

“Codification” and the Environment

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Abstract: This article examines the problem of “codifying” the environment in the context of the Italian system, where a specific source (Legislative Decree no. 152/2006) has recently been approved. Given that codes do not enjoy a specific “régime” as such, the paper suggests that it is not worth answering the question as to whether the decree is truly a code, since it is more important to assess whether the final product of the codification (i.e. the said Legislative Decree) is a “good” one. This article lists the Italian “code’s” shortcomings but also emphasizes the fact that it has introduced the principle of sustainable development as “hard” law, rendering it applicable to all administrative activities, not just those in the environmental sector. As a consequence, the “code” has become the instrument through which the main principle it established (sustainable development) has emerged and been promoted to the status of “general principle”. Being the expression of a responsibility towards future generations, this principle is closely related to the notion that the environment must be considered the object of a duty rather than a right.

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I. *Codification and the Environment in the Italian system*

The history of Western institutions has been marked by experiences of “codification” and this is especially true of Europe ¹. Indeed, some specific periods (such as that of the French revolution, for example) have particularly felt its influence.

The desire to codify has recently been re-emerging in Italy ², as elsewhere, and one of the areas to attract attention has been the environment.

More specifically, Italy’s enabling statute, Law no. 308/2004, has led to the issue of Legislative Decree no. 152/2006, governing environmental issues. The process resulting in the final version of the decree was not exactly a smooth one, however. Such fact is demonstrated by the numerous criticisms made by the legislation’s many opponents, both during the law-making process and afterwards. In particular, it was observed that the decree vested too many functions in the State. Indeed, the President of the Republic initially refused to promulgate it and requested that the text be re-considered. This is not all. The original decree has frequently been amended, thereby confirming that the “codification” was a sort of progressive adaptation of the initial “project”.

Some of the amendments changed the decree’s content quite considerably. The most recent one, in particular, is important because it appears to have transformed the original decree into a genuine code. Indeed, the advice given by the Council of State on 5th November 2007 (opinion no. 3887) emphasized that the proposing Ministry’s intention was to change the nature of the decree, thereby creating a systematic code based upon general principles.

Such fact raises a fundamental question: is the decree truly a code? ³

¹ See M.E. Viora, *Consolidazioni e codificazioni. Contributo alla storia della codificazione*, Giappichelli, Turin, 1956; C. Ghisalberti, *La codificazione del diritto in Italia 1865-1942*, Laterza, Rome-Bari, 1997, and G. Tarello, *Storia della cultura giuridica moderna*, I, *Assolutismo e codificazione del diritto*, Il Mulino, Bologna, 1981.

² In general, see G. Tarello, *Codificazione*, ad vocem *Dig. disc. pubbl.*, Utet, Turin, III, 1989, 465 et seq.; R. Sacco, *Codice. I. Teoria generale*, ad vocem, *Enciclopedia giuridica*, Treccani, Rome, 1988; Id., *Codificare: modo superato di legiferare?*, in *Riv. dir. civ.*, 1983, I, 117 et seq., and A. Gambaro, *Codice civile*, ad vocem, *Dig. IV, disc. priv.*, II, Utet, Turin, 1988, 462 et seq.

³ According to G. Rossi, *Diritto dell’ambiente*, Giappichelli, Turin, 2008, 47, for instance, the answer must be in the negative.

Although the decree's title does not include the word "code", a theoretical definition of the term is needed before this question may be answered.

This paper seeks to provide such a definition and to show how this process will require a reformulation of the question.

II. *The Italian Code's Shortcomings*

The ultimate goal of "codifying" environmental law is not easily achievable.

A focus on the result of the codification (rather than the process itself) reveals some inherent shortcomings⁴, although it should be noted that some of them stem from the enabling act providing the juridical basis of the decree.

The decree's first shortcoming is that it does not encompass all areas of environmental law. Many important aspects, such as noise pollution, electromagnetic pollution and light pollution, remain uncovered by the text.

Furthermore, even within the confines of the code, some important legal institutions have been addressed only very superficially. Consider the so-called "procedural participation", for example. The right to take part in decision-making processes is an aspect that is emphasized at an international level⁵, yet the decree deals with it only incidentally. Equally significant is the lack of focus on "market tools" that could be used to improve the environmental performance of firms. The latter point is highly relevant, given that the voluntary approach is acquiring ever-increasing importance within the legal framework of environmental protection.

A third shortcoming lies in the lack of consistency marking the whole "codification" process. Indeed, it was only by way of amendments contained in Legislative Decree no. 4/2008 that general principles were established i.e. well after specific provisions regulating the area in detail had already been enacted. Thus an evident logical inversion of the codification process devalued the function of principles despite the fact that, as the etymology of the word makes

⁴ See N. Olivetti Rason, *La disciplina dell'ambiente nella pluralità degli ordinamenti giuridici*, in S. Crosetti, R. Ferrara, F. Fracchia and N. Olivetti Rason, *Diritto dell'ambiente*, Laterza, Rome-Bari, 2008, 82.

⁵ See the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark, on June 25, 1998.

clear, principles do not constitute the goal but, rather, the starting point of a process.

III. *The Difficulties of Codifying Environmental Law*

Leaving specific features of the “code” actually produced to one side and considering the question in the abstract, any attempt to codify environmental law will be fraught with difficulty.

