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A New Lease of Life for the Aosta Valley's *Consorterie*[1]

Roberto Louvin and Nicolò P. Alessi

AUTHOR'S NOTE

The essay has been designed and written jointly; R. Louvin is mainly responsible for paras. 1 and 2, and N. P. Alessi for paras. 3, 4 and 5; the article pertains to the activities of the IEL (Innovative Education Laboratory) GEOLawB, which is part of the research excellence project "Law, Changes and Technology," sponsored by the Ministry of Education and carried out by the Law School of the University of Verona.

> "[...] property, although it must always be an individual right, need not be confined, as liberal theory has confined it, to a right to exclude others from the use or benefit of some thing, but may equally be an individual right not to be excluded by others from the use or benefit of some thing. " (MacPherson, *Property, Mainstream and Critical Positions*, 1978, 201).

The debate over the origins of the *consorterie* in Aosta Valley

1 Land ownership in Aosta Valley is historically characterised by collective forms of organisation or enjoyment (commons[2]) whose origin dates back to the Middle Ages. At that time, groups of people or families regularly shared the management and benefits of pastures and woods. These forms of community-based property and co-operative use have partly survived the attempts to reform the land tenure system, and still retain a remarkable vitality in almost the entire regional territory.

2 A few of these special forms of ownership share common features with the so-called *usi civici*, i.e. land use collective rights over other people's property (in Roman law: *iura in re aliena*, Lorizio, 1999). Conversely, others, much more original, are known as *consorterie* (Padula, 1911; Farinet, 1929; Andrione, 1957; Grisero 1961; Benedetto, 1976;

Petronio, 1999; Louvin, 2012) and constitute the main example of traditional collective ownership in the Region, ruled by customary law and ancient statutes since their very origin.

3 The existing literature on *consorterie* has classified them into two categories: *consorterie uti singuli* and *uti universi* [3](Louvin, 2012); traditionally, they involve the common (ownership and) managing of natural resources as woods, land and pastures. However, even buildings and infrastructures –like *rûs*[4], village schools, social dairies, ovens, mills, etc.–, activities and services have been collectively and spontaneously administered through the *consorterie*'s model. Several experiences are still active today (Créton, 2001).

4 While the Aosta Valley's *consorterie* may thus acquire variable forms, some common features can be detected. Indeed, in general, they have been established by either local landowners or local inhabitants and are supposed to be shared –in terms of their common management and benefits– (almost) exclusively among them. This does not come as a surprise, as most forms of collective ownership in the Alps are similarly organised.

5 Given their peculiar legal nature, it has appeared to be difficult to classify this type of organisations by means of the classical Roman law criteria established by Italian property law[5] (Brix, 2013). However, the excessively formalistic approach used in the past has today given way to a more conscious one, which has included the *consorterie* within the unitary and general category of 'collective domains' (Nervi, 1997; Marinelli, 2017; Grossi, 2017). The re-elaboration of this concept is the result of the contributions of several Italian legal scholars (Grossi, 1977; Palermo, 1964; Petronio, 1988; Cerulli Irelli, 1983; Cerulli Irelli, 2019) and Italian case law (Cerulli Irelli, 2016), which eventually paved the way for the new legal framework provided for by the national legislator in 2017.

The division of legislative powers and the evolution of the *consorterie*'s legal regime

6 Aosta Valley –an Italian autonomous region with a special and constitutionally entrenched *status*[6]– has an exclusive legislative competence in the following subject matters: land use rights, *consorterie*, communal property of agricultural lands and forests, regulation of minimal rural land ownership[7]. This is an almost unique competence that provides the region with a considerable leeway in regulating the commons existing in its territory (Buoso, 2018; Nicolini, 2018)[8].

7 The attributed legislative power was exercised only after some thirty years, with the approval of regional law (reg. law) no. 14 of 5 April 1973, providing for a first regional legal recognition and regulation of the *consorterie*. Until the entry into force of this regional law, the national rules laid down in law no. 1766 of 16 June 1927[9] had been applied to them, posing significant threats to their survival. In fact, the national regulation was specifically aimed at liquidating the traditional land use rights spread nationwide, i.e. dissoluting them while granting a system of *una tantum* funds to compensate the rights holders for their loss. Moreover, the national law provided an uniform regulation having the historical experience of Southern Italy as its main point of reference: this decision was a serious mistake, since the southern Italian legal

tradition differs from the customary rules that have been governing the alpine commons in several respects[10]. Therefore, a strict application of the national statute to the *consorterie* could have potentially led to considerable alterations of their traditional legal principles. However, this was not always the case, since the substantial ambiguity underlying the legal framework determined large fluctuations in the jurisprudence on the matter, as it was likely to expect[11].

