

# PROTECTION OF THE ENVIRONMENT AND THE GOOD LIFE

By Daniela Buaduin

What growth can be sustainable if the right to live in a healthy environment is not afforded to everybody? Pollutants, uncontrolled building, soil desertification, more and more altered landscape, weak approach vis-à-vis widespread natural risks, and illegality these are only some of the problems affecting our lives, with effects which are even more prejudicial for those who live in a condition of social marginality.

Environmental issues are inseparably linked with a person's dignity and their place within our legal system and the examination of the so-called multi-layer regulatory framework are to be considered in this perspective. This approach is also necessary to assess and comprehend the legislator's lines of policy and law and therefore outline a perspective of reform without concealing the risks inherent the anomaly of using excessively the word "emergency" when dealing with environmental issues.

## Focus on Facts

The report *State of the World 2013*<sup>1</sup> by Worldwatch Institute focused on a fundamental issue of human civilization and which is at the centre of current debate on the environment, namely if making our social and economic development models sustainable is still possible. In the introduction chapter, the Institute President, Robert Engelman wrote that the word "sustainable" was abused,

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<sup>1</sup> Worldwatch Institute, *State of the World 2013. Is sustainability still possible?* Italian edition edited by Gianfranco Bologna, Edizioni Ambiente, Milan, 2013.

which resulted in trivializing the notion, which is actually complex and structured, introduced in the environmental field by the text *Our common future* of 1987 where it is reported that “sustainable development” is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

As is known, environmental degradation affects to a greater extent economically disadvantaged and marginalized persons, who out of their choice or because they are obliged, temporarily or definitely quit the place of their habitual residence owing to sudden or progressive environmental changes which are prejudicial to their lives. Many researches have stated for years that the world community should adopt new definitions of “migrants”, because old categories are no longer capable to adequately reflect the complexity of migrations, their causes and procedures .<sup>2</sup>

As to air pollution a study carried out on more than 300,000 persons resident in nine European countries was published in *The Lancet Oncology*, according to which the higher is air pollutants concentration, the greater is the risk of developing lung cancer<sup>3</sup>. The European Community declared 2013 “the air year” and committed itself to strengthening the directive regulating the presence of pollutants in the atmosphere<sup>4</sup> whereas as to noise pollution it established new “anti-noise” objectives by envisaging their reduction by 2017<sup>5</sup>.

In the *Ispra (Istituto superiore per la protezione dell’ambiente)* [Superior Institute for Environmental Protection] report, through

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2 Worldwatch Institute, *State of the World 2013. Is sustainability still possible?* Quote, 392-392.

3 The Lancet Oncology, Air pollution and lung cancer incidence in 17 European countries: prospective analyses from the European Study of cohorts for Air Pollution Effects (ESCAPE), 10 July 2013, which can be consulted at:  
[http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045\(13\)70279-1/abstract](http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(13)70279-1/abstract).

4 Legambiente, *Malaria di città 2013. L'inquinamento atmosferico e acustico nelle città italiane*, 17 January 2013, 3 available at  
<http://www.legambiente.it/sites/default/files/docs/malariadicittà2013.pdf>

5 Legambiente, *Malaria di città 2013. L'inquinamento atmosferico e acustico nelle città italiane*, 14.

the collection of the findings from monitoring pesticides in waters, contamination is said to be considerably widespread although the examination did not cover all the national territory yet<sup>6</sup>. Alarming data emerged also from the study of the US Navy Headquarters of Naples, carried out in order to understand how dangerous it was for US soldiers and their families to live in Campania, where it is reported that 92% of private wells give rise to an unacceptable risk for health, without omitting the public water network in which the presence of water coming from “unauthorized” wells is alleged.<sup>7</sup>

Besides, our lives are also influenced by the ruthless use of fertile soil mostly located in the few valuable areas of our country - suffice it to think of the so-called land grabbing, which started as the purchase by rich countries of fertile soil the relevant resources<sup>8</sup> for negligible sums and then developed thanks to the uncontrolled spreading of power plants from renewable sources. Regarding the latter, planning and adequate control of the balance between the energy produced and the energy used, between the emissions reduced and those created are missing<sup>9</sup>. The management of the environment can be defined as responsible only if the decisions on the location of these plants are complemented by fair and sustainable policies on the use of the territory, ensuring the protection of ecologically important areas and respecting the rights of those who live in such areas.

In the fight against environmental destruction, the related disrespect for human dignity, indifference, individualism and unaccountability, a more and more decisive role is played by associations and committees set up to safeguard not only environmental interests “strictly speaking”, but also – broadly speaking - environmental ones, which include the protection of the quality of life in a given

6 Ispra, *Rapporto nazionale pesticidi nelle acque dati 2009-2010*, n. 175, July 2013, available at [http://www.isprambiente.gov.it/files/pubblicazioni/rapporti/R\\_175\\_2013ref.finale.pdf](http://www.isprambiente.gov.it/files/pubblicazioni/rapporti/R_175_2013ref.finale.pdf)

7 L'Espresso, 21 November 2013, *Bevi Napoli e poi muori*, 38-45, by G. Di Feo and C. Pappaianni.

8 Corriere.it, 28 January 2013, *Land grabbing: più del neocolonialismo, devastante per l'ambiente*, available at <http://www.corriere.it/ambiente/13gennaio 29/land-grabbing-devastazione-ambiente273138da-6960-11e2-a497-c004784909.shtml>

9 Repubblica, 16 March 2013, *Energie rinnovabili è guerra al Tar contro le centrali*, Turin edition, page 16 A. Bartolomei.

territory<sup>10</sup>.

*The power and action of EcoMafias*

*Chair: Having recalled that this is a delegation of the **bicameral enquiry committee on waste disposal and the related illicit activities**, may I remind our interlocutor that we are here to receive from him all the information he can give us just on this activity: in particular we would like to know **when, how and why the Casalesi clan started being interested in waste...***

*CARMINE SCHIAVONE: **The story started in 1988**; ... Pino Borsa, **lawyer** and Pasquale Pirolo, came to me with a proposal on the dumping of toxic barrels and **whatever** ... I said that there were about 240 hectares of land dug at a depth of 15-20 meters and I assured them that I would talk about it with everybody also because I was part of the **clan's administrative division** and not of the military one. So I went to **Casal di Principe** where there were Marco Iovine and my cousin; we all talked about the fact that I had received a proposal...I was answered that it would have been **good business** for the coffers of the clan who would have had money to invest **but the place would have been poisoned because wastes would have polluted ground waters** ...<sup>11</sup>*

These words are the beginning of the flow of statements made in October 1997 by the cooperating witness Carmine Schiavone and published as late as on 31 October 2013 by the Bureau of the Chamber of Deputies<sup>12</sup> as an act of transparency owed to the citizens living

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<sup>10</sup> Council of State, 4th Division, decision 14 April 2011, n. 2329; Administrative Court Lombardy, Milan, 22 October 2013, no. 2336.

<sup>11</sup> Enquiry Parliamentary Committee on the waste disposal and related illicit activities, 13th Parliament, sitting of 7 October 1997, hearing and documents produced by the cooperating witness Carmine Schiavone that can be consulted on: <http://leg.13.camera.it/bicamerale/rifiuti/resoconti/Documentounificato.pdf>.

