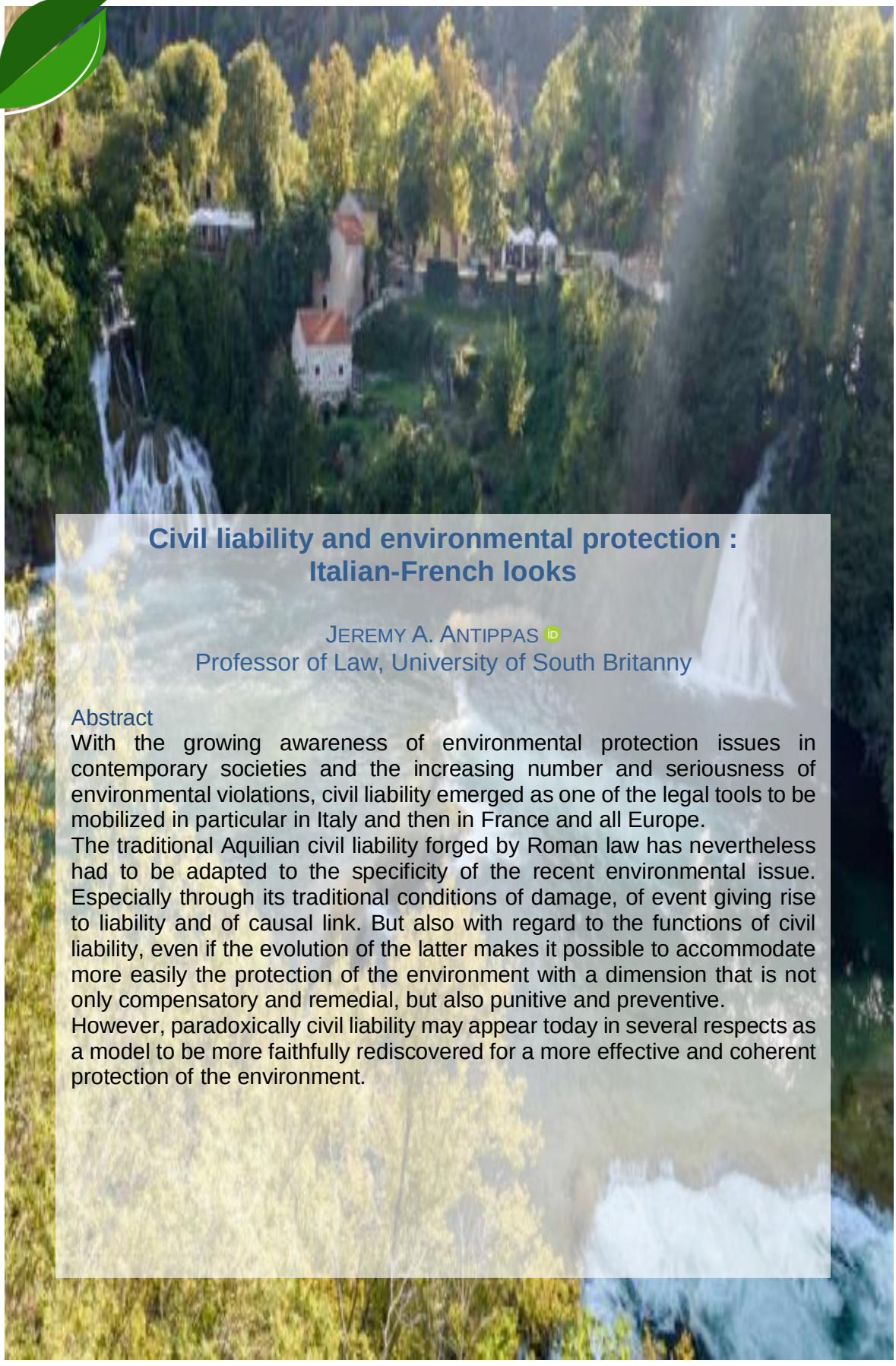
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Civil liability and environmental protection : Italian-French looks

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Abstract

With the growing awareness of environmental protection issues in contemporary societies and the increasing number and seriousness of environmental violations, civil liability emerged as one of the legal tools to be mobilized in particular in Italy and then in France and all Europe.

The traditional Aquilian civil liability forged by Roman law has nevertheless had to be adapted to the specificity of the recent environmental issue. Especially through its traditional conditions of damage, of event giving rise to liability and of causal link. But also with regard to the functions of civil liability, even if the evolution of the latter makes it possible to accommodate more easily the protection of the environment with a dimension that is not only compensatory and remedial, but also punitive and preventive.

However, paradoxically civil liability may appear today in several respects as a model to be more faithfully rediscovered for a more effective and coherent protection of the environment.

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Keywords: adaptation; associations; civil liability; conditions; comparison; environment; French law; functions; Italian law; ministery of Environment; person liable; plaintiff; pollution; protection.

Summary: 1. Introduction. – 2. Part I: The adaptation of civil liability made for environmental protection. – 3. Part II: The adaptation of environmental liability to make on the model of civil liability.

1. Introduction.[1]

'*La maison brûle et nous regardons ailleurs*'[2] ('The house is burning and we are looking elsewhere') declared the President of the French Republic Jacques Chirac twenty years ago. Pollution and global warming are indeed destroying our planet and its inhabitants. However, for several decades the occupants of the house who will have to leave it sooner or later to the next generations have been turning to various legal instruments. Different mechanisms appear indeed likely to ensure a protection of the environment on a public scale:– taxation, police, penalization, or recourses in annulment of certain administrative acts in front of pollution.

For example, in France in the recent case of Grande Synthe of July 1, 2021[3] the French Council of State annulled the refusal of the regulatory authority to take the additional measures necessary to curb the curve of greenhouse gas emissions produced on the national territory as being incompatible with the trajectory of reduction of these emissions set by decree (of April 21, 2020). The French Council of State also ordered the enactment of such measures within a certain period of time (nine months), in accordance with two international texts in particular: the United Nations Framework Convention on Climate Change (UNFCCC) of May 9, 1992 (which sets as its objective, in Article 1, to 'stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system') ; and the famous Paris Agreement, of December 12, 2015 on the occasion of the 21st Conference of the Parties of the UNFCCC (which aims in particular in its Article 2 to contain 'the increase in global average temperature well below 2° C above pre-industrial levels and continuing the action taken to limit the increase in temperature to 1.5° C above pre-industrial levels').

Civil liability, especially extra-contractual liability, which did not necessarily appear to be the most obvious in this area, is also from a legal standpoint one of the possible ways of protecting the environment.

In this respect, Italy preceded France: the Court of Auditors in several decisions of the early 1970ies handed down in connection with abuses in the Abruzzo National Park held public officials liable, initially administratively, toward the

[1] This text is the translation of an oral communication performed in Italian by its author for the Benincasa University of Naples and its Center of research ReCEPL, on April 20th, 2022, at the invitation of Professor Ilaria CAGGIANO, whom the undersigned thanks very much.
[2] Le Monde, 2002/09/02.
[3] CE, 2021/07/01, n 427301.

public authority.[4] In the case of the Scarlino Red Mud[5] it also held responsible the civil servants who had authorized the dumping of toxic waste.[6]

Then, the environmental protection by the judges was done through the use of the right of ownership (art. 844 of the Italian Civil Code) and the classic civil liability (art. 2043 and seq. of the Italian Civil Code).

For example, the Italian Court of cassation has held strict civil liability, i.e. without the need to proove a fault or a fraud, for damages resulting from dangerous activities under Article 2050 of the Civil Code regarding the production, transportation, management and disposal of pollutant products.[7]

Similarly, article 2051 of the Civil Code has sometimes been used to hold the custodial strict liability, for instance by the Tribunal of Venice referring at '*la previsione dell'art. 2051 c. c., inusuale per le ipotesi di danno ambientale, ma non del tutto esclusa*'[8] ('the provision of art. 2051 c. c., unusual for environmental damage hypotheses, but not entirely excluded').

There are sentences in the opposite sense, like the one of the Tribunal of Milan ruling that : '*è da escludere, in base al principio di specialità, che con riferimento al danno ambientale possa trovare applicazione la disciplina di cui all'art. 2043 c.c. e, tantomeno, la disciplina della responsabilità da attività pericolose ex. art. 2050 c.c. e da custodia di cui all'art. 2051 c.c.*'[9] ('it is to be excluded, based on the principle of specialty, that with reference to environmental damage can be applied the discipline of art. 2043 civil code and, even less, the discipline of liability for dangerous activities under art. 2050 c.c. and from custody under art. 2051c.c.').

However, as regards the right of *ownership* as a means of combating environmental damage, this appears relevant only insofar there is an harm to an*owner.*

Besides, this requires exceeding a certain threshold of tolerability, which is variable in particular according to the different persons and the local situations. The Italian Council of State in fact ruled that '*la valutazione diretta a stabilire se i rumori restino compresi o meno nei limiti della norma, deve essere riferita, da un lato alla sensibilità dell'uomo medio e, dall'altro, alla situazione locale*'[10] ('the evaluation intended to establish whether or not the noise is within the limits of the norm must be carried out according to the sensitivity of the average person, on the one hand, and the local situation, on the other').

The Italian Constitutional Court for its part quite early on marginalized the right of ownership as an instrument of environmental liability, judging that art. 844 of the Civil Code is not ' *uno strumento adeguato a risolvere i gravi problemi creati dall'inquinamento (...) la legge è, infatti, destinata a risolvere il conflitto tra proprietari di fondi vicini* '[11] ('a suitable instrument for solving the serious problems

[4] Corte dei Conti, 1973/05/15, n 39; 1975/12/20, n 108; 1979/10/08, n 61; 1980/02/15, n 868.
[5] Corte dei Conti, 1979/10/08, n 61.
[6] This solution is perhaps a little more difficult to imagine in France where, in order to engage the personal liability of public agents, it is necessary according to the *Pelletier* jurisprudence (1873/07/30, n 00035) to prove a personal fault, understood as being of great seriousness or wilfulness, which is not always verifiable in the case of a discharge of waste in the professional context.
[7] Cass. civ. Sec. I, 1995/09/01, n 9211.
[8] Trib. Ven., Sec. III, 2010/04/02.
[9] Trib. Mil., Sec. II, 2010/09/16.
[10] Cons. Stato, Sez. IV, n 2109/2018.
[11] Corte Cost., 1974/07/23, n 247.

created by pollution (...) the rule is, in fact, intended to resolve the conflict between owners of neighboring land...') and therefore that '[il] *contenuto del diritto di proprietà non* [poteva] *essere utilizzato per giudicare della liceità di immissioni che rechino pregiudizio anche alla salute umana o all'integrità dell'ambiente naturale, alla cui tutela è rivolto in via immediata tutto un altro ordine di norme di natura repressiva e preventiva*'[12] ('[the] content of the right of ownership [could] not be used to judge the lawfulness of emissions that also harm human health or the integrity of the natural environment, to the protection of which a completely different order of norms of a repressive and preventive nature is immediately dedicated').

