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ENVIRONMENT (CONSTITUTIONAL COURT, 2009)

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1. In 2009 the Italian Constitutional Court tackled various themes of environmental nature and its judgments are numerous and significant (over fifty, starting with decision n. 10/2009).

Setting aside the specific topics and sub-topics that are the subject of the individual judgments (affecting all areas: water, air, soil, pollution, etc.), in this field we may observe that the *focus* of the constitutional jurisprudence is still the issue of the division of the legislative competences between the State and the Regions in the field of public policies of protection of the environment when the theme of administrative competences (of the State, of the Regions, and of the lesser territorial authorities) are not directly involved.

In other words, also where the double dilemma arises as to whether on the one hand the environment is a *quid unicum* (an asset which has to be considered as a single unit) or whether it should instead be considered as a complex plurality of assets, and on the other hand whether the environment as such is a non-material or a material asset, the analytical reasoning of our constitutional judge, and naturally of his judgments, always ends up with providing an initial – and sometimes a full - answer to a recurrent question: Who does what and what do they do?

In this context, the constitutional jurisprudence of the year 2009 is aimed at investigating the relationship - which is as chaotic as it is delicate – between the legislative competences of the State and those of the Regions, in the light of articles 117 and 118 of the Constitution, as expressed by Constitutional Law n. 3/2001.

Indeed it is known that art. 117, secondo comma, lettera s) Cost. attributes to the exclusive legislative competence of the State the regulation of the "protection of the environment, of the ecosystem and of the cultural heritage" whereas the subsequent third comma of the same art. 117 identifies as a matter of "concurrent (between the State and the Regions) legislative competence" ("*competenza legislative concorrente*") a plurality of sectors that are objectively implicated and connected with the protection of the environment: the safeguarding of health and food; the administration of the territory; the nationwide production, transportation and distribution of energy; above all the valorisation of the cultural and environmental heritage, and so on.

And to this should be added the fact that, in the light of the fourth comma of art. 117 Cost., any matter that is not expressly attributed either to the exclusive legislative competence of the State, or to the concurrent competence of the State and the Regions, falls under the exclusive (or residual) competence of the Regions. This is a problem which immediately arose with regard to matters which had already traditionally been attributed to the concurrent jurisdiction of the Regions (hunting, building, etc.: cf. the text of art. 117 Cost. prior to the constitutional Reform of 2001).

All this explains and justifies the oscillations of our constitutional jurisprudence and enables us to understand, on the other hand, the important result of conceptual organization that has been achieved through the judgments of the year under consideration.

2. In the year 2009 the Constitutional Court delivered the following judgments on the protection of the environment in our legal system: n.10/2009; n.12/2009; n. 25/2009; n. 30/2009; n. 45/2009; n. 53/2009; n. 61/2009; n.79/2009; n.84/2009; n.86/2009; n.88/2009; n.109/2009; n.122/2009; n.137/2009; n.139/2009; n.141/2009; n.145/2009; n.153/2009; n.165/2009; n.166/2009; n.173/2009; n.186/2009; n.218/2009; n.220/2009; n. 225/2009; n.226/2009; n.232/2009; n.233/2009; n.234/2009; n.235/2009; n.238/2009; n.240/2009; n.241/2009; n.246/2009; n.247/2009; n.248/2009; n.249/2009; n.250/2009; n.251/2009; n.254/2009; n.260/2009; n.272/2009; n.279/2009; n.282/2009; n. 290/2009; n.300/2009; n.302/2009; n.307/2009; n.309/2009; n.314/2009; n.315/2009; n.316/2009; n. 322/2009; n.339/2009.

This is evidently rather a vast body of judgments (53, to be precise!) which are moreover ascribable to some homogeneous trends of thought and deliberation, as we have just seen. It therefore seems preferable to intervene selectively on those decisions that have contributed most towards determining or consolidating the trends and orientations which had already emerged in previous years, or to outline new interpretative lines of the constitutional norms (arts.117 and 118 Cost., which are obviously connected with arts. 9 and 32 as regards the more general principles).

