THE REGULATION OF ENVIRONMENT IN THE ITALIAN LEGAL SYSTEM*

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Abstract

The paper examines the concept of environment, which has traditionally been considered by three different perspectives: the environment as a constitutional principle, the environment as a juridical issue and the environment as a legal asset. Each of these three perspectives led the legal system towards greater awareness of environmental protection. None of these perspectives has, however, eliminated the problem of finding the legal core of the concept of environment. This complicates the balance, that must be accomplished in the case law and also by the legislation, between environmental protection and fundamental rights.

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1. Introduction: the recent discovery of the environment by the jurist

A survey of understanding of the concept of environment is a good way of examining the processes underlying the development of the continuing tension between legal and pre-legal concepts. Empirically "environment" can be understood simply as "the outside world", i.e. the external context in which a human being lives, establishes relationships and fulfils his/her potential.

Western thought is firmly rooted in the dialectic between the inner and the outer world, and because environment is the highest expression of this dialectic, and tends to assign to the first a sort of primacy. No wonder then, that the Ancient World - that is the Greek and Roman civilisations - intellectual achievements in philosophy, art and politics were considerable, whilst the development of scientific thought was much less impressive. The centrality of humans, both as individuals and in their social role, contrasted with the general disinterest in nature, which was mostly seen as providing a backdrop to human events, sometimes aesthetically appealing, sometimes rather inhospitable.

This topic certainly deserves more sophisticated analytical tools than those available to the writer; however we want to highlight that the regulation of the environment is a phenomenon far from obvious.

The recognition of the legal relevance of the environment in the Italian legal system was not, therefore, the result of a spontaneous evolution of the law, as it may have been in the case of other new-generation legal interests, such as privacy, transparency and legitimate expectations.

Moreover, the discovery of the environment by legal science was not the result of a sort of cultural syncretism of legal traditions[1].

[1] The importance of the South American constitutional provisions for the protection of the environment is known. The Brazilian Constitution of 1998 defined a "Green Constitution", which dedicates an entire chapter to the environment, is particularly notable. The main feature of the Latin-American approach to environmental issues is a distinctly eco-centric perspective, which considers the environment as a legal interest in itself, regardless of its utility to humans; this is a better indication of the priority accorded to the environment than the quantitative data on constitutional provisions devoted to environmental protection. Among the most interesting consequences of this perspective, which is anti-

It has been brought, rather, by an acknowledgment of the growing risks of uncontrolled pollution and hence the emergence of the environment as a *problem*[2]. In other words, it was a historical event, even if not exactly situated in a chronology, that opened a breach in the deep-rooted indifference of law towards phenomena not immediately related to human inter-relationships such as the protection of the environment.

Pollution, as everyone knows, is an unwelcome consequence of recent industrial, and thus economic, development. But this statement has implications on two levels.

The first and most immediate, relates to the fact that the industrial progress of the last quarter of the 20th century has led to an undeniable increase in abuse of the environment, including pollution. However, it cannot realistically be claimed that the contemporary era represents a "starting point": considerable environmental damage accompanied the so-called industrial revolutions. What characterises our times is, rather, the willingness to take action to prevent, or at least contain, pollution. This is the result of a diffused state of richness, which laid the cultural and "psychological" premises to direct attention, including the legislator's one, to environmental issues.

Although the empirical and cultural perspectives on pollution are related they must be carefully distinguished. A relevant witness of it was provided by the today's economic crisis, which has not been accompanied by any reduction of pollution. The crisis has brought a critical review of the environmental issues, which, risk to lead to unusual situations of social injustice.

The legal reflection on the environment has traditionally developed in three directions, dealing with the environment as a constitutional principle, as a juridical issue and, finally, as a legal

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thetical to that still prevailing in the so-called "developed West", is the idea of nature as an entity *entitled* to rights, rather than as an object to which the rights of humans make reference. This is well-illustrated by the Ecuadorian Constitution of 2008, and in particular see Art. 71 (included in Chapter VII, entitled "Rights of nature") which states that nature has a legal right to respect for its existence and to the maintenance of its vital cycles, its structure, its functions and its development. See also Bolivian law no. 71 of 2010, whose title, "*Ley de Derechos de la Madre Tierra*", is significant, makes similar provisions.

[2] Cass. SS.UU., 6 October 1979, n. 5172, in I Foro it., 2302 (1979); Corte Conti, 18 September 1980, n. 868, III Foro. it., 167 (1981); Cass. Sez. I, 1 September 1995, n. 9211, in I Giur. civ., 777 (1996).

asset. The relationships between these perspectives are many and complex, as shown in the next paragraphs.

2. Regulation or regulations? Introductory remarks

There is an inherent ambiguity to the concept of regulation. It can be interpreted in different ways. At the most basic level "regulation" may be treated as a synonym for "making a legal rule". Such an approach would, however, be reductive and formalist[3]. Even civil law jurists seem to recognise that the analysis of legal phenomena does not need to be limited to the analysis and interpretation of law. One cannot, therefore, neglect the contributions that both doctrine and case law can make to the attraction of the object from time to time considered in the legally relevant area. This is particularly true in the case of the environment; as we have already seen there is no ontological predisposition to regulation of the environment, but there is a relatively recent need for such regulation. In many cases jurists played a more effective and timely role in ensuring environmental regulation than the legislature.

The ambiguity of the concept of regulation also affects its inherent characteristics. To consider an "object" as a legal asset it is not sufficient that the "object" appears in legal language - both in current doctrine and in case law. The crucial distinction between legal and pre-legal is the attitude of the object taken into consideration to be terminal for precise and recognisable subjective situations, actually enforceable in a court of law, too.

This last aspect is, of course, the most important, and represents a kind of culmination. With reference to the environment, the attempt to be taken into account is therefore to verify the level of the regulation, and in particular the actual overcoming of the purely nominalistic stage of the regulation process.

The environment poses particular problems for the lawyer, because the legal system has considered it from different perspectives.

3. Environment as a constitutional principle

3.1 The lack of a precise reference to the right to a healthy

[3] G. Teubner, *Law as an Autopoietic System* (1993), 69.

environment in the Italian Constitution

Both doctrine and case law agree that environmental protection is an issue of constitutional importance, but this does not rest on positive law. In fact, the Italian Constitution does not make specific reference to environmental protection in the section dedicated to fundamental principles, and this is not surprising. When the Constitution entered into force neither of these developments had unfolded completely; not in the national context nor in the broader European context. The original Constitutions of the main European countries[4] did not mention protection of the environment as a founding principle of their respective statutes. Similarly, European law, which represented the main driving force behind environmental law until 1986 and the signing the Single European Act, did not include environmental protection as a goal.

On the domestic front, the absence of specific constitutional provisions relating to the environment did not prevent the case law of the second half of the last century from affirming without hesitation the constitutional principle of the need for environmental protection. The articles cited in support of this principle were Art. 32 of the Italian Constitution, which deals with health protection, and Art. 9 of the Constitution, which deals with landscape protection.

In one sense this choice is not surprising: both the right to health and the need for landscape protection unquestionably encompass important aspects of the environmental protection issue.

From another perspective, however, the anchoring of the principle of environmental protection in these constitutional pro-

[4] The French Constitution (1958) makes no reference to the environment. It was not until 2005 that the environment entered the Constitution, following the adoption of the *Charte de l'environnement adossée à la Constitution*. See C. Cans, *La Carta costituzionale francese dell'ambiente: evoluzione o rivoluzione del diritto francese dell'ambiente*, in D. De Carolis, E. Ferrari, A. Police (eds.), *Ambiente, attività amministrativa e codificazione* (2006); D. Marrani, *The Second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications*, in Envtl. L. Rev., 9 (2008). In Germany, however, the environment was included in the Constitution in 1994, following the introduction of Art. 20a, already in Chapter II of the Constitution, into the programmatic principles of the State. The European constitutions, which in their original version already contained significant references to the environment, are quite recent: Greek Constitution dated 1975, the Portuguese one dated 1976 and the Spanish one dated 1977.

visions was not entirely predictable. Many foreign legal systems have opted for different solutions; the most significant examples of this come from the case law of the ECHR. Despite the lack of a precise reference to the right to a healthy environment in the Charter the ECHR has developed the notion that it is implicit in the right (enshrined in law) to respect for private and family life and the inviolability of the home[5]. This approach ensures a sort of anticipation of the limit of the protection of an "implicit" environment right, that is a protection that can also be accessed when the damage to the environment does not become a real or potential injury to public health or, even less, can compromise the physical integrity of such citizens[6]. The corollary of this, however, is a conception of environment calibrated on the right of ownership, whose main feature is the so-called *ius escludendi*, not compatible with the collective enjoyment that characterises environment as a whole.

On the national front there were also attempts to define environmental damage as damage arising from disturb, thus exploiting the provision of Art. 844 civil code on releases[7], before explicit

[5] ECHR case law granted legal protection against the damage caused by pollution, without consideration (which might have been expected) of article 2 of the Convention (right to life) or Article 3 (right to physical integrity), instead relying on Article 8, which deals with the right to privacy and family life. The most significant judgment was that of 9 December 1994, in *López Ostra* vs. *Spain*. A more recent similar judgment was that of January 10, 2012, in *Di Sarno* vs. *Italy*.