First of all, the fact that the code under consideration is a state one raises the issue of the scope of the state’s legislative competence. On the face of it, given that in Italy the subject-matter in question falls under the state’s exclusive competence, no regional interference should be allowed. More precisely, art. 117 of the Italian Constitution (as amended in 2001) declares that the State enjoys exclusive competence in the area of, *inter alia*, “protection of the environment, the ecosystem and cultural assets”.

Of course, the scope of such competence depends entirely on how “protection of the environment” is interpreted. In any event, since its fundamental decision no. 407/2002⁶ (qualifying the environment as a sort of transversal subject-matter unsuitable for attribution to the State’s exclusive competence), the Constitutional Court has consistently ruled that significant room for regional legislative power does exist. Thus the Court has legitimated the regions’ law-making as regards the environment, allowing the related law to govern the area alongside that of the State, particularly when regional law introduces stricter forms of protection.

Legislative Decree no. 156/2006 nevertheless shows some signs of the frequently difficult relationship between state and regional sources. For example, Art. 268 (regarding air pollution) establishes that the “competent [administrative] authority” must be the one identified by regional law as the entity charged with the responsibility of monitoring compliance with licence conditions. As far as environmental impact assessment (EIA) is concerned, section 7 lays down the rule for the division of administrative competences, basing it on two criteria: competence to authorize the plant and the scale of the intervention. As regards the latter, only some projects are subjected to state EIA (one of the most significant legal institutions introduced by the environmental legislation, directed at checking the possible positive or negative impact a

⁶ *Foro it.*, 2003, I, 688.

project might have on the environment). Others, listed separately, are subjected to a regional EIA.

Finally, section 2 *quinquies* establishes that regions can provide for stricter forms of legal protection of the environment when specific situations within their territory so require. This so long as such provision does not cause arbitrary discrimination (including that of unjustifiably complicated procedures).

Returning to the regional competence for environmental legislation recognized by the Constitutional Court, it should be noted that the decree is also a tool deployed to “stabilize” and reinforce state competence in a field characterized by a “clash of competences”. As a matter of fact, this problem arises fairly frequently in the Italian legal system. Legislative Decree 163/2006 (the “Code on Public Contracts”) could also be considered the result of an attempt to establish state regulation in an area where both state and regional legislative competences are involved. Be that as it may, in its decision no. 401/2007, the Constitutional Court endorsed the role of state law in that particular field. *En passant*, a comparison of the two cases suggests that, in that case, the concept of “transversal subject-matter” was invoked by the Court for the purposes of strengthening the position of the state, whereas, in the context of the environment, the same concept was used to rule in favour of regional competence.

Another of the “difficulties” posed by codification is linked to the problem of establishing precisely where the subject of the environment begins and ends and defining the proper relationship between the latter and some closely connected topics, such as landscape, health and planning law.

Furthermore, the codification under consideration regards a sector that is particularly affected by EU law. Indeed, the latter is becoming increasingly relevant in the environmental field. In this respect, it is sufficient to mention waste regulation: the important framework directive 2008/98/EC has very recently been approved, thereby requiring the national legislator to intervene promptly in this sensitive area, by amending the existing legislation.

In truth, European law seems also to have provided an “opportunity” to reorganise environmental legislation in the form of a “code”. For instance, section 1(8) of Law no. 304/2004 (the enabling statute providing for the delegated legislation that became the “code”) includes among the criteria binding the government, the “full and consistent implementation of the European directives for the purposes both of guaranteeing high levels of

environmental protection and of contributing to the competitiveness of undertakings and territorial systems, thereby avoiding distortion of competition". This motivation is fairly frequent in the Italian system. The above-cited Code on Public Contracts (Legislative Decree 163/2006) was also issued on the "occasion" of the implementation of some European directives. This aspect may be summarized by stating that the relationship between Italian "codes" and European law is somewhat troubled. European law is often invoked as a justification for codifying the national law governing a sector that is thought to merit "stabilization", especially when infringement of the former has moved the Commission to take legal action against Italy. Codification can nevertheless lead to an "unstable" framework, owing to shifts that may or may not occur at the European level. From this point of view, the environmental code and the public contract code share the same destiny.

These difficulties are accompanied by more general ones disturbing the codification process in its function as a rationalization of the law and a concentration of sources. The crisis experienced by this technique is well expressed by the term "decodification" which is used to indicate the emergence of specific regulations (laid down by legal sources other than the "code") even in areas traditionally covered by the Civil Code.

IV. *A General Assessment of the Code*

The next (and intermediate) step is to consider what is, perhaps, the most important question in this paper: is the final product of the codification (i.e. the "code") a "good" product?

Several criteria might be applied when seeking to answer this question. As these are linked to different aspects of the work of codification, they naturally reflect different perspectives.

a) First of all, the "code" must be assessed in terms of its completeness. As already stated, various criticisms have been raised in relation to the overall structure of the code in that it appears incomplete.

b) Another yardstick is the "degree" of simplification that the code guarantees. This aspect is very important in an environmental context, given the subject's intrinsic complexity.

