PUBLIC PARTICIPATION AND ACCESS TO JUSTICE IN THE ENVIRONMENTAL FIELD IN THE EUROPEAN UNION AND IN ITALY¹

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In the environmental field, the Aarhus Convention has established an extremely important role for the implementation of information, participation and access to justice. This analysis focuses on the various ways and the possible problems of implementing the Aarhus Convention into European and Italian law. Regarding environmental information and public participation, some progress can be pointed out, in the E.U. and in Italy. However, there is an undeniably critical situation relating to the less homogeneous access to justice. In the environmental field, changes compared to the past failing command and control model can finally be made only through wider participation in the background choices, the actualization of the transparency principle, the search for consensus and a distribution of decision power among the various institutional and social involved subjects. In Italy, however, we observe a general attitude of distrust by the legislator towards the citizens and towards the environmental associations. The hope is that the right to pursue lawsuits in the environmental field could become more democratic, transparent and participated, placing more trust in the actions of the environmental associations and in those of the individual citizens, following the Roman popular action system.

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INTRODUCTION

This article focuses on three main parts: information, participation and access to justice in the environmental field, that is to say, the three pillars of the Aarhus Convention. In particular, this analysis will try to identify the various ways and the possible problems of implementing the Aarhus Convention into European and Italian law. Regarding environmental information and public participation, some progress can be pointed out, while it is impossible not to emphasize a critical situation relating to access to justice, that is less homogeneous, maybe because some Member States were afraid of a possible invasion in their legal system. It seems obvious, however, that in the environmental field only wider participation in the background choices, the actualization of the transparency principle, the search for consensus and a distribution of decision power among the various institutional and social involved subjects could at last make a difference compared to the past and to the failing command and control model, due to it not being shared by the citizens who should have followed the regulations.

I. THE AARHUS CONVENTION IMPLEMENTATION

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters seems to have an eye on an increasing institutionalization of environmental information and participation, aimed at wider access to justice. Signed in Denmark in 1998 by the E.U. Member States and by the Union itself, the Convention was then approved by Italy with Law n.108/2001².

The model of environmental governance proposed by this document is based upon three pillars: access to the environmental information, the participation of the citizens in the relevant decision-making processes and access to law. The three pillars will, therefore, be briefly illustrated—providing some early conclusions—by trying to identify the various ways

² Cf., on the implementation of the Convention in Italy, B. LORZ, *Verso l'applicazione della Convenzione di Aarhus nell'UE. Disposizioni di attuazione e progressi realizzati*, RIVISTA GIURIDICA DELL'AMBIENTE 1047 ss. (2006); M. CERUTI, *L'accesso alla Giustizia amministrativa in materia ambientale in una recente sentenza della Corte di Giustizia e la lunga strada per il recepimento della Convenzione di Aarhus da parte dell'Italia*, RIVISTA GIURIDICA DELL'AMBIENTE 113 e ss (2010); F. GOISIS, *Legittimazione al ricorso delle Associazioni ambientali ed obblighi discendenti dalla Convenzione di Aarhus e dall'ordinamento dell'Unione Europea*, DIRITTO PROCESSUALE AMMINISTRATIVO 101 ss (2012). For an Aarhus Convention implementation guide, made by United Nations, see also www.unece.org/env/pp/acig.pdf.

and the possible problems of implementing the Convention into European and into Italian law³. We can only briefly mention the circumstances for

