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CONTRACTUAL AUTONOMY BETWEEN INTERNAL AND ECOLOGICAL DIMENSION IN ITALY*

1. – In the face of growing pollution and increasingly frequent ecological disasters, environmental protection has become an imperative challenge for the global community and, in turn, to national legal frameworks all over the world [1]. Within this scenario, Italian legislation has undergone a serious process of revision, in light of the increasing amount of damage caused by pollution and climate change, which is a phenomenon that knows no geographical boundaries and calls inevitably upon various sectors of the internal system. Therefore, this study will examine the direction of the process of constitutional revision as well as the effects on some private law principles.

It is my contention that in order to understand the constitutional framework in Italy is important to point out, as will be outlined *infra*, that until 2022, in the Italian Fundamental Charter there were no specific and direct provisions that mentioned the 'environment' either as an asset, or as a value worthy of protection. Furthermore, this issue was only partially adopted by the legal doctrine [2].

On this premise, in the Italian legal system the right to environmental protection emerged only in connection with ownership and the discipline of *immissiones in alienum*, pursuant to art. 844 of the civil code [3]. Therefore, the criterion for establishing active legitimacy was identified only in the *vicinitas* with respect to a polluting source [4].

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* This article represents a very expanded paper of the lecture held at the International Conference on Sustainability Perspectives: Yesterday, Today, Tomorrow, organized in December 2021 by the University of Benevento "Giustino Fortunato" and Universidad La Gran Colombia.

[1] It is sufficient just to remark that the G20 meeting, which was held in Rome on 30–31 October 2021, devoted several sessions to climate change and the environment.

[2] Broadly D. AMIRANTE, *Diritto ambientale e Costituzione*, Milano, 2000, *passim*; D. PORERA, *La protezione dell'ambiente tra Costituzione italiana e "Costituzione Globale"*, Torino, 2009, *passim*; M. PENNASILICO, *Manuale di diritto civile dell'ambiente*, Napoli, 2014, 15 ss.

[3] It must be emphasized that an attempt was made to re-elaborate from a civil point of view, in the seventies, environmental law principally through the models provided by articles 844 and 2043 of the Italian Civil Code.

[4] On this point see *ex multis* A. POSTIGLIONE, *Ambiente: suo significato giuridico unitario*, in *Riv. Trim. Dir. Pubb.*, 1986, 32 ss.;

Overall, the notion of environment has been characterized by the opposing legal doctrine positions that have distinguished two strands of thought. On one hand, the "pluralistic" thesis (called "*pluralistica*") [5] according to which the notion of the environment, and its protection, was essentially based on a plurality of interests such as landscape protection, territorial governance and protection against pollution. On the other hand, the "monist" thesis ("*monista*") [6] which assumes the uniqueness of the asset; in summary, the protected asset is unique from which at the most a subjective protection aspect can be identified, deriving from Articles 2 and 32 of the Italian Constitution, and an objective one deriving from its art. 9 co. 2. In this regard, in the Italian Fundamental Charter there were no specific and clear provisions that mentioned the 'environment' as an asset or as a value worth of protection although in 2001, the concept of environment has been included in Article 117 of the Italian Constitution only for the purpose of formalising the division of competences between the state and the regions.

Just as important, two other concepts should not be overlooked. Firstly, the "ecocentric" concept, according to which, the environment is worthy of protection intrinsically. Secondly, the "anthropocentric" concept, according to which, the environment deserves protection as a place where a human being thrives alone, and within the social structures in which his personality can be developed [7].

On a closer look, it should be noted that it is not only the Italian Constitution that lacked a definition of environment but also in ordinary legislation there is no clear definition of environment. In fact, this cannot be considered the definition referred to in art. 300 of Legislative Decree 152/2006. This refers only to the compensable environmental damage which considers it inclusive of the economic benefit that can be derived from it [8]. Similarly, nor that on the subject of environmental impact provided by art. 5 of the abovementioned Decree could be considered likewise because it reports only the effects on the environment of anthropic activity.

However, the constitutional reform commences from a long path that has been established at the EU level although environmental protection was not mentioned among the provisions of the Treaty of Rome (ECC) in 1957. In fact, the environment topic started with the United Nations Conference in Stockholm in which some Heads of Government firmly decided that they must go and protect the environmental system with concrete

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V. DINI V., *Il diritto soggettivo all'ambiente*, in *Giuristi Ambientali*, 2004, 11; F. SBORDONE, *Le immissioni, commento all'art. 844 c.c.*, in F. PREITE, M. DI FABIO (eds.), *Codice della Proprietà e dei diritti immobiliari*, Milano, 2015, 720, according to which: «*É fuor di dubbio che – laddove l'immissione sia direttamente nociva per la salute dell'uomo (art. 32 Cost.) oppure sia causa di inquinamento ambientale (cioè, come si sosteneva in passato, prima dell'entrata di specifiche norme di tutela dell'ambiente, causa di "insalubrità" dei luoghi) – non si possa in alcun caso ricorrere al c.d. giudizio di tollerabilità (nel senso che l'attività del fondo immittente, costituendo illecito civile extracontrattuale, non potrebbe per ciò stesso essere tollerata; cfr. C.Cost. n. 247/1974; C.civ., S.U., n. 3164/1975; C. civ. n. 8420/2006). È però, al tempo stesso indiscutibile che, nell'ipotesi di immissione lesiva, l'inibitoria di cui all'art. 844 c.c., di là dall'autonoma tutela risarcitoria, possa costituire rimedio preventivo o attenuativo del danno da preferirsi (o comunque incentivarsi) rispetto alla mera riparazione economica della lesione all'integrità psicofisica dell'individuo*».

[5] This argument is supported by M.S. GIANNINI, *Ambiente: saggio sui diversi suoi aspetti giuridici*, in *Riv. trim. dir. pubbl.*, 1973, 15.

[6] In this sense A. GUSTAPANE, *Tutela dell'ambiente*, in *Enc. Dir.*, Milano, 1992, 507; P. MADDALENA, *L'ambiente valore costituzionale nell'ordinamento comunitario,* in *Cons. St.*, 1999, n. 5-6; F. GIAMPIETRO, *Diritto alla salubrità dell'ambiente. Inquinamenti e riforma sanitaria,* Milano, 1980, 71 ss.; F. FRACCHIA, *Sulla configurazione giuridica unitaria di ambiente: art. 2 Cost. e doveri di solidarietà ambientale*, in *Dir. econ.*, 2002, 215. Has also lately analyzed these thories M. SCIASCIA, *Riforma in itinere degli artt. 9 e 41 della costituzione: l'habitat umano quale bene collettivo unitario*, in *Amministrativ@mente*, 2021, 465 ss.

[7] In this regard M. CATENACCI, *La tutela penale dell'ambiente: contributo all'analisi delle norme penali a struttura sanzionatoria*, Padova, 1996, 41 ss.