[6] The decision on the significance dated June 29, 1996, *Guerra ed altre* vs. *Italia*, has to be considered in from the perspective of the advancement of protectability, guaranteed by the choice in favour of Art. 8 (and therefore the right to private and family life) as a vector of legal regulation of the healthy environment right. In this decision the Court (although asserting the irrelevance of the question on the grounds that the remedies offered by domestic law had not been exhausted) pointed out that an action on the environment based on a claim of infringement of Art. 2 (and hence of the right to health) could be examined in the light of Art. 6 of the Convention which provides, amongst other things, a right to a private life, rather than in the light of Art. 2.

[7] The legal systems of other European states have seen similar developments. In France, for example, the legal significance of the environment, and thus the protection of indirect and direct rights related to it (see *infra* in the text), was based on a large body of case law on *troubles de voisinages*. The concept of "neighbourhood" has been gradually extended until contiguity between the damaged area and the source of the damage is no longer necessary. See F. Nicolas, *La protection du voisinage,* in Rev. trim. dr. civ., 683 (1976); J.B. Blaise, *Responsabilité et obligations coutumières dans les rapports de voisinage*, in Rev. trim. dir. civ., 275 (1965).

regulations on environmental damage came into force. This topic will be explored in more detail below, in the section V which deals with the environment as a legal asset. Now we want to point out that the attempt in question only responded to the need to identify a possible model for the protection from the hypothesis of environment prejudice, as well as to individuate the relating judge, in the absence of *ad hoc* rules. This attempt, however, lacked solid constitutional foundations. Rather than representing the placing of environmental protection in the field of the constitutional right of ownership, it was a means of overcoming what appeared to be a gap in the legal system. This is clear from the fact that it was constitutional case law that, before the introduction of the rules on environmental damage, urged the overcoming of a protection model based on ownership[8].

The creation of a constitutional link between environmental protection and the right to health and landscape protection was, therefore, not inevitable; it highlights, once again, the tendency to person-centred interpretations of the Constitution.

This situation, however, may not be sufficient to clarify whether the relevance of environmental protection is related to the

[8] Corte Cost., 23 July 1974 n. 247, in I Foro it., 18 ss. (1975). In this judgement the Court was asked to rule on the constitutionality of Art. 844 of the civil code (hereafter "c.c."), which the referring judge had contrasted with Arts. 32 and 9 of the Constitution, referring to its inadequacy as a guarantee of legal protection against the injury caused by pollution. The referring judge remarked particularly ob the inadequacy of the criterion of "normal tolerance", foreseen in the discipline on the emissions (art. 844 c.c.), to be an effective limit to polluting activities carried with reference to the constitutional right of economic initiative. The Court did not endorse this position, stating that Art. 844 c.c. could not be considered, and thus scrutinised, as a setting out an environmental protection: the consideration that the principles contained in art. 844 c.c. do not constitute an appropriate tool for the solution of the serious problems created by pollution is certain exact. The rule is in fact intended to resolve conflicts between neighbouring landowners caused by the negative effects of activities carried out in their funds. It is also clear that the criterion of normal tolerance refers exclusively to the ownership right and cannot be used to judge the legality of releases of substances prejudicial to human health or to the integrity of the natural environment. See also: Cass., 10 October 1975, n. 3241, in Foro it., (Rep. 1975,) voce *Proprietà* n. 34; id., 19 May 1976, n. 1796, in Giur. it., 412 (1978); id, 13 December 1979, n. 6502, in Giur. civ. mer., 12 (1979); id.,10 March 1980, n. 1593, in I *Foro it.*, 2197 (1980); id., 18 August 1981, n. 4937, in Foro it., (Rep. 1981), voce *Proprietà*, n. 21; G. D'Angelo, *L'art. 844 Codice Civile e il diritto alla salute,* in F.D. Busnelli, U. Breccia (eds.), *Tutela della salute e diritto privato*, 420 (1978).

recognition ruled by Art. 9 and 32 of the Constitution.

This answer is negative, for at least two sets of intimately connected reasons.

The first set concerns the extent of the security granted by the two articles in question, the second set deals with the indirect nature of that protection. The first set of reasons is based on a strongly anthropocentric perspective on the relevance of environmental protection, as derived from the two above-mentioned articles. This stresses human well-being, with environmental integrity considered purely insofar as it is instrumental to human well-being. The consideration of landscape is not too different: even after the overcoming of the typical aesthetic conception of the so-called "pietrificazione"[9], the landscape is identified as a visual data usable by man. Landscape, therefore, could be inviolate in spite of a severe impairment of certain environmental elements. There is, therefore, an important shadow cone between health and landscape, which, precisely, is the preservation of the environment in itself, i.e. regardless of the direct implications for the human well-being. Biodiversity, animal welfare and protection of non-populated areas (such as wetlands and glaciers), for example, are not covered by the constitutional provisions on the right to health and landscape protection[10]. The consequence of it is obvious: the Constitutional guarantee of environmental protection is limited to indirect protection, i.e. cases in which damage to the

[9] A.M. Sandulli, *La tutela del paesaggio nella Costituzione*, in II Riv. giur. ed., 62 (1967); E. Casetta, *La tutela del paesaggio nei rapporti tra Stato, Regioni e autonomie locali*, in Le Reg., 1182 (1984).

[10] The draft of constitutional law A.C. 4307, prescribing to introduce the following paragraph before Art. 9 of the Constitution: The Republic recognises that the environment, its ecosystems and its biodiversity are of primary value for the preservation and development of quality of life; it ensures their protection and promotes respect, on the basis of the reversibility precaution and responsibility principles, and in the interests of future generations; it protects the needs and welfare of animals as sentient beings. This draft deserves to be remembered as an attempt to introduce the notion of direct protection of environment. Before it was abandoned this draft underwent many changes. In parliamentary debate it was suggested that the above text, which is rather redundant, with a new third paragraph to be added to Art. 9 of the Constitution. This would have stated that the Republic protects environment and ecosystems, including in the interests of future generations, and protects biodiversity and requires respect for animals. However the proposals for constitutional reform were not enacted.

environment also damages other legal interests[11].

This conclusion may appear devoid of tangible effects". Since the European Union acquired the competence to deal with environmental protection it has enacted several detailed regulations[12] that leave legislators little discretion with respect to implementation. In many cases these interventions have been directly relevant to environmental protection, i.e. without implications for safeguarding human health or landscape (see, for example, the Habitats[13] and Birds Directives[14]). To this body of regulations we should add the massive number of very detailed international rules whose relevance here is that they aim to impose a non-mediated environmental protection (see, for example, the Ramsar Convention[15] on wetlands, that are not habitable and have no landscape value).

It is, therefore, very difficult to argue that the lack of reference to environment in the fundamental principles of the Constitution has actually hindered the development of environmental law based: the obligation to transpose and/or harmonise with the supranational norms has, in effect, acted as a substitute for such reference. Nevertheless, the lack of a basic rule on environmental protection was not totally irrelevant.

The most significant effects of this lack are those relating to the content and structure of the review by the Constitutional Court.

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[11] Cass. SS.UU., 9 May 1979, n. 1463, in I Giur. civ., 695 (1980). The Court pointed out that the right to a healthy environment can be considered as a subjective right only when it is connected to the exclusive availability of an asset in the case of which preservation of the potential to provide benefit to the subject is inseparable from the preservation of environmental conditions.

[12] M. Renna, *Ambiente e territorio nell'ordinamento europeo*, in Riv. It. Dir. Pubbl. Com., 649 (2009).

[13] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[14] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

[15] The Convention was signed in Ramsar, Iran, on 2 February 1971 and ratified in Italy under law no. 448 dated March 13, 1976. The object of the Convention was to ensure the protection of wetlands, defined as permanent or temporary expanses of marshes, bogs or natural or artificial waters regardless of whether the water is stagnant or running, fresh, brackish or salt and including marine waters whose depth at low tide does not exceed six metres.

