ALICE CASCONE

ABSTRACT

Environmental Migration – Climate change – Natural disaster
Fundamental Rights – Residence permit – Public power
Administrative procedure – Civil Judge

The article explores the residence permit recognized by art. 20 bis of the Legislative-Decree n. 286/1998, specifically introduced for individual requests of protection by environmental migrants. This rule, entered into force in 2018 that has already been amended twice, presents several critical issues. First of all, it does not allow certain categories of environmental migrants to be protected in our legal system; furthermore, this residence permit determines the precariousness of the foreigner's legal position where, on the other hand, it is issued. Moreover, this residence permit seems to be at the crossroads between regulations that respond to different needs, a circumstance that concretely also determines a complexity and some contradictions that will be highlighted.

NICOLETTA FERRUCCI

ABSTRACT

Plant Monumentality – Urban Forest – Environment
Landscape – Culture

This work envisages an excursus on the intervention made by the Italian legislator on the role of plant monumentality within the regulatory framework of the Urban Forest. In particular the Author highlights the existence of a conservative discipline reserved to the traces of plant monumentality within the scope of the urban green planning and management.

This work also points out the close connection between nature, landscape and culture emerging from the legal provisions relating both to Urban Forestry and to plant monumentality.

MARIA CLARA MAFFEI

ABSTRACT

Protected species – derogations – habitat directive – international law
animal welfare – zoos directive

More and more frequently the decrees and the ordinances of the President of the Autonomous Province of Trento (PAT) concerning the brown bears (Ursus arctos) in Trentino are challenged by animal welfare organizations before the Regional Court of Administrative Justice (TRGA) of Trento and the Council of State. The present paper analyzes the recent events of some brown bears in Trentino from the perspective of international and EU law, in particular, as regards possible derogations from protection measures concerning protected species. The jurisprudence of the TRGA of Trento and the Council of State and the outcome of some of these events provide the starting point for some reflections concerning the welfare of captive animals and the regime of zoos or similar structures as ex situ conservation measures.

FRANCESCO MUNARI

ABSTRACT

Environmental law – role of science
inadequacy of traditional legal reasoning to discipline environmental issues

This paper poses the question of the general inadequacy of international environmental law to achieve its goals and posits that one major cause for such an inadequacy and lack of effectiveness lies in the fact that science and particularly hard sciences have traditionally been neglected in crafting environmental law rules. Environmental law has been using typical legal reasonings implying knowledge by the jurist of the issues to be disciplined, whereas in the environmental arena it is fundamental first to know, then to measure, and only ultimately to rule. The paper lists some examples on how this phenomenon has conditioned the evolution of environmental law, including some mistakes that have been made and are still made by policymakers and jurists in shaping environmental norms. It therefore advocates a complete change of perspectives and paradigms for a more efficient rule-making in our sector.

ANDREA PISANI TEDESCO

ABSTRACT

Environmental protection – european Green Deal – greenwashing
private nuisance – civil liability – potential damages – punitive damages
consumer law – competition law – class actions

In the framework of a renewed emphasis on environmental protection (see, for instance, the revised Articles 9 and 41 of the Italian Constitution) and a "just" transition towards a climate-neutral economy, this paper aims at addressing the – potentially groundbreaking – role played by certain "traditional" instruments of private law. The rationale is the following: the most successful pursuit of environmental protection requires the joint efforts of public and private legal tools, since, often, the interest of a private player can prove to be more effective than a keen prosecutor. Firstly, the potentially broader scope of Article 844 of the italian Civil Code, relating to private nuisance, is analysed, together with the new class actions introduced in the italian Code of Civil Procedure. Then, attention is brought to certain consumer and competition protection instruments, with specific regard to the greenwashing phenomenon. Lastly, the issue of environmental liability and the limits associated with a purely compensatory approach are addressed.