Some authors advocated a right to the environment under Article 2 of the Constitution, ruling that ' *La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo (...)*' ('The Republic recognizes and guarantees the inviolable rights of Man (...)'), independently of the right to property and even of the right to health.[13]

Beyond the personal rights, traditional civil liability was also used to protect environment. The Italian Court of Cassation for example was able to conclude to the application not only of civil liability but of strict liability for damage resulting from dangerous activities, governed by art. 2050 of the Civil Code.[14] Similarly, custodian liabilty of article 2051 of the same Code was sometimes used. [15]

The Italian law n 349 (1986/07/18), which created the Ministry of Environment, also defines environmental damage by referring to the fact of altering, deteriorating or destroying the environment in whole or in part; it entrusts the ordinary judge with the competence to deal with it. This law makes environmental liability a particular civil liability, as the Constitutional Court confirmed in relation to the 1986 law: '*La responsabilità che si contrae è correttamente inserita nell'ambito e nello schema della tutela aquiliana*'[16] ('The liability that is contracted correctly inserted into the field and scheme of aquilian liability').

However, although it defined environmental damage for the first time in legislation, currently this law largely referred to other special laws as regards the events giving rise to liability.

Special texts were adopted that made liability easier to enforce. In particular, the decree-law called 'Ronchi decree' n 22/1997 (1997/02/05) concerning environmental sanitation, or the decree-law n 224/2003 concerning the deliberate release of genetically modified organisms (GMO) into the environment. Today is in force the decree-law n 152 2006/04/03, that created the Italian Environmental Code, of which part sixth deals with '[la] *tutela risarcitoria contro i danni all'ambiente*' ('compensatory protection against environmental damages'), following the European Parliament and Council directive 2004/35/EC of 21 April 2004 on prevention and remedy in matters of environmental liability (OJ L 143/56).

Indeed, the protection of the environment through civil liability in particular and the treatment of environmental damage is also a European concern. The aforementioned european directive of 2004 institutes an obligation to repair

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[12] *Ibid.*

[13] S Patti, 'Diritto dell'ambiente e tutela della persona' (1980) I (1) Giurisprudenza Italiana 859; A. Postiglione, 'L'azione civile in difesa dell'ambiente' [1987] Rivista Trimestrale di Diritto Pubblico 303.

[14] Cass., civ. Sez. I, 1995/09/01, n 9211.

[15] Trib. Ven. Sez. III, 2010/02/04 (n 8). Compare: Trib. Mil., Sez. II, 2010/09/16 (n 9).

[16] Corte Cost., 1987/12/30, n 641/1987.

certain ecological damages, such as those caused to water, soil, species and protected natural habitats. The international Court of Justice also recognized environmental damage as such in 2018.[17]

In France, following the European text, an Environmental Charter was adopted in 2005, and given of constitutional value. Then the law n 2008-757 of (2008/08/01) relating to environmental liability and the law n 2016-1087 (2016/,08/08) for the reconquest of biodiversity, nature and landscapes. The latter establishes new provisions in the French Civil Code itself[18] in the area of liability, immediately following those relating to Aquilian liability.

In the meantime the damage caused to the environment as such, which in France is called '*préjudice écologique pur*' ('pure ecological damage'), i.e. independent of that (material, moral, economic...) caused to people themselves, had to be identified. In 2012, the French Court of Cassation after the sinking of the oil tanker Erika in 1999 off the Atlantic coast mentioned the '*atteinte directe ou indirecte portée à l'environnement, sans répercussion sur un intérêt humain particulier mais affectant un intérêt collectif légitime*'[19] ('direct or indirect damage to the environment, without repercussion on a particular human interest but affecting a legitimate collective interest').

Therefore, one may wonder whether civil liability offers actually a legal framework adapted to the protection of the environment.

On this regard, if civil liability had to adapt itself for the protection of the environment (Part I), environmental liability that results of it seems to have to and to be likely in return to adapt itself even more on the model of civil liability for a better protection of the environment (Part II).

2. Part I : The adaptation of civil liability made for environmental protection.

Formally, while environmental liability has integrated the French Civil Code since 2016, the Italian Environmental Code organizing environmental liability is distinct from the Civil Code. The fact remains that this specific code governs a liability that, as in France, flows into civil liability while involving an adaptation of the latter to achieve the objective of protection of the environment. This can be seen from the conditions (A) and the functions (B) of environmental liability.

A) Conditions

Damage to the environment. First, like the classical civil liability, Part Six of the Italian Environmental Code refers to a damage. Through the legal definition of environmental damage, one perceives however a priori the directly protected legal object: the environment. It is then immediately clear that it deals with a specific type of damage that indeed can be caused to the entire community, whereas the damage of both the Italian Civil Code (of which art. 2043 refers to

[17] *Costa Rica v Nicaragua,* ICJ 2018/02/02 n 150 Rec. ICJ, 15. See also: Y Kerbrat, Sandrine Maljean-Dubois, 'La reconnaissance du préjudice écologique par la Cour internationale de justice' (2018) 3, Revue Droit Environnement, 265.

[18] M. Hautereau-Boutonnet, 'Le Code civil: un code pour l'environnement?' (2021) 23 Rec. Dalloz 1280.

[19] Cass., crim., 2012/09/25, n 10-82.938. See also : Aude-Solveig Epstein, 'La réparation du préjudice écologique en droit commun de la responsabilité civile', (2016) 21 Rec. Dalloz 1236-1240.

'others' too) and the French Civil Code (of which art. 1240 mentions 'others') is caused to one or several specific person(s).

The Italian Council of State thus decided that '*La responsabilità ex art. 2043 cod. civ. si distingue nettamente dall'azione prevista dagli art. 309 e seguenti del d.lgs n. 152 del 2006, in quanto quest'ultima* (...) *è finalizzata a tutelare il valore 'ambiente', che costituisce l'oggetto di uno specifico interesse pubblico rispetto ai casi di danno o anche di semplice minaccia di danno ambientale*'[20] ('The liability under Art. 2043 [of] the Civil Code is clearly distinguished from the action provided for in Art. 309 et seq. of Legislative Decree n 152 of 2006, in that the latter (...) is aimed at protecting the value 'environment', which is the object of a specific public interest with respect to cases of damage or even of mere threat of environmental damage').

However, the main difficulty with respect to environmental damage lies less on its object than on its subject : the 'victim'. In fact, in Italian law as in French law the environment does not constitute a person. Neither are its elements. This is different from many foreign laws in which a river, a tree or a mountain can be endowed with legal personality.[21] These laws are generally more focused on the collective aspect. In our more individualistic laws, Mother Nature does not constitute a person in the legal sense, any more than do her components (fauna, flora, sites, ambient air, water...). One could thus at first sight be astonished that she can be a victim of a damage in the legal sense of the term in spite of the attacks which can effectively be caused to her, without being able to act in justice.

One could then more surely think of the damage caused to human beings because of the attacks to Nature or to its elements.

It is moreover historically one of the first reflexes of the law in the 'individualistic' societies: in Italy, the Court of Cassation had from the 1970ies, as recalled, used the right of property before civil liability to protect the owners or holders of legally protected interests.

French judges also mobilized the concept of personal damage.[22] The damage was thus legally considered as that caused not so much to Mother Nature as to her children: mankind.

However, a major difficulty with this reading grid, which can function when at least two persons are at stake, becomes inoperative when it is not a question of a dispute between two persons holding competing rights.

The damage to the environment as such had therefore subsequently to be identified : in 2012, it was defined by the French Court of Cassation in the Erika case, after that, the French Civil Code in turn enshrined this environmental damage itself since 2016.

However, in the definition of this type of damage we see that the reference to human beings is not totally absent.

In fact, in French law (Art. 1247 C civ.) it deals with '*une atteinte non négligeable aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement*' ('a non-negligible damage to the

[20] Cons. Stato, 2021/02/08, n 1166.

[21] See for instance : Mathilde Hautereau-Boutonnet, 'Faut-il accorder la personnalité juridique à la nature ?' (2017) 18 Rec. Dalloz 1040

[22] For example, for water: CAA Nantes, 2009/12/01, n 07NT03775; for air: CE 2017/07/12, n 394254; for light pollution: CE 2018/03/28, n 408974.

elements or functions of the ecosystems or to the collective benefits that Man derives from the environment').

In Italian law also, the Environmental Code provides from the outset - art. 2: '*Finalità'* ('Finality') -: '*Il presente decreto legislativo ha come obiettivo primario la promozione dei livelli di qualità della vita umana, da realizzare attraverso la salvaguardia ed il miglioramento delle condizioni dell'ambiente e l'utilizzazione accorta e razionale delle risorse naturali*' ('The primary objective of this decree-law is the promotion of the quality of human life, to be achieved through the safeguarding and improvement of environmental conditions and the conscious and rational use of natural resources'). It also rules at Art. 300 '*1. È danno ambientale qualsiasi deterioramento significativo e misurabile, diretto o indiretto, di una risorsa naturale o dell'utilità assicurata da quest'ultima*' ('1. Environmental damage is any significant and measurable deterioration, direct or indirect, of a natural resource or of the utility secured by it'). Then, in a section on the implementation of the precautionary principle Art. 301 states : '*In applicazione del principio di precauzione (...), in caso di pericoli, anche solo potenziali, per la salute umana e per l'ambiente, deve essere assicurato un alto livello di protezione*' ('In application of the precautionary principle (...) in case of dangers, even only potential ones, for human health and for the environment, a high level of protection must be ensured'). Again, for the sanction of restoration, art. 306 a. 4 of the Legislative Decree 152/2006 states : '*Nelle attività di ripristino ambientale sono prioritariamente presi in considerazione i rischi per la salute umana*' ('In the activities of environmental restoration, the risks for human health are taken into consideration in priority').

This reflects a certain existential difficulty of environmental damage – harm to environment or harm to human beings through environment ? - and could thus raise doubts about the consideration of this environmental damage *per se*.

The utility ensured by the natural resource can be one for the ecosystem - for example, the flora and fauna can be deteriorated by a damage to the air or the ground - but also of course for the human beings themselves since the environment is also theirs.

The Environmental Code also gives categories of environmental damage in accordance to the European Parliament and Council Directive 2004/35/EC : '*the deterioration, in comparison with the original conditions, caused to: a) protected species and natural habitats* (...) *b) inland waters* (...) c) *coastal waters and those included in the territorial sea* (...) d) *land* '. But still, the withdrawn utility of the environment can of course also be to the benefit of humain beings themselves since the environment in general is naturally also that of mankind in particular.

As it was recalled by an Italian author : '*L'inquinamento* (…) *colpisce indistintamente le persone, le cose e la natura*'[23] ('Pollution (...) indiscriminately affects people, things and Nature').

By the way, in France a kind of class action has been provided for the benefit of environmental associations for the reparation of bodily and material harm, that is to say in case of personal harms, resulting from damage caused to the

[23] B Pozzo, 'Danno ambientale: nuove prospettive nel codice dell'ambiente', in F Alcaro, C Fenga, E Moscatti, and others, *Valori della persona e modelli di tutela contro i rischi ambientali e genotossici* (Firenze University Press 2008) 48. See also: R Tommasini, 'Codice dell'ambiente et tutela della persona tra diritti individuali e interessi collettivi', *ibid,* 367-372.

environment[24], but not fot the reparation of the latter itslef.