³ On the origin of European environmental law, see R. ROMI, L'EUROPE ET LA PROTECTION JURIDIQUE DE L'ENVIRONNEMENT (Nantes 1993); S. CASSESE, SOTTO LA DIREZIONE DI, DIRITTO AMBIENTALE COMUNITARIO (Milano 1995); A. KISS & D. SHELTON, MANUAL OF EUROPEAN ENVIRONMENTAL LAW (Cambridge 1997); J. H. JANS, EUROPEAN ENVIRONMENTAL LAW (2000); L. KRÄMER, MANUALE DI DIRITTO COMUNITARIO PER L'AMBIENTE (Milano, 2002); ID., E. C. ENVIRONMENTAL LAW (London 2006); P. DELL'ANNO, PRINCIPI DEL DIRITTO AMBIENTALE EUROPEO E NAZIONALE (Milano 2004); A. BONOMO, *Europa e Ambiente: Profili Pubblicistici*, in F. GABRIELE, A. M. NICO, LA TUTELA MULTILIVELLO DELL'AMBIENTE 101 ss (Bari 2005); G. COCCO, A. MARZANATI, R. PUPILELLA, AMBIENTE. *Il Sistema Organizzativo ed i Principi fondamentali*, in M. P. CHITI, G. GRECO, TRATTATO DI DIRITTO AMMINISTRATIVO EUROPEO, parte speciale, tomo I, 157 ss. (Milano 2007); A. GRASSO, A. MARZANATI A. RUSSO, AMBIENTE. *Articolazioni di Settore e Normativa di Riferimento*, in M. P. CHITI-G. GRECO, TRATTATO DI DIRITTO AMMINISTRATIVO EUROPEO, cit., 273; G. CORDINI, P. FOIS, S. MARCHISIO, DIRITTO AMBIENTALE. PROFILI INTERNAZIONALI EUROPEI E COMPARATI (2nd ed., Torino 2008); M. RENNA, *Ambiente e Territorio nell'Ordinamento Europeo*, RIV. IT. DIR. PUBBL. COMUNIT. 649 ss. (2009); M. PRIEUR, DROIT DEL'ENVIRONNEMENT (Paris 2011); A. VAN LANG, DROIT DEL'ENVIRONNEMENT (Paris, 2011); J. H. JANS, H. H. B. VEDDER, EUROPEAN ENVIRONMENTAL LAW. AFTER LISBON (4th ed., Groningen 2012); A. BORZI-G. CARLOTTI, *Ambiente*, in G. CARLOTTI, A. CLINI (a cura di), MANUALE DI DIRITTO AMMINISTRATIVO 377 ss (Rimini 2014). Instead, on Italian environmental law, see: M. S. GIANNINI, "Ambiente": *Saggio sui Diversi Suoi Aspetti Giuridici*, RIV. TRIM. DIR. PUBBL. 15 ss. (1973); A. ANGIULI, *La Tutela dell'Ambiente tra Stato, Regioni ed Associazioni Naturalistiche. Profili Processuali*, DIR. PROC. AMM. 55 ss. (1988), e ID., *Premesse per uno Studio sui "Grandi Spazi Funzionali". Il Regime Giuridico del Parco*, in DIR. ECON. 63 ss. (1997); V. CAPUTI JAMBRENGHI, *Valutazione d'Impatto Ambientale e Garanzie Giustiziali*, SANITA' PUBBL. 301 ss. (1989); ID., *Tutela dell'ambiente e Beni Pubblici. Provocazioni per uno Studio sul Dominio Ambientale Eminente*, SCRITTI PREDIERI 311 ss. (1st ed., 1996); ID., *La Fase Istruttoria nei Procedimenti Amministrativi di Tutela Preventiva dell'ambiente*, in V. PARISIO (a cura di), DIRITTI INTERNI, DIRITTO COMUNITARIO I PRINCIPI SOVRANAZIONALI: PROFILI AMMINISTRATIVISTICI 49 ss. (Milano 2009); F. G. SCOCA, *Osservazioni sugli Strumenti Giuridici di Tutela dell'Ambiente*, DIR. SOC. 399 ss. (1993); G. MORBIDELLI, *Il Regime Amministrativo Speciale dell'Ambiente*, SCRITTI PREDIERI 1112 ss. (2nd ed., Milano 1996); G. CAIA, *I Compiti Tutela Ambientale nello Stato delle Autonomie (tra intervento comunitario e modelli differenziati dell'organizzazione amministrativa)*, SCRITTI GUARINO 375 ss. (1st ed., Padova 1998); F. FRACCHIA, *Sulla Configurazione Giuridica Unitaria dell'Ambiente Art. 2 Cost. e Doveri di Solidarietà Ambientale*, DIR. ECON. 216 ss. (2002); A. MEALE, *Valutazione Di Impatto Ambientale*, DIG. IT., DISC. PUBBL. (Aggiornamento, Torino 2005), *ad vocem*; P. DELL'ANNO, DIRITTO DELL'AMBIENTE (2nd ed., Padova 2011); ID., *Modelli Organizzativi Per La Tutela Dell'Ambiente*, RIV. GIUR. AMB. 957 ss. (2005); L. R. PERFETTI, *Il Governo dell'Ambiente in Italia tra Centro e Periferia*, in E. ROZO ACUNA (a cura di), PROFILI DI DIRITTO DELL'AMBIENTE DA RIO DE JANEIRO A JOHANNESBURG 345 ss. (Torino 2004); ID., *Cose, Beni e Diritti. Notazioni su Nozioni Problematiche a Partire dal Possibile Contrasto tra Paesaggio e Ambiente*, in W. CORTESE (a cura di), DIRITTO AL PAESAGGIO E DIRITTO DEL PAESAGGIO 241 ss. (Palermo 2008), and ID., *Premesse alle Nozioni Giuridiche di Ambiente e Paesaggio. Cose, Beni, Diritti e Simboli*, RIV. GIUR. AMB. 1 ss. (2009); B. CARAVITA, DIRITTO DELL'AMBIENTE (Bologna 2005); F. DE LEONARDIS, IL PRINCIPIO DI PRECAUZIONE NELL'AMMINISTRAZIONE DI RISCHIO (Milano 2005); D. DE CAROLIS, E. FERRARI, A. POLICE, AMBIENTE, ATTIVITA' AMMINISTRATIVA E CODIFICAZIONE (Milano 2006); M. CAFAGNO, PRINCIPI E STRUMENTI DI TUTELA DELL'AMBIENTE. COME SISTEMA COMPLESSO, ADATTATIVO, COMUNE (Torino 2007); A. CROSETTI, R. FERRARA, F. FRACCHIA, N. OLIVETTI RASON, DIRITTO DELL'AMBIENTE (Roma-Bari, 2007); M. MAZZAMUTO, *Diritto dell'Ambiente e Sistema Comunitario delle Libertà Economiche*, RIV. IT. DIR. PUBBL. COMUNIT. 1571 ss. (2009); S. MAGLIA, DIRITTO AMBIENTALE. ALLA LUCE DEL T.U. AMBIENTALE E DELLE NOVITA' 2011 (2nd ed., Milano 2011); L. COSTATO, F. PELLIZER, COMMENTARIO BREVE AL CODICE DELL'AMBIENTE (2nd ed., Milano 2012); G. MASTRODONATO, TUTELA AMMINISTRATIVA DELL'AMBIENTE NEL DIRITTO DELL'UNIONE EUROPEA E NEL D.LGS. 3 APRILE 2006, N. 152 (BARI 2012); G. ROSSI (a cura di), DIRITTO DELL'AMBIENTE (3rd ed., Torino 2015).

which, if it is possible, on one hand, to highlight some progress regarding access to environmental information and to public participation—although, participation in environmental field in Italy is still in its early stages—on the other hand, it is impossible not to observe how the situation appears less homogeneous relating to the access to law.

The Community is striving to adopting the necessary measures to assure a real implementation of the Convention. Indeed, the first pillar of the Convention, which refers to public access to the information, has been implemented on the European level, in Directive 2003/4/CE concerning the public access to environmental information. The second pillar, which concerns the participation of the public in environmental matters, has been implemented by Directive 2003/35/CE. The third pillar, on the other hand, is focused on guaranteeing access to justice in environmental matters and can be found in Title IV of the Aarhus Convention in Regulation 1367/2006. Moreover, Regulation 1367, adopted in 2006, aims at more generally guaranteeing application of the Convention's provisions and principles to the institutions and to the European authorities.

II. INFORMATION AND PUBLIC PARTICIPATION AT EU LEVEL

Environmental information, public participation and access to justice are shown to be closely related. The possibility of accessing the information concerning the environment is a preliminary moment of the participation, so participation is a very important concept for the effectiveness of environmental law. Indeed, wider participation in the background choices could lead to a decrease of complaints, making the creation of the best conditions for the acceptance of the public decisions as an alternative to their authoritative imposition. Nevertheless, the predominance of scientific data frequently causes a considerable obstacle to public participation.