<sup>12</sup> Decision of the Bureau no. 50 of 31 October 2013 and Decision of the President of the Chamber of Deputies no. 383 of 31 October 2013.

and working in those areas violated by environmental illegality<sup>13</sup>.

During his hearing, Mr. Schiavone reconstructed the origin of EcoMafias in Caserta; he talked about toxic waste buried along the Domitian coast and poured into the Lake of Lucrino too, about lorries carrying nuclear sludge from Germany to landfills; and he said that professionals, entrepreneurs and politicians were involved.

Since then the market of EcoMafias has never gone through a crisis, as it clearly appears from the report submitted in June 2013 by *Legambiente*<sup>14</sup> which at its twentieth edition reported the data of an incessantly growing illegal economy, with a turnover amounting to 16,7 billion Euro in 2012.

In the annual report of the National Anti-Mafia Prosecutor and Directorate, in December 2012 it is reported that since organized waste trafficking meets the needs of low-cost disposal, it is not local, but it is widespread all over the State and concerns all types of business, whatever their size and the economic sector, although the industrial sector is predominant.<sup>15</sup>

The report also analysed the connection between waste disposal and recycling, which actually risks turning into a criminal distortion of the so-called green economy, with the consequent “con(fusion) of illicit waste trafficking with the criminal activities related to alternative energy sources; indeed, national and EU public funding intended for a noble purpose is actually fuelling organized crime’s coffers in addition to enriching corrupted public administrators.<sup>16</sup>

Mafia seeps into the public administration through bilateral

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13 Press release no. 477 of 31 October 2013 “Boldrini: grande soddisfazione per la declassificazione degli atti sulle dichiarazioni di Carmine Schiavone” [Great satisfaction for declassifying the statements of Carmine Schiavone]

14 Legambiente, Osservatorio Nazionale Ambiente e Legalità, *Ecomafia 2013. Le storie e i numeri della criminalità ambientale*, Edizioni Ambiente, Milan, 2013.

15 Annual Report on the activities carried out by the National Anti-Mafia Prosecutors and by the National Anti-Mafia Directorate as well as on the dynamics and strategies of organised crime of mafia-type from 1 July 2011 to 30 June 2012, submitted in December 2012, 330.

16 Annual Report on the activities carried out by the National Anti-Mafia Prosecutor and by the National Anti-Mafia Directorate, quote, 317-318.

agreements with politicians, managers of local authorities, public officials and persons in charge of public services. It may take the form of the granting of authorizations and licences, town planning changes, failure to carry out controls, ad-hoc recruitments, planning assignments, contracts, entrusting of works and maintenance activities.<sup>17</sup>

The mixing up of organised crime and politics is also confirmed in the report<sup>18</sup> unanimously adopted on 5 February 2013 by the Parliamentary Enquiry Committee on the illicit activities connected with waste disposal in Campania. The foreword reported the distortive effect produced by emergency approaches in the waste sector whenever such approaches exceed a period consistent with the word “emergency”, which evokes a limited time in which contingent situations are to be faced through exceptional regulations and exceptional powers.<sup>19</sup>

The report confirmed Campania’s negative supremacy with regard to environmental violations and mentioned the technical in-depth analysis carried out by an eminent geologist on behalf of the Prosecutor’s Office of Naples. The analysis showed that all the area north of the city, which is still used for farming, is affected by pollution levels that will reach their peak in 2064 , with the precipitation to ground waters of leachate and other toxic substances resulting from the thousands of tons of special, solid urban and special hazardous waste poured, at least since the eighties, by various concerns of this sector controlled by Camorra criminal organizations.<sup>20</sup>

The enquiry carried out by the Committee reported the thirty-year practice of toxic and hazardous waste burned in the streets or the countryside and the serious consequences for health possibly

<sup>17</sup> Annual Report on the activities carried out by the National Anti-Mafia Prosecutor and by the National Anti-Mafia Directorate, quote, 786.

<sup>18</sup> Territorial report on the illicit activities connected with waste disposal in Campania Region (Doc. XXIII, n. 19).

<sup>19</sup> Territorial report on the illicit activities connected with waste disposal in Campania Region, quote, 15.

<sup>20</sup> Territorial report on the illicit activities connected with waste disposal in Campania Region, quote, 113.

resulting from this practice; indeed, the area at issue is also called “*Terra dei fuochi*” [Land of fires] and includes in particular the area across the provinces of Naples and Caserta.<sup>21</sup>

With a decree adopting urgent measures, the Government introduced into the Environment Code a provision (Section 256-*bis*) introducing the statutory offence of illicitly burning waste, which was punishable as a mere misdemeanour beforehand. The decree also provided that judicial authorities finding, during an investigation, that poisonous substances were dumped or illegally poured must inform central and local institutions so that they can take the prescribed actions.

The town of Giugliano, province of Naples is a typical example of abuse of the territory with devastating effects especially for the weakest persons. Here there is the story of the Roma community which was placed, after various transfers, in the area of Masseria del Pozzo, known to be at high environmental risk owing to the toxic waste present there. The unhealthy smell perceived in that area, the rashes on the children’s skin, the inadequate sanitation are the cost of a political and administrative choice based allegedly on public order requirements.

This inequality status with respect to environmental disasters involves all those workers who have to face the false dilemma between health and employment: “*hemmed in the grip of the factory both physically and psychologically because the plant uses the blackmail of bread and claims the right to pollute*”.<sup>22</sup>

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21 Territorial report on the illicit activities connected with waste disposal in Campania Region, quote, 144-151; Legambiente, Osservatorio Nazionale Ambiente e Legalità, *Ecomafia 2013*, quote, 135-137.

22 A. Prunetti, *Amianto. Una storia operaia*, Agenzia X, Milano, 2012, 78.

On 29 October 2013 the Office of the Prosecutor of the Republic attached to the Court of Taranto ordered that 53 persons be served the notice that preliminary investigations were concluded in the enquiry called “*Ambiente svenduto*” [Sold off environment]<sup>23</sup>.

The alleged offences included: criminal association aimed at perpetrating several offences against public safety, in particular failure to adopt precautions to prevent industrial accidents, poisoning of waters and foodstuff, intentional environmental disaster; offences against public administration and public confidence, such as corruption, extortion, falsity and abuse of office; as well as manslaughter consisting in infringing the rules to prevent industrial accidents with regard to the death of Claudio Marsella (the 29-year-old who deceased on 30 October 2012), engine driver of the *Movimento Ferroviario* unit, and Francesco Zaccaria (deceased at 29 on 28 November 2012), working as a crane operator.<sup>24</sup>

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23 Office of the Prosecutor attached to the Court of Taranto, notice of the end of investigations, 29 October 2013 (crim.proc. no. 938/2010).

24 The crane operators described by Adriano Sofri: Operai Ilva: “*Non risaliamo su quelle gru*”, 31 dicembre 2012, which can be consulted on: <http://www.repubblica.it/cronaca/2012/12/03/news/ilvaoperaigr-47962430>.



## **Discriminations and significant events**

- **June 2012**

- Rio de Janeiro, United Nations Conference on sustainable development, stressing the leading role of green economy within sustainable development and reduction of poverty and the institutional framework to reach such a development.
- Beginning of the operation to demolish the unfinished building which, in view of the Italian Football World Cup 1990, was supposed to become a 7-storeyed hotel with more than three hundred rooms and overall size of almost one-hundred and eighty thousand cubic meters of cement in the park south of Milan.

