, by themselves or in combination with other plans or projects, **affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field.**
- b) The competent national authorities ... are to **authorise** ... an activity **only if they have made certain that it will not adversely affect the integrity of that site.** That is the case where **no reasonable scientific doubt remains** as to the absence of such effects.

The compensatory measures

Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (art. 6, par. 4)

- ▶ «4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the **Member State shall take all compensatory measures** necessary to ensure that the overall coherence of Natura 2000 is protected».



The respect of the principles of non-discrimination and proportionality

The European Court of Justice 21 July 2011

European Legislation must be interpreted as not precluding legislation which prohibits the location of wind turbines not intended for self-consumption on sites forming part of the Natura 2000 European Ecological Network, without any requirement for a prior assessment of the environmental impact of the project on the site specifically concerned, **on condition that the principles of non-discrimination and proportionality are respected.**

In this context, the referring court must have regard to the **particular features of wind turbines**, taking account in particular of the **dangers which they may represent for birds, such as the risk of collision, disturbances and displacement, barrier effects forcing birds to change direction and habitat loss or degradation.**

The “*elastic*” nature of balance tools

The examination of balance tools between biodiversity and economy, as laid down in the legislation and singled out by case law, highlights their “*elastic*” nature as: **(a)** these tools are **applied by local authorities** to any single case and then **not uniformly**; **(b)** it is not easy to identify **the best scientific knowledge** in the field to refer to; **(c)** even the judge of legitimacy’s review on the prohibitions to carry out economic activities within the sites forming part of the Natura 2000 European Ecological Network is based upon a **broad and general criterion**, which is **the respect of principles of non discrimination and proportionality**.

Conclusions: two sectors wherein the legislation on biodiversity should be implemented

We should finally recall two sectors wherein the legislation on biodiversity should be implemented:

- ▶ the widening of ***economic instruments*** for biodiversity protection, by taking a similar and parallel way to that undertaken in the area of waste management which is leading to a change of the circular economy from an economic project to a legal system (es. ***biodiversity credits system***);
- ▶ a greater involvement of communities and citizens, with the introduction of stronger instruments of "***environmental democracy***", in the **spirit of the Aarhus Convention** on access to information, public participation in decision-making access to justice in environmental issue.