In the environmental protection field, it is very clear that all the citizens should be plaintiffs, for a more effective and shared environmental policy and law implementation. Furthermore, in order to protect the environment, the broadest access to justice should be guaranteed, as imposed by the Aarhus Convention, implemented by Directive 85/337, modified by Directive 2003/35, the public participation directive.

Environmental information, public participation and access to justice are, therefore, closely interrelated, indeed, taken on their own, they would be unable to ensure any effectiveness of environmental law. In particular, participation must be ensured through the procedure of authorization of

specific activities (mainly those activities of an industrial kind) listed in attachment I of the Convention. The result of the participation of the public, who are informed from the initial stage of the decision-making process, must then be duly taken into consideration in the final decision of authorising the activity discussed.

The possibility of accessing the information concerning the environment is a preliminary moment of participation, nevertheless if it were not followed by the participatory moment, it would be senseless.

Indeed, as stated by Jans and Vedder⁴, “Environmental information is interesting if it can be used to influence the decision-making. This requires access to decision-making procedures, in other words, public participation”.

In relation to the environmental information regulations, the E.U. first issued Directive 90/313 and subsequently Directive 2003/4, it then implemented the Aarhus Convention relating to environmental information through Regulation 1367/2006 (especially title II), in which Article 3 declares the applicability of general regulation 1049/2001 on the access to information held by the EU institutions.

Articles 4 and 5 of the Aarhus Convention establish a dual role for the public authorities, which intervene both in response to the citizens’ requests and, periodically, to update the information in their possession. Besides, the general obligations articles 6, 7 and 8 provide for more detailed measures, intended to guarantee public participation on different sides: that of the decision concerning the specific activities, that of the plans, of the programmes and of the environmental policies, and eventually that of the processing of the legally important deeds. The implementation of these rules by Directive 2003/35, the public participation directive, consists of two main parts: the provisions for a general public participation procedure (pursuant to Article 2), and Articles 3 and 4 which amend the EIA and IPPC directives in order to improve public participation as a part of those directives⁵. Pursuant to Article 2, the first stage of public participation involves informing the public about the proposals and the possibility of participation in the following plans and programmes, for instance: waste management plans and waste prevention programmes, packaging waste management plans, air quality plans, programmes for vulnerable zones.

In this phase, there may then be space for effective participation, when the options are still open, during the decision-making process. For the

⁴ EUROPEAN ENVIRONMENTAL LAW. AFTER LISBON 374 (cit., 4th ed.).

⁵ J. H. JANS, H. H. B. VEDDER, EUROPEAN ENVIRONMENTAL LAW, AFTER LISBON 375, cit.

Public Administration, the most important obligation is to take due account of the views of the results of the public consultation. At the end of this process, the public must be informed of the final decision and of the public participation process.

In particular, participation is essential for large scale projects, for example, for the renewable energy sector, in which a larger participation may lead to a reduction of claims; indeed, in this specific field, there are at least two kinds of claims: to protect the environment and to prevent damage to the landscape.

Finally, recent jurisprudence of the Justice Court must be mentioned. Its remarkable progress has been made, in relation to the clarification of some problems concerning participation and environmental information. In the Krizan judgment, on 15th January 2013, Case C-416/10, for instance, the Court of Justice provides a clear reconstruction of public participation in the authorization proceedings for a landfill, which was structured in three stages: the first was that of public information, in which the administration played an active part and disclosed data and information that were fundamental for the promulgation of the authorization measure; the second stage—in which the administration played a passive role—concerned the access of public to documents; the third stage, on the other hand, was that of the real participation, which occurred through the introduction of remarks and opinions regarding the final measure by the interested public. Indeed, the Court of Justice said that Council Directive 96/61/EC of 24th September 1996, concerning the integrated pollution prevention and the control, must be interpreted with the meaning that “the public concerned must be able to participate in an urban planning decision from its beginning, that is to say, when all options are still open and effective, public participation can take place; that the refusal to make the urban planning decision available to the public cannot be justified by invoking the protection of the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law to protect a legitimate economic interest, and does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make an urban planning decision like the one in the main proceedings available to the public concerned during the administrative procedure at first instance, provided that all options and solutions remain possible and that regularization at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process, this

being a matter for the national court to determine”⁶.

On the other hand, in the ruling of 18th July 2013, in Case C-515/11, *Deutsche Umwelthilfe*, the Court clarified the nature of the public authority and thus the possible subject of the access request, of those institutions which have legislative authority. Finally, in relation to an increase of the transparency and of the information to the public, we must also mention that the new amended Environmental impact assessment (EIA) Directive 2014/52/EU, came into force on 15th May 2014 to simplify the rules after twenty-five years: now EIA reports will actually be made more understandable to the public.

It may be argued that environmental information and public participation must become the core of the new model of environmental protection policy administration and management.

Nevertheless, some problems underlying the difficulty of extending and putting into effect the participative proceedings in environmental law cannot be ignored: first of all, the predominance of scientific data, which consequently causes a considerable obstacle to public participation, although the contribution of society would be an undeniable enrichment. It could be even stated that there is an inverse proportion correlation between the scientific decision-making process and public participation: while the need to rely on science and technology increases, the space of the participation reduces. The subjects presented by citizens are often formulated in non-technical language and on the base of less accurate data; moreover, frequently, the worries of the public are given by particularistic and egotistical interests. Finally, it must also be considered that ethical, political and cultural profiles, far from the sterility of the scientific data may emerge from participation.

III. ENVIRONMENTAL INFORMATION IN ITALY: ACKNOWLEDGEMENT OF *ACTIO POPULARIS* STATUS TO ACTION REGARDING ENVIRONMENTAL ACCESS

Legislative Decree no. 195/2005 is the reference regulation regarding

⁶ Moreover, the Article 15a of the Directive 96/61, as amended by the Regulation No 166/2006, must be interpreted with the meaning that the members of the public concerned must be able, in the context of the action provided for by that provision, to ask the court or the competent independent and impartial body established by law to order interim measures such as temporarily to suspend the application of a permit, within the meaning of the Article 4 of that directive, pending the final decision. A decision of a national court, taken in the context of national proceedings implementing the obligations resulting from the Article 15a of the Directive 96/61, as amended by the Regulation No 166/2006, and from the Article 9 (2) and (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by the Council Decision 2005/370/EC of 17th February 2005, which annuls a permit granted in infringement of the provisions of that directive is not capable, in itself, of constituting an unjustified interference with the developer's right to property enshrined in the Article 17 of the Charter of Fundamental Rights of the European Union.

environmental information and the right to access it in Italy, implementing European Directive 2003/4. Furthermore, the Environmental Code provides the right of access to environmental information and of participation for a cooperative purpose. The Council of State recently acknowledged *actio popularis* status to action regarding environmental access, allowing the protection of public interest to *quisque de populo*, like in Roman law. However, the great problem of information in Italy seems to be that of making a metamorphosis of the public administration toward a new more dynamic role, a subject who must provide information, not only on request.