- **July 2012**

- The Judge for Preliminary Investigations attached to the Court of Taranto ordered the precautionary seizure, without the permission to use them, of *Ilva* hot working area plants and appointed four administrators.
- The European Court of Justice established, with regard to the infringement procedure initiated by the Commission in 2009, that Italy infringed EU rules on the collection, treatment and discharging of urban sewage in that it did not comply with their implementation timeline.

- **August 2012**

- The Government enacted a decree-law containing urgent provisions in view of the reclamation and requalification of the territory of the town of Taranto.

- **September 2012**

- A ridge of rock fell on Via dell'Amore, a trail between Riomaggiore and Manarola, while some persons were passing by.

- **October 2012**

- The Minister of the Environment declared the procedure aimed at granting the integrated environmental authorization (*AIA*) to the Ilva plant of Taranto concluded.
- The Court of L'Aquila established that some members of the "National Committee for assessing and preventing major risks" were guilty of the deaths and injuries of several persons on account of bad communication of the risk related to the destructive earthquake of 2009.
- The Italian Court of Auditors ordered some public managers to pay damages to Campania for the prejudice caused to the touristic image of the Region because of the waste-related emergency.

- **November 2012**

- The Judge for Preliminary Investigations of Taranto ordered that the steel produced by Ilva be seized in that despite the order to stop production issued by the Prosecutor's Office, the company had continued its activity.

- **December 2012**

- The Government passed the so-called "*Salva Ilva*" decree-law, turned into law with amendments, authorizing the continuation of production provided that the requirements of the authorization order were met, notwithstanding the seizure orders on the property of the firm owning the plant.
- The Judge for preliminary investigations of Taranto rejected the request for release from seizure; the goods on the quays

could not be handled.

- The Prosecutor's Office at Taranto filed a petition with the Constitutional Court on account of conflict of competences with the Government regarding first the so-called "*Salva Ilva*" decree-law and afterwards the confirming law.

- **January 2013**

- The Court first and the Judge for Preliminary Investigations of Taranto afterwards raised doubts on the constitutionality of the so-called "*Salva Ilva*" law and in particular on the rule allowing the plant to market the finished and semi-finished products under seizure.
- The European Commission sent a letter to the Italian Government requesting compliance with European rules on air quality and excessive concentration of thin dusts.
- The Government passed the decree-law to overcome critical situations in the management of waste and some environmental pollution cases, which in particular dealt with the waste emergencies in Latium and Campania and postponed, to end 2013, the state of emergency for the shipwreck of Costa Concordia at the Giglio Island.
- The Minister of the Environment appointed an administrator to overcome the alarming critical situation of urban waste management in the territory of the province of Rome, under the provisions of the Stability Law of 2013.

- **February 2013**

- The Constitutional Court declared the two petitions on the conflict of competences submitted by the Office of the Prosecutor of the Republic of Taranto inadmissible in that they had been overridden by the question of constitutional legitimacy raised on the law first by the Court and subsequently by the Judge for preliminary investigations.
- Italy signed the Convention of the Council of Europe on

the value of cultural heritage for society, also known as Faro Convention (the name of the Portuguese city where the text was opened to the States' signature in 2005), which enlarges the notion of cultural heritage to include, in addition to traditional heritage, other elements such as the environment and folk traditions.

- **March 2013**

- The European Commission deferred Italy to the Court of Justice because of the situation of the management of waste in Latium.

- **April 2013**

- The referendum on the partial or total closure of Ilva of Taranto did not reach the quorum (50% plus one of those entitled to vote).

- **May 2013**

- The Judge for preliminary investigations of Taranto signed the seizure order of equivalent value amounting to 8.1 billion Euro, this being the total estimated cost of the interventions necessary to the functional restoration of the hot working area plants in view of possible environmental reclamation.
- The Constitutional Court filed the reasons for the decision in which it declared the questions of constitutional legitimacy on Sections 1 and 3 of the "*Salva-Ilva*" law raised by the Court of Taranto and by the Judge for Preliminary Investigations partly inadmissible and partly ungrounded.

- **June 2013**

- The Italian Government passed the decree-law, then turned into law with amendments. named “*Salva-Ilva bis*” with regard to the industrial plants of strategic national significance whose production activities involve serious and considerable dangers for the environment and health owing to non-observance of provisions made in integrated environmental authorizations (*AIA*) - such as Ilva S.p.A.. The decree ordered that the company be put under the administration of an external commissioner for 36 months, and entrusted Mr. Bondi and a pool of sub-commissioners with the management of the business and the environmental reclamation process.
- The European Union deferred Italy to the Court of Justice for the management of waste in Campania and proposed a fine of 256,819 Euro per day of delay after the second judgment until compliance by Italy.

- **July 2013**

- In the case of the so-called MUOS to be installed in the US Navy Headquarters of Niscemi (Caltanissetta) after acquiring the study of *Istituto Superiore di Sanità* [Superior Institute of Health] which excluded predictable risks due to the “known effects of electromagnetic fields”, the Region of Sicily ordered “that the annulment of the authorization be annulled”.

- **August 2013**

- The Government passed the decree-law modifying the so-called Code of the Environment and introduced measures aimed at simplifying and rationalizing the waste traceability control system and in the energy field.

## • September 2013

- The Court of Appeal of Turin filed the judgment in the “Eternit” trial, which sentenced the surviving defendant for the periods in which he actually managed the production centres, to the penalty of imprisonment for eighteen years on account of environmental disaster.
- The European Commission sent a letter of notice to Italy for having failed so far to ensure observance by the Ilva steelworks of Taranto of the directive on supplemented prevention and reduction of pollution and the directive on environmental damage liability establishing “the polluter pays” principle.
- The wreck of Costa Concordia ship underwent a complex rotation operation which made the sunken part resurface after the shipwreck of 13 January 2012 near Giglio Island.

## • October 2013

- The Office of the Prosecutor of the Republic attached to the Court of Taranto ordered service of the notice that preliminary investigations were concluded on fifty-three persons in the enquiry “*Ambiente svenduto*” on Ilva.
- A decision of the Bureau of the Chamber of Deputies declassified the hearing of the cooperating witness Carmine Schiavone as held in the session of 7 October 1997 at the Parliamentary enquiry committee on waste disposal and related illicit activities.

- **November 2013**

- A cyclone which caused death, terror and destruction knocked down Sardinia with the resulting state of emergency in the island declared by the Council of Ministers.
- The Chamber of Deputies passed the decree-law ratifying and enforcing the agreement between the Governments of the Republic of Italy and the Republic of France to carry out and operate a new railway line (Turin-Lyon), signed in Rome on 30 January 2012.
- The European Commission sent a letter of notice to Italy for non-compliance with the obligations resulting from the 2011/70 Euratom Council Directive of 19 July 2011 setting up a new community framework for responsible and secure management of exhausted nuclear fuel and radioactive waste.