[8] According to the abovementioned Legislative Decree «*È danno ambientale qualsiasi deterioramento significativo e misurabile, diretto o indiretto, di una risorsa naturale o dell'utilità assicurata da quest'ultima*».

actions [9]. Therefore, the first step can be traced back to 1972, when the European Council authorized the first Action Program to protect the environment (1973-1976), decreeing the political-community structure in environmental matters.

This fits perfectly with what is reported in EU case law which supported the need to make environmental legislation uniform in the Member States, as the relative divergences led to distortions in competition between the EU countries [10]. Noteworthy also, is a further ruling in which the ECJ in case 240/1983 established that the protection of the environment constitutes one of the essential aims of the European Community, with the consequence that the need for its protection legitimized certain limitations of the principle of freedom movement of goods [11].

In truth, it was only in 1987 with the Single European Act that environmental protection was included in the C.E.E. Treaty, in particular in the Title concerning environmental policy, consisting of three articles 130 R, 130 S and 130 T. [12]. A further step forward took place in 1993 with the Treaty on the European Union (Maastricht) which gave environmental protection the status of a community policy. Incorporating along with the objectives of the Community that of promoting sustainable growth that is not inflationary and respects the environment. Subsequently, the Amsterdam Treaty inserted art. 6 provided for the realization of a point of convergence between economic and social development actions [13]. Thereby allowing for the demands of environmental protection with a view to promoting sustainable development [14].

In this scenario, however, a fundamental element is the inclusion of environmental protection in the "Charter of Fundamental Rights of the European Union", whose art. 37 states that: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". Therefore, the protection of the environment assumes the guise of the European Union principle and this has influenced, to a greater extent, both politics in its choices and jurisprudence in its decisions.

Summarizing all this, it is possible to infer that the interventions of the European institutions clearly show an interest in characterizing the EU with a special repertoire of incompressible rights equal to those indicated and protected by the ECHR, whose provisions on the matter certainly represent a beacon in the complicated path of integration between the different EU legal systems [15].

Last but not least, I would like to point out that nowadays the topic of environmental sustainability is also the objective of the ONU Agenda 2030 [16]. More specifically a declaration or better a political agreement that

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[9] See on this point J.R. SALTER, *European Environmental Law*, Nijhoff, 1995, *passim*; J.H. JANS, H.B. VEDDER, *European Environmental Law*, The Netherlands, 2008, *passim*.

[10] C-91/79, Commissione delle Comunità Europee contro Repubblica Italiana, decision March 18 1980.

[11] C-240/83, February 7 1985.

[12] In particular, this article establishes the objectives regarding the safeguarding, protection and improvement of environmental quality, protection of human health and rational use of resources. Furthermore, the same article indicated the fundamental principles underlying the Community environmental policy.

[13] See on this point Art. 6 now Art. 11 of the TFUE.

[14] On this topic see P. PERLINGIERI, *Diritto civile nella legalità costituzionale nel Sistema italo comunitario delle fonti*, 2020, Napoli, 526 that assumes: "Sí che ogni attività deve sia produrre occupazione, sia garantire un progresso sociale ed economico sostenibile, nel rispetto dei valori e delle identità culturali preesistenti, del paesaggio e dell'ambiente, segnatamente mediante «la creazione di uno spazio senza frontier interne".

[15] For an in-depth analysis of the ECHR cases and approach see the following document *Guide to the case-law of the European Court of Human Rights* available on *https://echr.coe.int/Documents/Guide_Environment_ENG.pdf*.

[16] At the United Nations Sustainable Development Summit on 25 September 2015, 193 world leaders adopted the '2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (the so-called SDGS) to end poverty, fight

demonstrates that governments, international organizations, private business, academia, and civil society have a collective task to fulfil: that is, identifying the pathways to environmental, social and economic development [17].

The above-mentioned considerations are necessary in order to convey to the recent Italian Constitutional reform that has been approved for the first time since 1948. In summary, the core of the reform has been to introduce a clear and strong protection of the environment in order to define what the environment is, and what we have to protect, and in which way [18]. Generally, the constitutional reform was approved by the Italian Chamber of Deputies on February 8 2022, with a majority of 2/3 of its members.

In essence, the reform has provided a substantial introduction in article 9.2 of the Constitution adding these words: "[…] *It protects the environment, biodiversity and ecosystems, also in the interests of future generations. The law of the state regulates the ways and forms of animal protection*". It is clear from the reading of the above, that the aim of this amendment is that the will of the constitutional legislator is to protect the environment (although with a vague concept [19]) for the protection also of the future generations that is a parameter also to defend also sustainable development [20].

Furthermore, the amendment provision at art. 41 of the Constitution has added the word "environmental" in order to mark a new source of law to limit the private economic initiative [21]. In essence with this amendment the law states that private industry can no longer impact the climate and verifies direct and coordinates public and private economic activity, thus acting on the side of both law limits and guidelines for political and administrative activities.

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inequality and injustice, tackle climate change, foster social economic development, addressing the root causes of poverty and the universal need for development that works for all people.

[17] D. Denny, D. Castro, E. Yan, *Agenda 2030 Measurements and Finance: Interaction of International Investment Law and Sustainability*, in *Veredas do Direito*, 2017, 59. From this perspective, it is important to point also out that the Paris Agreement that was adopted in 2015 represents a legally binding international treaty on climate change and has a long-term temperature goal in order to maintain the rise in mean global temperature to well below 2 °C (3.6 °F) above pre-industrial levels, and preferably limit the increase to 1.5 °C (2.7 °F). In recognition that this would substantially reduce the effects of climate change.

[18] For a different opinion M. Cecchetti, *Osservazioni e ipotesi per un intervento di revisione dell'art. 9 della Costituzione avente ad oggetto l'introduzione di una disciplina essenziale della tutela dell'ambiente tra i principi fondamentali dell'ordinamento costituzionale*, in *Rass. online di dir. pubb. eur.*, 2020, according to which a series of principles for environmental protection have been already part of the Italian Constitutional since decades (e.g. the precautionary principle, the principle on preventive action, the principle establishing that environmental damage should be rectified at source). Therefore, for the author these are the principles that the current constitutional revision law proposal under discussion has failed to make explicit.

[19] In this way see also D. Fuschi, *Environmental Protection in the Italian Constitution: Lights and Shadows of the New Constitutional Reform*, in *Int'l J. Const. L. Blog*, Feb. 13, 2022, at: http*://www.iconnectblog.com/2022/02/environmental-protection-in-the-italian-constitution-lights-and-shadows-of-the-new-constitutional-reform/.*

[20] In the draft of the law there is a clear connection between the new article and the Article 20a of the German Constitution that includes, essentially, the concept of sustainable development as well. On the concept of sustainability see also M Antonioli, *La sostenibilità dello sviluppo tra principi del diritto, proceduralizzazione, eticità e crescita economica*, in *Riv. It. Dir. Pubbl. Com.*, 2017, 22 that rightly points out "*sostenibilità è, dunque, sinonimo della ricerca di soluzioni durevoli che si pongono nella prospettiva di un futuro non ben definito o, comunque, variabile: il che avviene in una dimensione temporale che si prefigge di tutelare le generazioni future, assolvendo ad una funzione solidaristica di tipo generazionale*".