Moreover, one may wonder whether environmental damage corresponds to an extrapatrimonial or, conversely, a patrimonial conception. The Italian Court of Audit had taken the decision to refer to the ' *bellezze naturali del Parco Nazionale d'Abruzzo* '[25] ('natural beauties of the Abruzzo National Park'), but had also clearly considered in the Scarlino red muds case environmental damage to be the injury of a collective asset, and thus a '*danno erariale*'[26] that is to say a 'fiscal damage' harming public finances.

When the Italian Court of Cassation recognized in 1995 its competence by integrating the matter into civil liability, ruling on facts prior to the specific law of 1986, it nevertheless emphasized its particularity due to its specific object : an asset that is not in commerce.[27]

It seems therefore to be both a public an private and patrimonial and extrapatrimonial damage.

It appears more precisely that it is above all a an extrapatrimonial damage, in particular in the absence of possibility of transfer, seizure or disposal of the environment as such at the disposal of all, but in no way it excludes the fact that the elements of the environment may have an economic value or an impact on private or public patrimonies.

In fact, this is what emerges from a decision of the Italian Constitutional Court, which (also for facts prior to the specific law of 1986) recognized an economic value of the environment, ruling that '*la tendenza dei rischi ambientali naturali a deteriorarsi impone una disciplina che eviti gli sprechi e i danni sicché si determina una economicità e un valore di scambio del bene* (...) *Questo consente di dare all'ambiente e quindi al danno ambientale un valore patrimoniale*'[28] (' the tendency scarcity of natural environmental resources imposes a discipline that avoids waste and damage so that an affordability and exchange value of the asset is determined (…). This allows the environment and thus environmental damage to be given a patrimonial value').

One may also ask whether we should consider a monistic or pluralistic conception of environmental damage : should we consider that there is one or that there are multiple environmental goods and therefore as many potential environmental harms? In Paolo MADDALENA's opinion[29], environmental goods are different but linked together, so there would be only one unitary economic and legal good.

The Italian Constitutional Court[30] actually considers the environment from a legal point of view as a unitary good, although different components could be protected separately.

The Italian Court of Cassation[31] also holds that the environment, itself considered, constitutes a good of a public nature, unitary and intangible.

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[24] Article 89 of French Law n 2016-1547 of November 18, 2016 on the modernization of Justice for the 21st century (C. envir., art. L. 142-3-1).
[25] Corte Conti, Sez. I, 1975/12/20, n 108.
[26] Corte Conti, Sez. I, 1979/10/08, n 61.
[27] Cass. Civ. Sez. I, 1995/09/01, n 9211
[28] Corte Cost., 1987/12/30, n 641/1987.
[29] P Maddalena, 'Il danno all'ambiente tra il giudice civile e il giudice contabile' [1987] Riv. Crit. Dir. Priv., 44.
[30] Corte Cost., 1987/12/17, n 641; Corte Cost., 1992/02/24, n 67.
[31] Cass. Civ. 2008/04/17, n 10118.

According to Alessandro AMATO[32], the environment is therefore a synthetic good, superimposed, as shown by especially by Article 19 of Law 349/1986 with the creation of the Ministry of Environment .

However, the Italian legislature, if it considers the environment (in the singular), deals with a '*danno all'ambiente*' ('damage to the environment') in the formula of Part Sixth of the Italian Environment Code, and the French one with ' *un préjudice écologique* ' ('*an environmental damage*') at art. 1246 of Civil Code, which means that there are different kinds of environment damages. In France, a Nomenclature of environmental damages was carried out.[33]

Threshold of seriousness of the damage. In any case, in order to give rise to civil liability, the damage caused to the environment must exceed a certain degree.

In Italy, even with the mobilization of the right of ownership, it was necessary that the threshold of tolerance be exceeded; and civil liability presupposes an ' *ingiusto* ' (' unfair ') damage : art. 2043 of the Italian Civil Code.

However, since the Law 349/1986, the legislature has not taken up the criterion of 'unfairness' for environmental damage.

For Lucio Valerio MOSCARINI[34], this would have been the corollary of the requirement of the specificity of the violated norm, since the special law whose violation was to be sanctioned had in fact already considered that the prohibited element was unfair. But this analysis no longer holds since the 2006 decree-law, which as we shall see no longer requires the violation of a *special* text.

Some authors[35] think that the absence of a requirement that the damage should be unfair would constitute a guarantee of a better protection of the environment. Indeed, the fewer characteristics of damage are required, the easier it is to implement environmental liability.

However, today the damage to the environment must be of a particular intensity, which does not seem likely to encourage its recognizing by the judge: it must in fact consist of a ' *deterioramento significativo* ' (' significant deterioration ') according to the Italian Environment Code criterion (art. 300). In France, environmental damage must likewise result from at least one ' *atteinte non négigeable* ' (' non-negligible impairment ') according to the Civil Code criterion (art. 1247).

The two laws are thus close on this point: the Italian positive criterion of 'significant' is in fact answered by the French negative criterion of 'non-negligible'.

In any event, according to some French authors[36], this would be a 'superfluous' clarification which would merely enshrine in the law the well established latin adage *de minimis non curat praetor* (the judge doesn't care about insignificant disputes) according to which judges don't have to solve 'minimal cases'.

Yet, the adage actually refers to the *admissibility* not to the *merits* of the action.

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[32] A Amato, 'La nozione giuridica di ambiente e di bene ambiente. Danno ambientale e tutela civile dell'ambiente', in A Amato, M Balletta, M Montini and others, *Danno ambientale: quantificazione e aspetti procedurali* (Lexambiente 2004), 4.

[33] L Neyret et GJ Martin, *Nomenclature des préjudices environnementaux* (1st edn, Lextenso 2012).

[34] LV Moscarini, 'Responsabilità aquiliana e tutela ambientale' [1990] Riv. Dir. Civ. 499.

[35] M Richiedei, *La responsabilità della pubblica amministrazione per danno ambientale* (Univ. Ca'Foscari 2014) 50.

[36] L Neyret, 'La consécration du préjudice écologique dans le code civil' (2017) 17 Rec. Dalloz 924.

Therefore, if the precision seems unhelpful it is mainly because in matters of civil liability the 'legally reparable' damage already consists in essence of a *non-negligible* or *significant* damage.

Italian civil liability already includes as recalled the general filter of the requirement of unfair damage (art. 2043 of the Italian Civil Code). This can undoubtedly refer to both a quantitative and qualitative assessment. In short, unfair because *disproportionate* or unfair because *inappropriate.*

Some damages are indeed part of life in society, as for example for a student not to graduate from university despite having made great efforts.

In contrast, the requirement of 'significant' environmental damage seems to refer exclusively to a quantitative assessment.

This appears to be no less than an unnecessary precision in relation to the general requirement of unfair damage by traditional civil liability.

Moreover, all the exceptions expressly provided for by Italian law to the reparability of environmental damage show perfectly that it is simply a matter of taking in consideration only that which is unfair. Article 303 of the Italian Environmental Code, entitled 'exclusions', in fact lays down a series of exceptions to the principle of reparability of environmental damage: environmental damage or imminent threat of such damage caused by acts of armed conflict, sabotage, acts of hostility, civil war, insurrection, or natural phenomena of an exceptional, unavoidable and uncontrollable nature, etc.

Thus, for instance the destruction by missile of an element of the Russian military fleet penetrating Italian air or sea space without authorization would of course have significant consequences for the environment, but no environmental liability could for as much be implemented.

At the most, it can be noted that with regard to these exceptions it is the text which upstream makes the distinction within environmental damage, between unjust and just damage; whereas it is essentially the judges who will have downstream to assess the question of the significant intensity of environmental damage.

Although the French Civil Code on the one hand does not contain such a precision (its art. 1240 refers indeed to any damage), French doctrine on the other hand integrates it perfectly by considering following the judges (that do so in a more implicit manner) that it is indeed socially unjust damage which is reparable. For example, the French Court of Cassation has already ruled that the revelation of trivial facts of private life, such as a celebrity's outing to a restaurant, does not constitute a source of liability.[37] The requirement of environmental damage resulting from a non-negligible infringement thus appears once again to be largely unnecessary.

Such legislative clarifications which follow the position of the courts but are not in the European directive of 2004 seem to be explained by the fear aroused by the relatively recent introduction of environmental liability into the law (in France, in 2012 and in 2016; in Italy, since the 1970s, then in 1986 and in 2006). It deals indeed with a new type of potentially frequent damage, the invocation of which could give rise to a fear of a clogging up of the jurisdictions. In a context of insufficient judicial budgets, an overly broad definition of environmental damage

[37] Cass., civ. I, 2002/04/3, n 99-19.852.

would also have constituted a potential additional source of slowness of the justice dans then condemnation of the concerned State for violation of Article 6 of the European Convention on Human Rights.

In any event, the significant character or the absence of negligibility seems to constitute an intrinsic element of the damage, and not a specific condition of environmental damage.

However, if it seems unnecessary, this legislative precision concerning environmental damage does not appear to be unconstitutional. Indeed, in France the Constitutional Council has ruled that this limiting precision of the reparability of environmental damage was in conformity with the Constitution.[38]

In any case, after examination, environmental damage appears to be an unjust damage. Like that required by traditional civil liability. There is thus a solubility, in this respect, of environmental damage in the general category of damage and thus, at least from this point of view, of environmental liability into civil liability.

The real specificity of the environmental damage seems to be its duality of damage either to the environment as such, devoid of legal personality, or, where applicable, through harm to the utilities of the environment, especially for human beings.

Event giving rise to liability. Although it recognized environmental damage earlier than French law, Italian law hesitated on the question of the cause of environmental liability.

Indeed, the 1986 law required fault or fraud (avatars of the culpa and dolus of Roman law and equivalent respectively to French quasi-delicts and delicts) for the implementation of environmental liability for the author of the damage, especially through the disregard of a special text. From this point of view, this law was in a way 'transparent' because it did not establish any fact specifically generating liability: it effectively referred to the classic conditions of civil liability (fault or fraud of art. 2043 of the Italian Civil Code) or to already existing texts.

Special texts such as the Ronchi Decree-Law n 22/1997 on environmental clean-up and the Decree-Law n 224/2003 on the deliberate release of GMOs into the environment had, in these respective fields, retained a strict liability, disconnected from fault or fraud.

While the Act of 86 could be seen on the one hand as *transparent* in that it referred to the fault or the fraud already present specially in the Italian Civil Code, it could also be seen on the contrary as *opaque* in that, in effect, it appeared to hinder strict liability (i.e. without any fault nor fraud and also possible in certain circumstances in the Italian Civil Code) at least if the latter was not provided for in a text specific to environmental liability.

Subsequently, albeit for events occurring before the 1986 law, the Italian Court of Cassation[39] also decided to apply strict liability for dangerous activities. Once again, it was thus classical civil liability and its instruments that were mobilized for the protection of the environment.