The E.U. first issued Directive 90/313 and subsequently Directive 2003/4, adopted in Italy respectively with the Legislative Decree 39/1997 and with the Legislative Decree 195/2005, which is now the reference regulation on environmental information and on its access, departing from general law no. 241 of 1990 containing regulations on the administrative proceedings and on the right to access administrative documents.

It is worth firstly highlighting that among the general principles of the Environmental Code, Legislative Decree 3rd April 2006, no.152⁷, there is the right to access environmental information and participation for a cooperative purpose: “Anybody can have access to the information concerning the state of the environment and of the landscape in the national territory, without being obliged to demonstrate the existence of a legally relevant interest (pursuant to Article 3-*sexies*)”.

However, the special regulation of Legislative Decree 195/2005 is characterized by two features: on one hand, it provides for a much wider meaning of information, which goes far beyond that of a document, to also include “any available information in written form, in visual form, in sound form, in electronic form”, including the data concerning the single parts of the environment or the relationship among these elements, information about the landscape; on the other hand, it considerably extends the number

⁷ Actually the Environmental Code represents a long-awaited regulatory *corpus*, made up of over 300 articles and 45 attachments, which finally gives legislative certainty and homogeneity, in relation to principles, administrative skills and sanctioning profiles, to the different sectors liable to judicial regulation. In fact, the decree has the purpose of obtaining alignment with EC laws, rearranging, coordinating and integrating environmental legislation in a several number of areas: Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) and Integrated Pollution Prevention and Control (IPPC); protection of water from pollution and management of water resources; protection of the land and prevention of desertification; waste management and reclamation of contaminated sites; protection of the atmosphere and the reduction of emissions into the atmosphere; compensation for damage to the environment. In the first part of the Code, the Legislative Decree 4/2008 has introduced some basic principles of European environmental law and Italian constitutional principles, like prevention, precaution, polluter pays, sustainable development, subsidiarity and loyal collaboration, and the principle of free access to environmental information.

of subjects legitimated to access, assuming that the environmental information can be asked by anybody, without the necessity of demonstrating a particular and qualified interest (thus distancing it from the general law on legal action)⁸.

Some examples of information can be found within the Environmental Code: in the E.I.A. regulation, information activity is expected to be a fundamental stage of the decision-making process of project approval through the obligation of the relevant authorities to make the information about the decision to choose available, pursuant to Article 5.1, b), whereas in the regulation of the Strategic Environmental Evaluation, the information object is composed by the plan or the programme proposal and by the environmental report which, according to the Article 10, paragraph 1, must be made available both to the authorities and to the public.

In relation to the Integrated Environmental Authorization (A.I.A.)—the measure that authorizes the execution of an installation at specific conditions, which must guarantee the compliance to the requirements as set forth in the second part of the Legislative Decree 3rd April 2006, n.152, as amended at last by Legislative Decree 4th April 2014, n. 46, containing the implementation of Directive 2010/75/UE concerning the industrial emissions⁹—as provided by Article 29-quattordecies of Legislative Decree 152 of 2006, this authorization, which encloses the authorization to release pollutants into air, water and soil in one only administrative deed, it turns out then to be necessary to run those industrial activities which present a high pollution potential, specified in annex VIII of the second part of the same decree. In line with the principles of the Aarhus Convention and with what is provided by the Articles 29-*quater* and 29-*decies* of the Legislative Decree 152 of 2006, in order to simplify and promote access to information and public participation, the Ministry of Environment publishes the documentation provided by the managers for issuing the A.I.A. of state competence, regarding the installations as set forth in annex XII to the second part of the Legislative Decree n.152 on-line.

Therefore, in relation to the regulations on environmental information, it would appear that Italy guarantees the greatest transparency intended to allow a widespread control over environmental quality, removing any

⁸ For a wider interpretation of the access title in the environmental subject, cf. Tar Brescia Lombardia, sez. I, 18 ottobre 2008, n. 1339, Tar Campania Napoli, 25 febbraio 2009, n. 1062 and Tar Lazio, III, 16 giugno 2006, n. 4767. Cf., on this topic, A. BONOMO, INFORMAZIONE E PUBBLICHE AMMINISTRAZIONI (Bari 2012).

⁹ It must be specified that the European regulation on the “Ippc” was included for the first time into the Directive 1996/61/Ce—acronym of “Integrated Pollution Prevention and Control”, then modified by the Directive 2010/75.

obstacle—both objective and subjective—to the complete access to environmental information. Indeed, the Council of State, Section VI, 11th January 2010, n. 24 recognizes *expressis verbis* to the *actio popularis* status of actions in the environmental access field. Even the Constitutional Court (judgments 227/2011 and 93/2013) has recently dealt with the matter of environmental information and participation, stating that the regions¹⁰ must even levels of protection on the whole national territory, legislating in the area of competence provided by the Environmental Code and ensuring the maximum information.

Just incidentally, it can be mentioned that—according to the teaching of the Roman jurist Paulus “*Eam popularem actionem dicimus, quae suum ius populi tuetur*”— popular action should be meant as an action allowing *quisque de populo* to protect State interest or as an objective right, and the plaintiff, who would be given the amount of the penalty in case of victory, should be considered as State authority, therefore he would receive the money for the execution of a *munus publicum*.