In this context decision n. 61/2009 appears to be of particular value, as its logical antecedent is, to some extent, represented by the previous decisions n. 12/2009, nos. 62, 104 and 105 of 2009.

In decision n. 61/2009 the Court once more tackled the *vexata quaestio* of the distribution of competences between the State and the Regions, in the light of art. 117 Cost., at last and definitively surmounting the jurisprudential trend set in motion by the "mother of all judgments", namely by decision n. 407/2002. After the new "*titolo V°*" of the second part of the Constitution came into force, decision n. 407/2002 led to the formulation of a real process of "dematerialization" of the subject of the environment. Thus the environment (*rectius*, the protection of the environment) was no longer a subject in the technical sense, it was instead a value and, as such, it was able to mobilize the competences of all the subjects of our multilevel system (and especially the legislative competences of the Regions, despite the clear literal contents of the formula about which see art. 117, secondo, comma, lettera s) Cost.).

However, decision n. 61/2009 affirms the pre-eminence – and indeed the exclusivity – of the legislative power of the State in the field of the environment, stating the principle by which, according to what is written in the grounds for the decision: "The Regions, in the exercise of their competences, shall respect the State provisions on the protection of the environment, but for the purposes of achieving the specific objectives of their competences (on the subject of safeguarding health, administration of the territory, exploitation of the environmental heritage, and so on) they may establish higher levels of protection...."

This is a most interesting point as it is not the matter of the environment as such that is, so to speak, fragmented and disjointed, to the extent that it takes on the character of (mere) value. It is instead thanks to fundamental issues of concurrent competence, between the State and the Regions (objectively implicated and connected with the public policies of protection of the environment), that the Regional legislative powers possess an important diffusive capacity, to the point of being able legitimately to raise the threshold and the standards of environmental protection in their territory of competence. This appears to be an important hermeneutic operation if we consider that, in the light of art. 117, terzo comma, Cost., on the subject of competing legislative competences the State can only provide for the "determination of the fundamental principles…" of the single matters. In any case, according to what also the best doctrine has pointed out in comment to this and other coeval decisions by the Constitutional Court (P. MADDALENA, *La tutela dell'ambiente nella giurisprudenza costituzionale,* in *Giornale di diritto amministrativo*, fasc. n.3/2010, 307ff and F. FONDERICO, commenting, moreover, on subsequent decision n. 225/2009, *ivi*, fasc. n. 4/2010, 369ff.), what appears clear and beyond dispute is the exclusive (and even the intangible) nature of the legislative competences of the State in the field of the environment. This means that the albeit active, and not merely marginal or supporting, role of the Regions has to be derived from other matters (those of concurrent competence), without subtracting anything from the ordinative and diriment value of letter *s)* of art. 117, primo comma, Cost.

In this regard the doctrine (P. MADDALENA, o*p. loc. cit.*) certainly hits the mark by pointing out that the judge of the constitutionality of the laws thus states equally the principle according to which the environment is always and in any case "material", objectively a "material" asset (also on this point reiterating the less recent constitutional jurisprudence) while concluding, from another point of view – but in reality with fully consistent logic – that if the State is bound to ensure the "minimum standard of protection" this in no way subtracts from the fact that the aforesaid standards and levels of protection have to in any case entail "appropriate and not reducible" care "of the environment". "Appropriate" and not "reducible" - and therefore "high" - protection which the individual Regions can implement if required, but only thanks to the mobilization of other faculties and powers, in the wake of art.117, terzo comma, Cost.

To fully grasp the elements of originality and novelty of the trend outlined by the aforementioned decision n. 61/2009 which leads, to some extent, to results of a certain degree of stability – almost a solid and stable point from which there is no going back – it may be useful to consult decision n. 62/2008 on the subject of the regulation of refuse which instead appears to follow in the wake of the previously cited decision n. 407/2002 (the "mother of all judgments", as we have already said). And indeed according to this decision of 2008 the legislative competence of the State on the subject of the protection of the environment is interwoven with other interests, with other different competences which are above all ascribable to the Regions: from here to state that the environment is a "value" (and not a matter in the true sense) is a short step, and thus we return to the spirit of decision n. 407/2002.