3.2 The structure of the Constitutional Court's review of environmental protection legislation as a consequence of the absence of a basic rule on the environment

The absence e of a basic rule on the environment has deprived the legal system of parameters by which to assess the legality of the primary discipline dedicated to the environment protection directly, i.e. free from effects on health and landscape. This is best illustrated by the issue of compensation for environmental damage regardless of whether the damage has any deleterious effects on human health or landscape integrity[16]. The Italian law has assigned the locus standi only to the Ministry of Environment, in

[16] In Italy the introduction of the institute of environmental damage occurred before the transposition of Directive 2004/35/EC. The law that established the Ministry of the Environment (law no. 349 dated 8 July 1986) was the first provision for liability for damage to the environment regardless of the repercussions for related issues of health property etc. In other European countries, however, the adoption of Directive 2004/35/EC has been a real breakthrough. Until this Directive was transposed into French law, in France liability for damage to the environment was decided on the basis of the law governing the damage done by neighbours. Although supported by a courageous and creative case law (see above, note 6), this interpretation still remained placed in the perspective of inter-private law relations. In Germany the model of environmental liability that applied before the transposition of Directive 2004/35/EC (which only occurred in 2007, when the *Gesetz zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über Umwelthaftung Vermeidung und zur Sanierung von Umweltschäden* came into force) was based on the law on civil liability for environmental damage (*Umwelthaftungsgesetz*) dated 10 December 1990, which remains in force. This law provides that where the release of a substance into the environment by one of the plants listed in Appendix 1 of the law results in death or injury to the body or health or property of a subject, the plant owner must compensate the subject appropriately (par. 1). This meant that only injuries relating to assets already protected by civil law were subject to compensation, not those connected with a "new" asset, as the environment could be. This is despite the fact that the 1990 law specifically relates to environmental liability, which should have increased the scope of its protection beyond that traditionally afforded by civil law. See, ex multis, *Manβnahmen des Wohnungsamts* (1952) 6 BGHZ 270, 278; M. Raff, *Private Property and Environmental Responsibility – A comparative study of German Real Property Law*, in The Hague, 121 (2003); J.P. Byrne, *Property and Environment: Thoughts on an Evolving Relationship*, in Harv. J.L. & Pub. Pol'y, 28, 679 (2004); E. Ferrari, *Le bonifiche dei siti contaminati come attività amministrative di ripristino*, in 5 Riv. giur. ed., 199 (2015); R.J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, in U.C.L.A. L. Rev., 703 (2000).

order to start the judgment of compensation[17]. This means that local authorities, environmental groups and, *a fortiori*, ordinary citizens have no locus standi for liability action. This choice could find an obstacle, or at least an *ex post* parameter of prudent evaluation, in a basic rule that categorised environmental protection as a right/duty of which each citizen is the imputation centre. It is difficult, of course, to discuss the potential effects of a hypothetical rule. Now we would like to highlight how provisions relating to environmental damage have developed into an incomplete constitutional framework because of their links to the concept of direct protection. This has prevented the most controversial rules and, such as that on locus standi[18], from being taken into consideration

[17] The Spanish legal system, for example, recognises the *locus standi* of individuals and associations (see, in this regard, Art. 41, par. 1, of the law no. 26 dated 23 October 2007, which suggestions that an action for environmental responsibility can be started *ex officio* following the operator's request or the instance of any interested person). This provision is not surprising; it is in keeping with a legal system that allows individuals, as stakeholders with a general interest in constitutional legality, to have direct access to constitutional justice. Moreover, the text of Art. 45 of the Spanish Constitution, which is dedicated to environmental protection has to be taken into consideration as contextualisation element of the rule on the *locus standi* with respect to environmental damage. This article considers a healthy environment to be a right of all citizens, rather than of the object of a general state duty of protection by state institutions («everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it. The public authorities shall safeguard rational use of all natural resources in order to protect and improve the quality of life and preserve and restore the environment, relying on the indispensable collective solidarity. Those who are shown to have violated the provisions of the previous paragraph within the time allowed by the law on criminal or administrative sanctions, as appropriate, shall have an obligation to repair the damage caused»). See B. Pozzo, *Il recepimento della direttiva 2004/35/CE sulla responsabilità ambientale in Germania, Spagna, Francia e Regno Unito,* in 2 Riv. giur. amb., 207 (2010).

[18] As far as the *locus standi* to defend the right to healthy environment is concerned, some fairly old statements by the Supreme Court about the right to health are of interest. The Court stated indeed that the perspective that there is legal protection only in cases of exclusive link between an asset (or a fraction of it) and one particular individual, or a group of them - and then assimilated to the individual - is conditioned by a patrimonial setting of legality and, because of conditioning, risks to limit the irresistible trend to actionability of claims which is a cornerstone of our Constitution (Cass. SS.UU., October 6, 1979, n. 5172, in Foro it., 2302 [1979]). The decision to assign the Ministry the exclusive locus standi for the environmental damage seems, instead, the result a patrimo-

on the basis of an authoritative paradigm as that represented by the Constitution[19].

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nial conception of environment, somewhat discordant from the current constitutional provisions (see the note below).

[19] In the sentence no. 641 dated 30 December 1987 the Supreme Court dealt with the issue of *locus standi* with respect to environmental damage, governed at the time by Art. 18 of the law establishing the Ministry of the Environment (among the many comments on this decision see particularly the critical approach of E. Ferrari, *Il danno ambientale in cerca di giudice e…d'interpretazione: l'ipotesi dell'ambiente-valore*, in Le Reg., 525 [1988]). The judgment, however, was not focused on the illegitimacy of individuals and environmental groups, but on the issue of jurisdiction. In other words, called upon to judge the constitutionality of the attribution to jurisdiction on environmental damage, the Court focused on whether the legitimacy of the Minister (at the time and also of the local authorities) could shift the focus of jurisdiction to outside the sphere of ordinary jurisdiction and, in particular, whether jurisdiction over such cases could be assigned to the Court of Auditors. In its judgment the Court stated that the right of action, which is attributed to the State and to the local institutions, is not related to the costs they may have incurred to repair the damage or the economic loss they may have suffered; instead it is due to their responsibility to protect the public and the communities in their area and in the interests of balancing the ecological, biological and sociological factors affecting the territory concerned. For the private citizen an environmental damage would be unjust to the extent that it assumes significance. However the protection of the citizen who has suffered a prejudice from an environmental damage is stated. The Constitutional Court, therefore, considered the question of legitimacy to be judged as unfounded on the grounds that environmental damage is not comparable to the loss of revenue, even in the abstract sense, and that no patrimonial matter was involved. The Court stated that the environment is "public" in that it exists for the collective enjoyment of the community, but it cannot be purchased in the perspective of *jus escludendi*: in other words the environment cannot be considered "public" in the sense that it belongs to the public bodies, although it should be "for the collective and appropriate use of the public, in the public interest" (on these issues, see M. Renna, *La regolazione amministrativa dei beni a destinazione pubblica* [2004]). The premises of the development of the concept of common goods - which is still controversial - can be found here. Common goods are things that express functional utility to exercise fundamental rights and the free development of the person. The commons must be protected and safeguarded by the legal system, also for the benefit of future generations. Regardless of whether the holders of common goods are public or private legal entities, the collective use of common goods (subject to the limitations and conditions imposed by law) must be guaranteed (in this sense the law draft enabling the Government to review the Chapter II of Title I of Book III of the Civil Code prepared by the so-called "Rodotà's commission"). Though still not made a legal rule, the category of common goods is still of relevance to case law (see Cass. SS.UU., 14 February 2011, n. 3665 stating that, where a property, regard-

Another effect of the lack of reference to environment in the fundamental principles of the Constitution concerns the structure of the Constitutional Court's review of environmental protection legislation. The review focused on the distribution of legislative powers in the environmental field. This was not just about the phase following the reform of Title V: even before 2001 environmental legislation - which was much less extensive than it is today - had been subjected to review by the Constitutional Court about the most relevant issues of the allocation of legislative, and sometimes administrative, competences. The situation has become even more significant when environment was contemplated by the Constitution in the article dedicated to the distribution of legislative powers between State and regional administrations[20].

The meaning of the concept of environment, as we will see, has long involved the Constitutional Court. Before dealing with this issue, however, it seems worth noting that, partly because of the absence of a basic rule on the environment (aiming, of course, to protect the environment *directly*), the "construction" of the concept in question by the Constitutional Court mostly occurred in a structured judgment designed to address the issue of who is competent to make decisions about the environment, rather than the scope and basis of such decisions.

This had a least two significant implications.

The first concerns a certain confusion between the profiles related to the allocation of legislative powers and those concerning the exact content of the rules reviewed by the Constitutional Court. In many instances, as we will show, disputes between State and regional administrations relate to the legitimacy of regional rules that, based on the (controversial) principle of the maximisation of protection, rose up the environmental protection standards as they were stated in State law. The issue of the legitimacy of such rules is a very difficult one as it involves the same identity of the environmental protection principle, i.e. its absolute or (more or

less of its ownership, is attributed to the implementation of the welfare state due to its intrinsic features, particularly those relating to the environment and landscape, such goods shall be considered outside of the outdated perspective of Roman dominium and of code-relating "common" property, that is, regardless of the property as instrumentally connected to the realisation of the interests of all citizens.

[20] G. Rossi, *Diritto dell'ambiente*, 44 (2010).

less) topics interrelated with neighbouring and sometimes potentially conflicting. We will deal with this in depth in the following section. Now we would like to highlight the inadequacy, or at least redundancy, of the judgment in relation to a similar question, that of the constitutionality of the "incremental" logic typical of some regional administrations.

As known, in this kind proceeding the only basic rule that can be considered by the Court is the rule relating to the allocation of legislative powers. It follows that the Constitutional Court has not been able to point out the intrinsic reasonableness of the hyper-regulatory logic expressed by the regional administrations, but it was inexorably limited within the logic scheme of legislative power allocation.

This has sometime produced surprising results.

For example, the proceedings which take into account State laws on the establishment of precise threshold values of electric field as basic rules[21]. This idea is not meaningless. The sense is to limit the regional administrations' hyper-rigorist trends without formally putting into question the incremental principle. These judgments asserted that the discipline of the threshold values of the electric field was not a part of the State law governing environment, but rather of the matter competing with energy and communication system; the regional rules that increased the State standards were ruled illegitimate as these standards were defined as basic rules and therefore irrevocable (not even *in melius*) by the regional legislative power.