¹⁰ About the sharing of competences between State and Regions, it must be pointed out that the advent of the new Title V, second Part, of the Constitution, introduced by the Constitutional Law n.3 of 2001, though mentioning for the first time, in the Article 117, the subject of the environmental protection, of State’s exclusive competence, has caused nevertheless serious interpretative problems of general character, assuming that the constitutional law has seen itself forced to rule the passage from a system based on the provision of legislative competences centralized into the State to a very different system, which provides, for the legislative function, a strict distribution of subjects between State and Regions, preventing the proxy of subjects, and for the administrative function, an extremely flexible mechanism according to which the same function can be conferred “to guarantee the unitary management” to Provinces, Metropolitan cities, Regions and State, “on the basis of the principles of subsidiarity, differentiation and adequacy”, following therefore an absolute rigidity on the level of the sharing of legislative competences and a big flexibility on the level of the administrative attributions (cf. Decrees n. 370 of 2003, n. 50 and n. 201 of 2005, n. 133 and n. 213 of 2006, n. 81 of 2007). Starting from the Decree n.407 of 2002, followed by the Decrees n. 307 of 2003, n. 108, n.135 and n. 232 of 2005, n. 103, n. 182, n. 246 and n. 398 of 2006, it has been constantly stated that “the legislator’s aim is anyway to reserve to the State the power of fixing uniformed protection standards on the whole national territory, without however excluding in this field the regional competence managing those interests functionally related with the specifically environmental ones”. Actually, the exclusive competence of the State, as set forth in Article 117.2 s) of the Constitution in the field of the environment, of the ecosystem and of the cultural heritage, it has not been considered a full and an exclusive competence, but, limiting the content of it, it has been restricted to the power of “fixing minimum protection standards, uniformed on the whole national territory”, with the result that, in regard to environmental protection, would have subsisted also regional competences. Finally, the Decree n.225 of 2009, has clarified that the characteristic in question can be explained resorting to the technical concept of “competition” of competences on the same subject. Cf., on the specific point, P. MADDALENA, *La Nuova Giurisprudenza Costituzionale in Tema di Tutela dell’Ambiente*, www.visionedimensione.it. About this theme, see also A. COLAVECCHIO, *La Tutela dell’Ambiente fra Stato e Regioni: l’Ordine delle Competenze nel Prisma della Giurisprudenza Costituzionale*, in F.GABRIELE, A.M.NICO, *LA TUTELA MULTILIVELLO DELL’AMBIENTE* 1 ss. (cit.). Moreover, it may be seen the reference to G.MASTRODONATO, *La Prevalenza Statale e il Ruolo Regionale nella Giurisprudenza sulla Tutela dell’Ambiente*, FORO AMM. 1817 ss (2011), CDS, fasc. VI.

Even though popular action cases are few in Italian law, Paladin's statement, according to which they acknowledge a significant interest by the citizen and enrich their juridical personality with a new power must definitely be shared. However, the true difficulty for assimilating the European regulations in relation to environmental information in Italy nevertheless remains that of changing the administration: from a passive subject, who supplies information on request, to an information supplying subject.

IV. PUBLIC PARTICIPATION IN ITALY

In Italy, there is general legislation on the participation in administrative proceedings and sectorial provisions in the Environmental Code. For example, in relation to E.I.A., Article 24 has identified an ad hoc sentence for participation, even if public inquiry is a non-obligatory instrument. Additionally, in the field of protecting water resources, the regulation requires the regions to promote the active participation of all the interested parties in processing, reviewing and revising the plans for the management of the hydrographical basins. However, it seems to be possible to underline the overall insufficient effectiveness of the participation instruments provided by the Environmental Code.

In Italy, it must be acknowledged that the jurisdictional remedy is often abused. On the other hand, overuse of the jurisdictional remedy would not occur, if suitable participative mechanisms during proceedings worked fully and if they were prepared by the legislator.

In Italy, Law no. 241 dated 1990 provides for a general legislation of the participation in administrative proceedings, whereas the one regarding various environmental sectors is included mainly in the context of the Environmental Code, where, in the general principles, pursuant to Article 3-*sexies*, already cited, it indicates of the right of access to environmental and participation information for cooperative purposes.

As for the sector regulations contained in the Environmental Code¹¹, we must highlight the innovation brought by the regulations as set forth in

¹¹ On the other hand, with reference to the construction and to the management of the production plants of renewable energy sources, they are governed by the Legislative Decree 3rd March 2011, n. 28, implementing the Directive 2009/28, according to special administrative proceedings simplified, accelerated, proportioned and adjusted on the basis of specific characteristics of any single application. The activity is regulated according to a proportionality criterion: a) by the single authorization pursuant to Article 12 of the Legislative Decree 29th December 2003, n.387; b) by the simplified building procedure pursuant to Article 6, or rather c) by the communication relating to the activities of free building pursuant to Article 6, paragraph 11. The Regions and the Autonomous Provinces establish the cases in which the submission of more projects for the construction of renewable sources plants located in the same area or in adjacent areas are to be evaluated in cumulative terms in the context of the environmental impact assessment.

Article 24—which provides for an autonomous stage of consultation with relation to the procedure of the environmental impact assessment—in which paragraph 4 states that “whoever has an interest, can examine the project and the relevant environmental study, can present his or her own observations, even giving new and further cognitive and evaluative elements”. The fact of having identified an “*ad hoc*” sentence for the participation effectively seems to indicate the legislator’s will to make the participation stage necessary, and no longer a mere possibility. On the other hand, the choice of proposing a public inquiry is left to the mere power of the relevant administration (pursuant to Article 24, paragraph 6).

Nevertheless, it is not uncommon to find that, either the public inquiry is not conducted, or it is conducted (when the administration decides to conduct the consultation pursuant to Article 24, paragraph 4, Legislative Decree 152/2006), but under the direction of an institution appointed by the Administration, which is favourable to the realization of the work and so it is not impartial.

Furthermore, even in relation to the operating methods of the proceedings concerning the authorization procedure for waste treatment, disposal or storage plants, the proceeding prescribed by the Article 208 of the Environmental Code, does not provide for the implementation of a preliminary investigation in accordance with the public inquiry proceedings form that allows maximum intervention of the subjects holding relevant interests during proceedings.

On the contrary, within the services conference—which is the chosen legal instrument for settling the many interests involved in opening a new waste disposal or waste recovery plant or continuing one which is already operative—the local authorities, the area authorities and the applicant of the authorization alone are convened, whereas there is no form of participation of the civil society.