- **December 2013**

- Via a decree-law containing urgent provisions aimed at facing environmental and industrial emergencies and promoting the development of concerned areas, the Government introduced, in the Code of Environment, a rule on the offence of illicit waste burning.
- The Court of Cassation declared null and void the precautionary seizure of 8.1 billion Euro against Riva Fire, the holding company controlling Ilva SpA, as ordered by the Judge for preliminary investigations of Taranto on 24 May and confirmed on 15 May 2013 by the *Tribunale del Riesame* [Translator's note: It is a court which is called upon by the accused to review an order issued by the Preliminary Investigation Judge against such person. This court has jurisdiction over precautionary measures such as orders for pre-trial custody or pre-trial seizure].
- The Constitutional Court declared the anti-regasifier rule of Val d'Aosta [Aosta Valley, a Region] illegitimate, in that the

region could not impose an absolute ban to carry out waste recovery and disposal all over the regional territory since this decision interfered with the State's competence over environmental protection as set forth in the Constitution.

- The Administrative Court (TAR) of Latium granted the appeal lodged by the Municipality of Colfelice against the actions undertaken by the Commissioner to overcome the urban waste management crisis on the territory of the province of Rome, and as a result annulled the relevant appointment decree by the Ministry - which extended the Commissioner's powers without complying with the limitations arising from the purpose of the law conferring extraordinary powers on him, from the relevant prerequisites, the EU law's principles of self-sufficiency and proximity in waste management, as well as from subsidiarity as a rule for the allocation of powers among the different levels of government.



## Legislation and policies

### *The environment and dignity*

In the ordinary discourse, the meaning of “environment” is manifold.

Legally speaking, since the seventies the Court of Cassation<sup>25</sup> has defined the right to health as right to healthy environment (Articles 2, 32 and 9, paragraph 2, Cost.) and the Constitutional Court<sup>26</sup> referred to a primary, absolute value, necessary to the community and citizens, impacting the quality of life and reflecting the need for a natural habitat where human beings live and act.

The notion of environment is a dynamic one and is shaped by many different conceptual sets; however, even if it does not lend itself to the fixed definitions typical of law<sup>27</sup>, it is clearly related to the dignity of human beings which finds its factual expression exactly in the environment.

The Constituent Assembly placed dignity at the basis of the rights recognised in our Constitution as a sort of common thread going through all its texture, starting from Article 1 which founds the Republic on labour. Dignity is owed to everybody without distinction of sex, nationality, language, personal, social, or financial conditions and is inviolable also pursuant to the Charter of fundamental rights of the European Union. Notwithstanding that, the States who undersigned that Charter are still reluctant to afford effective protection to the environment – which is markedly in conflict with the commitments undertaken as confirmed by the numerous environmental disasters described in the following paragraphs.

When speaking of dignity violated the first case to be mentioned cannot be but Taranto, the emission of toxic and dangerous substances,

<sup>25</sup> Court of Cassation Joint Divisions, 6 October 1979, n. 5172.

<sup>26</sup> Constitutional Court, decision 30 December 1987, no. 641; Constitutional Court, decision 28 May 1987, n. 210.

<sup>27</sup> D. Amirante, *Profili di diritto costituzionale dell'ambiente*, in P. Dell'anno, E. Picozza, *Trattato di diritto dell'ambiente*, vol. I, Cedam, Padoa, 2012, 234.

the leakage of pollutants in the sea and in the ground, excessive death and illness rates in the districts of Tamburi, Borgo, Paolo VI and the municipality of Statte<sup>28</sup>.

The environmental disaster caused by Ilva required the intervention of judges and caused a conflict between the powers of the State with regard to the decree-law called “*Salva Ilva*”<sup>29</sup> and its confirming law<sup>30</sup> containing urgent measures “to protect health, the environment and employment levels in the case of plants having national strategic significance”.

According to the Prosecutor’s Office that appealed to the Constitutional Court, these regulatory instruments made ineffective<sup>31</sup> the order by which the Judge for Preliminary Investigations of the Court of Taranto had submitted Ilva’s property to precautionary seizure<sup>32</sup>. Those laws supposedly legitimated, via the authorisation to continue the pollution-causing production, the perpetration of further offences of the same kind - prejudicial to health and the environment.

It is useful to recall that according to the aforementioned decree-law the Minister of the Environment may allow, through the integrated environmental authorization (so-called *AIA*)<sup>33</sup>, continuation of the

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28 Ministry of Health, Istituto Superiore della Sanità, *Ambiente e salute a Taranto: evidenze disponibili e indicazioni di sanità pubblica, periodi considerati 1995-2002, 2003-2009*

29 Judgment for conflict of competences between the State’s powers raised in connection with the decree-law 3 December 2012, no. 207, initiated by the Prosecutor of the Republic attached to the Court of Taranto with an appeal filed with the Clerk’s Office on 31 December 2012.

30 Judgment for conflict of competences between the State’s powers raised in connection with the decree-law 3 December 2012, no. 207, initiated by the Prosecutor of the Republic attached to the Court of Taranto with an appeal filed with the Clerk’s Office on 28 January 2013.

31 The Judge for Preliminary Investigations of Taranto, order of 25 July 2012 for pre-trial custody to be imposed on some of the persons under investigation and ordering precautionary seizure of all the hot working power plant of the steelworks and appointing administrators with the task of initiating the safety technical procedures to block specific production and the quenching of the plants.

32 Precautionary seizure is the tool whereby, following a request by the Public Prosecutor, the Judge can prevent that the free availability of offence-related property may compound the consequences of the offence itself or even facilitate the perpetration of other offences.

33 The supplemented environmental authorization is an administrative measure authorizing the operation of a plant subject to given conditions aiming at ensuring that it complies with the requirements provided for by Title III bis of Legislative Decree no. 152/2006 to prevent and reduce

production activity for a period not longer than thirty-six months, provided that the requirements of the authorization order are complied with, if there is the absolute need to safeguard work and production (Section 1, paragraph 1); furthermore it provides that this shall also apply when the judicial authority imposed seizure measures on the property of the company owning the plant (Section 1, paragraph 4).

The Prosecutor's Office alleged that this abnormal use of legislative powers gave rise to a sort of "annulment by law" of the judicial seizure order and infringed the principles according to which prosecution is compulsory and the public prosecutor is independent.

The clash between the Government and the judiciary was considered as inadmissible by the Constitutional Court<sup>34</sup> because of the possibility to rely, in the course of a standard trial, on the different remedy consisting in challenging legitimacy of the relevant provisions. The latter option, set out also by the applicant, was actually resorted to when the Court was seised both by the Judge for Preliminary Investigations<sup>35</sup> and by the Court of Taranto acting as appeal court<sup>36</sup> with an action to establish compliance with the Constitution of the "Salva Ilva" decree-law in the text resulting from the confirming law.

It should be recalled here that according to the judges from Taranto, a public authority may not waive its function to ensure healthy environmental conditions – not even for particularly significant reasons of public interest<sup>37</sup>.

pollution and guarantee a high level of protection of the environment.

34 Constitutional Court, decision dated 13 February 2013, no. 16; Constitutional Court, decision 13 February 2013 no. 17.

35 Court of Taranto, Office of the Judge for Preliminary Investigations, order 22 January 2013 (reg. ord. n. 19 of 2013).

36 Court of Taranto (acting as appeal judge under Article 322-bis of the code of criminal procedure, lodged by Ilva's legal representative against the order of the Judge for Preliminary Investigations who, on 11 December 2012 rejected the request to revoke preventive seizure imposed on the finished or semi-finished products kept in the company's plants), order 15 January 2013 (reg. ord n. 20 of 2013).