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[38] Costitutional Council 2021/02/05, 2020/881 QPC. See also : F Savonitto, 'La question prioritaire de constitutionnalité sur le préjudice écologique. Une « petite » décision du Conseil constitutionnel' (2021) 16 Act. Jur. Dr. Adm. 926.

[39] Cass. Civ., n. 9211/95.

The choice of strict liability was also made by the above-mentioned European directive of 2004. It is therefore also the choice which, after further hesitation to which we shall return, was partially endorsed by the Italian environmental code, which retains strict liability for the activities specifically mentioned in it.

At first sight, this appears to be consistent with the principles laid down in the same code, according to which, in article 3 ter on the 'principio dell'azione ambientale' (‘environmental action principle’) : '*1. La tutela dell'ambiente e degli ecosistemi naturali e del patrimonio culturale deve essere garantita* (...)' (' 1. The protection of the environment and natural ecosystems and cultural heritage must be guaranteed (...)'). In fact, the *guarantee* seems to presuppose that protection of the environment, when this is ensured by civil liability, is irrespective of any subjective behaviour and thus fault or fraud on the part of the person responsible.

However, are the facts that give rise to this strict liability under the Italian Environmental Code really specific compared to those that give rise to an equally strict liability under the Italian Civil Code? In fact, if we analyze the activities subject to strict liability listed in Appendix 5 of Part 6 of the Italian Environmental Code, we realize that the vast majority of them could be covered by the liability, without any fault having to be proven, for dangerous activities (art. 2050 of the Italian Civil Code), or even for things custody (art. 2051 of the Italian Civil Code). With regard to things in one's custody, one can indeed mention point 2 about '*Operazioni di gestione dei rifiuti, compresi la raccolta, il trasporto, il recupero e lo smaltimento di rifiuti (...)*' ('Waste management operations, including collection, transportation, recovery, and disposal of waste (...)').

Regarding dangerous activities, we can mention point 1 and think about several activities subject to authorization or registration such as '*Funzionamento di impianti soggetti ad autorizzazione, conformemente alla direttiva 96/61/Ce del Consiglio, del 24 settembre 1996, sulla prevenzione e la riduzione integrate dell'inquinamento*' ('Operation of installations subject to permit in accordance with Council Directive 96/61/EC of September 24, 1996, concerning integrated pollution prevention and control') , point 2 about the '*Operazioni di gestione* (...) *di rifiuti pericolosi*' ('Management operations (…) of hazardous waste') but also point 3 about '*Tutti gli scarichi nelle acque interne superficiali che siano soggetti ad autorizzazione preventiva conformemente alla direttiva 76/464/Cee del Consiglio, del 4 maggio 1976, concernente l'inquinamento provocato da certe sostanze pericolose scaricate nell'ambiente idrico della Comunità*.' ('All discharges to inland surface waters that are subject to prior authorization in accordance with Council Directive 76/464/EEC of May 4, 1976, on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community', or again to '4. All discharges of substances into groundwater that are subject to prior authorization in accordance with Council Directive 80/68/EC of December 17, 1979, on the protection of groundwater against pollution caused by certain dangerous substances').

Thus the event giving rise to environmental liabilty appears to be a dangerous event.

The Italian Environmental Code provides for subsidiary liability for fault or fraud for other activities than those specifically listed.

On the one hand, one may wonder about this element : would it not have been enough to refer to the classic civil liability and in particular to article 2050 of the

Italian Civil Code?

On the other hand, this absence of a reference must have the consequence that it is environmental damage as conceived by the Italian Environmental Code, that is to say, a *significant* harm, and not as it might be understood by the Italian Civil Code, an *unfair* damage in a general way, that is to be required.

The specificity in relation to liability under the Civil Code could thus be found not so much in the operative event as in the damage, although the latter appears as we have seen to be truly specific only in its nature as damage caused to a non-personified entity, and not insofar as it requires a threshold of gravity.

In any event, while there may be a fairly specific regime of environmental liability with respect to damage, there is no homogeneous regime in Italy with respect to the event giving rise to liability. From this point of view, French law seems both less hesitant and less heterogeneous, since the provisions resulting from the aforementioned law of 2016 do not require fault in the case of environmental damage for the implementation of civil liability.

In France, it is then a strit liability, and thus more homogeneous as to the generating fact (even if this one can in fact be culpable, the fault and a fortiori its demonstration by the plaintiff is not legally required).

One may also ask whether the Italian civil code can be invoked outside the specific cases provided for in the Italian environmental code.

In any case, while there may be a specific system of environmental civil liability as far as damage is concerned, there is no uniform system in Italy, in this field, if one looks at to the event that gives rise to liability.

This is not exactly the same choice made by the French legislature, which in fact in general unlike Aquilian liability (art. 1240 Civil Code) does not require fault in order to implement environmental liability (art. 1246 et seq. of the Civil Code). It is therefore in France a unique strict liability.

Causal link. Italian Law 349/1986 required proof not only of fault or fraud, but also of the causal link between the fault or fraud, resulting from the violation of a special law, and the damage caused to the environment (even though the latter could be deduced from the violation of the special law).[40]

Contrawise, the Ronchi Decree-Law of February 8, 1997 didn't require any proof of fault or fraud, nor of the causal link between the exceeding of the limits of acceptability of soil contamination set by the Minister of Environment. The Italian Environment Code opts for a strict liability where the causal link is presumed for the only activities listed.

It is very difficult to establish such a causal link. On the one hand, because the environmental damage may appear several years after the event that caused it. On the other hand, and perhaps above all, because environmental damage, except when a person such as a company accidentally pollutes a localized element, may result from a plurality of facts (which may have occurred over several years) and from a plurality of actors. Let's think about the example of the pile of plastic waste in the oceans - the infamous 6th continent - in which we all participated. Who can and should be considered responsible for the disappearance of sea turtles suffocating by plastic? The same is true for lawful

[40] A. Amato, 'La nozione giuridica di ambiente e di bene ambiente' (n 32) 8.

activities such as driving: can and should each driver be held responsible for the premature deaths caused by air pollution? Beyond the proof of the existence of the causal link, the question of the distribution of responsibility appears quite delicate between: drivers of individual or collective vehicles? users of coal heating? The State itself which authorized and did not regulate enough these activities (all the more so in legal systems which admit the theory of equivalence of conditions, i.e. considering as the cause of the damage any event, whatever its intensity, which has participated in it: both the State and citizens could thus be considered to be different causes of pollution. By the way we can sometimes see a change of course of the legislation, for example in France with a recent decree prohibiting heating on café terraces)?[41]

Not to mention the regenerative capacity of nature, which can erase some environmental damage or part of it. The situation is therefore unusual where it is the victim who not only can erase all or part of the injury but also can hide the causal link which appears indeed delicate to establish.

In order to alleviate this difficulty in part, strict liability may appear to be more appropriate since it does not presuppose proof of a causal link, which is in fact presumed. This is how it was implemented by the Court of Cassation in 1995[42] for acts prior to the 1986 Law.

Strict liability is also a way of focusing on the victim by putting in the background the conduct of the person responsible.

However, in order to avoid conferring too broad a scope of application on a nascent and in this respect potentially suspect environmental civil liability, the Italian Environmental Code has formally excluded (art. 303,1, h) the '*danno ambientale o [la] minaccia imminente di tale danno causati da inquinamento di carattere diffuso, se non sia stato possibile accertare in alcun modo un nesso causale tra il danno e l'attività di singoli operatori*' ('environmental damage or [the] imminent threat of such damage caused by pollution of a diffuse character, if a causal link between the damage and the activity of individual operated could not be established in any way').

In France, the law (art. L. 161-2, paragraph 7 of the Environmental Code, as it results from the aforementioned law of 2008), likewise expressly excludes from the scope of environmental liability damage caused by pollution '*à caractère diffus*' ('of a diffuse nature') such as air pollution, unless a causal link between the damage or its threat and the activities of an operator is established by the prefect. It is therefore up to the administrative authority to establish a causal link between an activity and environmental damage. But the aforementioned French law of 2016 does not lead in the Civil code to such an exclusion of liability in case of pollution of a diffuse nature.

B) Functions

Damage is a *sine qua non* condition of extra-contractual civil liability (art. 1240

[41] Décret n 2022-452 du 30 mars 2022 *relatif à l'interdiction de l'utilisation sur le domaine public en extérieur de systèmes de chauffage ou de climatisation* (prohibiting the use of outdoor heating or air conditioning systems on public property), after Loi n 2021-1104 du 22 août 2021 *portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets* (combating climate change and building resilience to its effects).

[42] Cass. Civ., N 9211/1995 (n 7).

et seq. of the French Civil Code and art. 2043 et seq. of the Italian Civil Code), unlike other forms of liability, and in particular criminal liability. Extra-contractual civil liability thus traditionally fulfils an essential function of reparation for this damage.

However, with the evolution of the matter, the Italian Court of Cassation[43] has now come to identify three functions of civil liability: compensatory, but also preventive and punitive.

Environmental liability seems not only to correspond to these three identified functions but also to participate to the aforementioned evolution.

Compensatory function. First of all, is *reparation* really possible in environmental matters? With regard to the possibility of reparation, the European Directive 2004/35/EC of April 21, 2004 on environmental liability refers in particular to the reparation of environmental damage in its very title. Like the legislature in France: art. 1246 of the French Civil Code states that : '*Toute personne responsable d'un préjudice écologique est tenue de le réparer*' ('Any person responsible for ecological damage is obliged to repair it'), on the model of art. 1240 : *'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer'* ('Any act that causes damage to anotherone obliges the person by whose fault it occurred to repair it'), but with the following precision of art. 1249 : '*La réparation du préjudice écologique s'effectue par priorité en nature*' ('The repair of ecological damage is carried out by priority in kind'). Damages can only be envisaged where reparation in kind is impossible or insufficient. This clarification of the mode of reparation of environmental harm appears to be welcome in France in comparison with the traditional provisions of the Civil Code which do not specify the form of reparation of harm in a general way (art. 1240). Otherwise, reparation in kind would certainly appear to be perfectly conceivable but not necessarily constitutive of a principle.

In Italy, the provisions of the Civil Code relating to classic extra-contractual civil liability envisage compensation ('*risarcimento*', art. 2043 et seq.). This is done in principle by way of equivalence, i.e. with an allowance, since reparation in kind must 1° first of all be requested by the victim, 2° then must be possible and, 3° finally, must not be excessively onerous for the debtor (art. 2058).[44] Reparation in-kind thus appears to be an exception.

Conversely, in environmental matters, it is now essentially and by right a reparation in kind (art. 311 of the Italian Environmental Code). That is to say that reparation in kind has become the principle.

Law 349/1986 had made it a subsidiary method of reparation, envisaging the reparation in kind only in case of *material* but maybe also *economic* (the question was indeed discussed of that form of reparation in case of excessive cost) possibility.

On the contrary, the Ronchi Decree-Law n 22/1997 and the Decree-Law n 224/2003 on GMOs had generalized the compensation in-kind in their respective

[43] Cass. Civ., 2017/07/05, n 16601.