However, with reference to the field of protecting water resources, pursuant to Article 122 of the Code, which includes Article 14 of the framework water Directive 2000/60, regarding the information and the public consultation into the plans for water protection, the regulation envisages the regions providing incentives for the active participation of all the interested parties in the processing, reviewing and the revision of the plans for the management of the hydrographical basins; therefore, it envisages a six-month period for presenting written observations about documents—already provided by the directive—like agenda or work schedule for the presentation of the management plans for the hydrographical basins, copies of the project management plan, etc.

With reference to the field of atmospheric pollution¹², Sector V of the Environmental Code leaves it up to the regions to make provisions for the quality of the air, so participation is not homogeneous in this specific field on the Italian level.

However, in general—although the Code contains some examples of a well structured participation—it seems to be possible to report the overall insufficient effectiveness of the participation instruments provided by the Environmental Code.

It is obvious that, if the legislator prepares participatory mechanisms suitable for assuring a wide involvement of the public during proceedings, it could hopefully reduce the working load of the administrative justice. The use of public hearings could, therefore, bring out the interests deserving of protection during proceedings, positions that would thus be taken into due consideration and punctually noticed by the relevant administration (obviously if the observations presented by the intervening subjects were pertinent to the object of the same proceedings).

The preparation of a more suitable proceedings model for protecting the interests of the communities concerned by the construction of a work which may affect the environment, and the respect of the obligation to state adequately the reasons for the regulation, by the relevant administration, could in this way act as a means of deflating the judicial dispute before the administrative courts.

V. ACCESS TO JUSTICE AT EU LEVEL. THE “NOT PROHIBITIVELY EXPENSIVE” REQUIREMENT OF THE JUDICIAL PROCEEDING IN THE ENVIRONMENTAL FIELD: TOWARDS AN EFFECTIVE PROTECTION OF THE PLAINTIFF’S RIGHTS

First of all, the pillar concerning the access to justice has not yet been implemented through an organic European directive. Indeed, although great decision-making power is allowed to the Member States in relation to guaranteeing wider access to justice, some recent Justice Court judgments seem to outline a great desire to provide wider access to justice. Recently the “not prohibitively expensive” requirement—provided in the Aarhus Convention and then implemented in the European legal system—seems to be at the centre of the European judge’s attention, in line with the principle of effectiveness. Naturally, in a system which does not make allowances for anyone, there is a great chance that the citizen will be discouraged from starting a lawsuit because of the considerable economic risks, therefore the

¹² On this specific field, cf. A. F. Uricchio, *Valutazione Economica degli Effetti Sanitari dell’Inquinamento Atmosferico: la Metodologia dell’Eea*. Available at www.arpa.puglia.it.

valorisation of this principle will give more effectiveness to environmental regulations.

It must be pointed out preliminarily that the pillar concerning the access to justice has not yet been implemented through an organic and systematic regulation at European level¹³. Indeed, in 2003 a proposal (COM 2003 624 def.) for a directive was presented in order to regulate evenly the access to justice in the environmental field, estimating an outline of minimum requirements—considering the great variety of different rules about the capacity to appeal, from *actio popularis* up to the “*schutznormtheorie*”, the theory of the protection regulation—unfortunately, it never got beyond the first reading in Parliament. Some Member States actually considered it unnecessary, while others were afraid of a possible distortion of their legal system, if the directive had gone into procedural details.

Therefore, in order to guarantee an effective application of the environmental regulations, on the 7th March 2012 the Commission issued a Communication where it declared the improvement of the access instruments to justice as its prime target, in line with the provisions of Article 47 of the Charter of Fundamental Rights. The provisions on access to justice at the EU level can be found in Title IV of the Aarhus Regulation 1367/2006.

In particular, Article 9 of the Aarhus Convention provides for the members of the interested public “who claim a sufficient interest or who, alternatively, assert the infringement of a right” to have access to an appeal proceeding before a judicial body. Article 10 *bis* of Directive 85/337, amended by the Directive 2003/35, thus clarified the concept of the interested public as those people who undergo or may undergo the effects of the decision procedures in the environmental field, while the nongovernmental organizations would be those which promote the environmental protection on condition that they satisfy the requirements established by the national law.

Although in the Aarhus Convention “the Parties are not obliged to establish a system of popular action (“*actio popularis*”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment”, nevertheless, “the Parties may not take the clause ‘where they meet the criteria, if any, laid down in its national law’ as an excuse for introducing or maintaining so strict criteria that they

¹³ In fact—as stated by B. VANHEUSDEN, *The Relevance of Environmental Justice for the Legal Framework in the European Union*, JEEPL 163 (2010)—environmental justice is a relatively new and unknown notion in European environmental law.

effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment”. ...Accordingly, the phrase ‘the criteria, if any, laid down in national law’ indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception

Therefore, although great decision-making power is allowed to the Member States in relation to guaranteeing widespread access to justice, some recent Justice Court judgments seem outline a great desire to provide wider access to justice. First of all, in the well-known judgment of 15th October 2009, which excluded the possibility of setting limits of a territorial nature on the access to justice subject. Law has underlined the circumstance for which, in some recent years, in the European legal debate, the market tout court meant would have lost a bit of its own centrality to make space for other topics, first of all that of the fundamental rights and, obviously, of their protection. On the basis of a similar change in direction—related especially to the most recent jurisprudence of the UE Court of Justice—the will of European Union to put human beings and their intrinsic rights at the center of the system can be seen. However, in the last jurisprudence, the right to property is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions actually correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed¹⁴.

Indeed, in a dispute concerning a work project subject to the Directive VIA, the Court considered the Swedish system excessively restrictive, in the part in which it requires, as condition for raising a judicial appeal, a membership base of at least two thousands members. In the same way, there is the judgment 4th Division, on 12th May 2011, in Case C-115/09, in which it is stated that the environmental association must be able to assert the same rights as the individual’s, because to consider the fact that they could not appeal against breaches of regulations deriving from European

¹⁴ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (2008) ECR I-6351, paragraph 355, and Joined Cases C-379/08 and C-380/08 *ERG and Others* (2010) ECR I-2007, paragraph 80. Case—law shows that protection of the environment is one of the objectives capable of justifying a restriction on the use of the right to property [see Case 240/83 *ADBHU* (1985) ECR 531, paragraph 13; Case 302/86 *Commission v Denmark* (1988) ECR 4607, paragraph 8; Case C-213/96 *Outokumpu* (1998) ECR I-1777, paragraph 32; and *ERG and Others*, paragraph 81].