We will explore the principle of incremental legitimacy in more detail later. Now we would like to stress the logical forcing by the Constitutional Court: to reduce the hyper-control by the regional administration the Court has paradoxically preferred to go beyond the boundaries of the State regulation on environment and took the concurring competences into consideration. That in accordance with a basic principle (see next paragraph): the idea that in the environmental field, the principle of enhanced protection is always in force and hence the easiest way to control the regional administrations trends would be to avoid considering environment as a matter.

The contribution of the Court to assessing the constitution-

[21] See Corte Cost., 7 October 2003, n. 307, in 2 Riv. giur. amb., 257 (2004).

ality of the incremental principle would probably have been more meaningful if it had also been reflected in the form of an interlocutory judgment. If it had been possible to review the legitimacy of the regional "incremental" law in the light of a basic rule on environmental protection then perhaps today we would not be dealing with the ambiguities that characterise constitutional case law on the division of competence in environmental matters.

The introduction of a basic rule on environmental protection might have the benefit of reducing the "drama" of the Constitutional Court's review of the assignment of legislative powers.

It is also relevant that the Constitutional case law on environment has mostly been expressed in terms of the allocation of competences to the State and the regional administrations because - as the Constitutional Court has pointed out repeatedly - this decision relates only to the holders of legislative power[22]. This means that private citizens that cannot participate in the proceeding. The same is true for environmental associations, although the Aarhus Convention[23] and its implementing regulations[24] do grant them the right to access justice in relation to environmental matters.

All this is particularly problematic because of the peculiarly detailed nature of environmental regulations, which often take the form of *ad hoc* provisions (the case of the decree that "saved" the Ilva of Taranto is a good example of this)[25]. The protection of private bodies, even in their possible associated forms, appears to be

[22] Corte Cost., 24 July 2009, n. 250, in 4 Riv. giur. edil., 1047 (2009); id., 23 July 2009, n. 233, in 6 Riv. giur. amb., 941 (2009); id., 24 July 2009, n. 250, in 4 Riv. giur. edil., 1047 (2009); id., 18 June 2008, n. 216, in Ragiusan, 65 (2009); id., 17 March 2006, n. 116, in 6 Giur. it., 1372 (2007).

[23] See the Aarhus Convention on access to information, public participation in decision-making and access to justice on environmental issues in the EU, signed on 25 June 1998 and ratified as law no. 108 dated 16 March 2001. See also: Z. Szende, K. Lachmayer (eds.), *The principle of effective legal protection in administrative law*, (2016), M. Pallemaerts, *Access to Environmental Justice at EU level: Has the Aarhus Convention Improved the Situation*, in M. Pallemaerts (ed.), *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law, 312 (2011); ECJ, joined cases C-401/12 P, C-402/2012 P and C-403/2012 P, *Council and others/Vereniging Milieudefensie and Stichting Stop Luchverontreiniging Utrecht*.

[24] For discussion of the impossibility of entities other than holders of legislative power participating directly in the Supreme Court proceedings see Corte Cost., 2 December 2013, n. 285, in I Riv. giur. edil., 1, 39 (2014).

[25] See Corte Cost., 9 May 2013, n. 85, in 3 Giur. cost., 1424 (2013).

weakened: the protection will be available when the *ad hoc* provisions would be followed by an implementing administrative rule, to be challenged urging the judge to introduce the incidental question of the review by the Constitutional Court (relating to the rule prior to the contested provision).

However, the review by the Constitutional Court as incidental question cannot rely, as we have seen, on a basic rule specifically governing environmental protection and possibly concerning the *an* and the *quomodo* of the balance between the principle in question and those ones potentially conflicting. The consequence is quite predictable: the increasing use of *ad hoc* provisions combined with the absence of a basic rule on environmental matters from the Constitution mark an alarming trend that risks causing the collapse of the regime of wide justiciability provided by the Aarhus Convention on environmental protection.

4. Environment as a matter

As mentioned above, the issue of the allocation of powers, although no doubt relevant to the development of environmental law has ended up somewhat monopolising the attention of interpreters of the law.

The issue of the delimitation of the matter "environment" is closely linked to the recognition of the constitutional principle relating to the environment. We have already noted that the lack of a constitutional basic rule has sometimes compromised the debate on the allocation of legislative powers, resulting in constitutional case law characterised by some logical-conceptual forcing. The kind of interference that has been found between the environment intended as a principle or as matter is not the only one. Analysis of the constitutional case law of the last decades is useful here: whilst the absence of a basic rule has increased the number of the disputes on the allocation of powers it is the recognition of the constitutional principle relating to the environment (though not governed by any specific constitutional provision) that has allowed the Court to reconstruct the issue of the an allocation of powers as characterised by a particular fluidity and by a strong decisional polycentrism.

At least until 2007 the Court advocated what interpreters have defined as the "de-materialisation" of the environment: ac-

cording to the line of the Constitutional Court's interpretation, the latter should not be intended as a real matter, but rather as a constitutional principle that applies wherever there is a requirement for environmental protection. The main consequence of this point of view became evident in the aftermath of the reform of Title V of the Constitution, which - as is well-known - introduced the term "environment" into the text of the Constitution, thereby giving the State exclusive competence to legislate on environmental matters. The new provision was received with considerable scepticism[26] since it was considered an expression of an anachronistic centralising logic. This logic conflicted both with current legal trends (and in particular with the federalist basis of the law no. 59 dated 1997 to which, according to some doctrine, Constitution law no. 3 dated 2001 was intended to give a constitutional value) and established constitutional case law that had brought environment with the jurisdiction of concurrent State-regional administrations (on the grounds that Art. 117 of the Constitution, previously in force, had not covered this matter)[27]. From this widespread scepticism a substantial "neutralisation" of the constitutional amendment. The Constitutional Court did not hesitate to point out that "with regard to environmental protection, the existing plurality of legitimacy reasons through direct regional interventions aiming to simultaneously meet (…) more needs than those of unitary character (as defined by the State) had not to be eliminated"[28]. This meant that despite the unequivocal nature of the amendment introduced by Art. 117 Cost., the State's role in the environmental protection would be limited to the identification of "uniform standards of protection throughout the country".

The resulting interpretation is thus not so different from the

[26] See G. Manfredi, *Standards ambientali di fonte statale e poteri regionali in tema di governo del territorio*, in Urb. app., 296 (2004).

[27] See Corte Cost., 22 May 1987, n. 183, in Quad. reg., 1399 (1987); id., 29 December 1982, n. 239, *ivi*, 213 (1983); id., 21 December 1985, n. 359, in I Rass. avv. Stato, 223 (1986); id., 27 June 1986, n. 151, in Foro amm., 3 (1987); id., 20 December 1988, n. 1108; id.,15 November 1988, n. 1029, in Riv. giur. amb. (1989). For a critical interpretation of post-reformation case law, see G. Manfredi, *Tre modelli di riparto delle competenze in tema di ambiente*, in Ist. fed. (2004).

[28] Corte Cost., 26 July 2001, n. 407, in Giur. cost., 2940 (2002). See also Corte Cost., 28 March 2003, n. 96, in Ragiusan, 198 (2003); id., 24 June 2003, n. 222, in Riv. giur. amb., 1002 (2003); id., 4 July 2003, n. 227, in I Foro it., 2882 (2003); 7 October 2003 n. 307, in Giur. cost., 5 (2003).

pre-reform interpretation, in which - as we have seen - environment was attributed to the concurrent jurisdiction. This result, namely the effective neutralisation of the constitutional reform, has been pursued by the Court taking into account the environment intended as a constitutional principle. The syllogism expressed by the Court can be summarised in the following terms: matters have predetermined and precise boundaries, whereas constitutional principles have inherently unstable borders; the protection of the environment is a principle of constitutional importance, therefore it is not a real matter[29].

This conclusion is certainly interesting, first because of its apparently paradoxical nature: as we have seen, the Constitution does list environmental protection among its fundamental principles and although the Constitution refers explicitly to the environment in the article dedicated to the distribution of powers, through a kind of historico-legal contortion the Constitutional Court denies that environment is a "matter" on the grounds that it is intrinsically a principle[30]. This, however, is not too surprising, as it stresses the overcoming of some positivist principles, first of all that one concerning the identity of legislation and right. The less persuasive aspect of the Constitutional Court's position is the main premise of the above-mentioned syllogism, namely the intrinsic incompatibility of legal principle and matter. This incompatibility seems excessively peremptory[31] and, ultimately, too strong. If it were generally accepted that every time a constitutional principle is considered relevant it is impossible to identify a corresponding matter, Art. 117 of the Constitution would have to be regarded as a kind of empty box. Ultimately, this would imply that in most cases the distribution of powers between State and

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[29] F. Benelli, R. Bin, *Prevalenza e "rimaterializzazione delle materie": scacco matto alle Regioni*, in Quad. cost., 1185 (2009); F. Benelli, *La smaterializzazione delle materie. Problemi teorici ed applicativi del nuovo Titolo V della Costituzione*, (2006).

[30] R. Ferrara (*La tutela dell'ambiente fra Stato e regioni: una storia "infinita"*, in I Foro it., 692 [2003]) highlights that the Constitution explains the reference to the environment « no matter it can be considered as a "principle", too».