[21] For a focus on the economic relationship between sustainable develompment and Italian Costitution see V. Pepe, *Riforma dell'art. 41 della Costituzione per uno sviluppo sostenibile: la sostenibilità come etica pubblica*, in *Atti del Convegno La Tutela del Patrimonio Ambientale*, 2012, 44.

2. – After these considerations on recent Constitutional reform, I believe that nowadays the contract law scholars cannot ignore issues of environmental protection after these constitutional advancements.

But exactly for these reasons we must start to consider the delicate relationship between the protection of human beings and the environment; in other words, it is necessary to identify the owners of those who protect the environment. To amplify this concept, we must begin with the perception that some scholars hold of the "right to the environment". In particular, according to some Italian scholars it is a «formula evocativa di una rosa di situazioni soggettive diversamente strutturate e protette» [22] or better a «fascio di rapporti giuridici» [23].

Starting from these considerations, the legal positions under review have, over the years, been subjected to the analysis of some case law. In fact, the jurisprudence has established both the existence of a subjective right but above all the normative references of the Constitution connected to the aforementioned subjective right, namely Articles 32 and 42 of the Constitution. More precisely, it refers to two decisions of the Corte di Cassazione [24] which were then taken up by the Corte Costituzionale [25] in the section which the fundamental right of the individual to environmental protection is emphasized.

On this point, it is important to note that there is no ruling or close correlation between the environment and the position of the subject, but only a connection with the right to health is emphasized. In fact, the legal position is often referred through the term «*diritto ad un ambiente salubre*». On the other hand, it should not be overlooked that jurisprudence hold that subjective law should be interpreted in a triple dimension, namely: personal, social and public. In fact, according to the case law, that was decreed before the recent Costitutional reform, "[…] *la stessa configurabilità del bene-ambiente e la risarcibilità del danno ambientale, pur specificamente regolato dalla L. n. 349 del 1986, art. 18, trovano "la fonte genetica direttamente nella Costituzione, considerata dinamicamente e come diritto vigente e vivente, attraverso il combinato disposto di quelle disposizioni (artt. 2, 3, 9, 41 e 42) che concernono l'individuo e la collettività nel suo habitat economico, sociale e ambientale*" [26].

It seems to me to reflect that although could be accepted the recognition of a subjective right regarding the environment, it must be acknowledged that this entitlement is often compared to the right to health but likewise needs to be linked to further subjective legal situations such as the right to development. The latter must be understood not only as freedom of economic initiative but also, and above all, as the "right to free oneself from the condition of poverty" [27]. From this point of view, the assessment that the Public Administration must undertake becomes central. But despite this fundamental assertion, I believe it is demonstrable that entrusting power to the Public Administration entails the existence of legitimate interests (subjective legal position of advantage). These interests are achieved through the protection of a further interest of the subject, purely instrumental, to the legitimacy of the administrative act and only within the limits of the realization of this instrumental interest [28].

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[22] M. Cafagno, *Principi e strumenti di tutela dell'ambiente. Come sistema complesso, adattativo, comune*, Torino, 2007, pp.185 ss.; B. Caravita, *Costituzione, principi costituzionali e tecniche di formazione per la tutela dell'ambiente*, in S. Grassi, M. Cecchetti, A. Andronio (eds.), *Ambiente e diritto*, II, Firenze, 1999; G. Morbidelli, *Il regime amministrativo speciale dell'ambiente*, in Studi in onore di *Alberto Predieri*, Milano, 1996, 1133 ss.

[23] B. Caravita, A. Morrone, *L'organizzazione costituzionale e l'ambiente*, in L. Nespor, A.L. De Cesaris (eds.), *Codice dell'ambiente*, Milano, 1999, 71 ss.

[24] Cass., sez. un., March 9 1979, n. 1463 and Cass., sez. un., October 6 1979, n. 1572.

[25] Corte cost., May 28 1987, n. 210.

[26] Cass., June 19 1996, n. 5650.

[27] C.E. Gallo, *Ambiente e posizioni soggettive della persona*, in R. Ferrara, P.M. Vipiana (eds.), *I "nuovi diritti" nello stato sociale in trasformazione*, Padova, 2002, 81 ss.

[28] E. Casetta, *Manuale di diritto amministrativo*, Milano, 2007, 293 ss; C.E. Gallo., *op. cit*., 94 ss.

On the basis of existing evidence, it is reasonable to conclude that the concept of relativity of subjective legal positions could be applied. To sum up, the same relationship of a subject with an asset can present itself "according to the cases and moments, and even according to the kind of protection that the subject claims [...], now as a subjective right, now as an interest protected only in a reflex way" [29].

Since the environment is framed at constitutional level, this entails at the same time a significant expansion of the sphere of legal positions concerned by the subject. Therefore, I would like, once again, to emphasize that different subjective positions can be welded to the concept of environment and as a consequence it seems appropriate to speak of "right to the environment" which leads to favouring the simultaneous existence of different legal situations outlined by relativity, according to those values, including constitutional ones, to be protected.

In light of the observations that have been made, it is clear that the topic is much more multifaceted and it requires several comments as will be *infra* developed [30]. In fact, starting from this overview, alongside the classic rule according to which the contract becomes unproductive in legal situations towards third parties, it is legitimate to develop exceptions to the principle of contractual relativity and focus the Betti's thought on the direct and indirect effects of the contract [31] or more appropriately on the effects also for subjects outside of contractual parties. In summary, although the contract creates (damaging) effects for third parties even though they may not have been part of the agreement [32] regardless of the intentionality of the contractual parties [33].

3. – As previously noted, a Public Administrator in the exercise of his duties has the task of balancing the interests involved, therefore matching the protection of the environment with the rights of the entrepreneur.

Therefore, the public administration should make its choices in accordance with the reasonableness and proportionality criteria. In theory, the setting of limits on the exercise of entrepreneurial activity must be bound by the correlation of these limitations to social utility, in the sphere of which health and the environment are unquestionably identified.

From the point of view of the balance between interests involved, it should not be overlooked that the Italian Corte di Cassazione has established the separation line between environmental protection and corporate rights. Practically the criterion of reasonableness must be used to ascertain whether or not the limiting norms of the other fundamental rights are reasonable in consideration of the environmental value.