In this context, simplification means the reduction of procedures or the elimination of unnecessary steps in them. As far as coordination between

different procedures is concerned, some provisions are worth mentioning. Under section 9, for instance, the forms of participation provided for by the law regulating environmental impact assessment meet the requirements established by Law no. 241/1990 (the general legislation governing administrative procedures). Furthermore, if considered useful, the authority can convene a so-called "conference of services" (*conferenza di servizi*) which, for decision-taking purposes, gathers together all the public bodies involved in the same matter. This is not all. As long as the timeframes provided for public consultation during the EIA are respected, the competent authority can enter into an agreement with private applicants and other bodies for the purposes both of regulating the way in which the authorizing power must be exercised and of achieving simpler and more effective procedures. In addition, a Government regulation ("*regolamento*"), providing for delegification regarding technical activities, should also ensure that procedures are simplified.

c) Another side of the simplification issue and a highly relevant yardstick in its own right is the coordination/concentration of different elements of public administration. In this respect, the so-called "integrated environmental licence", provided for by the Integrated Pollution Prevention and Control Law, should be mentioned. Under the code, if an intervention is subject both to IPPC regulation and to the state EIA rules, then the final EIA decree "takes the place" of the IPPC licence, the latter being "substituted or coordinated" by the EIA. A similar rule applies when competence for the EIA is enjoyed by the regions. The rules governing the permit required for waste treatment installations offer another example; while the previous regulations provided for two different licences, only one permit is now needed for the purposes of realizing and managing such infrastructures. These efforts to concentrate and reduce licensing competences and related administrative acts certainly merit a positive mention. Nevertheless, many other sectors theoretically needing similar rules (town planning, in particular) have been ignored by the code in practice.

d) The balance between "central" and "local" is another criterion. In this respect, it is sufficient to remember the criticisms raised in relation to the code's concentration of power in the State. The Ministry appears as the real protagonist in the main environmental situations (ranging from the EIA to liability for environmental damage) and only pretty limited room has been left to the regions.

e) The balance between Acts of Parliament and government regulations ("*regolamenti*") constitutes another relevant point of reference for understanding

the basic choices the code reflects. Although some of the code's provisions delegate the regulation of certain specific subjects to government regulations, the overall impression is that the code shows a clear preference for Acts of Parliament. It is worth noting that the code does not make use of a specific tool provided for by the Italian Constitution. In cases of exclusive state competence (such as the subject-matter of the environment), Article 117 allows delegation to the regions of the power to pass regulations. In other words, the code could have increased the regions' role in environmental protection by focusing on their competence to issue regulations instead of recognizing their genuine legislative powers but, ultimately and as stated earlier, it decided otherwise.

f) Another possible criterion for evaluating the code is the balance it strikes between procedures and organisation. Although some provisions do address organisational aspects, there is no doubt that the code appears to focus on activities and procedures. Once again, the final image is of a code that is incomplete because it neglects certain important aspects. More specifically, the rules governing the Ministry's structure are wholly excluded, as are those governing the organisation of the national environmental protection agency. Moreover, the code fails to resolve the most sensitive issue on the table: the relationship between politicians, those in charge of the administration and the technical experts. Here, a symbolic example may be found in the EIA and, more particularly, the cases of "silence" and dissent. Section 26 deals with silence by providing that expiry of the deadline without any express provision issued by the authority will lead to the Government's exercise of a substituted power that allows it to intervene by issuing an injunction against the inactive authority. Hence, the pre-eminence of the political level is ensured, despite the somewhat curious fact that a political body might act without considering any technical elements (the premise is that it is the technical body which has remained silent). It is, however, likely that the authority's old practice of issuing acts after expiry of the deadline will continue. It should in any case be noted that, under the general law governing administrative procedures (L. 241/1990), technical bodies are supposed to enjoy a sort of protected special competence. This "guaranteed" sphere of competence is protected against administrative interference in that the administration cannot intervene without the technical body's evaluation, where such evaluation is required by law. In other words, the administrative body responsible for the procedure cannot decide cases when technical bodies involved in environmental matters remain silent, since that silence constitutes an insuperable bar. Such is the general rule set by the

general law. Nevertheless and as already stated, under the code, the special technical competence has no protection against political interference in one of the most important legal institutions established within the environmental field (the EIA): when a conflict arises, it is the politicians who have the last word.

The code remains silent, on the other hand, on the equally paradigmatic subject of “dissent” during the EIA procedure. As regards the political body’s disagreement with the findings of the technical body (a Commission), it would appear (in the light of the code’s solution to the previous sensitive problem of inaction) that the Environment Minister has the power to reverse the technical body’s final decision. The code remains equally silent in relation to disagreement on the part of the Minister with competence for the realization of infrastructures (who might insist on overriding opposition from the Minister of the Environment). Once again, it would seem preferable to confer final decision-making power on the Government, entitling it to solve the conflict and have the final word. This solution is partly based on a consideration of similar cases regulated by Italian law. In particular, when a negative EIA is issued at the end of a “conference of services” (*conferenza di servizi*), section 14-*quater*, para. 5 of Law no. 241/1990 provides that this obstacle can be overcome and identifies the Government as the body entitled to adopt the final decision, after taking account of the various interests involved. It is worth noting that, in this case, the power to overturn a negative decision emerging from the conference is conferred not only on the individual Ministry, but on the whole Government, thereby increasing the possibility that the previous assessment will be reversed.