[31] In a critique G. Cocco, A. Marzanati, R. Pupilella (*Ambiente: il sistema organizzativo e i principi fondamentali*, in M.P. Chiti, G. Greco (ed.), *Trattato di diritto amministrativo europeo*, 209 [2007]) state that «it is one thing to enhance the cross-sensitivity of X in relation to ecology, but another thing to misunderstand that at least the attention to essential environmental factors (air, water and soil) has finally drawn to a self-sufficient and self-referring content».

regional administrations is an impossible task.

This scenario was, however, averted by a drastic change to constitutional case law, which since 2007 has begun to "take seriously"[32] the provisions of Art. 117 of the Constitution on the State's competence in the field of environment. The undisputed constitutional value of the protection of the environment has ceased to be an obstacle to recognising the protection of the environment as a matter.

So what the new recognition of environment as a matter of legislation begun. This process, however, had no disruptive effect: in other words, it was not the recognition of the environment as a matter (and, therefore, as a State matter) that resulted in the marginalisation of the regional administrations.

There are at least two sets of reasons for this.

The first set concerns the increased importance of the principle of loyal cooperation to constitutional case law. The Court has used this principle to assert that whenever the State interferes in matters that fall under the jurisdiction of regional administrations (in this case we speak of competence combining or overlapping, which in the case of environment very often concerns the neighbouring matter of territorial government), it is necessary "to adopt measures implementing the same interventions and involving, through appropriate forms of cooperation, the regional administrations in whose territory the measures are intended to be realised"[33]. The instruments of cooperation are numerous: the most common are agreements between unified State-Regions or State-Regions-local autonomy Conferences. By finding suitable administrative tools through which it can exercise its decision-making powers the Court has managed to mitigate the centralization of the matter of the protection of the environment and, conse-

[32] G. Manfredi, *Sul riparto delle competenze in tema di ambiente e sulla nozione di ambiente dopo la riforma del Titolo V della Parte seconda della Costituzione*, in Riv. giur. amb., 1008 [2003] is critical of the Supreme Court's case law and irrespective of the reform of the Constitution.

[33] Corte Cost., 29 January 2005, n. 62, in Ragiusan, 170 (2006); id., 20 November 2009, n. 307, in 6 Giur. cost., 4623 (2009). See also Corte Cost., 21 December 1985, n. 359, in Giur. cost., 2552 (1985); id., 27 June 1986, n. 153, in Riv. giur. urb., 16 (1987); id., 15 May 1987, n. 167, in I Foro it., 331 (1988); id., 28 May 1987, n. 201, in Riv. giur. amb., 639 (1987); id., 29 October 1987, n. 344, in Giur. it., 1466 (1988); id., 30 December 1987, n. 617, in Riv. giur. amb., 113 (1988); id., 10 March 1988, n. 302, in Giur. it., 611 (1989).

quently, of all the matters for which they interrelate, although formally of shared or regional competence.

The second reason why reform of Title V can be considered a kind of Copernican revolution concerns the increasingly influential role of the supranational rules on environmental protection. Most environmental protection regulations are derived almost wholly from very detailed and precise European or international sources. This should help to defuse the debate about the allocation of powers to the State and the regional administrations whilst also improving understanding of the problem of the allocation of powers in a more complex and articulated system. In a context where environmental rules are mostly written off by national borders and take hyper-detailed contents, the focus of the problem of the allocation of powers is in relation with the incremental principle (namely that the environmental standards set by the legislation can be raised from lower levels of government from that one generating the *in melius* derogated rule).

The value of this incremental principle also concerns both the relationship between the national and European legal system and the relationship between national and regional legislation.

In the first case the idea widespread among the jurists refers to the presence, within the European law in force on environment, of the principle of a more stringent protection always accordable by the Member States. Some of the reasons for this belief are to be found in Art. 193 of the Treaty of the Functioning of the European Union (ex Art. 176), which provides that "the protective measures adopted under Art. 192 (i.e. in order to protect environment) do not prevent any Member State from maintaining or introducing provisions designed to provide greater protection. These provisions must be in accordance with the treaties. They shall be notified to the Commission". The rule in question, in fact, makes no mention of a general incremental principle[34].

In fact, it does not prejudge whether Member States can increase environmental protection according to two conditions.

The first condition is that the increase should not be con-

[34] M. Renna, *Il sistema degli 'standard ambientali' tra fonti europee e competenze nazionali*, in *L'ambiente nel nuovo Titolo V della Costituzione*, in B. Pozzo, M. Renna (eds.), in Quaderni della Rivista giuridica dell'ambiente, 15 (2004). See also M. Mazzamuto, *Diritto dell'ambiente e sistema comunitario delle libertà economiche*, in Riv. it. dir. pubbl. com., 1571 (2009).

trary to the UE Treaty rules protecting potentially conflicting values and guaranteeing freedom of movement. The second condition is that the European Commission must be informed about this increase. EU law cannot, therefore, be considered as establishing the principle of incremental protection.

Moreover, taking into account matters other than environment one may conclude, from a general and systemic perspective, that the evolution of European law is not inspired by a blind incremental logic; on the contrary it appears to be based on the idea that there should be a balance between potentially antagonistic principles. The most obvious example is the rules governing the public tenders, which are certainly necessary or the effective implementation of the principle of free competition and the four European basic freedoms. As far as tenders are concerned[35], the Commission warned Member States about the risks of hyper-regulation (sometimes called "gold-plated regulation"), which is often associated with the refusal of principles close to that one directly protected. In the case of procurement, for example, the directly protected interest concerns the accessibility to the tenders and non-discrimination against operators from other Member States. Ultimately, the European Union seems more and more inclined to prefer the principle of balance to the more primitive notion of incremental protection and this necessarily has implications for environmental protection regulation.

As far as the relationship between State and regional administrations in domestic law is concerned, there is an extensive[36] and somewhat contradictory body of constitutional case law dealing with the legitimacy of the incremental principle[37]. This princi-

[35] European Commission, Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market (COM [2011] 15); also a document dated 3 March 2010 entitled Europe 2020 - A strategy for smart, sustainable and inclusive growth. On these issues see also the Opinion of the European Economic and Social Committee on the Green Paper from the Commission on policy options for progress towards a European contract law for consumers and businesses - (COM [2011] 15).

[36] The Court's decisions defined the principle in question was defined as red line with respect to the environment. See A. Romano Tassone, *Stato, Regioni ed enti locali nella tutela dell'ambiente*, in Dir. amm., 114 (1993). For a critical perspective on the incremental principle, see F. Fonderico, *La tutela dall'inquinamento elettromagnetico*, 105 (2002).

[37] Some Constitutions state this (controversial) principle explicitly. This applies,

ple began important for the constitutional case law around the late 1980s in a series of decisions relating to rules on hunting in which the Court declared some regional rules reducing the number of huntable species (in order to strengthen environmental protection) unconstitutional. Given the specifics of the case in which this ruling was made it does not appear to pose any problems: if personal and ethical beliefs are left to one side it seems indisputable that the right to hunt is not an expression of a constitutional principle that may be unfairly prejudiced by a regional intervention that strengthens the system of wildlife protection established by the State. The alarming aspect of these early judgments was that State legislation on environment has always been minimalist, representing a baseline on which regional administrations could build to strengthen protection, because of the constitutional principle of environment protection[38].

This idea has also established itself in more complex areas than that of the hunt[39], resulting in a jurisprudential trend characterised by an absolutisation of environmental principle.

The issue certainly deserves further study, in addition to this contribution. On the principle of incremental protection, we would like to point out that the recent constitutional case law began to carry out a reversal from its original approach: many

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in particular, to the Spanish Constitution, which in Art. 149 no. 23 states that the State has exclusive competence with respect to basic legislation on environmental protection subject to the right of the Autonomous Communities to enact additional safeguarding rules.

[38] Corte Cost., 7 October 1999, n. 382, in Le Regioni, 190 (2000); id., 5 November 2007, n. 378, in www.cortecostituzionale.it; id., 14 aprile 2008, n. 104, ivi; id., 22 February 2010, n. 67, ivi. *Contra*: Corte Cost., 6 February 1991, n. 53, in I Foro it., 3000 (1991). In these decisions on air pollution the Supreme Court recognised as constitutionally legitimate the national legislation (i.e. the DPR no. 203 dated 1988), which specifies that only the State can set minimum and maximum release values (with regional administrations only permitted to set more stringent limits in the case of "particularly polluted areas" or due to "environmental needs"). This ruling was based on the assumption that the central authority has better access to scientific expertise than the regional administrations and the need to ensure uniformity of treatment of the various competing plants. See also Corte Cost., 7 November 2003, n. 331, in Giur. cost., 3511 (2003).

[39] Corte Cost., 7 November 1994, n. 379, in Giur. cost., 342 (1994); id., 25 May 1987, n. 192, in Cons. Stato, 858 (1987); id., 30 June 1988, n. 744, in Giur. cost., 3403 (1988); id., 27 July 1992, n. 366, in Dir. e giur. agr., 24 (1994); recently id., 29 October 2002, n. 407, *cit*.

judgments related to the electro-smog threshold values, in which a strong awareness of the interrelation with the environmental protection principle confirm it. This principle cannot, under any circumstances, be regarded as a super-principle that overrides other constitutional principles, such as freedom of economic initiative or - perhaps especially - those relating to the use of essential public services (such as electricity).