8 Despite the described "hostile" legal background, the *consorterie* have thus been able to remain lively, continuing to operate according to their ancient customs and statutes, regardless of the legislation existing at the national level (Cerulli Irelli, 2016). Indeed, they have been and still are a very particular phenomenon which, however, today more than ever, requires an *ad hoc* discipline, as even stated by the Constitutional Court[12].

9 The regulation established by reg. law no. 14 of 1973, still in force today, has set out a public regime for the *consorterie* as the regional council deemed insufficient the private law model established by the special national legislation on the alpine commons (Louvin, 2012). It should be noted that the term *consorteria* is used to (alternatively or jointly) refer to the common resource which is collectively owned and managed as well as to the community endowed with the power to govern the common asset. The very same terminological approach –which tends to highlight the strong link between the collective goods and the community– will be replicated in law no. 168 of 20 November 2017, to which we shall return shortly.

10 The regional regulation of the 1970s provides for the indivisibility and inalienability (except, in expressed cases, in favour of the municipalities) of the *consorterie*'s holdings, the application of the national regulations on hydrogeology, forestry or other similar legal provisions to their silvo-pastoral heritage, as well as the prohibition of financial distribution of their profits among the members of the *consorterie* and the obligation to reuse these profits in the management of the commons.

11 Despite having introduced a legal regime which respects the original function of these traditional commons, the regional legislation has subsequently proved too restrictive and has eventually failed to protect and empower them. This result has been caused mainly by the excessive rigidity of their public law regime. Indeed, whereas a lack of clarity of certain provisions is apparent –in particular in terms of accounting procedures –what has especially contributed to the failure of this system is the requirement of a public legal recognition for each *consorteria* by means of an order of the President of the Autonomous Region (Louvin, 2012). The (relative) failure of this discipline is evident if one focuses on the number of *consorterie* which have been able to obtain such recognition: out of 371 applications submitted (and more than 450 *consorterie* surveyed in the 1950s), only 24 have been accepted.

12 Therefore, the approach adopted half a century ago, despite the good intentions of the regional legislator of that time, has not been able to provide for an effective legal framework for the Aosta Valley's commons. In the recent years, the regional public law model has definitely been called into question, owing to the emergence of the new civil law principles progressively laid down by the national legislator. The national regulation has proved increasingly aware of collective property rights' existence and peculiarities: the first milestones of this gradual legislative turnaround are to be traced back to law no. 431 of 8 August 1985[13] and law no. 97 of 31 January 1994 (Lorizio, 2019). This process of reclassifying commons as complex legal entities within a non-public

regime finally led to the adoption of law no. 168 of 20 November 2017 ("*Norme in materia di domini collettivi*").

Law no. 168 of 20 November 2017 and its effects

13 With the approval of law no. 168 of 2017 (Caliceti, Iob, Nervi, 2017; Pagliari, 2019), the regulation concerning the alpine commons, originally of derogatory nature[14], has definitively turned into a general rule applying, in principle, to all collective forms of property rights[15]. Indeed, all the various existing kinds of collective ownership or management are now included in a new loose and general category named "collective assets" (or "collective domains"). The legislator has therefore adopted the position of the doctrine, which had long stressed the impossibility of classifying an ontologically unique and resolutely pluralist phenomenon within the ordinary categories of Roman civil law (Grossi, 1998).

14 The law on collective assets has established several fundamental principles (extending and clarifying the discipline of the law no. 97 of 1994) which must be followed by all the regions while regulating the communal ownerships located in their territory, in order to provide them with appropriate autonomy[16]. In this respect, it should be pointed out that the Law no. 168 of 2017 recognises the collective domains as primary and complex legal systems, subject only to the Constitution, endowed with self-regulation and self-management powers. The entities entitled to manage the commons now have a legal personality under private law and hold a *status* of representative of the communities of reference.