Union Law, would contrast with the principle of effectiveness, just for the fact that they would be specifically intended to protect collective interests.

The “not prohibitively expensive” requirement of the judicial proceeding as provided for in the Article 9, paragraph 4 of the Aarhus Convention and then implemented in the European legal system by Article 10 *bis*, fifth paragraph of Directive 85/337 and article 15 *bis* of Directive 96/61, envisages that people who intend to lodge an appeal would not be prevented from prosecuting or from carrying out a judicial appeal included in the scope of these articles because of the costs that could arise from it. The above mentioned directives provide that the judicial protection in the environmental field be fair, equal, timely and not excessively highly priced.

Recently the principle seems to be at the centre of the European judge’s attention, given that it has been frequently confirmed in the latest judgments by the E.U. Court of Justice, in which, to sum up, it has been stated that the judge must assure the respect of the not excessively high costs requirement, considering both the interest of the person who wants to protect his own rights and the general interest connected with environmental protection. Consequently, the judge cannot restrict his judgment to the economic situation of the person concerned, but he must also conduct an objective analysis of the costs amount, a fortiori since the private citizens and the associations are naturally called to play an active role in the environmental protection. In this sense, the costs of the proceeding must not exceed the financial capacity of the interested public and must not to seem in any way objectively unreasonable.

In Italy, however, there is no expressed coding of the principle of non-excessive burden of the judicial proceedings in the environmental field, and first of all, there is no differentiated procedural system which could guarantee wide access to justice to citizens and to associations, except for the appeals regarding access to documents in the environmental field that, according to the Legislative Decree 195 of 2005, are exempt from the payment of the court fee. It is clear how, in a system which makes no allowances, there is a great chance that—whereas it would not be significant to individual interests—the citizen is discouraged to start a lawsuit because of the considerable economic risks, which are moreover increased by this period of economic crisis, and all that obviously contrasts with the European principles and directives, as well as with the international conventions.

While pointing out that the Aarhus Convention does not impose a justice without any cost, but one at a reasonable cost and that could be able to assure a significant role to the public, the judgment of the 11th April 2013, in Case C-260/11, *Edwards & Pallikaropoulos* is still worthwhile

mentioning. It proposes a moderate orientation about the cost of access to justice in the environmental field, assuming that, in a pondering judgment, the judge must consider the subjective profile of the plaintiff and the objective profile too, which represents the propensity of the public to access justice. Moreover, it must also consider other aspects like the plaintiff's prospects of success, the complexity of the case and the applicable regulation.

VI. THE LEGAL POWER OF THE ENVIRONMENTAL ASSOCIATIONS IN ITALY AND THE ENVIRONMENTAL DAMAGE LAWSUIT IN THE SECTION 6 OF THE ENVIRONMENTAL CODE

In Italy, Article 13 of law no. 349 dated 8th July 1986 recognizes the legal powers of the environmental associations of national and extra-regional scope *expressis verbis*. Anyway, administrative law, despite having proposed very strict interpretations at first, in the last few years, it has combined with this legal criterion to a wider capacity criterion, more in step with the Aarhus Convention, based on a case-by-case recognition of the judge. However, even if the Italian system currently seems to be characterized by a substantial coherence with the Aarhus Convention, on closer inspection, some critical profiles remain: first of all, the certainty of law. In relation to the proceedings of compensation for environmental damage outlined by Legislative Decree no. 152 dated 2006, Section 6, on first sight it seems to have been constructed in accordance with a “ministry-cantered” scheme, in which the Ministry of Environment is reserved both the administrative powers of ruling and sanctioning, and the legitimacy to proceed in civil and criminal courts. Consequently Section 6—referring to the denial to procedural capacity of the local authorities—contrasts clearly with the subsidiarity principle.

In Italy, there are at least three problematic points concerning the fulfilment of the subjective claim in environmental protection: first of all, the possibility of the individual claim is not coinciding with the general interest and this assumption in Italy has led to the drastic reduction of subjects who can start environmental damage action (in fact the trial capacity of the Local Government has been abolished by centralizing the action to the Environment Ministry); secondly, there is the possibility that the execution of the claim may not turn out to be concretely defendable from an economic viewpoint; finally, the characteristic of the Italian legal tradition, which highlights the need to institutionalize the interest whenever it exceeds the purely individual sphere. In other legal systems the citizen can

activate their environmental protection claim directly, which does not cease to be so, also exerting common claims to others, as happens for instance in the U.S.A., with the citizens suits.

In Italy, Article 13, of the law 8th July 1986 n. 349 recognized the *expressis verbis* legal power of the environmental associations of national and extra-regional scope, over at least five regions and enrolled in dedicated registry at the Minister of Environment, in legal proceedings.

It must be recalled that European law, though recognising the discretion of the Member States to establish which violated rights can be appealed in the environmental field, has observed how they could not deprive the environmental associations of the possibility to fulfil the role recognised to them by the Directive 85/337.

Therefore, the administrative law, despite having initially proposed very strict interpretations, in the last few years it has combined a wider capacity criterion to this clearly restrictive legal criterion, which is, for this reason, more in step with the Aarhus Convention, based on a case-by-case recognition by the judge. This new criterion is applied as long as the associations pursue environmental protection purposes as statute, and not in an occasional way, and has an appropriate representativeness and degree of stability in a relevant area, which can be connected to the area in which the collectively used and allegedly damaged asset is situated. Indeed, especially in the most recent judgments of the Council of State (6th Division, 23rd May 2011, n. 3107 and 13th September 2010, n. 6554) it has been stated that legal power does not exclude, just in itself, similar legal capacity in a well-defined territorial scope, and this also for the mere spontaneous committees that are formed with the main intent of protecting the environment, the health and/or the quality of life of the inhabitants residing in that circumscribed area.