Given the highly sensitive nature of the issue, a clear rule established by the code would have been preferable, as would a general division of competences between political figures, administrative structures and technical bodies. The latter should avoid any interference in the evaluation of general interests since they have no specific legitimacy in that field. On the other hand, it would have been helpful to establish what kind of exigency might entitle the politicians to override the technical bodies’ evaluations.

g) Another possible criterion for assessing the code is the “quality” of its rules.

In this respect, the assessment is not very positive. Notwithstanding the fact that the task of “pinning down” environmental issues in a well-structured framework law is truly complex, greater care should have been taken in drafting the provisions. Some of them appear confused (for instance, section 278, regarding air pollution, qualifies as “orders” acts which, from a theoretical

point of view, are sanctions). The language used is sometimes very technical, almost a “code” within the code. In other instances, the code does not express clearly the specific rule it is establishing (in particular, in the context of the public selection process intended to identify the firm to be accorded the right to provide waste-collection services, it is not clear if the “in-house provision” system is eligible). Sometimes it forgets to deal with an important stage of the procedure (e.g. the phase relating to the execution of measures that the authority might require the liable party to take in cases of environmental damage). These flaws and lack of comprehensiveness are quite remarkable, considering that one of the most important functions traditionally assigned to codes is that of helping lawyers find the rule clearly applying to a specific case.

h) Sectoral stabilization is another of a code’s tasks. It offers a separate yardstick that can be helpful in assessing the quality of a code. Legislative Decree no. 152 has not achieved this goal since the existence of the code has not prevented tensions or states of flux stemming from amendments occurring at a European level and thus the need for “maintenance” through legislative intervention. The constant amendments are the most significant proof of the code’s failure as an instrument intended to stabilize the law for once and for all. In a way, they seem to turn the codification exercise into a complex process whereby the first version of the code appears as a peculiar kind of draft law endowed with immediate effect. The most that can be said is that the code achieves a “stabilization” understood in a wholly different sense from that used above for our evaluation purposes: in actual fact, the law has been stabilized through subsequent legislative stages which form part of the same codification experience and reflect (or should reflect) one and the same project. Even if this perspective is adopted, however, it must be said that the final code (i.e. the original text plus amendments) has not been placed beyond all danger of future modification. Indeed, section 12 of Law no. 69 dated 18 June 2009 confers power on the government to issue further legislative decrees for the purposes of amending and integrating the existing legislation on the environment (the “code”, most particularly).

i) A comparison of the environmental code with the most traditional experiences of codification can provide other important and appropriate criteria for evaluation. Traditionally, codification was linked to deep-rooted historical and social change. Such fact is demonstrated by the most famous example, carried out at the end of the French Revolution (although, on a closer analysis, it was not the product of the revolution itself, but the result of the genius of

Napoleon, the man who assumed power after it). The first in the modern era, it is considered a sort of “model” for those that followed. However, most recent forms of codification have lacked its particular social impetus and are also much less ambitious than that fundamental experience. As a consequence, given that the two cases in point are so dissimilar, it seems useless to pursue this line of analysis. At most, it might be observed that, instead of codifying the law governing a sector, the Italian legislator has “reinforced” or “consolidated”⁷ it, without aspiring to set up a new legal system. On the other hand, greater transformations are impeded not only by the European influence but also by the structure of the Italian system and the complexity of the plural sources involved in environmental matters.

j) A different and more interesting analysis focuses on another of the traditional tasks of codification: depoliticization (by laying down clear rules), in favour of neutralization. In this respect, it must be observed that Italian environmental law often swings from extreme technicality to over-politicization. The “code” has not affected the relationship between the two poles: policy continues to dominate.

k) Traditionally, codes set out a law that was basically complete, thereby excluding any need for integration by way of external sources. Taken as a whole, the “code” has failed in this task, too. Indeed, the very important “dimension” of market dynamics (also relevant from a juridical point of view) has not been “captured” by the code. Consideration of this dimension is essential for outlining the current environmental protection system and understanding the behaviour of the various players involved. Although it is true to say that it is very difficult to intervene by way of a code with regard to market dynamics (an area in which legislatures are often plagued by informational asymmetries), this aspect is nevertheless one of the most significant in the environmental sector and is totally neglected by the code.

l) Very interesting elements emerge from a consideration of one of the traditional rationales for codification, namely, the need to reduce legislative chaos and confusion. Incidentally, such reduction might be seen as a measure favouring both citizens and firms, who prefer a very clear legal framework within which to act. This objective is also relevant to environmental codification, given that the laws dealing with this matter are particularly fragmented. Nevertheless, the task has not been achieved owing to uncertainties generated by internal factors (shortcomings in the code) as well as

⁷ See M. E. Viora, *Consolidazioni e codificazioni*, cit., 42 et seq. on this subject.

external ones (e.g. crises caused both by European law and by judicial decisions).

Finally and as we will see at the end of the analysis, the absence of a code does not necessarily imply for one moment that the law is unclear.

V. The Issue of Disciplinary Boundaries

The traditional concept of a code was closely related to the need to construct an exhaustive legal *régime* for the purposes of allowing the boundaries between disciplines to be easily identified.