[44] « *Il danneggiato può chiedere la reintegrazione in forma specifica, qualora sia in tutto o in parte possibile. Tuttavia, il giudice può disporre che il risarcimento avvenga solo per equivalente, se la reintegrazione in forma specifica risulta eccessivamente onerosa per il debitore*» («The aggrieved party may seek reparation in kind if it is possible in whole or in part. However, the court may order that compensation be made only by equivalent, if repairing in kind is excessively burdensome for the debitor»).

fields.

Judges for their part had made reparation in kind a natural way of environmental damage. For example, a decision of the Lombardy Regional Administrative Tribunal stated for facts prior to the adoption of the Environmental Code, with regard to the responsibility of a producer for the contamination of a site: '*è l'articolo 2050 c. c. ad imporre al responsabile di attivarsi al fine di porre in essere atti e comportamenti unitariamente finalizzati al recupero ambientale del sito*'[45] ('*it is Article 2050 c. c. that requires the responsible party to take action in order to put in place acts and conduct unitarily aimed at the environmental recovery of the site*').

Despite some controversy, money can be combined with reparation in kind. In fact, Article 311 of the Italian Environmental Code refers to '*il risarcimento del danno ambientale in forma specifica e, se necessario, per equivalente patrimoniale*' (*'the compensation for damage environmental in kind and, if necessary, by pecuniary equivalent*'). For example, when the reparation in kind occurs several years after the damage has been produced and it is therefore necessary to repair the harm caused by the unavailability of the natural resource.[46]

In any event, today the reasons for the priority of this reparation in kind are quite understandable: the environment and its components have also and may be above all, as recalled, an extrapatrimonial value. Therefore, when reparation can in principle be made by monetary equivalent for damage caused in general in an economically liberal society where money constitutes a reference standard, it must on the other hand be made in kind when it is a question of environmental damage caused to a value that is in particular extrapatrimonial and of general and not private interest.

Moreover, it can be very difficult to put a figure on environmental damage, such as the destruction of animal species. Damages that are only symbolic would only devalue the object of the protection, like the request in the '*Affaire du Siècle*' ('Case of the Century') in France where, as we will come back to, the associations that were plaintiffs asked for symbolic damages.

From this point of view, the 'polluter pays' principle resulting from European law (in particular from the Single European Act and the aforementioned European directive of 2004), which is very much imbued with an economic market logic, but which is also taken up by the Italian environmental code - art. 3 ter: '*Principio dell'azione ambientale*' ('Principle of environmental action'- does not therefore appear to be totally adapted to environmental liability. Indeed, a 'polluter *repairs*' principle would seem to be more relevant.

Furthermore, to ensure the effectiveness of reparation in kind, Italian law provides for a substitution mechanism by the Minister of Environment in case of default by the person responsible, who can then turn against the defaulting party within a period of 5 years.

However, reparation in kind does not always appear to be an appropriate solution. This is particularly true in view of the time that may have elapsed between the production of the damage and the pronouncement of the judicial

[45] TAR Mil., Sez. I, 2013/10/03, n 2222.

[46] Cass. 2008/04/17, n 10118 : 180 000 euros to pay in addition to the repair in kind of Piave river damaged 9 years before.

solution. This is particularly evident in the Erika case in France which occurred in 1999, 13 years before the decision of the French Court of Cassation...

The reparation by monetary equivalent provided for as a subsidiary rule in Italian law as in French law thus appears inevitable and even welcome. Except that it may remain delicate to put a figure on extrapatrimonial damage such as that caused to the environment.

Moreover, even if it is fulfilled in a manner adapted to its purpose, is the compensatory function of environmental civil liability sufficient?

Preventing function. For the above-mentioned reasons of extrapatrimonial value, but also because prevention is often less onerous than reparation in kind or by equivalent, environmental liability also seems to have to fulfil a function of preventing from damage. The question of the autonomy of an action in prevention in relation to an action in civil liability has been raised.[47] However, here again, the aforementioned European directive of 2004 now also expressly refers to *prevention* in matters of environmental *liability.* The preventive action is thus now clearly integrated into the very field of environmental liability. In line with the European text, the Italian Environmental Code, after having established a regime applicable in particular to the imminent threat of environmental damage (art. 298 bis 1, a and b), provides in this respect concretely (art. 3041) that 'the operator concerned' shall bear the costs of prevention of the environmental damage whose imminent threat is verified. This is indeed an aspect of liability since, on the one hand, it is necessary that there is an imminent threat of environmental *damage*, which is the very condition of liability, and, on the other hand, that the person *responsible* bear the costs of prevention.

The French Civil Code, which provides for an action to prevent damage or its aggravation, envisages the question in a similar way but from the opposite angle, no longer of the person responsible but of the victim or in any event the payer, by providing (art. 1251) that '*Les dépenses exposées pour prévenir la réalisation imminente d'un dommage, pour éviter son aggravation ou pour en réduire les conséquences constituent un préjudice réparable*' ('The expenses incurred in preventing the imminent occurrence of damage, in avoiding its aggravation or in reducing its consequences constitute compensable loss') . This function of prevention is understood by the idea that 'an ounce of prevention is worth a pound of cure' - in Italy: '*meglio sudare che tremare*' ('rather sweat than tremble') and in France '*mieux vaut prévenir que guérir*' ('prevention it is better than cure') - especially in the case of environmental damage which unlike the classic damage of civil liability concerns the entire community.

Besides, that is not devoid of economic considerations since the cost of prevention can be much lower than the one of repair.

The technique of solidarity, which had been envisaged for a time in the field of environmental civil liability, as we shall return to, also ensured according to some '*a greater deterrent to behaviours of misconduct and an incentive to take appropriate preventive and precautionary measures in order not to incur environmental damage*'.[48]

In addition to this prevention in the strict sense of the term (of such a nature

[47] A Amato, La nozione giuridica di ambiente e di bene ambiente' (n 32)
[48] M Richiedei, *La responsabilità della pubblica amministrazione per danno ambientale* (n 35) 52.

as to avoid damage or its aggravation), civil liability for the protection of the environment may also in France reveal an *interruptive* function (as in the '*Affaire du siècle*' case). In this case, it is no longer a question of avoiding the production or the aggravation of the damage, but simply its continuation. This is done by the injunction of the judge. The advantage of this is that it may be accompanied by a penalty payment, as provided for in article 1250 of the French Civil Code.

Punitive function. In several respects, the punitive function seems to be little present in Italian and French environmental liability laws.

First of all, no punitive damage known in the Common law is laid down in this matter, either by French law or by Italian law. Whether it is in the form of a specific award or a monetary equivalent, reparation is never greater than the damage actually caused.[49] In practice, it may even be less, because of the absence of solidarity resulting from the law between co-responsibles for the same environmental damage.

Also, because reparation by equivalent, in which there may be a desire to punish, is now the exception: judges cannot therefore punish anti-environmental behavior by fixing punitive damages. Moreover, even when reparation in kind is exceptional, in the law 348/1986, it could only be implemented in the absence of impossibility and also in absence of economic cost according to some.

Secondly, because since the 2006 decree-law, it is a question of a strict liability, thus disconnected from a wrongful or fraudulent behaviour of the person responsible that would be to punish. It's then not really a question of 'punishing' the person responsible by impoverishing him or her in order to repair the environment at all costs, in order to 'enrich' Nature!

Moreover, because reparation in the monetary form of equivalent damages is rarely combined with reparation in kind. The Italian Court of Cassation in fact ruled that '*non residua alcun danno ambientale economicamente quantificabile e quindi risarcibile - né in forma specifica, né a maggior ragione per equivalente - ogniqualvolta, avutasi la riduzione al pristino stato, non persista la necessità di ulteriori misure sul territorio reso oggetto dell'intervento inquinante o danneggiante*'[50] ('no economically quantifiable environmental damage remains and is therefore compensable - neither in kind, nor a fortiori by equivalent damages - whenever, having had the reduction to the pristine state, the need for further measures on the territory made the object of the polluting or damaging intervention persists'). The possible cumulation of reparation in kind and reparation by monetary equivalent does not correspond to any punishing purpose, but to a compensatory function in case of damage resulting specifically from the unavailability of the resource before its reparation in kind.

In addition, since the aforementioned Italian decree-law of 2006 creating the Environmental Code, it is now the more often a question of strict liability and thus one disconnected from any fault or fraud: the conduct giving rise to liability therefore does not appear any more to require punishment.

Eventually, because, unlike the general law of civil liability under the Italian

[49] Showing that Italian environmental law does not provide punitive damages at all in spite of apparences: G Spoto, 'I danni punitivi e il risarcimento del danno ambientale', in F Alcaro, C Fenga, E. Moscatti and others, *Valori della persona e modelli di tutela contro i rischi ambientali* (n 23) 349, 363.

[50] Cass. Civ., Sez. III, 2015/08/13 n 16806.

Civil Code (art. 2055), joint and several liability is excluded in environmental liabilty in cases where there is more than one person liable. This does not seem likely to punish one of the co-responsible persons for the damage which he has contributed to causing by his participation. One can think that, when it provided for solidarity in this matter, the Italian legislature accentuated compensatory function of the environmental liability extending to the maximum the area of the persons liable for the consequences of the environmental damage ; but it can be added that it is also the punitive function that emerges when a person, whose capacity as joint and several debtor is retained, can be made to pay for the other co-responsible parties.[51] Both in terms of the obligation to pay the debt, but also in terms of the contribution to the debt against the other co-responsible persons. In fact, the Italian Civil Code expressly provides for a distribution according to the seriousness of the respective fault and the consequences thereof.

The absence of joint and several liability may appear to be questionable in the case of liability that is precisely of a collective nature: environmental damage is collective and thus public (as Italian law perfectly shows putting Minister of Environment at the center of the environment liabilty as we'll see in Part 2) because it is caused at the same time to elements of Nature, humans and other beings, and even the event that gives rise to that liability the most often emanates precisely from a plurality of persons.

For Alessandro AMATO[52], this absence of solidarity would be similar to the Common law market share liability, in which a person is liable only for his market share. However, on analysis, the two systems of Civil law solidarity, on the one hand, and Common law market share liability, on the other, appear to be likely to be combined for greater efficiency when the parties responsible actually intervene in a same market. For example, automobile manufacturers. In this case, the responsible parties could each be liable for the totality of the environmental damage, with the onus on the person or persons convicted to turn against the co-responsible persons to recover the share that the latter must assume. A share then determined according to the one of each operator on the anti-environmental market, and no longer according to the seriousness of the respective faults or their consequences, since as recalled it deals with a strict liability regardless faultes and frauds.