Starting from these premises, it is a question of understanding whether the environmental value examined together with the other interest's worthy of protection, entails, in regard to the latter, what I would like to define as "homeopathic compression". Such compression would be legitimate when it is reasonable and proportionate with respect to the ecological protection objectives to be realized. The point just

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[29] Author traslator, see E. CASETTA, *op. cit.*; G. MIELE, *Principi di diritto amministrativo*, Padova, 1966, 183 ss. according to which «*a seconda dei casi e dei momenti, e perfino a seconda del genere di protezione che il soggetto faccia valere* […]*, ora come un diritto soggettivo, ora come un interesse protetto in modo solo riflesso*».

[30] See § 5.

[31] E. BETTI, *Teoria generale del negozio giuridico*, Napoli, 1994, 258.

[32] See on this point M. FERRARA SANTAMARIA, *I contratti a danno di terzi*, Napoli, 1939, 12.

[33] I.L. NOCERA, *Il contratto "a danno del terzo": identificazione come categoria unitaria e necessità di una tutela effettiva*, in *Giust. Civ*., 2021, 462 that emphasies the fact that "*la produzione di un danno in capo al terzo è un accidente e prescinde dalla sussistenza di un elemento psicologico ovvero dell'intenzionalità dei contraenti*".

mentioned came from the view that public interest always prevails over private interests, since the former aim is to satisfy general interests. Indeed, the environmental interest, although prevailing, meets the limit of definitive non-compression of other rights. In this contest, some scholar argues persuasively that "*i diritti costituzionali si ergono a difesa della libertà del singolo dallo Stato, sia riconoscendo un àmbito inattingibile al potere della mano pubblica, sia imponendo alla stessa obblighi positivi o negativi di prestazione*" [34].

At this point it is important to recall the issue of the so-called "green clauses" to which reference is made when the public entity, according to reasonableness and proportionality, indicates the aforementioned clauses among the criteria for awarding a tender. The aim being to identify entrepreneurs who can offer eco-efficient products and services, thus ensuring an ecologically virtuous management of purchases and public works [35]. On this point, it is important to recall that the European Commission in recent years has repeatedly emphasized the importance of facilitating the means aimed at safeguarding environmental interests in the context of the single market and as a consequence of public contracts.

On this point, it deserves to be highlighted that supranational public contracts are increasingly characterized by references to the environment. A typical example is the environmental policy of green public procurement that aim to push the evolution of the market for products and services that have a minimum impact on the environment. Therefore, the future prospect is to stimulate the production of technology but at the same time to place on the market products that do not impact from an ecological point of view, acknowledging research aimed at bringing about solutions for change [36].

In other words, it should also be specified that the prevalence of environmental value over the exercise of the business activity must not be interpreted abstractly but concretely. In summary, the above-mentioned "compression" of fundamental rights by the Public Administration must be understood in a significant way, linked to a verification of the aims intended [37].

The point, however, is that the concept of reasonableness turns into abuse by the Public Administration. Therefore, one Italian scholar assumes that it is important «*legittimare la decisione non in ragione di principi*

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[34] A. ZOPPINI, *Il diritto privato e le "libertà fondamentali" dell'Unione Europea. (Principi e problemi del Drittwirkung nel mercato unico)*, in F. MEZZANOTTE (ed.), *Le libertà fondamentali dell'Unione europea e il diritto privato*, 2016, Roma, 28.

[35] On this point see C. IRTI, *Gli "appalti verdi" tra pubblico e privato*, in *Contratto e Impresa/Europa*, 2017, 197 that talks about the *green public procurament* and on this point the author assumes that these "*possono offrire, da un lato, uno straordinario contributo alla sostenibilità e, dall'altro, un vantaggio competitivo per le stesse imprese sul territorio nazionale e comunitario, posto che, nella misura in cui l'ambiente diventa elemento di selezione nel mercato, le imprese che riescono a interpretarlo come un'opportunità di sviluppo economico hanno maggiori probabilità di successo*".

[36] In this respect see E. MARCENARO, *Energy Contracts at the Crossroad between Public Law and Private Law: The Relevance of Sustainability Objectives in International EPC Contracts*, in *International EPC Contracts*, 2017, 250, according to which "Sustainability is now an integral part of multinational companies' culture and strategy and therefore their conduct of business, including that of Enel's. It drives a process of continuous and transversal improvement within the company as well as in the local communities, being key for its mission of growth and development worldwide. Aiming at generating and distributing value on the international energy market for the benefit of customer requirements, shareholders' investment and competitiveness of countries where it operates, Enel's activities are aimed at getting support from local communities whereby being in tune with the environment, protecting human safety, focusing on the development of renewable sources and of technically innovative projects. The objective is to contribute to creating a better world for future generations".

[37] On this point see B. CARAVITA, *Diritto dell'ambiente e diritto allo sviluppo: profili costituzionali*, in *Studi in onore di Alberto Predieri,* Milano, 1996, 357 that observes «*la difficoltà dunque, si incontra nel passaggio tra le idee e la realtà, tra la scala dei valori ed i fatti della vita concreta, in cui troppo spesso si realizza a pieno il principio del NIMBY (not in my back yard), che sembra caratterizzare il comune sentimento ambientalistico della collettività (post) industriale e di una legislazione che è più che altro attenta a petizioni di principio, salvo agire con valvole di fuga (attraverso meccanismi di deroghe) in favore di (spesso forti) poteri economici, senza ottenere nessuna forma di tutela ambientale significativa per la collettività*».

astratti, ma di realtà concrete e verificate; di interessi reali, anziché di finalità artificiose o prefigurate» [38].

As a consequence, it is essential that the Public Administration demonstrates its suitability in the knowledge of socio-economic realities on which its "*agere*" will affect, and at the same time, show that it has evaluated the possible effects that would be produced as a result of its action. In summary, it could be tolerated if environmental policies and values have an impact on socio-economic contexts and if, therefore, the primacy of environmental value over all other fundamental freedoms is declared. In essence, it is essential that the decisions will be based on a transparent procedure.

4. – But despite this fundamental assertion on the Constitutional revision, it is emerged the need to investigate the topic of the environment from a civil law point of view. Effectively, the protection of the third party, the possibility of providing remedies to protect the environment and, at the same time, if these remedies protect the legal sphere of third-party rights as well as any compensation for damage that they have suffered. In essence, it is necessary to consider precisely the role that, in the context of environmental management, private law, with its tools can undertake and at the same time the concrete contribution it can provide on these issues.

In theory, if it were agreed to integrate the set of fundamental remedies suitable for countering the new forms of damage to the environment, it appears clear that the subtle relationships existing between private law and environmental law can, in reality, be framed as double-sided. In other words, assuming that private law is increasingly flexible over sensitive issues and those issues related to ecology, it seems necessary to include some civil law principles.

In practice, adopting this approach would involve a double observation in reference to two fundamental concepts: environmental solidarity, which can be derived from art. 2 of the Constitution and the concept of sustainable development [39].