A closer consideration of this point is helpful to our enquiry.

A study of environmental law's evolution into the current "code" can give the impression that the legislator has simply echoed the surfacing and consolidation of environmental awareness, so far without succeeding in hastening its development in any useful way.

In actual fact and unlike other cases of codification, a specific feature of Legislative Decree no. 152/2006 is its effort to meet society's demand for certainty by providing a unitary legal framework, thereby according the environment the dignity of an autonomous disciplinary subject.

This observation is closely connected to the subject of legal principles.

Indeed, the presence of general principles marks the breakthrough from a code having the sole function of "identifying" and "declaring" the pre-existing law (with the exception of the EIA and the environmental liability regulation) to a legal source reflecting deeper transformations occurring within the legal order.

Although the principles governing the environmental sector may have been drawn from European law (which prevails over Italian law) prior to the "code" as well, their express statement in the latter's initial provisions confers *locus standi* on citizens, who now have the right to "trigger" them directly, including before a court. It should be added that, at least in the Italian juridical tradition, it is precisely through the clear identification of principles that a legal system becomes autonomous.

The same may be said of the environment, as an academic subject, in relation to the position it occupies within administrative legal science as a whole⁸.

VI. *Is Legislative Decree no. 152/2006 truly a Code? The Wrong Question*

Returning to the starting point of this analysis, it may now be said that there is little point in asking whether Legislative Decree no. 152/2006 is an authentic code (rather than the fruit of a consolidation, for instance) since the answer depends on the preliminary and “troublesome” definition of “code”. Furthermore, the decree’s qualification as a code would be legally significant only were it to have certain clear consequences. This is not the case in the Italian system: codes do not enjoy a specific “*régime*” as such. It is therefore worth taking the trouble to try and answer the question raised earlier regarding the nature of code only if it helps to focus on the basic issue of the internal “quality” of text as a whole and to offer new criteria for assessment.

This is precisely what the previous pages have sought to do and we now have quite a complete checklist for a final evaluation.

There emerges the picture of a code that:

- is not complete;
- does not stabilize the sector;
- neither reduces the importance attached to policy nor considers the role of the market properly;
- concentrates power in central government;
- fails to modify the previous normative framework, except in some areas such as EIA and environmental liability;
- does not deal with the organizational aspects; and
- lays down rules that are often unclear.

In short, the code appears to be a text deserving a negative assessment overall, being at most a tool facilitating the search for the relevant provision on a specific point.

In addition, it must be observed that not only is the code incomplete, but it also reaches beyond the subject matter of the environment to some extent.

⁸ See V.E. Orlando, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico*, 1889, R. Università di Modena, Modena, 1925, 16. For a more recent appraisal, see M. Mazzamuto, *Il riparto di giurisdizione. Apologia del diritto amministrativo e del suo giudice*, Editoriale scientifica, Naples, 2008.

This observation may sound paradoxical but should become more comprehensible after analysing the element that has been subjected to the “experience” of codification i.e. the environment.

Codification requires that an autonomous “subject” or area of the law, with its own specific features, already exists and can be identified.

The “code” does not provide an unequivocal definition of “environment”. It does, however, lay down the main principles embodying the environment’s primary features from a juridical point of view.

For instance, section 2-*bis* establishes the principles governing environmental law-making and clarifies that they stem from articles 2, 3, 9, 32, 41, 42, 44 and 117 of the Constitution and from the EU Treaty.

Moreover, section 3-*ter* makes all private and public bodies and persons subject to the duty to protect the environment, the ecosystems and cultural assets. The provision cites article 174 of the EU Treaty as the source of the precautionary principle, the preventive action principle, the principle that “the polluter pays” and the principle that environmental damage should be rectified at source, as a matter of priority. These principles therefore bind administrative action.

Lastly, section 3-*quater* lays down that any human activity which is legally relevant under the code must comply with the sustainable development principle, so as to guarantee that satisfaction of the present generation’s needs does not compromise the quality of life and opportunities of future generations.

The sustainable development principle is the true keystone of the duty of solidarity⁹. Underpinning the whole of environmental law, it is the expression of the latter’s rationale: responsibility towards future generations¹⁰. It thus supports a definition of “environment” that focuses on solidarity.

Such fact merits attention as it is frequently asserted that the principle belongs to the category of “soft law” and lacks concrete legal effect, since it is up to States to translate it into binding provisions or “hard law”. Indeed, it has also been widely criticised on the ground that it appears vague and that its normative status is ambiguous.

⁹ It was shaped by the UN Brundtland Commission’s final Report (*Our Common Future*), which was issued in 1987 and coined the definition (“development which meets the needs of the present generation without compromising the ability of the future generations to meet theirs”). It was subsequently emphasized during the Rio de Janeiro Conference (1992).

¹⁰ In general, see the Declaration on the Responsibilities of the Present Generations Towards Future Generations, Unesco, 1997.