In any case, in 1995 but for facts prior to the adoption of Law 349/1986, which expressly excludes it, the Italian Court of Cassation retained passive solidarity in environmental liability; in this case between, on the one hand, the producer and, on the other hand, the manager, transporter and sorter of polluting products.[53]

Some decisions of regional administrative Tribunals had also opted for solidarity.[54]

In France, the legislative provisions relating to environmental civil liability are silent on solidarity. Thus, unlike Italian law there is no specificity in relation to traditional French civil liability where the juridictional cases retain, in the absence of legal or contractual solidarity, an obligation *in solidum* between the various

[51] G. Spoto, 'I danni punitivi e il risarcimento del danno ambientale' (n 49).
[52] A Amato, 'La nozione giuridica di ambiente e di bene ambiente' (n 32), 26.
[53] Civ. Sez. I, 1995/09/01, n 9211.
[54] TAR Lombardia, Milano, Sez. I, 2013/07/25, n 195 (in this case between all operators of collection and management of toxic waste).

persons responsible for the same damage. Such obligation is a substitute for passive solidarity, characterised by its principal effects (each of the persons is liable for the whole of the debt to the victim) but without its secondary effects (in particular, an action against one of those persons does not interrupt the running of the statute of limitations in relation to the others). The purpose of this obligation in solidum is to protect the victim against a division of the proceedings against the responsible people; but the latter do not appear to be punished because the person ordered to compensate for the harm can turn against the co-responsible persons to make them pay their share of the debt of responsibility.

However, in several other respects, a punitive function of environmental liability appears.

First, reparation by monetary equivalent is provided for only if reparation in kind is impossible. Thus, such reparation in kind may in practice prove extremely onerous for the responsible: it can be avoid only in case of impossibility, understood like an *absolute* one i.e. for everyone, and not a *relative* impossibility (especially in relation to the financial situation of the responsible person).

Secondly, even if it does not require fault or fraud, strict liability does not necessarily exclude their existence, and thus a punitive dimension of the judicial decision. Better still, strict liability makes it possible to condemn a responsible person more easily than in the case of liability for fault or fraud, and thus to punish more widely unlawful conduct.

The Italian Court of Cassation[55] has moreover expressly recognized this punitive function of liability for damages caused to the environment as such.

In some respects, even if it exculded solidarity Italian law 349/1986 was more punitive. It provided for environmental liability in the case of fault or fraud, and was thus conducive to the punishment of subjective behaviors. It also referred to the benefit derived by the responsible party and the seriousness of the latter's fault. Profit and seriousness thus reflect a reprehensible subjective behavior to the detriment of the environment, and therefore a punitive function of environmental liability.

In any event, the three functions - compensatory, punitive and preventive - of civil liability clearly identified by the Italian Court of Cassation are still relevant today and more than ever in environmental liability. These functions would then benefit from being expressly mentioned by the legislature itself in France as in Italy.

Anyway, with some adaptations civil liability provided a framework for the environment liability that uses its instruments. However, this environmental liability now seems in turn to need to be adapted more closely to the model of civil liability in order to protect the environment more effectively.

3. Part II: The adaptation of environmental liability to make on the model of civil liability.

There are undoubtedly several avenues for improving environmental civil liability. Two that result from the comparison with classical civil liability appear of

[55] Cass. Civ. 2008/04/17, n 10118.

particular interest: on the one hand, with regard to the persons who can be plaintiffs (A) and, on the other hand, with regard to the persons who are liable (B).

A) Plaintiffs

Who can act? Historically, Italy considering environmental damage as public harm to the State, has opted from the outset for the competence of the latter: from the first decisions of the Court of Auditors in the 1970s, then with the Environmental Code of 2006, passing through Law 349/1986, the Ronchi Decree and the 'GMO' legislative decree.

Various theories have been put forward in doctrine to explain that.

First, the thesis of a subjective public right of the State, according to which it is the latter that must be considered both the holder and the beneficiary of the right to take legal action in case of environmental damage. Indeed, the State can be considered as having an interest in the preservation of the environment. However, even if only the State is invested with the right to act, of which it is thus the sole *holder,* it is easy to understand that it cannot indisputably be considered as the sole *beneficiary.* Indeed, the environmental damage concerns the entire community: everyone breathes the ambient air, consumes and uses water as well as the fruits and products of the earth...

Thus, several other theses have been put forward: that of a power of the State to act in the interest of the whole community[56], and that of a sort of representation of the people by the State[57] or even of a particular class action.[58]

Anyway, the Italian Council of State ruled that '*Il bene tutelato in via diretta dal legislatore del decreto legislativo n. 152 del 2006 è l'interesse alla tutela ambientale posto in capo al Ministero dell'ambiente*' [59] ('The asset directly protected by the legislature of Legislative Decree n 152 of 2006 is the interest in environmental protection placed on the Ministry of Environment').

In spite of that, the Italian Environmental Code through its art. 299[60] seems to make the power to sue not a personal right but a function and also a duty of the State through the Ministry of Environment.

As far as other public authorities are concerned, the 1986 law was ambiguous because on the one hand it allowed public authorities to bring legal actions, but on the other hand it reserved the right to monetary compensation to the State. The Italian Court of cassation had adopted a bold solution by considering that the protection of their territory constitutes for Regions '*uno loro diritto della personalità*'[61] ('one personal right of theirs', including in Italy and France the one to be left alone).

The Italian Council of State nevertheless confirmed in its part that under the

[56] GG Greco, 'Danno ambientale e tutela giurisdizionale', [1988] Sanità Pubblica 355.
[57] P Maddalena, 'Il danno all'ambiente tra il giudice civile e il giudice contabile' (n 29).
[58] A Amato, 'La nozione giuridica di ambiente e di bene ambiente' (n 32).
[59] Cons. Stato, 2021/02/08, n 1166 (n 20).
[60] "*Il Ministro de l'ambiente e della tutela del territorio e del mare esercita le funzioni e i compiti spettanti allo Stato in materia di tutela, prevenzione e riparazione dei danni all'ambiente*" ("Minister of environment shall exercise the functions and duties incumbent on the State in the field of protection, prevention and repair of environmental damage").
[61] Cass. Pen. Sez. III, 1993/06/15, n 9727.

law in force the State monopoly: '*La responsabilità ex art. 2043 cod. civ. si distingue nettamente dall'azione prevista dagli art. 309 e seguenti del d.lgs n. 152 del 2006, in quanto quest'ultima (…) è finalizzata a tutelare il valore "ambiente", che costituisce l'oggetto di uno specifico interesse pubblico rispetto a casi di danno o anche di semplice minaccia di danno ambientale*'[62] ('Liability under Article 2043 of the Civil Code is clearly distinguished from the action provided for in Articles 309 et seq. of Legislative Decree n 152 of 2006, in that the latter (...) is aimed at protecting the value 'environment', which is the subject of a specific public interest with respect to cases of damage or even the mere threat of environmental damage').

Thus, Italy which has chosen to place the State in the forefront in this area has reserved a very limited role especially for the environmental associations. In 2000, they were granted a limited power to propose liability action to the Municipalities and Provinces, which the latter two had got in 1986. This was subject to certain conditions of purpose, continuity and interregional or national vocation. The reform of 2006 put the State back as the only holder of the right to act in environmental liability. It was considered as one of the manifestations of the regression of the Italian law regarding the protection of the environment.[63] In any case the conformity appears doubtful with the European directive of 2004 which foresees a role for the non-governmental organizations with regard to the collective interests at stake. From this point of view, it is not certain that Italian law is fully compliant with European law.[64]

Moreover, the state of Italian law does not appear to be fully in line with the principle of subsidiarity[65], which in a liberal system must lead to the competence of the State in non-regalian matters (such as the environmental protection) only in the absence of private initiatives.

In any case, this has not been judged contrary to the Constitution: the Italian Constitutionnal Court has in fact ruled that :'*La scelta di attribuire all'amministrazione statale le funzioni amministrative trova una non implausibile giustificazione nell'esigenza di assicurare che l'esercizio dei compiti di prevenzione e riparazione del danno ambientale risponda a criteri di uniformità e unitarietà, atteso che il livello di tutela ambientale non puo' variare da zona a zona e considerato anche il carattere diffusivo e transfrontaliero dei problemi ecologici, in ragione del quale gli effetti del danno ambientale sono difficilmente circoscrivibili entro un preciso e limitato ambito territoriale*'[66] ('The decision to assign the administrative functions to the state administration finds a not implausible justification in the need to ensure that the exercise of the tasks of preventing and repairing environmental damage meets the criteria of uniformity and unity, given that the level of environmental protection cannot vary from area to area and also considered the diffusive and transboundary nature of ecological problems, due to which the effects of environmental damage are difficult to circumscribe within a precise and limited territorial scope').

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[62] Cons. Stato, 2021/02/08, n 1166 (n 20).
[63] U Salanitro, 'Il risarcimento del danno all'ambiente: un confronto tra vecchia e nuova disciplina', in F Alcaro, C Fenga, E Moscatti and others, Valori della persona e modelli di tutela contro i rischi ambientali e genotossici (n 23) 331, 342.
[64] F Caringella, L Buffoni, *Manuale di diritto civile* (Dike giuridica 2018), 434.
[65] MP. Giracca, *Danno ambientale*, 587.
[66] Corte Cost., N 235/2009.

It later reiterated the compliance with the Constitution.[67]

However, it is not forbidden to consider that in reality it is mainly up to the judge downstream to make homogeneous the consequences of environmental damage, regardless of the quality upstream of the plaintiff to the action. Indeed, whether it is the State or an association which acts to denounce the damage caused to the ambient air, there is no reason why this same damage should be treated differently by the judge according to the person who has seized the court.

In Italian law, environmental associations can intervene in legal proceedings initiated by the State, and even challenge the legality of administrative acts or constitute themselves civil parties in cases of environmental crimes.[68]

But can associations, not recognized as holders of a right to implement environmental liability by the Environmental Code, nevertheless act on the basis of classic civil liability? Could the special law (the Environmental code) be circumvented by means of the general law (the Civil code)?

In fact, it seems to be a matter of articulation. In this respect, the jurisprudence of the Italian Court of Cassation in particular repeats that environmental damage has a triple dimension, personal, social and public.

The first concerns species the health of the person; the second, the interactions between people; the third, the interest in the protection of the environment considered in itself that is called in France '*préjudice écologique pur*' ('pure environmental damage'). Thus, associations can act for the first dimension, personal, and if anything for the second, social, while the last dimension, public, is in Italian law unquestionably a State monopoly.

Any other person will have to proove a personal harm.

Several decisions can be cited, for instance one ruling that: '*Il risarcimento del danno ambientale, in sé considerato come lesione dell'interesse pubblico alla integrità e salubrità dell'ambiente, è previsto e disciplinato soltanto dal D.Lgs. n. 152/2006, sicché il titolare della pretesa risarcitoria per tale tipo di danno è esclusivamente lo Stato, in persona del Ministro dell'ambiente; tutti gli altri soggetti, singoli o associati, ivi compresi gli Enti pubblici territoriali e le Regioni, possono invece agire, in forza dell'art. 2043 c. c., per ottenere il risarcimento di qualsiasi danno, ulteriore e concreto, che abbiano dato prova di aver subito dalla medesima condotta e conseguente alla lesione di altri loro diritti particolari, diversi dall'interesse pubblico e generale alla tutela dell'ambiente*' [69] ('Compensation for environmental damage, in itself considered as an injury to the public interest in the integrity and wholesomeness of the environment, is provided for and regulated only by Legislative Decree No. 152/2006, so that the holder of the claim for compensation for this type of damage is exclusively the State, in the person of the Minister of Environment; all other subjects, individual or associated, including territorial public bodies and the Regions, may instead act, under Article.