GIUSEPPE ANDREA PRIMERANO

ABSTRACT

Soil – environmental matrix – regeneration – sustainable development
European Union – strategic approach – Italian Constitution
public administration – evolutionary perspectives

The article explores the issues of land consumption and regeneration, deeply connected in a phase of ecological transition sensitive to social inclusion. The study moves from the European and constitutional perspective in order to clarify the centrality of soil, a limited resource producing ecosystem services, in the context of a new rationality of territorial and urban planning choices. Specific attention is paid to the application of the strategic method in environmental matters and territorial governance, as well as to the need to ensure public direction in urban regeneration processes. The analysis of regeneration as an alternative to land consumption does not neglect the importance of ensuring adequate incentives and investigates the characteristics of a phenomenon suitable for

intercepting the various declinations of sustainability, allowing a reflection on its nature as a tool aimed at reducing multiple situations of marginalisation and degradation.

ALESSANDRA QUARTA

ABSTRACT

Cultural Heritage, European Union – European Cultural Policy
European Heritage Label

Cultural heritage is a topic with many dimensions, often complementary to each other. Even within the European Union, the topic is developed from different perspectives, partly because the European Union's involvement in the field of culture has developed gradually over the years and with different actions.

After briefly outlining some of the different European initiatives, this paper aims to provide an analysis of one of the measures adopted by the European Union: The European Heritage Label. This is a rather recent initiative that shows how the member States are fully aware of the potential but also of the limitations there are in managing heritage at the European level; for this specific reason, in the Decision by which the European Heritage Label was adopted, there is an explicit reference to the 1972 UNESCO World Heritage Convention, a crucial tool in this field.

Starting from a more general approach inherent to the label, the selected sites in Italy will then be analysed specifically. Through the study of these heritages, it is possible to have a tangible and practical approach to what is considered cultural heritage within the European Union, which therefore deserves to be protected and disseminated.

CATERINA COLAPRICO

ABSTRACT

Base transceiver station (BTS) – Municipality's powers in urban planning law
Allocation of BTS – Electromagnetic pollution

This essay revolves around the critical examination of the recent judgment issued by the Italian Council of State, regarding the allocation of a Vodafone's base transceiver station (BTS) in a little town in Sardinia.

Although, this apparently simple question can hide several juridic problems, connected both to private and constitutional interests.

On one hand, the thriving process of construction of those antennas in the latest years helped for sure the access for everyone to technology in all Europe, generating a lot of economic opportunities and contributing to the development of the right to communicate. All these positive effects arise from the widespread availability of BTS, which is important to guarantee a good connection all over Europe and Italy: this is the 'capillary action principle'.

On the other hand, those base transceiver stations cause electromagnetic pollution, which can affect environment and people's health. That is the reason why BTS's construction has to be regulated by national law (in particular, art. 4 of the Framework Law n. 36 of 2001) and balanced by judges, in order to protect these two essential rights. The Italian law grantees high level of protection against electromagnetic pollution with respect to some peculiar places called 'sensitive sites', taking a stand for the environment and citizen's care. Additionally, those certain sites must be included in the Municipal Regulation, established by art. 8, sixth clause, Framework Law n. 36 of 2001 (as it was modified in 2020), so that the single territorial Entity can consciously decide if a BTS should be built somewhere else, also with the cooperation of the telephone line manager.

This complex scenario, in a picture of different and conflicted rights, private and constitutional, generated two opposite points of view.

The judgment of Regional Administrative Tribunal of Sardinia in 2015 was clearly based on the purpose of the judges to safeguard first of all the human health. Through the prohibition to build the Vodafone's BTS near sites such as a rest home and a kindergarten, T.A.R. Sardinia chose the protection of the customer of those places, too close to the source of electromagnetic pollution over the capillary action principle, in the name of the precautionary principle, basing the judgment on a substantial need of security.

In 2022 the Council of State reached diametrically opposite results, with the judgment n. 5283, allowing Vodafone to build its BTS near the rest home and the kindergarten. The motivation was based on the fact that those sites were not formally included in the Municipal Regulation, and it was not forbidden to build nearby.

I believe that this conflicted juridical episode could represent a warning for the Italian lawmaker to improve the legislation in this peculiar sector, also facilitating the dialogue between the opposite interests that arise from the allocation of a BTS, trying to upgrade and develop towards the safeguard of environmental issues.

FABIO SERGIO DURANTI

ABSTRACT

Integrated Environmental Authorization – administrative procedure technical consultancy

This paper, following the judgment of the Catania Regional Administrative Court no. 2270/2022, aims to reconstruct the scope of the administrative judge's reviewability in relation to integrated environmental authorisation measures, with a focus on the results of the technical consultancy carried out in the judicial phase.