15 Furthermore, the regulation expressly recognises that the collective assets serve some fundamental functions: environmental protection; cultural, collective and intergenerational solidarity; safeguard and conservation of local communities. As for the legal regime of the holdings concerned, it is irrevocably stated they are inalienable, indivisible and to be exclusively and perpetually devoted to agriculture, forestry and pasture. Notably, these property may not, under any circumstances, be subject to acquisitive prescription.

16 This renewed national legislative framework, whose fundamental principles necessarily apply to Aosta Valley[17], gave expectedly rise to repeated calls for reform of the regional regulation coming from the representatives of the *consorterie* as well as from scientific and associative milieus[18].

The participated elaboration of a draft regional law on the consorterie

17 The request for a radical reform of the long-standing regional legal framework put forward by the representatives of the Aosta Valley's *consorterie* encouraged the regional government to immediately set up a round table – qualified as a "technical group for the drafting of a new regional law on collective property"[19] – at the Assessorato/ Assessorat (regional ministry) of agriculture and environment, in order to trigger a shared and inclusive drafting process.

18 It should be noted that, during its very first meeting, the round table decided that the drafting of the regional bill should have been preceded by several public meetings to be

held in different Aosta Valley's municipalities; this decision was aimed at promoting a genuine popular participation, in line with the fundamental values underlying the management of the commons. The choice immediately showed its positive potential: hundreds of stakeholders took part in the public debate, thus confirming the effectiveness of the commons' logic as an organisational model which provides innovative solutions which, at the same time, are firmly connected with the experience of a precise community (Ostrom, 1990). This degree of participation was anything but surprising: after all, the democratic capital has always been an essential feature of the alpine populations' historical experience (Louvin, 2015).

19 The described participatory approach resulted in a quick development of a set of guidelines that oriented the work of the round table, which eventually completed the drafting activity in the summer of 2019[20].

20 The draft regional bill (now: DRB) –consisting of 24 articles– aims to implement the constitutional principles and the fundamental rights related to these forms of commons, considered as primary social formations, as well as to promote the protection of the landscape and the national historical and artistic heritage[21]. In accordance with the national law's recognition of collective property as a special form of private property (law no. 168 of 2017) and support to mountain areas (art. 44, Constitution; law no. 97 of 1994; art. 174 of the Treaty on the Functioning of the European Union), this bill specifies the modalities of purchase and management of the original collective property characterising the *consorterie*'s core. This regulation is intended to promote the collective assets' social function as well as their full accessibility[22], while at the same protecting and empowering the communities which are traditionally entitled to own and manage these commons[23].

21 In a nutshell, the DRB's principal purpose is thus to implement the principles of law no. 168 of 2017 and of the Constitution[24], adapting them to the truly unique Aosta Valley's context. This objective implies achieving a synthesis between the general principles formulated by the national regulation and the *consorterie*'s concrete legal and historical *status*. Accordingly, the DRB is composed, on the one side, of a part that may be defined as an implementation of the law no. 168, reproducing its basic principles; on the other, of an "innovative" part, with provisions specifically fit for *consorterie* as a special legal phenomenon and directly deriving from the regional exclusive legislative power in this field.

22 Notably, the legal entrenchment of the *consorterie* is not only to be found in modern law, but also in other ancient original legal sources – like old statutes and regulations, as well as the medieval fiefdoms, the Sardinian Cadastre, the deliberations and municipal by-laws approved by the Royal Delegation – as today further confirmed by the law no. 168. Similarly, the bill expressly foresees that, in case of a lack of more recent sources, it would be possible to assess the existence of a *consorteria* on the basis of the current land registers and the traditional management methods practised by the community, as possibly defined by their foundational acts. The secular legal tradition regains thus its full authority, after two centuries of absolute state normative monopoly: these collective domains are indeed recognised as operating primary legal systems, expression of traditional community legal pluralism.

23 The Aosta Valley's *consorterie* – regardless of their specific and varying traditional labels – are qualified by the DRB as "collective assets" or "collective domains", replying the national law's definition. The entities governing the common patrimony would be

endowed with legal personality under private law, entitled to broad self-organisation, self-administration and self-management powers through their statutes and regulations which have to comply only with the Constitution. These functions imply a full capacity to manage their common environmental, economic and cultural heritage, in a true intergenerational logic.