[67] Corte Cost. 2016/04/19, n 126/2016.

[68] Cass. Pen. Sec. III 2018/10/15 n 46699 : « In tema di danno ambientale, le associazioni ambientaliste sono legittimate a costituirsi parti civili nel processo per reati ambientali, sia come titolari di un diritto della personalità connesso al perseguimento delle finalità statutarie, sia come esponenti del diritto alla tutela ambientale » ("On the subject of environmental damage, the environmental associations are legitimated to constitute themselves as civil parties in the trial for environmental crimes, both as holders of a personality right related to the pursuit of the purposes statutory purposes, and as exponents of the right to environmental protection").

[69] Cass. Pen, 2016/08/29 n 35610.

2043 c. c., to obtain compensation for any damage, further and concrete, that they have proven to have suffered from the same conduct and consequent to the injury of their other particular rights, other than the public and general interest in the protection of the environment'); or another stating that : '*La legittimazione a costituirsi parte civile nei processi per reati ambientali aventi ad oggetto fatti compiuti successivamente al 29 aprile 2006 spetta in via esclusiva allo Stato per il risarcimento del danno ambientale di natura pubblica, inteso come lesione dell'interesse pubblico alla integrità e salubrità dell'ambiente, mentre tutti gli altri soggetti, singoli o associati, comprese le Regioni e gli altri enti pubblici territoriali, possono esercitare l'azione civile in sede penale ai sensi dell'art. 2043 cod. civ. solo per ottenere il risarcimento di un danno, patrimoniale o non patrimoniale, ulteriore, conseguente alla lesione di altri loro diritti particolari diversi dall'interesse pubblico alla tutela dell'ambiente, pur se derivante dalla stessa condotta lesiva*'[70] ('The legitimacy to file a civil action in trials for environmental crimes having as their object facts committed after April 29, 2006 belongs exclusively to the State for the compensation of environmental damage of a public nature, understood as a lesion of the public interest in the integrity and healthiness of the environment, while all other subjects, individual or associated, including the Regions and other territorial public entities, can exercise civil action in criminal proceedings pursuant to Art. 2043 Civil Code only to obtain compensation for further damage, patrimonial or non-patrimonial, consequent to the injury of their other particular rights other than the public interest in the protection of the environment, even if resulting from the same harmful conduct').

Consequently, in Italian law, environmental associations have a role, but a very limited one, in that they must prove that they have suffered personal injury and act in accordance with the classical civil liability.

Instead, should perhaps be reconsidered the legitimacy of associations and other persons to act even with regard to the public dimension of environmental damage. Indeed, the public interest unquestionably linked to the recognition of environmental damage does not seems to require a monopoly of the State, because the public interest in environmental matters actually concerns not at all sovereignty, but the entire community.

In addition, in a liberal society, the State's monopoly of action must remain very exceptional and be linked to the regalian missions.

In France, contrary to Italian law, historically the associations[71] were the first persons recognized by the judges as legitimate to act in case of environmental damage per se, that is to say what is in Italy considered as the public dimension of environmental damage.

The French legislature then broadened the list of potential claimants, including according to article 1248 of the Civil Code '*toute personne ayant qualité et intérêt à agir, telle que l'Etat, l'Office français de la biodiversité, les collectivités territoriales et leurs groupements dont le territoire est concerné, ainsi que les établissements publics et les associations agréées ou créées depuis au moins cinq ans à la date d'introduction de l'instance qui ont pour objet la protection de*

[70] Cass. Pen, Sec. III, 2016/05/16 n 20150.

[71] For example: L Dutheillet de Lamothe, 'Le contentieux en droit de l'enironnement mené par les associations devant le Conseil d'Etat' (2019), spec. num. Rev. Jur. Env 41; T Fossier, 'La réparation du préjudice collectif associatif, prélude à celle du préjudice écologique', ibid 63.

la nature et la défense de l'environnement' ('any person with standing and interest to act, such as the State, the French Office of Biodiversity, the local authorities and their groupings whose territory is concerned, as well as public establishments and associations approved or created for at least five years on the date of the institution of the proceedings which have as their object the protection of nature and the defence of the environment').

Furthermore, the principle of subsidiarity seems to be more respected in France since the following article 1249.2 states: '*En cas d'impossibilité de droit ou de fait ou d'insuffisance des mesures de réparation, le juge condamne le responsable à verser des dommages et intérêts, affectés à la réparation de l'environnement, au demandeur ou, si celui-ci ne peut prendre les mesures utiles à cette fin, à l'Etat*' ('In case of impossibility of law or fact or of insufficiency of the measures of repair, the judge condemns the person in charge to pay damages, affected to the repair of the environment, to the applicant or, if this one cannot take the useful measures to this end, to the State'). It is therefore mainly up to the non-State plaintiffs not only to take legal action but also to repair - when the responsible person does not do so himself, as we shall see - the damaged environment.

France has also been quite and maybe to much liberal with associations (as shown in particular by the 'Case of the Century' judged by the administrative Tribunal of Paris, February 3, 2021)[72] by considering, for example, that 'Oxfam', an association fighting against poverty and for fundamental rights, is eligible to act in case of environmental damage. Even if one can consider that the right to the protection of the environment constitutes a fundamental right, the identity of the person who presides over this association - Mrs. Cécile Duflot, former French Minister of Environment and former president of the ecological political party 'Europe Ecologie Les Verts' - does not appear to have been totally unrelated to the judge's decision to consider the association admissible to act and to invoke the ecological damage. In the same way, another association ('*Notre Affaire à tous*') was judged admissible to act, even though it had not previously demonstrated any struggle for the preservation of the environment.

On the one hand, environmental associations may appear legitimate to act; on the other hand, they do not always have expertise in environmental protection - think about the French associations '*Oxfam*' and '*Notre Affaire à tous*'.

This case also helps to show their relative inexpertness in this matter: not only did they request monetary compensation without considering reparation in kind, although this latter is the priority method of reparation in the French law since 2016, but they also evaluated the damage at... one euro, which can thus contribute seriously to devaluing the environment.

Inexpertness or conversely competence, which brings us to the question of who should be responsible.

B) Persons liable

By making the State, if not the beneficiary, at least the holder of the action in environmental liability, Italian law does not expressly envisage that the State can

[72] Administrative Tribunal of Paris, February 3, 2021 N 1904967, 1904968, 1904972, 1904976/4-1.

be held liable for environmental damage. This seems questionable.

First of all, this is a break with the first movement of jurisprudential consecration of environmental damage. According to some authors like Leonardo SALVEMINI[73], there has been a shift from *State liability* to *liability towards the State.* However, this does not appear to be entirely exact insofar as the liability implemented in the 1970s is not that of the State but that of civil servants. The fact remains that in the 1970s if the Court of Audit did not accept the responsibility of the State as such for environmental damage, at least it recognized the responsibility of the President and then the Commissioner-Governor of the Abruzzo National Park, i.e. the responsibility of a public person. It was thus the responsibility of a public person implemented at the request of another public person: the State. That is to say, relations between public persons.

The logical evolution could therefore have consisted, for the administrative judge, in recognizing in the relations this time between private persons and the State, the responsibility of the latter for the damage caused by the public agents and all the persons under its authority.

Secondly, this failure to take into account the State as responsible for environmental damage means in practice that environmental damage, which objectively corresponds to the definition given by Italian law, cannot be compensated if it is caused at least in part by the State. Yet, the definition of environmental damage does not imply any limitation of its consideration according to the status of the persons who are likely to cause it.

Such a lacuna appears more generally to be an obstacle to emerging environmental civil liability.

Finally, the liability of the State would appear to be welcome in the event of the exclusion of the liability of any other person based on article 303,1, h of the Italian Environmental Code for the '*danno ambientale o* (...) *minaccia imminente di tale danno causati da inquinamento di carattere diffuso, se non sia stato possibile accertare in alcun modo un nesso causale tra il danno e l'attività di singoli operatori*' ('environmental damage or (...) imminent threat of such a damage caused by pollution of a diffuse nature if a causal link between the damage and the activity of individual operators could not be established in any way'). Indeed, who better than the State itself should be responsible for such pollution of a diffuse nature and resulting from multiple activities for which it did not sufficiently ensure the general regulation?

Some authors consider that, since the 1986 Italian law it could be a question of ensuring immunity for public agents, and in any case of a contradictory system.[74] Nevertheless, today Italian law could lead to the environmental liability of both private and public persons. The case of the State seems to be special, because it is the only one who holds the power to act.

However, some limited possibilities of responsibility of the Italian State in environmental matters appear through the following prisms:

-The liability of the Italian State towards the European Commission for the non-conformity of Italian law with the European Union's norms. This was the case before the adoption of the Italian Environmental Code. The Commission initiated

[73] L Salvemini, *I principi di diritto dell'ambiente* (1st edn Giappichelli 2019), 270.

[74] Ibid, 270. See also: U Salanitro, 'Il risarcimento del danno ambientale: profili introduttivi', in I Nicoltra e U Salanitro, *Il danno ambientale tra prevenzione e riparazione* (Giappichelli, 2011) II.

several infringement proceedings against Italy after the latter's reluctance to transpose faithfully the European directive of 2004.[75]

Nevertheless, in such a case it is not a question of direct responsibility of the State for ecological damage, but of a failure on the part of the latter to fulfil its European obligation to transpose a text, in this case relating to liability for this type of damage.

-The liability of the State, like that of any public entity with decision-making powers, also seems likely to be engaged when an administrative act appears to be a source of environmental damage. For example, if the State authorizes a public dump in an area already marked by waste pollution. The case of waste in Campania is a good example. A lawsuit was filed by a municipality (Serre) against a series of measures adopted by the Commissioner delegated to solve the waste emergency in the region, including a measure to build a large landfill on the site of the municipality. The plaintiff municipality deduced that the quantity of waste had caused a degradation of the environment to the detriment of the rights of the citizens, of the environmental health and to the local ecosystem (declared wetland). The Tribunal of Salerno admitted the action.[76] Such a case could appear likely to be verified if necessary against the State.

-The responsibility of the State towards other persons can also be envisaged in case of delay in the protection of the environment : article 309 of the Italian Environmental Code indeed organizes a right of '*Richiesta di intervento statale*' ('Request to the State intervention') in favor of non-governmental organizations[77], and article 310 of the same code recognizes for them a right to '*risarcimento del danno subito a causa del ritardo nell'attivazione, da parte del* (...) *Ministro, delle misure di precauzione, di prevenzione o di contenimento del danno ambientale*' ('compensation for the damage suffered as a result of the delay in the activation, by the (...) minister, of precautionary measures, prevention or containment of environmental damage').

One can thus seem to deduce from this a conceivable liability of the State both for the delay in its reaction and also for the period of deprivation of the availability and enjoyment of the environmental goods.