37 Court of Taranto, Office of the Judge for Preliminary Investigations, order 22 January 2013 (published on the Official Journal n. 6, first special series of the year 2013), with which the questions of constitutional legitimacy were raised on the provisions of the "Salva Ilva" decree-law, in the text resulting from its conversion into a law.

The provisions under scrutiny were ultimately considered legitimate in that they do not encourage entrepreneurial practices such as to cause harm to personal safety and dignity. According to the Court<sup>38</sup>, all the fundamental rights safeguarded by the Constitution, expressing as a whole human dignity, are mutually complementary without any of them totally prevailing over the others. According to the Constitutional Court, use of the adjective “fundamental” in Article 32 of the Constitution does not point to the predominance of the right to health over all the other personal rights, in that there is no strict hierarchy among fundamental rights: balancing of these rights, exactly because it is a dynamic exercise and not established in advance, must be performed based on such rules of proportionality and reasonableness as can allow preserving their essential core.

The tragedy of Taranto, the city of the two seas but also the steel city, put a question to everybody: if public power had acted in time, should the judicial power have been exercised to protect health and the environment? Such a question cannot be left unanswered, on the contrary it urges us all to consider what development is, the seeming dilemma between health and work, but also the State’s unavoidable task to provide the preconditions for actually exercising the rights safeguarding persons and for fully respecting their dignity.

### *Beyond the State: for a layered approach to protection*

In the European integration process where the individual took a central role and public power has a wider structure, which is partly undefined yet, rights are recognized and safeguarded not only by the State but also by way of multifarious sources that go “beyond the State” and give rise to the so-called “layered” protection framework<sup>39</sup>.

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38 Constitutional Court, decision 9 May 2013, no. 85.

39 E. Lupo; *Pluralità delle fonti ed unitarietà dell’ordinamento*, in E. Falletti e V. Piccone (edited by), *Il nodo gordiano tra diritto nazionale e diritto europeo*, Cacucci Editore, Bari, 2012,5.

The regulatory framework set up by the European Union in the environmental field is so large and includes so many branches that the Commission was led to affirm that the priority is not so much adding new rules, but rather making sure that the various measures agreed upon by Member States are correctly applied by national, regional and local authorities, by economic stakeholders and the public in general<sup>40</sup>.

The Charter of fundamental rights of the European Union<sup>41</sup> emphasizes the need for a high protection level and for integrating environmental policy into the other community policies through the principle of sustainable development (Article 37). It was only with the Lisbon Treaty, entered into force on 1 December 2009, that the Nice Charter acquired the status of primary law of the Union (Article 6 paragraph 1) and the procedure for the EU's accession to the European Convention for the protection of human rights and fundamental freedoms (Article 6, paragraph 2) was initiated. On 5 April 2013 the representatives of the Member States of the Council of Europe and the European Union reached the agreement on the text of accession<sup>42</sup>, which will be hopefully adopted as soon as possible to foster the protection of the right to healthy environment as considered by the Court of Strasbourg to be part of the Convention.

In the Italian Constitutional Charter, the word “environment” was introduced as late as in 2001 following the reformation of Title V<sup>43</sup>, when a new subject matter was added to the competences allocated to the State and Regions, respectively: the State has exclusive competence over “safeguarding the environment, ecosystem and

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40 European Commission – Directorate General for the Environment *Editorial Information in The Environment for Europeans*, Luxembourg, May 2012, no. 47, 2.

41 On this subject: S. Rodotà, *La Carta come atto politico e documento giuridico*, in A. Manzella, P. Melograni, E. Paciotti, S. Rodotà, *Riscrivere i diritti in Europa*, Il Mulino, Bologna, 2001, 55, ss.

42 Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on human rights. [http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Workingdocuments/471\(2013\)007EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Workingdocuments/471(2013)007EN.pdf)

43 Constitutional Law 18 October 2001, no. 3 “Amendments to Title V of the second part of the Constitution”.

cultural heritage” (Article 117, paragraph 2, subparagraph s) of the Const.) whereas “upgrading cultural heritage and the environment” is incumbent on concurring legislation enacted by State and Regions (Article 117, paragraph 3, of the Const.).

Without going into the merits of the plentiful case-law which strengthened the role of the environment in the Constitution, currently considered as a fundamental right of the individual<sup>44</sup>, it is appropriate to specify that in the field of “environmental protection” specific interventions by Regions are allowed only in those cases when, though impacting environmental interests, they are the expression of a competence typically pertaining to Regions, and provided that they do not jeopardize the balance between conflicting requirements as struck by way of the legislation enacted at State level.<sup>45</sup>

A similar concurrence of competences between State and Region was present in the Ilva of Taranto case, where Region Apulia passed a law<sup>46</sup> in 2012 on the assessment of health damage in the procedures for environmental authorization of industrial plants. It is a monitoring system applied to heavy industries, according to which when critical elements are present it must be held that there is a health damage linked to the emissions of the given plant and the relevant mitigating, supervising and controlling measures provided for by regional laws must ensue<sup>47</sup>.

When considering the different layers of environmental regulations, one should refer to the use increasingly made by the Italian Government of the so-called “decree-law” [a governmental

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44 P. Maddalena, *La tutela dell'ambiente nella giurisprudenza costituzionale*, in *Giornale di Diritto Amministrativo*, 3/2010, 308.

45 Constitutional Court, decision 4 July 2013, n. 178; Constitutional Court, decision 20 June 2013, n. 145.

46 Regional law 20 July 2012, n. 21 Norme a tutela della salute, dell'ambiente e del territorio sulle emissioni industriali inquinanti per le aree pugliesi già dichiarate ad elevato rischio ambientale [Provisions to safeguard health, the environment and territory on polluting industrial emissions for the areas of Apulia already declared at high environmental risk].

47 See the Report “*Valutazione del Danno Sanitario Stabilimento ILVA di Taranto ai sensi della LR 21/2012 Scenari emissivi pre-AIA (anno 2010) e post-AIA (anno 2016)*” [Evaluation of health damage ILVA of Taranto plant under RL 2/2012 pre-AIA emissions scenarios] submitted on 29 May 2013 by the director general of ARPA Puglia.

decree equated to a law in terms of enforceability and effects, to be confirmed by a legislative act by a set deadline].

The recourse to decree-laws adopting urgent measures outside the requirements provided for by the law as specified by the Constitutional Court<sup>48</sup> reduced Parliament's margin of discretion and risks altering our form of democratic-parliamentary government, which is connected to the protection of fundamental values and rights. Excessive use of decree-laws strengthens the role of Government to face an emergency that is qualified as such by the same entity that makes use of this extraordinary power.

One cannot help wonder if the notion of "emergency" was broadened to include situations that do not feature the typical elements of necessity and unpredictability as they actually stem from the presence of institutions unable to tackle problems via standard means, as in the case of waste disposal in the Campania region<sup>49</sup> and the decree-law<sup>50</sup> that was issued to cope with twenty-year-old criticalities that had actually become run-of-the-mill issues<sup>51</sup>.