24 It is worth noting that the *consorterie*'s acts of self-organisation and self-management would not be subject to any form of approval, supervision or control by the public authorities. This provision reflects the will to establish a simple and streamlined system aimed at making the public intervention purely ancillary and subsidiary, in order to avoid the drawbacks of the previous regional regulation.

25 The DRB definitively confirms the inalienability, indivisibility of the *consorterie*'s commons and the prohibition of their acquisition by adverse possession. These assets are acknowledged as irreplaceable elements of the alpine ecosystem and as a fundamental source of wealth for the entire Aosta Valley's community; accordingly, the common goods are to be used solely for agro-silvo-pastoral purposes, and are automatically subjected to the general landscape protection regulations[25].

26 Furthermore, the DRB thoroughly addresses the issue of alternative uses of the collective properties, which will be possible provided that an authorisation based on specific grounds is asked. This is a significant element (which had already been addressed by the national regulations on alpine commons[26]): the *consorterie* should be allowed to carry out complementary activities, insofar as these remain closely connected with their territorial contexts and benefit their communities. Activities "related to tourism, hospitality, culture, leisure, services and the production of renewable energy, as well as the marketing of local products"[27] are specifically mentioned. The introduction of such a derogation from the *consorterie*'s traditional functions relies on the observation of the considerable depopulation of several regional mountainous areas and the desertification of services in those territories; by means of their complementary activities, the *consorterie* may contribute to meet the main environmental and social needs in those marginal rural areas. However, the authorisation would not exempt them from the obligation to reinvest all their incomes in their activities and in the management of their lands[28].

27 Following the same *rationale*, the *consorterie* would also be allowed to ask for the conversion of the agricultural use of their estates to other employments, by means of a procedure that would promote the respect of the general interest. Indeed, the regional council – in agreement with the municipality council concerned – may authorise such an employment, limited to the strictly necessary areas, as long as the traditional forms of use are neither of environmental interest nor longer economically viable[29]. The reason underlying this provision is apparent: the *consorterie*'s activity ought to be allowed to be more compatible with a modern socio-economic context; this regulation may thus contribute to avoiding their disappearance and, even, supporting their revival as a virtuous economic and social model, possibly able to impact on a process of repopulation of the remote valleys. The DRB's purpose is thus to strike a balance between the safeguard of the traditional collective properties and the promotion of their economic sustainability in a modern market economy context.

28 Another crucial issue dealt with by the new regulation has to do with the definition of *consorterie*'s legal *status*. To this end, a (free) procedure for the attestation of their private law legal personality would be established; after their compulsory registration

in a "Register of the *consorterie*" a certificate would be issued: the exhibition of this act would ensure the public record of the *consorterie*'s collective rights in the land register. This registration would grant a strong legal protection of the communal ownership as it implies the opposability of the collective rights against third parties[30].

29 It should be noted that this procedure would inevitably imply a control, albeit very limited, by public authorities; however, the application for registration would be refused solely on the basis of important, duly justified and substantiated reasons and in compliance with the rules and principles of the administrative procedure[31].

30 In case a *consorteria* ceases to operate properly, the DRB states that the municipality – or, in case of *inertia*, a commissioner *ad acta* appointed directly by the president of the region[32] – shall initiate a procedure for the reconstitution of the *consorterie*'s organs. Should this procedure fail, the municipality could ask other similar entities or other *consorterie* present in its territory to separately manage the abandoned properties. The management shall always be carried out through a "separate" administration, to which the members of the expired *consorteria* could contribute by setting up a committee; accordingly, there would always be the opportunity to return the assets if the ceased *consorteria* was reconstituted. This possibility will be available even if, in the meantime, the properties were devolved to the municipality, all the acts adopted during the public management remaining valid. However, the reconstitution of the *consorteria* need to be duly certified by the "Register of the *consorterie*".

31 Hence, the administration of abandoned properties by the municipality would take place only insofar as it is impossible to find other similar bodies able to manage them. Similarly to other entities, the municipality would administer them separately, and the members of the ceased *consorteria* would still have the right to set up a "Committee for Participation in the Separate Administration" with a consultative and participatory function[33].