We hope that this new approach is not hampered by incorrect, ideologically biased approaches based on the principle of incremental protection[40]. We are referring to Art. 3 *quinquies* of the Environment Code, which states that the regional administrations have the authority to adopt more stringent legal forms of environmental protection than the State provides, but only if the particular situation of their territory demands it and subject to the condition that such additional protection does not entail any arbitrary discrimination[41]. From an objective point of view this Article appears to be a real obstacle - certainly it is not a sort of *laissez-passer* - for the supporters of the incremental logic[42]. In fact this

[40] Unfortunately the Constitutional Court seems to have made a sort of "reversal" in a recent judgment. In judgment no. 58 dated 29 March 2013 (in 2 *Giur. cost*., 892 [2013]), which states that «Art. 3-quinques reflects the principle affirmed by this Court according to which the regional legislature is permitted to increase environmental standards if doing so does not compromise the balance between opposing needs specifically identified by the State law». It is notable that the decision, which endorses the incremental principle, specifically ascribes the matter to the competing legislature rather than to the State legislature. This is contradictory: if, in fact, the incremental principle is fundamental to our legal systems and that, in particular, has been devoted by the above mentioned Art. 3-quinquies, then logically it should apply to matters governed by the State, in order to overcome the rigid allocation of a competence belonging to the State power.

[41] See D. de Pretis, *Il codice dell'ambiente e il riparto delle funzioni tra Stato e Regioni*, in AA. VV., *Studi sul codice dell'ambiente*, M.P. Chiti, R. Ursi (eds.) (2009).

[42] Even if it is assumed that Art. 3 *quinquies* actually states the so-called "incremental principle", such a norm, being a primary rule, cannot give any complying power in comparison with the national and regional legislation. In other words, it cannot be used to determine the constitutionality of State and regional regulations on environmental questions. Further confirmation of the effectiveness of the provision in question (assuming that it is erroneously interpreted as the foundation of incremental principle) is that the rule in question does not apply to extra-code areas, such as noise, electromagnetic and light pollution although these areas are clearly related to the environment (all sectors, however, where the use of quantitative threshold values is widespread and which

rule provides a mechanism for restricting regional administrations' protectionist initiatives as it requires them to limit such initiatives to situations where there are demonstrable territorial peculiarities that demand a more stringent level of protection than the State provides. An ecologically minded regional administration cannot, therefore, adopt hyper-cautious regional rules that depart from the standards set by the national legislator. Nor can the regional legislature rely on an individual interpretation of the principle of precaution to raise the level of protection beyond that provided by the State law. The role of the sub-state source of law is, therefore, far from being strengthened by the standard code-related regulation mentioned above.

A similar perspective also applies to the sectoral rules in the Environmental Code, in which the logic of the incremental protection would seem, at first glance, confirmed respect to a specific case. This is best illustrated by Art. 271, par. 4, which provides that air quality plans and programs set specific release limits and stricter requirements than those contained in the Code (...), as long as they are necessary to pursue the aims concerning the air quality. Even in this case, in our opinion, the incremental logic is not implemented: the presence of a sectoral rule authorising the *in melius* derogation confirms the absence of a general principle of protection maximisation[43]. If the law recognised a general principle of protection maximisation there would be no need for specific provisions, such as the one cited.

It follows that the logic of incremental protection, and its implicit premise - the over-primary nature of environmental interest and the impossibility of comparing it with other constitutional values - are not a part of the legal system in the field of environment.

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the regional hyper-cautionary logic focuses on).

[43] A similar assertion can be made with reference to pre-existing par. 10 of Art. 281 of the Environment Code, which provides that in adopting plans or programs and in granting authorisations to deal with particular health risks or areas requiring special environmental protection, the regional and autonomous provincial administrations may set release threshold values and requirements more stringent than those set out in this title, if this is necessary to achieve the threshold and the target values for air quality. This rule, now repealed, supported through a series of stringent restrictions the regional intervention aimed to raise the overall standards of environmental protection, so as to interpret the hypothesis of an "upside" redefinition of the same standard.

This conclusion is also supported by an argument about uncertainty management. If the constitutionality of the incremental principle is questionable then we cannot neglect the possibility for the legislator to regulate, in environmental field, phenomena whose potential implications he doesn't know fully. In these cases the precautionary principle[44] (Art. 191 TFEU and Art. 301 of the Environmental Code) - which requires the competent authorities, including the legislature, to take appropriate measures to prevent damage to the environment based not just on firm scientific evidence about risk but also potential risks - can be invoked. It is, obviously, an extremely "complex" principle. Misapplication, for example adopting measures designed to protect against remote or hypothetical risks, poses a real risk to the development of certain economic-industrial sectors. As far as the State-regional administrations relations, if the logic of incremental protection is endorsed, dangerous synergies with the precautionary principle could be determined. The incremental protection advocated by the regional administration may, in fact, easily rely on a high number of situations of scientific uncertainty and introduce levels of adjustment which systematically go beyond the State's standards and thus undermine the unity of national environmental regulation framework, which has implications for the relative economic and industrial competitiveness of different areas of the country.

5. Environment as legal issue

The last problem we will discuss is probably the most complex: the configurability of the environment in terms of actual legal right. It could be argued that this topic should have been discussed first, due to its importance and the sense in which this is a preliminary issue, but our decision to postpone the analysis was not taken lightly. We wanted to highlight a fundamental issue,

[44] B. Marchetti, *Il principio di precauzione*, in M.A. Sandulli (ed.), *Codice dell'azione amministrativa*, 149 (2010); F. Trimarchi, *Principio di precauzione e «qualità» dell'azione amministrativa*, in *Riv. it. dir. pubbl. com.*, 1673 (2005); F. De Leonardis, *Tra precauzione e ragionevolezza*, in 26 Federalismi.it (2001); Id., *Il principio di precauzione nell'amministrazione del rischio* (2005). See also, *ex multis*, B. Wiener, *Precaution*, in D. Bodansky, J. Brunnee, E. Hey (eds.), *Oxford Handbook of International Environmental Law* (2012).

namely that the debate on unity of the environment from the perspective of the law (on its material or immaterial nature and ultimately on its real existence was actually quite far removed from the practical problems in the filed of the protection of environment.

The positions expressed by the literature on controversial identity of the concept of environment represent a valuable legal heritage. There was a deep and very broad process of reflection; it has often involved extra-legal issues, such as the still relevant dialectics between supporters of the anthropocentric interpretations and those ones who would prefer its overcoming, that is the affirmation *of* an environment law (i.e. where the same environment is, in some way, the metaphorical "owner") instead of a right *to* the environment.

It is not possible to report the debate in full here as it is characterised by a great heterogeneity not only about content, but also the related methods of investigation. We will confine our discussion to the positions that had most influence on the debate about the environment and on the elaboration of legal institutions that today form the existing law.

The traditional idea to which contemporary interpreters still need to respond, is represented by what is termed somewhat misleading "pluralist" theory. Pluralist theory derives from research by Massimo Severo Giannini[45] in which the environment was denied the dignity of uniform legal right, rather recognising in it the merely verbal summary of a number of legally relevant profiles, referring to the known triad: landscape, urban planning and health. On the basis of this premise, a good part of twentieth-century doctrine was an attempt to find the balance between the above polarities, assigning each time one of them a prominent leading role[46]. Giannini's pluralist premise (which might more appropriately be referred to as the "denier" premise) therefore had a strong feedback from the doctrine.

The premises of pluralist theory were the features of the legislation then in force and, in particular, the silence of the Con-

[45] M.S. Giannini, *Ambiente: saggio sui diversi suoi aspetti giuridici*, in Riv. Trim. Dir. Pubbl., 15 (1973); A. Predieri, *Paesaggio*, in Enc. dir., XXXI, 507 (1981).
[46] E. Capaccioli, F. Dal Piaz**,** *Ambiente (tutela dell'),* in Noviss. Dig. it, Appendice, 257 (1980).

stitution about the protection of the environment, the fragmentary nature of the sectoral legislation *latu sensu* relating to environmental issues and, lastly, the absence of an administrative body institutionally aiming to environmental protection.

These circumstances have been overcome thanks to a series of decisive reforms, in good part enhanced by European Union.

Before examining the impact of these reforms on the so-called pluralist interpretation, it should be stressed that although the pluralist interpretation has been enjoyed by the literature, it has had little impact on constitutional case law.

Even before 2001 (when textual reference to environment was introduced into Art. 117 of the Constitution.) the environment was recognised as a right of great constitutional significance in constitutional case law. This was not, however, reflected in detailed study of the legal matrix characterising that right. The Constitutional Court was mostly engaged in underlining the cross-cutting nature of the environment concept (and hence the related legislative and administrative powers), which clearly did not help to identify a common definition of the notion.

As we have noted above, the jurisprudential debate on the environment focused on the difficulties surrounding allocation of legislative and administrative powers. There are many reasons for this. In our opinion one reason was the absence of a constitutional provision that could have represented a parameter on which to build a reflection aimed to understand not "who" decides on the environment, but "what do we mean when we talk about environment".

It was not, therefore, the Constitutional Court case law to have started the crisis of the so-called pluralist theory. This crisis was, however, caused by the legislative reforms that have come into force in the last few decades. This statement needs to be clarified.