It should be remembered that the concept of sustainable development was introduced explicitly in the 1980s¹¹. More specifically, the first important stage in the development of the concept at an international legal level was the occasion of the independent Commission set up by the UN in 1984 (the World Commission on Environment and Development, or "WCED")¹². In 1987, the so-called Brundtland Commission (named after its chairperson, the Prime Minister of Norway) published its Report "*Our Common Future*", defining sustainable development as follows: "development which meets the needs of the present generation without compromising the ability of the future generations to meet theirs". It is worth noting that this first and very famous definition does not refer to the environment¹³ but focusses, rather, on the needs of future generations. As a matter of fact, the road to a clear implementation of the principle subsequently proved to be extremely difficult. Partly for this reason, a significant attempt was made to turn it into a international agreement. The second stage in the concept's development was therefore the Rio de Janeiro Conference (the United Nations "Conference on Environment and Development", also known as "UNCED" or the Earth Summit). The title of the Conference is highly significant in its own right. Although it contains no explicit definition of sustainable development, it links the term "development" to "environment" by a conjunction, thereby demonstrating the need to use an integrated pattern of analysis.

The Rio Declaration comprises 27 principles. The third principle declares that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations", whilst the fourth provides that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". A "plan of action" (Agenda XXI) was issued in Rio along with the declaration. By identifying the action to be taken for "Global Sustainable Development for the XXI Century" and thereby helping to clarify the object of the principle, the plan expressed the need to guarantee not only environmental protection, but also social development, human rights and social justice.

¹¹ See R. Allen, *How to Save the World*, Totowa, NJ, Barnes & Noble Books, 1980; L. R. Brown, *Building a Sustainable Society*, New York, W. W. Norton, 1981, and J.G. Robinson, *The Limits to Caring: Sustainable Living and the Loss of Biodiversity*, in *Conservation Biology*, 1984, 20.

¹² In general, see Philippe Sands, *International Law in the Field of Sustainable Development*, *Brit. Y.B. Int'l. L.*, 1994, 303 et seq.

¹³ S. Atapattu, *Sustainable Development, Myth or Reality?: A Survey of Sustainable Development Under International Law and Sri Lankan Law*, in *Geo. Int'l Env'tl. L. Rev.* 2001, 271.

The principle has subsequently been mentioned in numerous conventions. For instance, art. 3 of the U.N. Framework Convention on Climate Change (1992) provides that “the Parties have a right to, and should, promote sustainable development” and the Convention on Biological Diversity (1992) declares that “States are responsible for conserving their biological diversity and using their biological resources in a sustainable manner”. In 2002, exactly ten years after Rio, the World Summit on Sustainable Development (“WSSD”) took place in Johannesburg and led to a Declaration on Sustainable Development and a Plan of Implementation.

The sustainable development principle has also been adopted at a European level.

Art. 2 of the EU Treaty states “the Community shall have as its task ... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment...”. In addition, art. 6 refers to our concept while laying down the principle of integration: “Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development”. The Charter of Fundamental Rights of the European Union also deals with sustainable development. Indeed, under Chapter IV (significantly entitled “Solidarity”), article 37 (“Environmental protection”) provides that “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”.

Returning to the Italian context, however, the principle may now be considered “hard law” and has become binding.

It is significant that section 3(3) of Legislative Decree 152/2006 emphasises solidarity. It states that the sustainable development principle must ensure that the solidarity principle be taken into account in the dynamics of consumption and production, in order to protect and improve the quality of the environment, including that of the future. As a matter of fact, the provision creates some uncertainty in that the duty appears to apply not only to the activities carried out by authorities, but also to every other human activity, thus

including private ones. Such an interpretation could either result in the provision being downsized to the status of a declamatory (and useless) statement or in very serious restrictions being imposed on private parties who would find themselves obliged to respect the environment generally, in addition to meeting specific legal requirements. It should, however, be noted that there is a difference between section 3-ter and section 3-*quater*. The former establishes a general duty of protection extending to individuals, without further defining such duty's parameters, whereas the latter circumscribes the duty to respect the sustainable development principle within precise legal confines, given that it refers only to the activities that are "relevant" under the code.

This frame seems to be compatible with the concept of "environment" which, elsewhere, I have suggested should be formulated in terms of duties and solidarity¹⁴, rather than rights (the object of which is often equated with a "healthy environment")¹⁵.

In my view, occurrences such as natural disasters demonstrate that it is profoundly misguided to put man at the centre of the world as a sort of "master". This form of anthropocentrism leads, in legal terms, to the qualification of human beings as the "protagonists" of rights and thus entitled to demand a particular kind of nature. Yet man cannot compel the environment to be configured in a specific way (still less a "healthy" one) for the simple reason that nature does not conform to human rules, but shapes and follows its own. Very often, mankind appears to be the victim, rather than the aggressor.

¹⁴ F. Fracchia, *The Legal Definition of Environment: From Rights to Duties*, in *ICFAI Journal of Environmental Law (IJEL)*, April 2006, 17-37.