32 As an *extrema ratio*, the definitive incorporation of the property into the municipal patrimony may also be possible, if a decision to this effect is taken by at least two thirds of the members of the *consorteria* or when it proves impossible for them to certify the existence of collective ownership. Once again, the purely subsidiary nature of public intervention in the management of collective property is confirmed.

33 The draft bill also addresses the involvement of *consorterie* in urban, rural, local and strategic planning, in the management and development of forests and pastures as well as in the activity of promotion of local culture[34]. Specifically, the *consorterie* would be entitled to information and participation rights related to regional territorial planning, environmental protection and energy production policies: they would be compulsorily informed by public administrations and local authorities of any planning procedure (territorial, hydraulic, environmental, energy, cultural...) affecting their territory, and allowed to issue advices and suggestions. Any decision that might be contrary to the indications they may have expressed would have to be duly justified.

34 In addition to the right to information, a real participation in policy-making processes would thus be concretely recognised, and, as long as possible, the access of collective domains to justice in environmental matters would be promoted.

An ambitious project with a promising future

35 The described draft bill is a courageous attempt to explore – and exploit – the formally broad legislative competence accorded to the region, trying to extend the application of its provisions beyond the traditional *consorterie*. Indeed, firstly, the DRB upholds the application, as far as possible, of the very same regime to any form of traditional collective property or management, whatever they may be called, provided that they are aimed at safeguarding and managing natural assets – such as soil, forests and water – and at collectively exercising either correlated production activities or mutualistic, educational, welfare and labour activities[3532] . These latter commons are usually referred to as *corvées*.

36 Secondly, the DRB recognises not only forms of community management stemming from traditional regional experiences, often still very much alive – like the *rûs,* the old village schools, the social dairies, the ovens and mills – but also all those new cooperative and mutualist forms that would declare their willingness to submit to the *consorterie*'s regime.

37 This project is thus definitely intended to provide for common minimum rules for all forms of collective property and management in Aosta Valley, not only recognising (nonetheless not establishing) them, but also empowering them and supporting their free and varied emergence. In other words, the future bill would be potentially applicable to any land or real estate intended to satisfy collective interests in the agricultural, silvo-pastoral and environmental fields, insofar as its members voluntarily adhere to these specific rules. This would *de facto* open the system to the constitution of new *consorterie*, thus promoting their model based on mutuality as a paradigm for the renewal of the alpine culture and economy and the rediscovery of the virtuous aspects of collaborative management.

38 As seen, Aosta Valley has witnessed several experiences of collective ownership and management which are still significantly alive, which need to be supported by means of an appropriate legal regime. An empowering legal framework, as the one provided for by the DRB, would help them emerge from their *limbo* of obscurity deriving from the contradictions of state and regional legislations.

39 Finally, the draft bill –on which a broad consensus seems to be forming– takes a very clear position in favour of the (old and new) *consorterie*; as collective assets –a *tertium genus*, i.e. an alternative to both private and public ownership (Volante, 2018)– they not only are to be considered as authorised or tolerated, but, rather, undeniably encouraged as an expression of fundamental constitutional principles. Furthermore, they are expression of local cultural diversity, and represent a model of virtuous economic and environmental management, specifically careful to an intergenerational perspective; in other words, they embed a "certain vision of the economy", as brilliantly illustrated by Jean Tirole (Tirole, 2016).

40 To date, this draft bill has not yet been formally introduced in the regional council, due to early elections called on September 20-21, 2020. The approval of this "courageously regional" and innovative regulation would certainly contribute to strengthening the Aosta Valley's community spirit and culture of autonomy (Toniatti, 2018) in their deepest and most authentic sense.

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NOTES

1. Given the absence of a corresponding term in English, the Italian term *Consorteria* (and *Consorterie* when plural) will be (also) used when referring to these traditional forms of commons

2. To indicate them, several expressions will be used throughout the article, all deemed equally interchangeable, such as collective ownership, commons, communal ownership or property, community-based property, collective assets, collective domains.