To establish ideas for purposes of exploring this point, it is necessary to start from the contract's concept which is traditionally characterized by an economic setting and nature and as a consequence aims to regulate the (private) interests of the contracting parties. In reality, it would be necessary to disengage (if we are thinking about the environmental topic and the role of the contract in this context) from this approach in order to reach a vision of the contract in which environment and market can be "merged". In this regard, the relationship between the environment and the contract becomes significant as this allows us to go beyond the conception of the agreement pursuant to art. 1372 of the Italian civil code which is intended as an instrument producing effects exclusively between the contracting parties.

On this point [40], it appears important to concentrate on some Italian doctrine that assumes that is necessary to interpret the behaviour of the parties in the context of the contract, as well as the point that no contractual relationship can be qualified as inelastic because the repercussions of a contract could also exist for those who are not contractual parties [41]. In summary, no contractual relationship could be formalized as a rigid

[38] In this way G. BERTI, *Interpretazione Costituzionale*, Padova, 2001, 158.

[39] J.R. EHRENFELD, *Sustainability needs to be attained, not managed*, in *Sustainability: Science, Practice and Policy,* 2008, 1-3.

[40] Some of the leading scholars together with the President of the Corte costituzionale and other qualified magistrates also discussed these principles and the interpretation of law in a conference held at the Consiglio di Stato on April 20 2022, organized by the Università degli Studi Roma 3.

[41] In this way N. LIPARI, *Introduzione*, in *Benessere e regole dei rapporti civili*, Napoli, 2015, 471 ss. that *verbatim* notes "*il necessario contesto entro il quale è possibile leggere il modo d'essere del soggetto anche nella sua dinamica negoziale, nessun rappor-*

agreement, because this must necessarily be transcribed according to its effects not only on the contracting parties, but also on all those who are also indirectly involved by the effects of that contract.

Starting from this assumption, it is necessary to look from another point of view, in the sense that traditional institutions of a patrimonial nature, must be reread and reinterpreted. In fact, dwelling on the social function, it seems logical to clarify that this does not only affect the right of ownership [42], but could also emerge in mandatory relationships (pursuant to Article 1174 of the Italian civil code) when it arises with regard to the non-equity interest of the active subject.

To better understand this concern, it is important to start by analysing the German derivation concept of *Drittwirkung* [43]. According to which the constitutional principle can enter directly into the contract or more importantly the idea that the (economic) constitution entails legal obligations on private law interactions of private persons in their relationships *inter se* [44]. In reality, the Italian Constitutional Court has already indirectly legitimized the intervention of the judge also in the creation (or rather in the destruction) of the contract, so that it must be considered composed not only by the will of the parties, but also by those principles directly deriving from the legal system as a whole as a consequence the constitutional protections [45].

In practice adopting this approach I would like to comment as follows: the last constitutional revision allows possible margins of intervention to the judge in the face of a contractual clause that conflicts with the environment protection [46].

On this basis, it is not surprising that a contract stipulated between two private parties even if it does not contain "green clauses" certainly cannot violate constitutionally protected values such as health. Therefore, the analysis that needs to be done is to check if the contractual agreement is respectful and adherent to the

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to contrattuale è pensabile entro l'ottica riduttiva di una pattuizione anelastica, perché questa va necessariamente letta (e, in ipotesi, ridimensionata) in funzione delle sue ricadute non solo sui soggetti contraenti, ma anche su tutti coloro che dai riflessi di quel contratto vengono incisi o anche soltanto sfiorati".

[42] Broadly A. TRABUCCHI, *Istituzioni di diritto civile*, Padova, 2001, 447; F. BOCCHINI, E. QUADRI, *Diritto Privato*, Torino, 2011, 414, according to whom "*Pare innegabile che ne derivi una marcata funzionalizzazione del diritto di proprietà, nel senso di un suo riconoscimento, anche quanto a modi di atteggiarsi in concreto, come strumento di tutela dell'interesse particolare del titolare, ma da esercitare sempre compatibilmente con la realizzazione di finalità economico-sociali imposte dall'ordinamento, perché considerate espressione dell'interesse generale*".

[43] For a discussion on this concept *ex multis* T.O. GANTEN, *Die Drittwirkung der Grundfreiheiten*, 2000, Berlin, 23; E. ENGLE, *Third party effect of Fundamental right*, in *Hanse Law Review*, 2009, 165 ss.; in the Italian literature *ex multis* see N. LIPARI, *Il diritto civile tra passato e futuro*, in *Riv. trim. dir. proc. civ.*, 2021, 317 ss.; G. VETTORI, *Il diritto ad un rimedio effettivo tra passato e future nel diritto privato europeo*, in *questa rivista*, 2017, II.; P. FEMIA (ed.), *Drittwirkung: principi costituzionali e rapporti tra privati*, 2018, Napoli, *passim*.

[44] For an deeply comparative overview on the the experience in German, France, Netherland and Israel see G. ALPA, *Diritti, libertà fondamentali e disciplina del contratto: modelli a confronto*, in *Giust. civ.*, 2018, 5 ss. as well as P. STANZIONE, *Diritti esistenziali della persona, tutela delle minorità e Drittwirkung nell'esperienza europea*, in *Eur. dir. priv.*, 2002, p.p. 41 ss.; M. ZARRO, *L'evoluzione del dibattito sulla "Drittwirkung" tra Italia e Germania*, in *Rass. dir. civ.*, 2017, 997 ss. See also the in-depth analysis of the case of the Spanish Supreme Court, in G. CAPAREZZA FIGLIA, J. R. DE VERDA Y BEAMONTE, *Nullità del contratto preliminare per lesione della personalità umana. Un caso di applicazione diretta delle norme costituzionali nella giurisprudenza della corte suprema spagnola*, in *Rass. dir. civ.*, 2013, 1099 ss.

[45] See the comment also at the Corte Costituzionale decision n. 238/ 2013 in E. NAVARRETTA, *Costituzione e principi fondamentali: dialogo ideale con Angelo Falzea*, in *Riv. dir. civ.*, 2017, 982-998.

[46] As was noted by R. BIN, *L'applicazione diretta della Costituzione, le sentenze interpretative, l'interpretazione conforme a Costituzione della legge*, available on *http://www.robertobin.it/ArtICOLI/roma06Definitiva.pdf*, 14,15 ss. "*la Costituzione non è un "criterio esterno", ma entra a pieno titolo nel "materiale legislativo" su cui l'interprete deve lavorare con i tradizionali criteri dell'interpretazione letterale, storica, sistematica ecc. [...] allora risulta evidente che di "applicazione diretta" della Costituzione si può parlare in riferimento ad ogni decisione assunta sulla base di una "regola del caso" la cui formulazione abbia coinvolto anche considerazioni sul significato di una disposizione costituzionale*".

values of the system as a whole, since it is on the basis of this reflection that the relationship between sustainable development and contractual equilibrium develops. This must also be understood in the sense of non-patrimonial and contractual justice, where the latter is nothing more than an exaltation of the principles of solidarity and proportionality. In summary, the contractual agreement should be understood not only in those agreements with a patrimonial content but also in those sustainable patrimonial legal relationships and also for the effects on external contractual parties.