This position proves to be effectively representative of the local communities' interests, and for this reason, it is also to be appraised from a viewpoint of horizontal subsidiarity, or in other words by considering that the localities and their inhabitants, affected by dangers to public health or to the environment in a circumscribed territorial area, would have not independent protection, in the event of inactivity of the environmental associations expressly legitimated by law. In this situation, the administrative judges indicate three standards of recognition for the legitimacy of the local association, traditionally applied by the pertinent law: from the statutory purposes of the authority, up to the stability of its organizational set-up, as well as to the so-called *vicinitas* of the same compared to the substantial interest which is assumed to be injured because

of the administrative action and to whose protection, hence, the applicant body intends to take legal action.

Although foreign literature contains so many criticisms of the Italian legal system, in a 2007 research project organized by the European Union Commission in order to understand the legitimacy range of the environmental associations to appeal into the several legislations of the Member States, mentioned by the same Commission also in its Communication ¹⁵ of the 2008 on implementing the European Environmental Law, Italy was found to be evaluated among the most advanced countries. In the Country Report specifically dedicated to Italy, it can be seen that “the system itself has evolved in a positive manner. Public Authority’s acts and omissions violating environmental law are indeed often and widely challenged by citizens, including associations, through the judicial administrative proceeding before the Regional Administrative Courts (at first instance) and before the Council of State (at second instance level). Legislation (Article 18.5 of Law 349/86) recognizes environmental associations’ autonomous legal standing before the administrative judge, if the association is officially recognized by the Ministerial decree and provided that they fulfil specific requirements established by law. Added to this is the fact that “Case law... has increased the possibility for environmental NGOs to challenge public authorities’ acts in the name of the protection of ‘collective interests’ (e.g., irrespective of their legal personality, or if they represent local exponential interests)”.

So if the Italian system actually seems characterized by a substantial, and recognized, coherence with the precepts of the Convention, on a closer inspection, some critical profiles remain, and it is not ruled out that, sooner or later, they would be destined to come to light in the European law. First of all, the problem of the certainty of law.

The Italian system seems to be coherent with the Convention as regards minimal range of access to justice just thanks to the double binary legitimacy, which is the circumstance that (after initial uncertainties) the administrative judges declare themselves to be willing to verify the legitimacy of the local associations case by case. Indeed, a recognized legitimacy to national level associations alone, located in at least five regions, would be a system that could seriously jeopardise the possibility of giving sufficient voice to local environmental interests and to their need for protection. The well-known judgment on Sweden of the 15th October 2009, in Case C-263/08 actually completes and explains the subject of Article 10

¹⁵ COM (2008) 773/46.

of the Directive 85/337, which requires the member countries not to establish extremely restrictive requirements for the access to justice and thus excludes the possibility of establishing limits of a territorial nature.

Now, analyzing the proceedings of compensation for environmental damage outlined by the Legislative Decree no. 152 of 2006, even after the amendments of the law no. 166 dated 2009, it follows that before it was easily constructed in accordance with a “minister-centered” scheme and thus in clear contrast with an organizational system of competence distribution that could be described as “environmental federalism”.

It therefore, clear how the Environmental Code sacrifices the constitutional principles of subsidiarity and of loyal collaboration, supposing that in the environmental damage field the local authorities, the regions and environmental associations are only given a servile role, that is purely collaborative towards the Ministry of the Environment. The latter is reserved the administrative, ruling and sanctioning powers, and the legitimacy to proceed in civil and criminal courts as laid down by Articles 299 paragraph 1, and 311, paragraph 1 of the Code. Moreover, compensation for damage per equivalent is to be paid to the State and is intended as per law to the so-called revolving fund, aimed at the intervention of environmental restoration after damage, but not in an exclusive way.

According to Articles 309 and 310 of the Code, the local authorities and environmental association are assigned, not only the power of claims for damaging events and of initiatives toward the Minister, but also the power of appeal against illegal measures and the legitimacy to act “against the compensation for the damage suffered because of the delay in activating the precautionary, the preventive and the damage limitation measures”. Therefore, the context outlined by the Section 6 of the Code, referring to the denial to procedural capacity of the local authorities, contrasts clearly with the subsidiarity principle.

CONCLUSION

In the environmental field, the implementation of information, participation and access to justice seems to play an extremely important role, like the Aarhus Convention has established. However, in Italy a general attitude of distrust by the legislator towards the citizens and towards the environmental associations which operate for the environmental protection can be observed. Therefore, in order to try to be more in line with European law, with the Aarhus Convention and with the subsidiarity principle, these brief considerations could be concluded with the wish that the right to

lawsuits in the environmental field could become more democratic, transparent and participated, if more trust is placed in the actions of the environmental associations and in those of the individual citizens, and with the wish that someday soon it could follow the Roman popular action system.

In conclusion, it seems evident that, especially in the environmental field, only the wider participation in the background choices, the actualization of the transparency principle, the search for consensus and a distribution of decision-making power among the various institutional and social subjects involved, in other words “creating the best conditions for the acceptance of the public decisions as an alternative to their authoritative imposition”, could at last make a difference compared to the past and to the failed model of command and control, which has ruled over the European scene since the early years of the Twentieth Century, because it is not shared by the citizens who should have followed the regulations.

In Italy, however, it must be pointed out that, despite the commendable work done by the administrative judges in order to broaden the legitimacy criteria in the environmental field, a general attitude of distrust by the legislator towards the citizens and towards the environmental associations which operate for the environmental protection can be observed. These brief considerations could be concluded with two wishes: that the right to lawsuits in the environmental field could become more democratic, transparent and participated, by placing more trust in the actions of the environmental associations and in those of the individual citizens, through an evolved interpretation of rules and regulations that proves to be more in step with European law and with Article 118 of the Italian Constitution, which includes the subsidiarity principle, and also with the Aarhus Convention. The second wish is that, someday soon, it could follow the Roman popular action system, in which the individual, as a part of the community, and thus independently from any idea of representation, can enforce their own rights and those of all the other citizens in the courts.

In the environmental protection field, as it is an interest that concerns the whole biotic community, as has been seen, the individual should be able to act in their own interest and in that of the community, not only the human one, but that of all the living beings, as well as of the environment in its whole.