### Risk and precaution

The history of environmental disasters which tragically affected our country, not only in the last century but also more recently, shows

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48 Constitutional Court, decision 24 October 1996 n. 360; Constitutional Court, decision 23 May 2007, n. 171;

49 When ruling that our country was guilty of violating the applicants' fundamental rights, the Court excluded that the long-lasting state of emergency, in force since 11 February 1994 to 31 December 2009, was one cause of "force majeure", that is an irresistible force or unpredictable event, out of the State's control, preventing actions in compliance with its obligations.

50 Decree-law 25 January 2012, no. 2 "Misure straordinarie e urgenti in materia ambientale" [Extraordinary and urgent measures on the environment] turned with amendments into Law 24 March 2012, n. 28.

51 See: the *Relazione territoriale sulle attività illecite connesse al ciclo dei rifiuti nella Regione Campania*, adopted in the sitting of 5 February 2013 by the Parliamentary Enquiry Committee on the illicit activities connected with waste disposal, available at <http://www.camera.it/dati/leg16/lavori/documentiparlamentari/indiceetesti/023/019/INTERO.pdf>; Legambiente Osservatorio Ambiente e Legalità, *Ecomafia 2013*, cit., 119 ss.

the existence of a risk that, apart from its source, raises analysis and management issues. Only think, in terms of dramatic events, of the cyclone that in November 2013 spread death, terror and destruction in Sardinia and the resulting state of emergency declared in the island by the Council of Ministers.

Generally speaking, risk is the likelihood that a given event causing harm to individuals, animals or objects takes place in a definite time span, whereas environmental risk is the likelihood that an activity or a production process impact directly on the environment causing damage also to human beings.<sup>52</sup>

In political and regulatory decisions on the management of scientific uncertainty with regard to the probability that in the long term some risky events actually take place, a useful benchmark for the protection of health and the environment consists in the precautionary principle (Section 3-ter<sup>53</sup> and 301 of the Code of the Environment).

During the UN conference held in Rio de Janeiro in 1992 it was indicated as applicable principle by the contracting States: Principle 15 of the Rio Declaration actually states that lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The precautionary principle was applied in the clash between the State and Sicily region on the so-called MUOS<sup>54</sup> to be set up in the US navy headquarters<sup>55</sup> near Niscemi (Caltanissetta) and the Sughereta natural reserve. In the procedure annulling the regional instrument that, by virtue of the aforesaid principle, had revoked the building permit, the regional administrative court of Palermo<sup>56</sup> rejected the petition for stay of the revocation as filed by the Ministry

52 Term “risk” in *Le garzantine. Scienze, Garzanti*, Milan, 2005, 1279.

53 Provision included by legislative decree 16 January 2008, no. 4 “*Ulteriori disposizioni correttive ed integrative del decreto legislativo 3 aprile 2006, n. 152, recante norme in materia ambientale*”. [Further corrective and supplementary provisions to legislative decree 3 April 2006, no. 152 containing rules on the environment]

54 Muos is the acronym for “*Mobile user objective system*” that is the communication system for mobile users composed of three satellite dishes and two helical transmitters.

55 The Naval Radio Transmitter Facility (NRTF).

56 Regional Administrative Court Sicily, 1st Division, judgment 9 July 2013, 469.



of Defence. The Court found that the precautionary principle and the right to health of the local community took priority, and that the rights at issue could not be subjected to prejudicial measures until it was absolutely certain that the satellite communication system in question was not harmful.

After acquiring the study by *Istituto Superiore di Sanità* excluding predictable risks due to the “known effects of electromagnetic fields”, on 25 July 2013 the Region ordered the “revocation to be revoked<sup>57</sup>” and this was followed by the letter of the Ministry of Defence<sup>58</sup> notifying waiver of the appeals pending before the Sicilian administrative courts.

The decision of the Sicilian Regional Assembly did not put an end to the population’s fear to suffer environmental and health damage as a result of the electromagnetic waves coming from the military base - especially after reading the report of the verifier appointed by the Court of Palermo<sup>59</sup> in another proceeding for the annulment of the authorization to carry out the works to install Muos.

It should be clarified that the verification is a non-judgemental fact-finding activity ordered by the court to complete knowledge of facts that cannot be inferred from documents, and that the verifier is a public body unrelated to the parties in the trial having specific technical expertise.

In the case at issue, the University professor appointed to verify the possible electromagnetic effects of Muos and of the radio broadcasting facilities already installed at the radio station of Niscemi stated that “*the electromagnetic field relayed by Muos can produce biological effects on the exposed persons, electromagnetic interferences in electronic appliances, airport facilities and aircraft, effects on biocoenoses and fauna in the Sughereta di Niscemi, a site of Community importance*”.

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57 No. 32513, 24 July 2013 “Revocation of the revocation orders no. 15513 and 15532 of 29 March 2013”.

58 No. M\_D GU DC/2/27890 of 23 July 2013.

59 Administrative Court, Palermo, 1st Division, order 21 December 2012, n. 2713.

It should be specified that electromagnetic pollution is something which was realized only recently and that its effects on human health are partially known based on studies which led to conflicting results. Regulation of this matter therefore follows the aforesaid precautionary principle; this means that even if unambiguous scientific findings are missing on the damage caused by exposure to electromagnetic fields, appropriate measures are to be adopted to reduce such exposure.

What has been said so far offers a good opportunity to reflect on disclosing environmental risk. On 31 October 2012 the Court of L'Aquila<sup>60</sup> declared some members of the “National Committee for forecasting and preventing major risks” (a technical and scientific consultancy body of the Civil Protection Department) guilty of the deaths and injuries of several persons owing to miscommunication of the risk related to the destructive seismic quake of 6 April 2009 – which caused many casualties in Abruzzo.

It must be specified that it was not “science” that was tried because it did not manage to forecast the earthquake; rather, it was the violation of specific obligations with regard to the assessment, forecasting and prevention of seismic risk and the provision of clear, correct and exhaustive information.

As we know, current scientific knowledge does not allow accurate forecasts of the year, the month, the day and the hour, the magnitude and depth of an earthquake; there is a very high level of uncertainty, therefore the most effective way to prevent or mitigate seismic risk is compliance with anti-seismic rules along with the use of appropriate techniques and materials in buildings.

The preliminary investigation established that there were serious criminal negligence and violation of the precautionary rule applicable to this matter in the defendants’ conduct, since the risk assessment was carried out in a superficial, imprecise and generic

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60 [Court of L'Aquila, Criminal Division, judgment 22 October 2012 – filed on 19 January 2013, n. 380.](#)

way and apodictic and self-referential statements were made that proved quite ineffective with regard to the duties imposed by the law and resulted unambiguously into providing reassurances to the population.

The tragic effect produced by the decision to eliminate the filter between the National Committee for forecasting and preventing major risks and the population of L'Aquila as represented by the Department of Civil Protection, which could have evaluated the formats, mechanisms and contents of the message to be disseminated, could be appreciated at the end of the witness' examination carried out to reconstruct the motivational process that led individual victims to stay at home in the night between 5<sup>th</sup> and 6<sup>th</sup> April 2009.

A correct communication implements the right of each individual to be informed on environmental problems, which furthermore can be tackled in the best possible way with the participation of all the citizens concerned.