In theory, the analysis of the contract from an ecological point of view has led some scholars to ask themselves questions, precisely whether it is feasible to consider a new contractual *genus*: the "ecological contract" [47] that is, the one outside the imbalances of macroeconomic relevance [48]. Effectively this "ecological" analysis of the contract demands that the category of the contract, traditionally anchored to the role of a patrimonial agreement, must be understood as an open, flexible and functional model for the realization of interests also of a non-patrimonial nature. The ecological contract, therefore, acts as a driving force in the ecological management process and in the reorientation of consumption towards "greener" products [49].

Therefore, it is also necessary to see and consider as well as evaluate the legitimacy of the agreement, in particular it will be necessary to verify its legitimacy and merit according to the values that characterize the entire legal system. At the same time, it will also be necessary to assess that the contract itself does not compromise the environmental value and is, therefore, compliant from an "ecological" point of view.

On the basis of existing evidence, the acts of the private subject that collide with the general interest of environmental protection that as shown, has today a Constitutional protection, which will obviously not justify legal protection. Basically, we are facing a (concrete) control of contractual merit that takes into account all the acts that have been put in place [50]. In summation, the reason is to avoid an act originating from the private party (even if it is legitimate by reason n) that is illegitimate since it conflicts with the protection of an ecological interest. It seems to me to reflect that nowadays it is possible to speak of "weakening of private autonomy" whenever the subjective right arising from the contract is transformed into a legitimate interest since it touches an external or public interest, *rectius* the "environmental good".

Therefore, the concept of illegitimacy (*immeritevolezza*) is broad enough since it would not emerge only between the parties but also if the latter, in the exercise of their private autonomy, harm the interests of third parties (which are not party to the agreement). In fact, although third parties inevitably also placing themselves *ab externo* with respect to the internal agreement, they are in any case bearers of general interests and therefore susceptible to being harmed.

The foregoing has been an effort to illustrate that contractual freedom encounters the insurmountable limit of social utility, therefore those particular interests that we can call "harmful" from a social point of view

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[47] In this way M. PENNASILICO, *Contratto e uso responsabile delle risorse naturali*, in *Rass. dir. civ.*, 2014, 768; ID., *Sviluppo sostenibile e "contratto ecologico": un altro modo di soddisfare i bisogni*, in *Rass. dir. civ.*, 2016, 493 that suggests to create the so called "*quarto contratto*". *Contra* S. LANDINI, *Clausole di sostenibilità nei contratti tra privati. Problemi e riflessioni*, in *Contratto e ambiente*, in M. PENNASILICO (ed.) *L'analisi "ecologica" del diritto contrattuale*, 2016, 343 ss.; S. PAGLIANTINI, Sul cd. contratto ecologico, in M. PENNASILICO (ed.), *op. cit. supra*, 367 ss.

[48] In this way E. NAVARRETTA, *Luci e ombre nell'immagine del terzo contratto*, in G. GITTI, G. VILLA (eds.), *Il terzo contratto*, Bologna, 2008, 317.

[49] See on this point EU COM (2001) 68, «*Libro verde sulla politica integrata relativa ai prodotti*», 16 ss.

[50] G.B FERRI, *Meritevolezza dell'interesse e utilità sociale*, in *Riv. dir. comm*., 1971, 17. Lastly, E. MINERVINI, *La ''meritevolezza'' del contratto: Una lettura dell'art. 1322 comma 2 c.c.*, Torino, 2019, 13 ss.

will be undeserving of protection [51]. Critically, it is possible to talk of a brake of public order on negotiating autonomy. In fact, there is a scale of constitutionally protected values: this means that there are values which, despite having the same constitutional dignity, do not have the same specific weight. In summary: private economic initiative is a protected right but this right degrades with respect to that of the good-life and as well as the environmental protection [52]. What I am saying is that public order certainly does not want to de-legitimize private autonomy but the latter will always have to give way to the founding values of the legal system.

5. – From the above observations the discussion should be carried out by asking, in a preliminary way, about the possibility or not of giving priority to the positions of the contracting parties within the dynamics of the aforementioned "ecological contract" with respect to the environment. Therefore, the question to be answered is whether environmental protection can weaken in the presence of the interests of the contractual parties and their "Supreme Will" [53].

The observations regarding the position of the holders of common interests in environmental matters, start from the recognition of such subjects of a legitimate interest, understood as an advantageous position that is achieved based on the actions of the Public Administration. Therefore, legitimate interest also receives recognition in the collective context in which the subject operates and carries out from his or her personality. Precisely by virtue of this consecration certain juridical situations arose no longer registered to the individual subject but, vice versa, to the entire community connected by the common interest to the good of life. In essence, recognition was given to those interests defined as "widespread" that is a collective interest without owner but common to all citizens belonging to a disorganized social formation (otherwise we would speak of collective or category rights) and not identified independently.

Starting from these observations, it is important to note that it is precisely the environmental sector that experienced the first forms of development of these collective interests, allowing entities the *legitimatio ad causam* in addition to the possibility of intervening in judgments for environmental damage [54].

It follows that the theoretical foundation of the legitimacy of the holders of widespread interests, is in the interests referable to a more or less broad community of subjects (consumers, users, etc.). Therefore, the fact that the care of the general public interest (e.g. the environment) is left to the Public Administration does not mean that it cannot be referred indiscriminately to entities and that the latter represent the actual users of the common good [55].

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[51] In a similar way see A. M. BENEDETTI, *L'autonomia contrattuale come valore da proteggere. Costituzione, solidarietà, libertà*, in *Nuov. giur. civ. comm*., 2019, 827 ss.

[52] Notably still assumes that "the environment must be imposed as a constraint on market play" G. AMATO, *Il mercato nella Costituzione*, in *Quad. cost*., 1992, 18.

[53] I talk about the "Supreme Will" of the contractual parties in G. PASSARELLI, *Contract Law in Contemporary International Commerce. Considerations on the complex relationship between legal process and market process in the new era of globalisation*, Baden-Baden, 2019, 39 ss.

[54] For a discussion on this topic M. PENNASILICO, *Sviluppo sostenibile, legalità costituzionale e analisi "ecologica" del contratto*, in *Persona e Mercati – Saggi,* 2015, 39 according to which "*Il legislatore sembra aver, finalmente, preso atto che la cura dell'interesse "pubblico" o "collettivo" alla conservazione dell'ambiente richiede non soltanto tecniche imperative di "comando e controllo", ma anche il concorso dell'azione dello Stato e dei cittadini, singoli o associati*".