¹⁵ Italian scholars have developed several definitions. For instance, according to M.S. Giannini, "Ambiente": *saggio sui suoi diversi aspetti giuridici*, in *Riv. trim. dir. pubbl.*, 1973, 23, environmental law comprises three other specific and individual areas of law: planning law, pollution law (relating to the protection of water, soil and air), and "natural beauty" law (he consequently denied the existence of a unitarian legal concept). Alberto Predieri, on the other hand, included the environment within the concept of natural beauty (*Paesaggio*, ad vocem, *Enc. dir.*, XXXI, Giuffrè, Milan, 1981, 503 et seq.) In contrast, judges (i.e. the Court of Cassation, sitting in joined divisions, Judgements 1979/5172 and 1979/1463, reported in *Foro it.*, 1979, I, 2302 and 902) have often qualified the environment as a right (or, more specifically, "a right to a healthy environment") based on art. 32 of the Constitution (which deals with health) and one protected by the ordinary judge. The idea of a unitarian right is also endorsed by A. Postiglione, *Ambiente: suo significato giuridico unitario*, in *Riv. trim. dir. pubbl.*, 1985, 35, and F. Giampietro, *Diritto alla salubrità dell'ambiente*, Giuffrè, Milan, 1980. It should, however, be remembered that these theories were developed before the environmental issue was recognized under the Italian Constitution; it was only through the amendment of 2001 (Constitutional Law No. 3 of 10 October 2001, *Gazz. Uff.* 2001, October 24, No. 248 (It.)), that protection of the environment was added to the State's legislative powers.

From another angle, elements of nature (habitat, fauna, vegetation and so on) traditionally included both within the general concept of “environment” and within what we perceive as being our environment, cannot enjoy the legal protection ensured by a right. From a legal point of view, only man can enjoy rights: non-human elements, *per se*, have no right to legal protection.

Furthermore, this “rights-based” approach does not ensure any safeguards for those dangerous species that endanger human life (e.g. poisonous snakes or crocodiles). Although they would fall foul of any human right that were to have a “healthy environment” as its sole object, it seems unfair to deny them legal protection.

It also does not fit the current features of the legal system. The law takes the environment into account when setting targets or standards for firms, for example, and when conferring certain public competences on authorities, limiting the actions of citizens and preventing dangerous activities etc. Technically speaking, there is no evidence of a right in such cases and when, on closer analysis, a genuine right does exist, its object is not the environment, but health.

Preserving a unitary concept of the environment, however, the approach here suggested also focuses on ethical considerations. Broadly speaking, once a sort of “anti-ecological” attitude has been overcome¹⁶, the environment must be seen as one of the objects of man’s moral responsibility. More specifically, philosophers have made huge efforts to identify man’s moral duties and have progressively expanded the area of what is considered morally relevant, overcoming a series of obstacles in the process. These efforts have shed light on new kinds of moral commitment, ranging from those towards other men or society to duties relating to the environment. In a way, this result is closely connected to the ethic of respect for what is “other”, such ethic being enriched by the idea that the “other” might not only be a human being, but also the environment. In other words, even when man is seen as an aggressor, his position *vis à vis* the environment should correctly be defined in terms of solidarity, duties and responsibility. This concept also appears significant in the context of a legal analysis.

¹⁶ R. Carson, *Silent Spring*, Boston, Houghton Mifflin, 1962; A. Leopold, *A Sound Country Almanac*, The New York Times Book Review, 1949; E. Hargrove, *Foundation of Environmental Ethics*, Englewood Cliffs, NJ, Prentice-Hall, (1989); K.M. Sayre, *An Alternative View of Environmental Ethics*, in *Envtl. Ethics*, 1991, 195 et seq.; J. R. Desjardins, *Environmental Ethics* Wadsworth, Belmont, 1993, 13 et seq.; D.G. Dallmeyer, Albert F. Ike and A. Young (eds.), *Environmental Ethics and the Global Marketplace*, Athens, University of Georgia P., 1998, *passim* and A. C. Flournoy, *In Search of an Environmental Ethic*, in *Colum. J. Envntl L*, 2003 et seq.

It is worth observing that the theory suggested here stresses the need for an "anthropocentric" legal perspective. Nevertheless, a clear difference between this kind of anthropology and the traditional one must be emphasized. This kind of anthropology does not refer to rights but to duties. Indeed, when dealing with man (whether as "aggressor" or as "victim"), the legal system establishes his responsibility to respect and protect the environment by laying down a list of obligations. Consequently, environmental law must embrace the provisions that are devoted to establishing and regulating those human actions that trigger an obligation to respect and protect nature.

Thus defined, environmental law manifests specific principles. These are precisely the ones mentioned above, namely, the principle that "the polluter pays", the "preventive action" principle, the precautionary principle and the principle that environmental damage be rectified at source. They might easily be translated into concepts of duty, solidarity and responsibility. The common thread running through them all is the sustainable development principle. This, too, might be conceived in terms of duties and responsibilities.

To conclude, the "right" to live in a specific environment can be vested in humanity as a whole only by adopting a philosophical approach. Nevertheless, this right of "humanity's" can only be guaranteed by imposing concrete "duties" on mankind.

VII. *Sustainable Development: a now General Principle*

For the purposes of this analysis, the "code's" most important provision is section 3-*quater*, para. 2, since this qualifies the sustainable development principle as a rule that is applicable to all administrative activities and therefore even when administrative power is not being exercised to defend an environmental "interest". Under this provision, therefore, any activity carried out by a public authority must respect the principle. This for the purposes of ensuring that, when an authority takes public and private interests into account in the exercise of a discretionary power, the environmental ones are given priority.