The pluralist/denier thesis suffers from a structural fallacy involving the investigative perspective on which it is based, namely the idea that the legal value of the concept of environment can be denied or affirmed in accordance with the degree of "firmness" of regulations and the setting prepared by the legislation providing for the protection of the environment.

The approach underlying the positivist argument supported by Giannini is affected by the evolution of positive law, as

a result of which the reference to the environment has "entered" the Constitution, the approval of the Environmental law Code and the establishment of a Ministry for environmental protection.

These three new provisions have not, in fact, resolved several critical issues affecting environmental law. The formal Constitutional treatment of the environment is somewhat unsatisfactory, as we have seen. The fact that the only reference to the environment is in the norm dedicated to the allocation of legislative powers has decisively influenced the Constitutional Court's review and reducing the attention paid to the substantial features of the environmental discipline and to the internal and external limits of the legislature's discretion.

The Environmental Law Code was inspired and supported by a strong intent to systematisation[47]. Nevertheless it has not given particular characteristics of rationality to the system. Many important sectors, such as electromagnetic and acoustic pollution, did not deal with the Code. The same can be said about the organisation of administrative functions[48], representing a highly problematic area of environmental law, in which, ultimately, the strongly interrelated nature of the environment law.[49].

Finally, although awareness of the imperative for efficient, coordinated management of environmental problems may have prompted the establishment of the Ministry of Environment this

[47] In this regard, the decision no. 3838 dated 5 November 2007, in which the State Council has clarified how the corrective decree no. 4 dated 2008 has resulted from the aim to make the current legislative decree a real code, provided with a systematic character and a core of common principles, is to be taken into consideration. he Environmental Code has certainly been an important factor in the implementation of environmental protection and its matrices. This also because of stepped positivization of important principles, most notably that of sustainable development. This, however, was not enough to mitigate the consequences of the failure to explicitly reference the right to a healthy environment in the Constitution. These consequences consist, as has been shown, in the indirect kind of the protection granted by the legal system to the environment, which still "passes" through the protection of different fundamental rights as everyone is entitled.

[48] F. Fracchia, *Introduzione allo studio del diritto all'ambiente. Principi, concetti e istituti*, 89 (2013). Similarly, Id., *Amministrazione, ambiente e dovere: Stati uniti e Italia a confronto*, in D. De Carolis, A. Police (eds.), *Atti del primo colloquio di diritto dell'ambiente*. Teramo, 29-30 aprile 2005, 119 ss. (2005).

[49] M. Renna, *Vincoli alla proprietà e diritto dell'ambiente*, in Dir. econ., 715 (2005).

has not completely resolved the highly fragmented organisation[50] of administrative functions relating to the environment, which is characterised by overlap, particularly in relation to activity-planning at regional level.

If Giannini's methodological theory - based on the legislator's silence to deny the legal relevance of the environment right - is accepted, then the numerous and important legislative initiatives of recent decades mean that anachronistic character of the revisionist thesis must be also be acknowledged.

The latest legislation has not eliminated the problem of finding the legal core of the concept of environment, but it has affected the terms of the debate. Attention has moved from the problem of the existence and unity of the environment to the more complex issue of the categorisation of subjective situations concerning it and to the techniques through which the legal system assure protection to these situations.

Clarification of this point is needed here. The shift away from the traditional debate on environmental right from the *an* to the *quomodo* of its protection should not be represented as an underestimation of the complex nature of the issue under debate. The critical point relates to the different levels on which the empirical and legal matter is situated. There is no doubt that from an empirical point of view the environment is not a unique right; rather it is entailed in a delicate balance of components, each of which in turn is likely to be qualified and treated as a single right. Indeed, even before, always from a purely phenomenal point of view, it is not even arguably true that for humanity the environment necessarily represents something to be enjoyed; on the contrary, it often proves inhospitable and sometimes aggressive. It is enough to recall the literary trope of the stepmother nature, which from Lucretius onwards has been one of the favourite subjects of Western poetry.

None of this has much to do with the problem of environmental qualification as a *right*. From an empirical point of view, a right can be seen as consisting of several entities, as in the case of a

[50] The objectives stated by the legislation in hand put conservation and recovery of the environment corresponding to the fundamental interests of society and quality of life and to the preservation and enhancement of the national heritage and the defence of natural resources from pollution within a systematic framework (Art. 1, paragraph 2, law establishing the Ministry of Environment).

company or an inheritance.

This means that the unity character in law is not compromised by the multiplicity of the asset-component that is found empirically. In order to define the environment as a legal right the various components must be united by a specific legal regime, this would result in the recognition and protection of subjective legal situations related to the right in the context of legal procedures and possibly trials.

The doctrinal conflict affecting recognition of legal situations is cultural, rather than legal. The conflict is between those who consider the environment to be a "terminal" of active legal situations (which show their nature of *rights* when they are considered by the legal system as accomplished and absolute situations and as "*interesse legittimo*" when placed in a dialectical position with the discretional power) and those who are oriented to represent the environment as a source of only *duty* situations, in turn attributed to the solidarity duty provided by Art. 2 of the Constitution[51].

The second approach is completely out of step with current thinking, and not only in relation to the environment. The contemporary jurist instinctively associates legal rights with active situations. Often, adopting an remedial approach, the rights are even recognized *ex post*, taking into consideration the need to give juridical protection under certain circumstances. For example, the still-ambiguous concept of chance was recognized this way.

The "duty oriented" thesis, however, tends to reverse this paradigm and to suggest a different interpretation: the reconstruction of the legal right starting from a passive situation, precisely that of duty, provided by Art. 2 of the Constitution.

Of course we take a very different position to Giannini, who denied the legality of the environment legal right on the basis of (temporary) lack in the positive law; however this idea implicitly denies the relevance of the abundant legislation on the environment and directly reconnects the legal significance of that legal right to a general principle such as that of solidarity.

This approach, however, raises some questions.

The principle of solidarity becomes a source of non-dialoguing duties with specular active situations and, therefore, is

[51] F. Fracchia, *Introduzione allo studio del diritto all'ambiente,* cit. at 48.

ultimately not ontologically distinguishable from a moral duty. The principle of social solidarity, on which the theory in question is based, can turn into a dangerous regulation of extra-legal concepts, according to the idea of an ethical State.

If a legal asset is only interested by duty situations (indeed provided by a very general provision as Art. 2 of the Constitution) an uncontrolled proliferation of legal rights could develop.

In our opinion, the role that Art. 2 of the Constitution can play in environmental matters is antithetical to that reported above: this rule seems to act as a provision of non-relinquishability of certain fundamental rights (including that to a healthy environment) rather than a source of duties. We will deal with this issue in detail later.

At this point it is interesting to consider the implicit premise of the thesis assuming that in the positive law there would not be issues more stringent than Art. 2 of the Constitution from which to infer the existence of *active* situations involving the environmental protection. The arguments for this premise are unconvincing. Whilst the rules on the environment still do not represent an organic and consistent *corpus*, despite the gaps underlined by Giannini having been addressed, it is also true that some legal institutions presupposing the existence of subjective situations different from the duty and included in active situations can be found

At least two starting points can be detected.

The first relates to environmental damage, which - it is acknowledged - entered national law through European law. The main characteristic of this right is that it establishes in terms that are completely new to the domestic legal system, a direct duty to repair environment damage. Therefore, the protection of the environment has lost any instrumental connotation: environmental damage was a source of compensatory obligations to the extent that it had contributed to injury to an additional, independent legal right, mainly health or property.

As long as the compensatory mechanism has developed in the terms described above, the environment has not been recognised as an asset. The introduction of legislation on environmental damage has given the system a significant change: the compensation it guarantees is no longer related to the damage that the polluted environment has caused to the health or property of a par-

ticular subject, but to the damage suffered by the environment itself. Thus the environment was implicitly recognised as legal right in itself: the provision of the compensation has, in other words, shown - but perhaps it would be more correct to say that, at least in part, *determined* – the juridification of the environment as a specific asset.

The regulations on environmental liability are far from perfect. The exclusive State locus standing, and thus the perspective of the ministry as a single *advocate* of the rights of individuals, can be challenged. Such provision (the exclusive State locus standi) could have found an obstacle in a constitutional rule consecrating the right to a non-polluted environment, thus becoming a criterion of the legality for all regulations relating to the environment, including that one that prevents subjects other than the ministry to have a jurisdiction. All these questions show clearly how difficult the environmental damage and, possibly, its perfectibility, still is. In an analysis focused on regulations, is to be considered as relevant is the creation of a system of rules in which the environment is able to be considered apart from its links with different and already protected asset.

The second aspect to be considered is the role played by the procedural rules governing the public choices' impact on the environment. At present the numerous rules on the *quomodo* of public decisions concerning the environment are a sort of magnifying glass on the juridification achieved by the notion of environment as well as on the type of legal relationship between environment and human beings,.

It must be stressed that the rules applicable to environmental administrative proceedings are significantly different from State law no. 241 dated 1990; they mark a strengthening of the guarantees of participation which, of course, correspond to active legal situations for individuals (apart from the reconstructive options in terms of rights or "interessi legittimi"). The special procedure for access to environmental information that, led by international and European laws and today considered as a characterising element of the environmental right[52], shows special character of the rules governing the environmental law.