[55] On this point see the decision of Consiglio di Stato nr. 6 February 6, 2020 that talks about "*legittimazione ad agire di carattere generale*" and lastly Consiglio di Stato nr. 530 January, 26 2022. However, it must be point out that art. 18 co. 5 of Law 349/1986

To better understand this issue, it is necessary first to clarify the subjective legal positions that are identified in the principal three subjects: private (entrepreneur), public administration and citizens. Add to this the case of two private entities who agree to build a non-public work, the realization of which could harm the environmental property whose owner is the State. It is clear that even in this last case the subjects involved (directly or indirectly) could always be three, from the point of view of non-economic interests, but of the subjective legal situations involved, e.g. construction of a public work potentially impacting the environment [56].

From this trilateral scheme of different subjective legal situations (subjective right or legitimate interest) [57] the point where it is necessary to focus on is whether the Public Administration and the private entrepreneur can agree on a contract whose subject is the construction of work that is found to be potentially in conflict with environmental protection. In this scenario, it is clear that the environmental good finds its sources in the interests of citizens, bearers of diffuse individual interests. At this point it is possible to examine and understand the scope of the various subjective legal situations influenced by the ecological contract as well as the profile concerning the civil protection that the injured party would be able to activate.

Notably, it is first of all necessary to be aware that the sphere of "non-weakening" rights is created by jurisprudence and has the purpose of providing strong protection to all those substantial situations of interest that should be unrelated to any limitations by the Public Administration. Broadly, the degradation or weakening of law occurs when the individual right, in contrast with a rule, changes into a legitimate interest. Therefore, jurisprudence states that there are cases of "non-degradable" rights [58], therefore not subject to the limitations of the Public Administration [59].

It is not surprising therefore that Italian Corte di Cassazione [60], qualifying health as mental and biological well-being, ruled that the protection granted to the healthy environment is the same as that which assists fundamental rights and also applies to the power-duty of the Public Administration to provide for health as a general interest.

Since the seventies, we have seen the need to grant an adequate form of protection in favour of interests referable to the generality of citizens, who as such, exceed the limits of a strictly individual relationship. This has led doctrine and jurisprudence to seek, even in civil matters, solutions that would allow individuals to find positions that can be linked to the widespread interest and, as such, can be protected in court. In this direction, the Corte di Cassazione has highlighted "indivisible" collective goods with respect to which a juridical situation of advantage for the individual, while "divisible" collective goods susceptible, vice versa, to a fractional enjoyment by individual subjects. In this last hypothesis, a real position of individual right has

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created the Ministry of the Environment, allowing the environmental associations identified on the basis of art. 13 to intervene in judgments for environmental damage and appeal for the annulment of illegitimate acts.

[56] In this contest it is also important to point out that art. 4 of L. 180/2011 recognizes the legitimacy of the most representative associations of entrepreneurs to challenge administrative acts damaging to widespread interests.

[57] It seems fair to remember that these can refer to both natural persons and organizations.

[58] Corte Costituzionale decision n. 140/2007.

[59] According to E. CASETTA, *Manuale di diritto amministrativo*, Milano, 2009, 322 «*opinare nel senso che un diritto rimane diritto anche a fronte di un potere attribuito da una legge significa ritenere che esso sia stato giudicato «vincente» rispetto a qualsiasi altro interesse da una fonte superiore alla legge stessa e, dunque, dalla Costituzione. Seguendo tale ragionamento, tuttavia, in presenza di un potere conferito dalla legge, il giudice non può accordare la preferenza al diritto condannando l'amministrazione e sostanzialmente disapplicando la legge, ma semmai, ove ritenga che questa abbia attribuito all'amministrazione un potere che non le spettava, deve sollevare la questione di legittimità costituzionale della legge per contrasto con la disposizione costituzionale che configura come intangibile il diritto*».

[60] In this way Italian Cass. sez. un., decision n. 1463/1979.

been identified, incorporated in the widespread interest but separable from the latter, in the event of injury, in order to be activated in court for compensation purposes.

The feasibility of the protection of the individual's right before the civil court has been affirmed with particular force in the matter of a healthy environment [61], which would be configured as a right when the alteration of the environment is considered as such to have a negative and direct impact on the health of the individual. Practically, the most effective tool for ensuring the individual protection of widespread environmental interests is art. 844 of the Italian civil code which, as seen *supra* [62], guarantees protection against injections harmful to health, not only in favour of the owners of the fund where there are injections, but also of any other person, potentially exposed to the danger of damage to their own health.

The next step was the recognition, not only of the admissibility of the competition between the injunction pursuant to art. 844 of the Italian civil code and that of no contractual liability for the damage to the right to health, but also to the practicability of the remedy pursuant to above mentioned art. 844 outside the cases regulated therein, whenever the infringement of the right to health is highlighted. This ensues from the fact that over the years the Italian legislator has considered introducing a special regulation on environmental damage with Law 349/1986, which takes into account the profound interpretative evolution undergone by the very notion of environment. To summarize, the environmental intangible asset is finally considered by the legal system according to a broad vision, therefore, including all the countless profiles of interest and the different facets that it is able to offer to the community. Therefore, an acquired awareness emerges that its nature as a transversal value requires extensive protection.

In other words, it was intended to characterize on the one hand, "pure" environmental damage, resulting in the compromise of the environmental balance and referred to the knowledge of the civil court; on the other hand, the administrative damage from the public authorities, consisting of the expense that the administration must incur to repair the environmental damage caused by the wilful or negligent behaviour of one of its officials, attributed, however, to the competence of the *Corte dei Conti*.

Lastly, the *Testo Unico in materia ambientale* (d.lgs. n. 152/2006) significantly affected the issue of environmental offense, by strengthening the legitimacy of environmental protection associations to autonomously propose a compensation action. It follows, as regards the widespread interest, that the latter is protectable provided that it touches inviolable and fundamental rights of the person.

In the light of these considerations it follows that the protective "shield" would be recognized in particular hypotheses not directly, but by means of a connection with an undifferentiated generality of subjects. In particular, in compliance with the party autonomy, the ecological contract must also necessarily take into account the individual citizen (understood as a third party in the subjective trilateral position) who, from the economic activity arising from the contract, could see the meta-individual interest (*extra partes*) harmed but who inevitably also touches one's own individual sphere.

On this premise, if the Public Administration issues a provision authorizing the construction of a landfill, this could be contested and therefore the *vicinitas*, as a prerequisite for contesting, is given by the link that binds the applicant with the physical place in which he lives. In essence, the environmental good justifies an expansion of the legitimacy to act in favour of subjects with an environmental interest. Therefore, the environment could appear as a limit to public and private economic initiative and the lawfulness of this initiative is measured by the intensity of protection granted to the environment.

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[61] See Cass., September 25 1996, n. 5650, in *Foro it*., 1996, I, 3062, with comment of V. COLONNA; Cass., sez. III, February 3 1998, n. 1087, in *Urb. e app*., 1998, 721, with comment of C. VIVANI.