In any case, the judgments subsequent to decision n. 61/2009 and especially n.12/2009 and n. 30/2009 appear broadly to confirm the assumptions of the often cited decision n. 61/2009. In particular, these judgments uphold the concept that the national regulation regarding the protection of the environment plays the role of "limit", in the sense that it prevails over the regulations made by the Regions (including the Special Statute Regions) even on subjects and fields of their competence.

3. In any case, it is with decision n. 225/2009 that the new jurisprudential trend appears to receive definitive and stable consecration. Without any doubt, this is the weightiest and most important decision to have been issued by our constitutional judge in the year 2009 with regard to the subject of the protection of the environment in our constitutional system (cf. P. MADDALENA, op. loc.cit e F. FONDERICO, *op. loc. cit.*).

Indeed it is stated that: "The subject "protection of the environment" has a content which is at the same time objective, as it refers to an asset (the environment), and finalistic because it aims at the best conservation of the asset itself. On the environment various State and Regional competences are concurrent; however, they remain distinct from one another,

pursuing autonomously their specific objectives through the provision of various disciplines".

So the environment is certainly an asset, it takes the form of a material object and with regard to it there is a plural concurrence of State and Regional powers; the assumptions of this concurrence are in any case constructed according to the principles of autonomy and differentiation/distinction.

The Constitutional Court is perfectly coherent when it adds that "The State is entrusted with the protection and conservation of the environment, by means of establishing "appropriate and not reducible" levels of "protection", while it is up to the Regions, in full respect of the levels of protection established by the State provisions, to exercise their own competences, aimed essentially at regulating the enjoyment of the environment, preventing the environment from being compromised or altered". And so the guideline which had already clearly emerged with the previous decision n. 61/2009 is confirmed, apart from the fact of distinguishing in a clear-cut manner between one competence (of the State) aimed at ensuring appropriate and not reducible levels of protection of the environment and the direct Regional powers aimed instead at regulating the concrete forms of the enjoyment of the asset "environment", without that enjoyment turning into a lower level of its protection.

To this should be added, on the same wavelength as a large part of the jurisprudence which became consolidated in the year 2009, that "State competence, when it is the expression of the protection of the environment, is a limit to the exercise of the Regional competences", pointing out that "The Regions themselves, in the exercise of their competences, shall not violate the level of protection of the environment set by the State" and that, moreover, "The Regions themselves, so long as they remain within the limits of the exercise of their competences, can attain higher levels of protection, thus having an indirect effect on the protection of the environment". Which, all things considered, cannot let us forget, in the opinion of the Constitutional Court, that "This possibility is, however, excluded in the cases in which the State law has to consider itself binding, as it is the fruit of a balance between several interests which may be in contrast with each other".

It is certainly significant that our constitutional judge has reached clear-cut conclusions in the context of a process of balancing/comparison between the protection of the environment and that of health (art. 32 Cost., to be read in connection with art. 117, terzo comma, Cost.).

Indeed the Court fully grasps the links between functions (and above all between culture and values) which bind together in a sort of inextricable *quid unicum* the safeguarding of health and the protection of the environment, as "there is no doubt that the healthiness of the environment conditions human health". And on the other hand it is no less true (at least from the legal point of view!) that "the two competences have different objects", in the sense that the Regional regulations aimed at safeguarding the human right to health can only reflect indirectly on the environment which has already been made the subject of "appropriate" regulations and protection by the law of the State.

Consequently, in the field of the protection of the environment the State has exclusive legislative competence. According to art. 188 Cost. the State therefore has the right grant to itself, i.e. to the Regions or to the lesser territorial authorities, the exercise of administrative functions regarding the environment, in the light of the principles of subsidiarity, appropriateness and differentiation.