-The State environmental liability can also be envisaged in the case of ecological damage caused following a failure to respect the principles of precaution, prevention and correction of environmental damage. In fact, since the Legislative Decree of 16/01/2008 n 4, article 3 ter of the aforementioned code,

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[75] Part Six of Legislative Decree 152 of 2006 has been revised following the infringement procedure 2007/4679, raised by the European Union against the Italian State, in which the European Commission highlighted the failure to meet the obligations arising from the European Parliament and Council Directive 2004/35/CE of the of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. In particular, Italy was challenged for having kept in force, in Legislative Decree 152/2006, rules that: - in case of environmental damage link the liability of operators to the requirement of fault or intent; - allow in case of damage the possibility of replacing remedial measures with monetary compensation; - limit the scope of application of the directive.

[76] Trib. Salerno, 2007/04/28, n 1189.

[77] Art. 309.1 refering to *"regioni,* (…) *province autonome e* (...) *enti locali, anche associati, nonché* (...) *persone fisiche o giuridiche che sono o che potrebbero essere colpite dal danno ambientale o che vantino un interesse legittimante la partecipazione al procedimento relativo all'adozione delle misure di precauzione, di prevenzione o di ripristino*" ("regions, autonomous provinces, and local authorities, including associated entities, as well as natural or legal persons who are or may be affected by environmental damage or who have a legitimate interest in participating in the proceedings relating to the adoption of precautionary, preventive, or restoration measures").

on 'Environmental action principles', states: '*1. 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*' ('1. The protection of the environment and natural ecosystems and cultural heritage shall be ensured by all public and private entities and public or private natural and legal persons through appropriate action that is informed by the principles of precaution, preventive action, correction, as a priority at the source, of damage caused to the environment, as well as the polluter-pays principle, which, pursuant to Article 174, paragraph 2, of the Treaty of European Unions, govern the community's policy on the environment').

Consequently, failure to comply with these principles of European origin and codified by the Italian legislature would constitute a fault.[78] Such a fault, which is a subsidiary basis of environmental liability in Italian law (if the strict liability for the specific and listed activities cannot be held), as we have recalled, would thus be the cause of liability of the person who caused it, if necessary the State itself, in the event that one or more environmental damages were to result from it.

- More generally, the liability of the State appears likely to derive from article 299, paragrah 3, which states: '*L'azione ministeriale si svolge nel rispetto della normativa comunitaria vigente in materia di prevenzione e riparazione del danno ambientale* (...)' ('The ministerial action shall be carried out in compliance with existing European legislation on the prevention and remediation of environmental damage (...)').

- Again more generally, the State through the acts and policies of the public administration appears likely to be considered as an author, at least in part, of the environmental damage.

This is the case in at least three respects: because of a State policy, or because of the disregard by the State Administration of the State's international commitments, or even because of the disregard by the State of the State environmental laws.

In the first case, France for example (unlike Italy) adopted a policy favoring the development of diesel.[79] However, a WHO report of 2012 pointed out its carcinogenic effect.[80]

Today, only in France about 45,000 deaths per year are considered to be directly linked to ambient air pollution[81] and 13 million deaths in the world are considerated by the WHO to be directly linked to the pollution.[82]

It is not only a question of infringement of fundamental human rights, in this case the rights to life and health protected bu European Convention and Court of Human Rights, but also clearly an environmental damage in the sense of the Italian and French laws since it is a question of a *'atteinte non négligeable aux*

[78] In France: H Delzangles, 'Le "contrôle de la trajectoire" et la carence de l'État français à lutter contre les changements climatiques' (2021) 36 Act. Jur. Dr. Adm., 2115, 2127.
[79] https://www.leparisien.fr/archives/tout-a-debute-sous-de-gaulle-05-06-2012-2032992.php
[80] https://www.iarc.who.int/wp-content/uploads/2018/07/pr213_E.pdf
[81] https://ec.europa.eu/environment/archives/cafe/general/keydocs.htm#country
[82] Environmental health (who.int)

éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement' ('non-negligible infringement of the collective benefits derived by man from the environment') in the sense of article 1247 of the French civil code and a '*deterioramento significativo e misurabile, diretto o indiretto, di una risorsa naturale o dell'utilità assicurata da quest'ultima*' ('significant and measurable deterioration, direct or indirect, of a natural resource or of the utility secured by it') in the sense of article 300 of the Italian Environmental Code.

By opening clearly the way to a possible environmental liability of the State, the Italian environmental code would also appear to be consistent with its own provisions: in addition to the above-mentioned provisions which refer to the duties of the State in this matter, art. 302 on definitions sets out: '*4. Per "operatore" s'intende qualsiasi persona, fisica o giuridica, pubblica o privata, che esercita o controlla un'attività professionale avente rilevanza ambientale oppure chi comunque eserciti potere decisionale sugli aspetti tecnici e finanziari di tale attività, compresi il titolare del permesso o dell'autorizzazione a svolgere detta* attività' ('4. "Operator" means any person, natural or legal, public or private, who engages in or controls a professional activity with environmental significance or who otherwise exercises decision-making power over the technical and financial aspects of that activity, including the holder of the permit or authorization to carry out that activity'). Indeed, the State is a legal person under public law, and it is not impossible to think that it exercises decision-making power on technical aspects (for example, with its regulations on the technical characteristics of motor vehicles) and financial aspects (especially through its fiscal policy).

Furthermore, cannot the fact that the Administration authorized, not prohibited or not sufficiently regulated certain polluting activities, especially the massive use of fossil fuels, entail its environmental responsibility? As Italian law stands, article 303 of the Environmental Code exempts the '*danno causato da un'emissione, un evento o un incidente verificatisi prima della data di entrata in vigore della parte sesta del presente decreto*' ('damage caused by an emission, event or accident that occurred before the date of the entry into force of Part Six of this Decree') and the '*danno in relazione al quale siano trascorsi più di trent'anni dall'emissione, dall'evento o dall'incidente che l'hanno causato*' ('damage in relation to which more than thirty years have elapsed since the emission, event or accident that caused it').

This would largely limit the liability of the State as well as of any person for past activities. On the other hand, article L161-2 of the French Environmental Code that lists the various exemptions does not refer to such a case.

The second case of potential liability of the State in case of environmental damage refers to its disregard of international commitments. The aforementioned example of deaths linked to air pollution can also be understood through the fundamental rights protected by the ECHR, and in particular the rights to life (a. 2) and to a healthy environment that the ECtHR has derived from article 8.[83] We can also mention, more recently, the Paris agreements providing for a maximum threshold of warming of the air temperature. Here again, French case law is instructive, having sanctioned the French State for failure to comply with the

[83] *López Ostra v. Spain*, n 16798/90/, ECHR 227 (1994).

trajectory set by the international texts.

Regarding the third case, a state public service that would disregard the laws of public protection of the environment should engage the responsibility of the State.

Thus, even if the activities of the latter do not fall within the scope of the strict or 'objective' liability foreseen for operators by the Italian environmental code, the environmental liability of the State could well fall within the scope of 'subjective liability', if not for fraud at least for fault (disregard, by the Italian State Administration, of the law or of Italy's international commitments in the matter...).

The fact that the State is the guarantor of the interests of the community should therefore not only lead to conferring on it standing to act, but should also lead to considering it as equally responsible. This is the choice of French law. First, the Charter of the Environment of 2005 (article 4) that has a constitutionnal value refers to the number of potential debtors as 'any person' - and the State is obviously a legal person. Then, in spite of the traditional reticence of the French administrative judge criticized by a majority of the French doctrine [84] the Administrative Tribunal of Paris, seized by associations, finally admitted in January 2021 that the State could be considered as responsible for environmental damage.[85] Thus, in France in matter of environment the State is both a remedy and an evil, Doctor Jekyll and Mr Hyde.

However, this does not appear incongruous insofar as the law of civil liability taught us that the same person can following to the circumstances be responsible ortherwise a victim.

This duality of apprehension of the State - which can be a claimant (the French Civil Code having integrated environmental liability in 2016 grants the State the right to act in case of environmental damage) but also responsible - would thus benefit from being extended to Italian law, which could on this point also be inspired by French law.

Again, the principles of the Italian environmental code lead to the retention that the guarantee of environment, natural ecosystems and of cultural heritage should be assumed according to art. 3 ter, 1 by '*tutti gli enti pubblici e privati e dalle persone fisiche e giuridiche pubbliche o private*' ('all public and private entities and by public or private legal persons'), and art. 3 quarter, 2 rules that: '*Anche l'attività della pubblica amministrazione deve essere finalizzata a consentire la migliore attuazione possibile del principio dello sviluppo sostenibile*' ('The activities of public administration must also be aimed at enabling the best possible implementation of the principle of sustainable development').

This would therefore logically seem to imply a possibility of environmental liability of the State, which is not however expressly provided for in the adopted measure, nor in past legal measures.

Nevertheless, the various difficulties of the environmental liability action against the State should not be overlooked. They appear in light of French law

[84]Marthe Lucas, 'Préjudice écologique et responsabilité: pour l'introduction légale du préjudice écologique en droit de la responsabilité administrative', (2014) 4 Envir., 11-18; C Huglo, 'L'inéluctable prise en compte du dommage écologique par le juge administratif', (2013) 12 Act. Jur. Dr. Adm., 667-673.
Compare: Maryse Deguergue, 'Les imperfections de la responsabilité administrative environnementale' (2018) 36 Act. Jur. Dr. Adm 2077-2081, advocating a *"solidarité"* (public solidarity) without however clearly precising if it must be a taxation.

[85] Administrative Tribunal of Paris, in January 2021, N 1904967, 1904968, 1904972, 1904976/4-1.

which also has its own batch of inconsistencies. In particular, French law strangely provides that, in the event that the plaintiff is unable to take the necessary measures, the damages may be paid to... the State itself. Quite singular situation where the State would pay damages to itself!

The State would not be in reality responsible at all, because such a payment would only be made by the game of accounting entries from a public budget to another public budget.[86]

As can be seen, a whole area of environmental liability appears either blocked upstream (Italian law) or annihilated downstream (French law).

Consequently, French law would benefit from eliminating this weapon of mass self-destruction of the environmental liability. For example, by providing that when it is the State that is judged to be responsible or co-responsible, the damages due by the latter should always be paid to the plaintiff and allocated to the concrete repair and protection of the environment. If necessary under the control of the debtor State itself.

If it were to take up this possibility of holding the State responsible for environmental damage, Italian legislature would have to take care to refrain from providing for the State to pay compensation to itself, even from one State budget to another.

More fundamentally, in all cases where the State is considered as a person potentially responsible for environmental damage, whether the compensation is in kind or in the form of a monetary equivalent, it can only be made at the taxpayer's expense.

More precisely, the present and future taxpayer, for past choices that were essentially public, such as for instance the French policy of favoring diesel.

This contributes definitly to make environmental civil liability a strange legal object between the traditional tools of penalization and taxation, but undoubtedly a necessary evil both before and for a deep ecological transition.

[86] J Bétaille, 'Le préjudice écologique à l'épreuve de l'affaire du siècle' (2021) 38 Act. Jur. Dr. Adm. 2228-2234.