To this end, it first analyses the discipline and purposes of the authorisation procedure, also in its review phase, to understand how the elements of technical complexity permeate the matter. It then highlights the necessity and appropriateness of an in-depth preliminary investigation within the procedure, which must be taken into account while motivating such measures.

Then, analysing the discipline of the controversial institute of technical consultancy, an attempt is made to identify the scope of its application and, considering the reticent behaviour of administrative judges in this regard, to understand how it can be applied to environmental disputes for the full protection of the interests at stake, also in relation to the principle of equality of the parties.

Lastly, the paper focuses on the specific issue of the results of the technical consultancy and their usability in the motivation of the judgment, an indispensable element for the purposes of justice that can and must make full use of the results of the technical consultancy if correctly carried out.

CHIARA MALINVERNO

ABSTRACT

Administrative discretion – Renewable energy – Environmental protection Landscape protection – Principle of proportionality – Principle of integration

With the judgment no. 8167 of 2022, the Council of State identified the principles that should guide the Administration in balancing the protection of the landscape and the interest in increasing renewable energy production: the principle of proportionality and the principle of integration.

The essay aims to analyse the concrete application of these principles to the

activities of Administration, especially in order to maximise the protection of different interests and, specifically, the conservation of landscape and environment.

In this analysis, particular attention is given to the impact of the Constitutional reform of Articles 9 and 41 on the definition of "environment" and "landscape", also in the light of promoting sustainable development.

STEFANIA SQUILLACE

ABSTRACT

Forests traversed by fire – Hunting activities – Environment
Ecosystem – Art. 117, paragraph 2, lett. s) Constitution – Transversal matters
Limit of national protection

According to established case law of the Italian Constitutional Court, the subjects environment and ecosystem, attributed to the exclusive competence of the State by Article 117, paragraph 2, lett. s) Cost. are 'transversal' subjects, which means that it is reserved to the national legislature the uniform protection regulation and the Regions, in the exercise of legislative power, cannot derogate or lower that minimum limit of protection.

In the commentary note, an attempt was therefore made to examine, in the regulatory context before and after the reform of Title V of the Constitution, the evolution of this more than 20-year jurisprudential orientation, the principles of which were confirmed in Judgment No. 144 of June 13, 2022, while also highlighting its critical aspects.

In the present case, the Italian Constitutional Court declared the constitutional illegitimacy of the first part of paragraph 5, of Art. 46, Liguria Regional Law No. 35 of 2008, which reduces from ten years to three years the ban on hunting in forests affected by fire, and limits the application of the ban to areas larger than one hectare; these provisions were found to be in conflict with Art. 10 of Framework Law No. 353 of 2000 (on forest fires) and the national protection limit established to ensure the reconstitution of the forest and fauna.

On the other hand, the Court declared as unfounded the question of the legitimacy of the second part of paragraph 5, of Art. 46, of the reg. law, which places the obligation to tabulate forests, since it is not a condition limiting the ban on hunting, but a fulfillment placed on the functional public administration to identify areas covered by fire, like the one already provided for by Framework Law 353 of 2000.

GIOVANNI ZACCARONI

ABSTRACT

State liability – Effectiveness of EU law – Right to claim compensation
Rule intended to confer rights on individuals – Francovich

The principle of State liability is an important step forward in the case law of the Court of Justice of the European Union (CJEU). The case law of the CJEU, although with a somehow minimalistic approach, focused considerably on the manifest and grave violation as precondition of State liability as well as on the issue of the causal link. However, the existing case law never answered the question of the possibility, for EU legislation on air quality, to entitle individuals, in the event of a sufficiently serious breach by an EU Member State, to claim compensation from the Member State concerned for damage to their health. In Ministre de la Transition écologique, for the first time the CJEU answers negatively to this question since the provisions of Directive 2008/50/EC are not able to confer rights on individuals. The judgment of the CJEU poses in turn several other questions on the nature of the obligations stemming from EU law and of the legal instruments that more often translates these obligations in the EU legal order. This case comment attempts to answer to these questions.