[62] See *supra* § 1.

6. – It is reasonable to conclude, on the basis of the circumstance that the ecological contract has not yet been regulated by law nor can we already speak of a separate regulatory contract category. It is believed that the relationship between the environment and the contract would lead the latter to be no longer understood in its traditional form but as a "resource" *in primis* of the contractual parties and then of the community.

However even though this current argument enjoys support in legal academia, there are a few additional proposals on the legal remedies in the case of violation of environmental protection rules [63]. Certainly, the classical legal remedies as (restitutionary and compensation damages) can be applied. One thing these remedies have in common is their reaction to a violation of the rules by others. In particular, they can be felt in the phase following the verification of the lesion and aim, as it is well known, to restore the harmful effects deriving from the violations created.

In addition to these classical remedies there are other specific solutions for the environmental issues as, for example, the Directive 2004/35/CE that maintains that on the basis of the 'polluter-pays'principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or remedial measures [64].

In summary, the precautionary, corrective, sustainable development as well as the "polluter-pays" principles are all essential elements of environmental protection [65] and are merged into the Italian regulatory framework that we find within the *Codice dell'Ambiente* [66].

In this respect, I want to stress, however, that between the above-mentioned principles that are different from each other, in the environmental context that of "precaution" plays a central role when compared to the others because its *ratio* is to avoid damage [67]. Therefore, the protection of the environment already applies where there is a "risk" that the environmental good may be compromised. As a consequence, the authorities may adopt measures aimed at preventing any risks to the environment [68] with advance protection [69] but only if there is a scientific evidence that the environment is at risk [70].

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[63] See on this point also the conclusion of G. PULEIO, *Rimedi civilistici e cambiamento climatico antropogenico*, in *Persona e Mercato*, 2021, 489 ss.

[64] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004.

[65] U. MATTEI, *Tutela inibitoria e tutela risarcitoria, Contributo alla teoria dei diritti sui beni,* Milano, 1987, 91 ss.; S. RODOTÀ, *Il problema della responsabilità civile*, Milano, 1964, 52 e ss.

[66] Art. 3-*ter*, d.lgs. n. 152/2006 hold «*la tutela dell'ambiente e degli ecosistemi naturali e del patrimonio culturale deve essere garantita da tutti gli enti pubblici e privati e dalle persone fisiche e giuridiche pubbliche o private, mediante una adeguata azione che sia informata ai principi della precauzione, dell'azione preventiva, della correzione, in via prioritaria alla fonte, dei danni causati all'ambiente, nonché al principio "chi inquina paga" che, ai sensi dell'articolo 174, comma 2, del Trattato delle unioni europee, regolano la politica della comunità in materia ambientale*».

[67] Cons. Stato, sez. V, decision December 27 2013, n. 6250, in *Urb. e app.*, 2014, 551 e ss., with comment of G. MONACO, *Dal Consiglio di Stato quasi un "decalogo" sull'applicazione del principio di precauzione.*

[68] In this way also Consiglio di Stato, May 18 2015, n. 2495, in *Giur. it*., 2015, 11, 2474, with a comment of C. VIVIANI, *Principio di precauzione e conoscenza scientifica*, according to which "[…] *le Autorità possono fare ricorso a provvedimenti che mirino a prevenire i rischi eventuali per l'ambiente ponendo una «tutela anticipata rispetto alla fase dell'applicazione delle migliori tecniche proprie del principio di prevenzione*".

[69] See on this point S. GRASSI, *Problemi di diritto costituzionale dell'ambiente,* Milano, 2012, 61; L CHIEFFI, *Biotecnologie e tutela del valore ambientale*, Torino, 2003, 20.

[70] According to art. 304 of Codice dell'Ambiente The Environment Minister «*in qualsiasi momento, ha facoltà di: a) chiedere all'operatore di fornire informazioni su qualsiasi minaccia imminente di danno ambientale o su casi sospetti di tale minaccia imminente; b) ordinare all'operatore di adottare le specifiche misure di prevenzione considerate necessarie, precisando le metodologie da seguire; c) adottare egli stesso le misure di prevenzione necessarie* […] *ha facoltà di adottare egli stesso le misure necessarie per la prevenzione del danno, approvando la nota delle spese, con diritto di rivalsa esercitabile verso chi abbia causato o concorso a causare le spese stesse, se venga individuato entro il termine di cinque anni dall'effettuato pagamento*».

In essence, from the above observation a few conclusions can be drawn. The first is that the most appropriate protection regime for the environmental problem (especially if we consider the conservation of the environment for future generations) is prevention assuring the anticipation of damages. In this way there would be a reduction in the other remedies which are often not exhaustive enough to protect environmentally. In fact, protection after environmental damage not seem to me to be the best solution.

The second conclusion to be drawn, considering the amendment art. 41 of the Italian Constitution, the judge faced with a contractual clause that contrasts with the protection of the environmental balancing the interest of all parties involved, has a margin of intervention in the contract and as a consequence could declare that contract or clause is null or void (art. 1418 cod. civ. and 1421 cod. civ.).

The last conclusion to be drawn is that nowadays it could be an important pathway for innovative measures not only for special and obligatory compensations in case of damages but, above all, to create incentives (e.g. tax advantages or exception from lawyer's fee [71]) for contractual parties when they adopt clauses that ensure sustainability or environmental protection [72]. Effectively, attention to the details of contracting should coincide with capacity building, integrated environmental impact measures as well as benefits for the contractual parties.

More important, in the view of environmental protection, ecological contracts will have to be integrated into a broader system of resource planning, regulatory controls, incentives and market mechanism as well as not only an economic tool but also as management of natural resources in the interest of future generations [73].

[71] No doubt, lawyers and notaries play an essential role, being capable to reconcile the international, public and private laws in the performance of the contract, by way of drafting, interpretation thereof and comparison of various systems of laws and jurisdictions.

[72] In a similar way see L. JOHNSTON, E. DANNENMAIER, *Sustainable Use of Wildlife: The Role of Private Contracts as a Conservation Tool*, in *Int'l wildlife l. & pol'y*, 1998, 272 that suggest: "Contracts could require group ranches to develop a wildlife management plan (with the support of the Wildlife Conservancy) to ensure the sustainability of the wildlife population and to provide an annual flora and fauna species inventory that will serve as baseline data for conservation planning as well as information that can be provided to potential tourists".

[73] In a similar way A. NERVI, *Beni comuni, ambiente e funzione del contratto*, in M. PENNASILICO (ed.), *Contratto e ambiente,* cit., 51 that notes "*esiste anche un'altra dimensione dell'istituto contrattuale, la quale ravvisa nel negozio una valenza precipuamente organizzatoria: il contratto costituisce il mezzo attraverso il quale due o più soggetti coordinano tra loro lo svolgimento in comune di una determinata attività giuridica, i cui effetti trascendono la loro dimensione individuale*".