3. The *consorteries uti universi* are forms of collective ownership and management of indivisible goods among landowners, who corresponded to the inhabitants of a village. On the contrary, the *uti singuli* typology is more similar to a co-ownership (acknowledgd by an act) whose members are generally free to dispose of their shares.

4. In Aosta Valley, an irrigation canal is called *rû*, while other alpine regions use different names such as *bisse* or *suonen* in Valais, *waalen in* Alto Adige, *bialières in* Val Maira, *riali* in Ticino, etc. (Bodini, 2002).

5. As also stated by the Commissariat of use-rights for Piedmont, Liguria and Aosta Valley (Comm. use-rights), judgement no. 362 of 2 March 1998.

6. Const. law no. 4 of 1948.

7. Art. 2 of the Autonomy Statute (ASt); in accordance with Art. 4, ASt, the region is also entitled to exercise administrative powers in the same competence matters; these powers have been transferred, i.a., by law no. 196 of 1978 and decree of the President of the Republic (d.P.R.) no. 182 of 1982.

8. Differently from the ordinary regions: see, on this, Const. Court, judgement no. 113 of 10 April 2018.

9. As provided for by art. 51 ASt.

10. Gradually protected by law no. 991 of 1952 and law no. 1102 of 1971 on "mountain family organisations"; law no. 97 of 1994 increased the number of recipients of the legislative interventions in question ("all the other organisations characteristic of mountain environments"); on this, see below.

11. Comm. use-rights, judgement no. 362 of 2 March 1998.

12. Const. Court, judgement no. 87 of 1963.

13. Which introduced a broader regime of *ex lege* landscape protection applying to all collective properties.

14. Since it was intended to define special rules for mountain organisations only, in derogation from the general discipline of law no. 1766 of 1927.

15. Law no. 168 of 2017, art. 1.

16. Law no. 168 of 2017, art. 3.

17. Law no. 168 of 2017, art. 2, para. 5.

18. Among these bodies, it is worth noting the action carried out by the Association Autonomies Biens Communs Vallée d'Aoste, a non-profit association which has been the main driving force for initiatives aimed at studying and regenerating experiences in the management of common goods in the region.

19. This group was composed of members of: the spontaneous committee of the Aosta Valley's *consorterie*, the association Autonomies Biens Communs Valle d'Aosta, the Council of Notaries, the Bar Association, the Order of Engineers, the Order of Agricultural and Forestry Engineers, the Order of Accountants, the Order of Land Surveyors and the Association of Aosta Valley's municipalities.

20. This project can be consulted on the website of the Association Autonomies Biens Communs Vallée d'Aoste: www.autonomiebenicomuni.eu.

21. Articles 2 and 9, Constitution.

22. Art. 42, para. 2, Constitution.

23. Art. 4, Constitution.

24. Artt. 2, 42, para. 2, and 118, para. 4, Constitution.

25. Art. 5, paras. 1 and 2, DRB.

26. Art. 3, para. 1, point b) 1), of Law No. 97 of 1994.

27. Art.8, para. 1, DRB.

28. Art.13, para. 2, DRB.

29. Art.13, para. 3, DRB.

30. The registration of the *consorterie*'s goods in the land registers should be made in a unitary form and mention their characteristics, as well as the abovementioned legal sources. The *consorterie*'s real estate assets would thus be registered in the land registers as inalienable and indivisible property and its use as agro-silvo-pastoral or similar.

31. Art. 9, para. 8, DRB.

32. Art. 21, para. 1, DRB.

33. All the income deriving from the management by the municipalities would be used only to finance projects of general interest for the municipal community.

34. Art. 3, para. 4, let. b), law no. 97 of 1994.

35. Art. 7, para. 1, DRB.

ABSTRACTS

Commons have existed in the Aosta Valley's territory for centuries, of which the most distinguishing and still lively are called *consorterie*. This article aims to study this peculiar form of commons, as well as the evolution of their legal status, focusing on national and regional legislation. This paper also seeks to analyse a regional draft bill on commons written by a technical group appointed by the regional government. Its principal goal is to provide *consorterie* with a new legal status in line with the results achieved by scholars, jurisprudence and national legislation. Moreover, the legislative proposal explores the regional legislative competence related thereto by proposing some innovative solutions.

INDEX

Keywords: Commons, Aosta Valley, Consorterie, Regional draft bill

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