Another example is the significant gap that exists between

[52] Reference to the Italian decree no. 195 dated 19 August 2005.

the current regime and that foreseen in the general law on access under three different points of view: the greater wideness of the notion of information if compared with to that of the document, the higher number of passive subjects of the compulsory information and, above all, the largest legitimacy allowing access to information "to anyone can ask for it, without declaring his/her own interest"[53].

A similar observation can be made about the right to participation,[54]. At this subject, the consultation[55] in the strategic environment assessments and environment impact assessments and the (possible) public inquiry (that can occur in the first of the two aforementioned procedures[56]), both inspired by an in-the-procedure conception of the right to response definitely broader than that which characterises the standard set by the State law no. 241 dated 1990, is to be considered.

Something similar applies to the procedural rules (which have also been influenced by international and European laws[57]), as they are characterised by an emphasis on objective jurisdiction[58]: the most significant aspect, in this sense, was the active procedural legitimacy accorded to environmental associations identified by the ministry[59]. Objective jurisdiction, by definition, re-

[53] Art. 3, par. 1, decree no. 195 dated 19 August 2005.

[54] Tar, Lazio, Roma, sez. III *quater*, 10 January 2012, n. 389, in www.federalismi.it

[55] Art. 14 and 24 of the Environment Law Code.

[56] Art. 24, paragraph 6, of the Environment Code.

[57] The Convention was signed on June 25, 1998 (ratified by Italy through the Law no. 108 dated 16 March 2001 and adopted through the Council Decision dated 17 February 2005 (2005/370/EC).

[58] A. Police, *Il giudice amministrativo e l'ambiente: la giurisdizione oggettiva o soggettiva?,* in D. De Carolis, E. Ferrari, A. Police (eds.), *Ambiente, attività amministrativa e codificazione*, cit. at 4, 320. They are particularly explicit about the fact that the distinctly subjective feature of the jurisdiction endorsed by many European countries risks jeopardising the effectiveness of European law (see ECJ, 12 May 2011, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein‐Westfalen, C-115/09, in Dir. Proc. Amm., 91 (2012) commentary by F. Goisis, *Legittimazione al ricorso delle associazioni ambientali ed obblighi discendenti dalla Convenzione di Aarhus e dall'ordinamento dell'Unione Europea*, in Dir. Proc. Amm., 91 (2012).

[59] Not only the associations recognised by the Ministry have the necessary locus standi: the judge in charge of the case evaluate each case the existence of legitimacy of the association (Cons. St., Sec. VI, 13 September 2010, n. 6554, in 9 Foro

quires an *object*, which is a legal right which the law considers should be given a special protection. This special protection, however, is expressed through the recognition of a specific legal active situation, i.e. the right to action, whose peculiar aspect is not being "hooked" to any basic subjective legal situation.

This specific features demonstrate the inherent legality of the concept of environment (such juridical "strong" as having somehow "deformed" many systematic categories, as seen above), meaning that in our opinion there is no need to cite the principle of solidarity as a crucial factor in legal regulations applying to the environment; however it also reflects a concept of the legal system monopolised by duty profiles.

The recognition of the legal regulation of the environment concept doesn't deny the special extent of vagueness that characterises many of the concepts that "populate" the environmental legislation: this is amply demonstrated by the continuing ambiguity of the concept of waste and the serious consequences of this, especially in criminal law. Although the *quality* of the legislation is questionable this does not affect the legality of the protected right, about which there is now little doubt.

6. Conclusion

The arguments we have made thus far have led us to believe that today, despite the continued absence of a basic constitutional provision governing the environmental protection and the consequences of this for the core of the Constitutional Court's review, is not difficult to call into question the constitutional relevance of environmental protection, as well as the configurability of the environment as unique legal right which subjective legal situations are referred to.

This implies a change: debate about the existence of a legal concept of environment and the possible existence of subjective legal situations referring to it seem to have given way to the ur-

amm., 1908 [2010]; id., Sec. VI, 13 May 2011, n. 3170, in III Foro it., 19 [2012]). In a comparative perspective: M. Delsignore, *La legittimazione delle associazioni ambientali nel giudizio amministrativo: spunti dalla comparazione con lo standing a tutela di environmental interests nella judicial review*, in Dir. Proc. Amm., 753 (2013). See also: J. Wates, *The Aarhus Convention: A Driving Force for Environmental Democracy*, in J. Envtl. Planning L. 2 (2005).

gent problems posed by the special character of environmental guidelines, particularly the potential conflict with the fundamental principles of our general program (see the principles applying to civil liability, right to access and the right to judicial protection, which have been revisited - as we have seen - in the light of rules on environmental damage, access to environmental information and access to justice in environmental matters respectively).

Today the conflict affects not only the regulation of individual rights but also the upper level of the dialectic between opposing interests.

The traditional view is that environment protection is exists in a strong dialectic tension with economic and industrial development governed by Art. 41 of the Constitution. As we have already shown, the Constitutional Court mostly focused on this conflict, although in its review of the allocation of legislative powers it has considered the need for a prudent balance between the above two conflicting values.

This view now seems rather simplistic in that it only addresses the needs of a small segment of society - what would, in nineteenth-century historiographic terminology, be referred to as the "bourgeoisie". The economic crisis has given us a new and complex framework: today the right to a healthy environment seems to be potentially antagonistic to some social rights, such as the right to work or to own a house, rather than to the freedom of to conduct business. This is best illustrated by the well-known Ilva-case (Taranto, Italy), which involved a dramatic conflict between the victims of pollution (not the polluters) and the institutions protecting them from the consequences of that pollution. The criminal judge had ordered the seizure of the plant because of non-compliance with the *Autorizzazione Integrata Ambientale* (AIA) (authorisation complying with the *integrated pollution prevention and control* (IPPC) system as prescribed by the European Union).

These events can obviously be considered from a philosophical, sociological or political perspective rather than a strictly legal perspective.

Nevertheless, the jurist has to overcome the conceptual paradigm that includes in the "genetic code" of environmental law the tension between those who attack the environment and those who are affected by the consequences of such aggression. The questions to investigate seem to have changed somewhat. To

what extent is there a right to pollute? Also to what extent is there is a right to consent to being polluted?

The issue of the existence of the right to be damaged is certainly not new to modern doctrine. The prohibition on "selling one's body" is an example of it. The famous case on dwarf-tossing[60] which dealt with the claimant's freedom to submit to a practice generally considered detrimental to his/her own dignity can also be considered under this framework. On that occasion the French Council of State affirmed the principle that every individual has a duty of social solidarity towards others, and a corresponding duty to him or herself. There is not, therefore, an unlimited freedom to "see one's own rights denied"; in the dwarf-tossing case the right concerned was the legal right to personal dignity.

This topic has traditionally been the province of experts on private law, philosophy and general law theory[61].

The explanation for this is that the cases tend to involve the concept of self-determination, which in turn is the base of valid and effective negotiations. Moreover, it is no accident that the term "human dignity" only appears in the Constitution in the second paragraph of Art. 41, which limits private economic initiative[62].

Today's news leads, however, to consider the idea that the problem of the undeniability of certain fundamental rights should also be studied in the perspective of public law and, as noted

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[60] Cons. État Ass., 27 October 1995, *Commune de Morsang-sur-Orge*, in *Dalloz*, 257 (1996). The case in question was subject to review by the administrative judge because the administrative decision of the local authority, which prohibited all late-night entertainment venues from permitting such activities, was contested by the "victims" of the game of the launch. The applicants alleged the illegality of the prohibition by declaring themselves satisfied with their jobs, which gave them an economic stability to which they might not otherwise had access, partly because of their disability. Called upon to balance some very important constitutional values against each other, the Council of State decided that there can be no restrictions on the preservation of human dignity (in turn interpreted as an essential component of public policy), not even at the instigation of the individual concerned or in order to preserve other fundamental rights such as the right to work or the freedom of economic initiative.

[61] See C. Cricenti, *Il lancio del nano. Spunti per un'etica del diritto civile*, in Riv. crit. dir. priv., 21 (2009); A. Massarenti, *Il lancio del nano e altri esercizi di filosofia minima* (2006).

[62] See G. Azzoni, *Dignità umana e diritto privato*, in Ragion pratica, 75 (2012).

herein, also referring to the issue of the right to a healthy environment.

The possible answers to the question of whether there is a right to consent to pollution range between two extremes. The first holds that recognition of the freedom to abdicate one's right to a healthy environment in favour of another right to which one accords higher priority would demonstrate that law is distinct from morality. The second, however, is that allowing individuals to "opt out" of fundamental rights would mark a crisis of the legal system, as it would in effect be an admission that it was unable to balance conflicting interests.

Of course this is not the right forum for evaluating the subtleties of these positions or describing the positions lying between these extremes. What we would like to emphasise in this discussion of legal regulation is the new framework for dealing with the problem of the definition of the boundaries between legal and meta-legal issues.

In our opinion, one should not ignore the fact that the right to an healthy environment although often cited in the legal system, is destined to remain merely virtual as long as other basic rights, such as the right to work or own a house (which ultimately contribute to emancipation from need), are not adequately satisfied.

The principle of social solidarity, in this sense, necessarily plays a decisive role, not only as an abstention duty (in this case from disrespectful behaviour towards environment), but also as link between the fundamental rights that, if considered in isolation, risk to be relegated in the mere "ought to be" perspective.