The Aarhus Convention on 25 June 1998, ratified by our country<sup>61</sup> and adopted by the European Union<sup>62</sup>, provides that wider access to information and greater participation in decision-making processes improve decisions' quality and transparency, strengthen their efficiency, contribute to making the public aware of the environmental issues and obtaining its support to the decisions taken.

In 2008, the Italian Parliament introduced an ad-hoc provision in the Code of the environment (Section 3-sexies) on the right of access to environmental information and collaborative participation to promote adequate levels of life quality through the protection and improvement of the environmental conditions as well as the farsighted and rational use of natural resources.

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61 [Law 16 May 2001, no. 108.](#)

62 [Council Decision 2005/370/EC of 17 February 2005.](#)

## Environmental damage, prejudice to society

Environmental illegality in Italy has a long-lasting and well-established tradition even if recently it reached such an invasive size as to cause irreparable damage, which can be clearly perceived also by the most inattentive and indifferent observers.

The law (Section 311 of Legislative Decree no. 152/2006) defines environmental damage as “*any direct and indirect significant and measurable deterioration of a natural resource or the utility provided by it*” and provides that pecuniary damages play an ancillary role vis-à-vis specific compensatory measures – i.e., if supplementary and compensatory measures have not been taken or cannot be taken by the entity required to take them.

It is incumbent on the Ministry of the environment to claim for damages by virtue of its obligations to preserve and restore natural resources, which nonetheless does not justify the lack of provisions explicitly allowing environmentalist associations and other local public bodies to claim damages. However, judicial decisions<sup>63</sup>, starting from 2007, have reiterated that regions, provinces, municipalities, environmental protection associations and individuals are generally entitled to initiate a civil action in the criminal proceedings for offences against the environment if the illicit conduct gave rise to refundable damage based on tort liability rules as set out in the Code (Sections 2043 and 2059 of the Civil Code).

The legal instruments for environmental defence envisage the right to take part in the authorization procedures and the proceedings for claiming damages, to have recourse to administrative justice against detrimental actions, but also criminal penalties consisting mostly in fines for not complying with the authorizations issued by public administrative bodies.

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63 Court of Cassation 3<sup>rd</sup> Criminal Division, 6 March 2007, no. 16575; Court of Cassation Crim., 28 October 2009, no. 755, Court of Cassation Crim. 22 February 2010, no. 14828; Court of Cassation, 25 May 2011, no. 25039.

Reference is made to the so-called “administrativisation” of environmental protection through public bodies entrusted with preventing degradation, carrying out surveillance and punishing deviant behaviour<sup>64</sup>; as a result, administrative malfunctioning did not spare the environmental field, where very little was done to prevent and repress illicit and prejudicial activities, which could therefore spread owing to the connivance of the few and the inexperience and indifference of the many.

Among the numerous examples of environmental damage provided by national cases, the choice went to one that is probably best suited for grasping what level can be reached by environmental illegality: the Eternit case<sup>65</sup>, that is the most serious declaration of guilt in the Italian judicial history with regard to damage to health and to the environment connected with asbestos processing<sup>66</sup>.

In 2012 the Court of Turin<sup>67</sup> had sentenced the heads of the multinational to a term of imprisonment of sixteen years for causing, through disreputable management of eternit product, thousands of diseases (asbestosis, mesothelioma, pleural plaques, lung carcinomas) and deaths among workers and the population residing near the plants of Casale Monferrato, Bagnoli and Rubiera, as well as an environmental disaster which is partly continuing.

As pointed out by the judgment, an important aspect which led to the indictment concerned the massive presence of asbestos outside the workplace due to the transport of the raw material on uncovered trucks which drove along the town’s streets, the practice of having the workers’ families wash their overalls and mend torn bags

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64 G. Schiesaro, *Il reato ambientale: verso una più adeguata tecnica di tutela penale dell'ambiente*, in L. Pepino (edited), *La riforma del diritto penale. Garanzie ed effettività delle tecniche di tutela*, Franco Angeli, Milan, 1993, 467.

65 The word “eternit” comes from Latin aeternitas which means eternity, and was used to indicate a brand name of fibro-cement based on asbestos owing to its high resistance.

66 M. Floccia, G. Gisotti, Mauro Sanna, *Dizionario dell'inquinamento*, La Nuova Italia Scientifica, Rome, 1989, 2: the term “asbestos” is referred to a group of minerals made of magnesium silicate which have first-rate endurance to fire, heat and chemical aggression, whose microscopic fibres easily disperse in the air, while asbestos dust poses serious risks to health and the environment.

67 Court of Turin, 1st Criminal Division, 13 February 2012 (filed on 15 May 2012).

but also to the dust caused by production activities in all the area adjacent to the industrial plant. Furthermore in the plant of Casale Monferrato there was the habit (approved by the heads of Eternit) to let everybody requesting it take home the so-called “polverino”, i.e. thin dust that is the debris of turnings, used to pave streets and courtyards or as insulator in construction or maintenance works of buildings, whereas at Cavagnolo the population re-used discarded materials to pave and smooth out roads, farmyards and courtyards.

The description of what happened and still happens, the number of injured persons – which is unfortunately not final - disclosed a catastrophic disaster caused by the defendants with general wilfulness, in that to achieve their industrial and business objectives they acted being fully aware of the enormous damage that would be caused to the environment and to people’s health.

The first instance judgment had declared the two defendants guilty of the offence of unnamed wilful damage, aggravated by proven environmental disaster (Section 434, paragraphs 1 and 2 of the Criminal Code), and wilful neglect of safeguards against industrial accidents aggravated by the occurrence of accidents (Section 437, paragraph 2 of the Criminal Code).

The operative part of the appeal judgment<sup>68</sup> was read at the hearing of 3 June 2013; the appellate court decided that there was no case to answer in respect of one of the defendants in that he had passed away some weeks before and acquitted both defendants because they did not commit the offence during the periods when they did not hold oversight positions in the Italian plants of the multinational. As to the periods when the surviving defendant actually managed the production concerns, the Court found that he was not to be prosecuted for the offence of failing to implement safeguards against industrial accidents because the latter was statute-barred, whereas it sentenced them to a term of imprisonment of eighteen years for environmental disaster.

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68 Court of Appeal of Turin, 3 June 2013 (filed on 2 September 2013).

With regard to compensation for damage, the defendant, jointly and severally with the companies belonging to the group Eternit, liable in tort, was sentenced to pay tens of millions of Euro to local authorities,, trade unions, associations and natural persons, even if the number of the latter was reduced (the judgment awarded compensatory damages to 932 persons, whereas the number indicated by the first instance judges was higher than 2,000).

The widespread and manifold environmental illegality mentioned above is also prejudicial to the State's coffers, hence to each taxpayer, especially at a time when the dearth of available resources jeopardizes fundamental public services. It should be recalled that administrative and accounting liability arises each time a public official, because of an illicit behaviour, due to wilful or unintentional non-compliance with his/her duties, causes damage to the administrative authority's property.

One of the preconditions for this kind of liability is the damage suffered by the State's finances, meaning damage caused to the community that, although it cannot be connected directly to the public administration as a public body, is nonetheless prejudicial to fundamental public interests.

The Regional Prosecutor of the Court of Auditors of Campania, at the inauguration ceremony of the 2013 judicial year, highlighted the role played by environmental damage in causing damage to the State's finances as related to waste management: suffice it to think of the conviction<sup>69</sup> of some public administrators to pay damages to Campania because of the detrimental effects caused to the Region's touristic image by the waste-related emergency - given the serious social and economic repercussions produced by the emergency on the region's touristic development.