In this way, the sustainable development principle, true foundation of environmental law as a whole and basis of the other environmental principles referred to above, seems to have reached beyond its own boundaries (including

those of scientific study), being now a general principle of administrative law *tout court*.

It seems a sort of Hegelian dialectic, not only because “development” has been able to absorb its opposite (the environment), but also because the environmental principle has expanded beyond its original confines, becoming the synthesis and thereby assuming a new role.

In other words, Legislative Decree no. 152 has carried out its mission as a code by laying down clear principles in a specific sector but it has also turned these into constraints applicable to any kind of administrative decision. Thus, in accordance with the principle of integration (likewise established by the EC Treaty), the sustainable development principle now influences any discretionary choice that might be made by the authorities and thus renders it even more open to judicial review.

If the original version of the “code” could be criticised for its lack of general principles, the most recent amendment marked a real breakthrough in the evolution of environmental law. Moreover, the fact that these principles are also based on international and European law means that they assume a special significance. Incidentally, as regards the importance the code attaches to environmental regulation, it should be mentioned that section 3 provides “the provisions of the present decree can only be amended, departed from or repealed by way of express declaration”. In this way, the role of the code has been reinforced.

Returning to the principles the code contains, it is precisely the sustainable development principle that permits us to imagine the code’s future.

Any prediction of its fate must consider that codification failures can depend on various factors. These include incompetence on the part of the legislator and legal academics’ inability to guide the law-makers adequately.

In the past, the Italian science of administrative law has been pretty active and attentive. Nevertheless, it failed to guide or inspire those responsible for shaping the code in any significant way. Now that the code has been issued, however, scholars of administrative law can take responsibility for “lighting the path” that must be followed to enforce the code.

The sustainable development principle still needs to be clearly defined and constitutes the acid test of legal academics’ ability to contribute valuably to the evolution of environmental law. The fact that the principle has a significantly long-term relevance will necessitate continuous adjustments that

cannot be left solely to the judges or to “maintenance activities” carried out by Parliament.

VIII. *Some Final Remarks regarding Man's Role: from Gamekeeper to Hunter*

The codification of environmental law “within” the legal system has turned into a statement of principles governing “the” legal system.

As soon as it had fulfilled its task of rendering environmental law autonomous, the code faded - as “code” - and became the instrument through which the main principle it had established has emerged and been promoted to the status of “general principle”.

In conclusion, we can say that the decree does not appear to be a true code but, rather, the result of a “strengthening” experience or consolidation (although it should be noted that the term is used here not in its traditional sense but with reference to the sustainable development principle, which appears stronger than before and consequently a sort of solid cultural “structure” within our system).

In his book *Liquid Modernity*¹⁷, Z. Bauman maintains that society's traditionally solid structures are going to dissolve into an “endless sea”. Partly due to globalization, the long-term perspective is fading and being replaced by a terrifying insecurity.

This thesis offers food for thought on the subject of the environment. In particular, globalization shares with the force of nature the characteristic of being (at least to some extent) beyond an individual's control; the dissolution of rigid structures might be compared with the dissolving of traditional command and forms of control, as well as of “hard” laws and codes, and insecurity is the feeling often used to describe not only the mood of the individual plunged into the “liquid world”, but also that of man scanning the world's future and consequently his own fate.

Nevertheless, there is an important difference between Baumann's picture and the environmental context, since it is only in the liquid world that man turns out to be no longer a gamekeeper or gardener, but a hunter (as the author maintains in the final part of his book). As far as the environment is concerned (at least as it has appeared recently), man ought to adopt a different kind of behaviour and one that is characterised by his duties. These duties are

¹⁷ Blackwell, UK, 2000.

precisely the elements upon which I have suggested basing a new definition of “environment”.

From this point of view, however, the idea of the “intelligent” hunter¹⁸ might also be usefully employed. Were man not to respect the environment, he would run the risk of extinguishing himself. Indeed, the human species might disappear along with the natural resources in a landscape affected by an extreme exploitation that lacks a sense of responsibility. Once again, the concepts of duty, responsibility and solidarity are more appropriate for sketching a profile of man and his relationship with looming natural problems.

In this perspective, the code appears as the ultimate version of a rigid structure in a liquid world, devoted to conferring certainty on an unstable situation. Incidentally, as observed earlier, the lack of a code does not for one moment imply a situation of uncertainty in the legal context. Indeed, there are legal systems very different from the Italian one (e.g. the common law ones), where legal academics and judges are able to develop and guarantee a stable legal framework.

Nevertheless, coming back to the Italian system, the final message that can be drawn from the Italian experience and its effort to highlight the concept of solidarity contained within the principle of sustainable development, is this: environmental law’s “codification” is one of the factors that can help us to bear in mind that, when managing nature, we must emphasise our duties rather than thinking only of our rights.

¹⁸ As a matter of fact, there are those who assert that, rather than controlling nature, man is more like a bee that is used by nature. Indeed, just as a flower’s beauty attracts a bee that is “used” for pollination purposes, so the species that most appeal to us are the ones most protected by ourselves (thus turning *us* into *their* prey, in some sense) and the ones that therefore have the best chances of survival (M. Pollan, *The Botany of Desire: a Plant’s-Eye view of the World*, New York, Random House, 2001).