In his report it is written that overcoming the emergency situations made the criticalities actually worse because the remedies already adopted paved the way to new disasters for which no adequate

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<sup>69</sup> Court of Accounts, Jurisdictional Division, Campania, judgment 29 October 2012, no. 1645.

solutions would appear to be available yet<sup>70</sup>. More and more often, a sort of state of need is invoked along with the authorisation to go ahead in breach of the law, in the name of a real or alleged emergency, almost as if there were at administrative level justifications for illegitimate actions affecting the conditions of civilized life<sup>71</sup>.

*Environmental governance: between exercise of power and fundamental rights*

As said, governing the environment entails risk management, i.e. possible dangers of a predictable event have to be reduced; at the same time, it is necessary to manage emergencies, that is tackle unexpected situations via ad hoc practices and organisational systems other than the ordinary ones.

The measures to face an exceptional event include the appointment of an extraordinary commissioner as provided for by the decree-law<sup>72</sup> called “*Salva Ilva bis*” – which concerned, in particular, industrial plants of national strategic significance whose production activity involves serious and considerable dangers to the environment and health because of non-compliance with the provisions of the integrated environmental authorization (*AIA*), such as Ilva S.p.A. .

The commissioner is appointed for twelve months (which may be extended up to thirty-six) and has all the powers vested in management bodies; the commissioner is tasked with drafting an industrial plan complying with the environmental one aimed at ensuring observance of the law and *AIA*.

Part of the workers of Ilva of Taranto raised some doubts as to whether

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70 Address of the Regional Prosecutor attached to Jurisdictional Division for Campania, Tommaso Cottone, “Inauguration of 2013 judicial year” assembly of 2 March 2013, 57.

71 Address of the Regional Prosecutor Tommaso Cottone “Inauguration of 2013 judicial year”, quote, 5 and 6.

72 Decree-law 4 June 2013, no. 61 “New urgent provisions to protect the environment, health and labour in the operation of firms having national strategic significance”, turned with amendments into law 3 August 2013, no. 89.



the commissioner, a former chief executive of the company<sup>73</sup>, would be acting as a third party and objectively as well as on the as yet unclear relationship between the environmental and health protection plan, on the one hand, and the *AIA* administrative measure on the other hand.

It is useful to point out that the misuse of the solution consisting in appointing a commissioner, which allows departing from standard rules and competences, may alter decision-making processes of public administrative bodies - whose powers are never completely unfettered and autonomous, as they are always subject to the public purpose established by the legislator and to the respect for fundamental rights.

The *Istituto Superiore per la Protezione e la Ricerca Ambientale* and the *Agenzia Regionale per la Protezione dell'Ambiente della Puglia*, after the inspection of 10 and 11 September 2013, established non-compliance with the authorization as for the third quarter of implementation of the decree reviewing the *AIA* of 26 October 2012; this was followed by the injunction<sup>74</sup> to ILVA S.p.A. not to enforce the requests made by the Supervising Authority.

The European Commission addressed a letter of formal notice to Italy under Article 258 of TFEU on 26 September 2013; the letter represents the first stage of the infringement procedure. In the Commission's view, Italy had not ensured up to then compliance by Ilva of Taranto with the directive on integrated prevention and reduction of pollution<sup>75</sup> and with the directive on the liability for environmental damage<sup>76</sup>, which laid down the "polluter pays" principle.

The European Court of Human Rights also decided to deal with the effects on health produced by Ilva's emissions. On 6 October

73 La Repubblica, *L'Iliade di Taranto*, A. Sofri, 5 June 2013, 10.

74 Prot. DVA-2013-0023937 of 21 October 2013.

75 Number of infringement procedure 2013\_2177: <http://euroinfra.politichecomunitarie.it/ElencoAreaLibperaaspx>.

76 Directive 2008/1/EC of the European Parliament and the Council of 21 April 2008.

2013 it actually notified the Italian Government of the application<sup>77</sup>, submitted as early as 2009, of a woman who developed leukaemia and then died because of the pollution caused by the Taranto plant - according to what was alleged by the applicant and then by her relatives.

The right to environment needs public power to be recognized and defended, but it is attacked by such power each time administrative authorities are unjustifiably inactive or take extraordinary measures which produce long-term or structural effects such as to require an in-depth political and institutional debate.

It must be stated quite clearly that the stubborn inattention to environmental issues, the marginality and poor effectiveness of ex ante and ex post controls, the gigantic size of corruption as well as a legislation on pollution bristling with interpretative hindrances and multiple exceptions are only some of the elements that point to the need for a governance plan of the environment that is articulated, far-sighted and capable to reconcile the many important interests underpinning the diverging legal positions involved.

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77 Application no. 43961/09 Giuseppina Smaltini vs. Italy, 7 August 2009: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127699#{"itemid":\["001-127699"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127699#{)

## Recommendations

1. Developing tools to strike the right balance between regional autonomy and national coordination so as to prevent re-introducing the substantial differences experienced by citizens as for public health care and the relevant fees (“tickets”).
2. Launching the National Health Plan, which was scheduled to be ready by January 2013, including Essential Care Levels (LEAs) that should be adjusted to afford all citizens full-fledged compliance with healthcare guidelines – including citizens affected by rare diseases.
3. Reconsidering the mechanisms underlying payment of fees (“tickets”) and waiting times, which are the “regulators” of the health care demand, as they are currently detrimental to those citizens that are close to the poverty threshold. It should be recalled that the latter include minors and even newborns.
4. Implementing the palliative care net throughout the national territory on the basis of standardised quality criteria (e.g., 24/7 availability, psychological support to patient and relatives).
5. Regulating the so-called biological will to enable citizens to exercise the right to express their wishes. Expediting the nationwide implementation of the Electronic Health Record which should include a dedicated section only accessible if urgency procedures prove to be necessary.
6. Providing that AIFA [Italian Drugs Agency] simplifies the procedures for drugs containing cannabis-derived active principles. The relevant measures should also provide for expanding the scope of treatable diseases to include, for instance, treatment of the side effects produced by chemotherapy.
7. Amending, where necessary, pharmacological vigilance procedures. Additionally, effective measures have to be taken regarding distribution of drugs to counter speculation related to price differences across European markets.
8. Developing the tables listing the damages payable based on

medical risks, which are needed to enable fair as well as timely compensation. This should include additional measures to contain the costs of “defensive” medicine and foster safety (e.g., by way of investments into health care buildings, vocational training, etc.).

9. Disseminating initiatives to promote the right to health such as the PartecipaSalute project ([http://www.partecipasalute.it/cms\\_2/](http://www.partecipasalute.it/cms_2/)) which allow spreading information and raising awareness. Informing patients of the costs of individual health care measures.
10. Developing practices aimed at mutually respecting competences - in the light of the rule of law, which can create trust in institutions. In this sense, attention should be paid to the debate within the Roll of Medical Doctors, who are engaged in redefining their ethics code. Also the Roll of Journalists should perhaps initiate a reflection on the role information plays in this framework and whether it might be useful to introduce rules to reconcile freedom of the press with citizens’ right to receive information that has been double-checked and is respectful of suffering