

**POLICIES AND POWERS OF LOCAL GOVERNMENT IN THE
AREA OF ENVIRONMENTAL PROTECTION: AN
INTRODUCTION**

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1. ENVIRONMENTAL PROTECTION AND LOCAL GOVERNMENT ACTION

Many studies assert the global dimension to environmental protection as a kind of hallmark of environmental law which sets it apart from other branches of special administrative law:¹ questions relating to atmospheric or marine pollution, deforestation, the protection of birds, or, above all, climate change² can certainly not be addressed from a local perspective.

Focusing on the ascending effect of such protection, it should be stressed that environmental questions, including in particular those of global significance (including - fundamentally - climate change), must be addressed first and foremost by international bodies, and then subsequently by those on lower levels (for our present purposes, the European and national authorities), whilst acknowledging that local government will only play a marginal role.³

¹ A. MASSERA (ed.), *Diritto amministrativo e ambiente*, Editoriale Scientifica, 2011, 51 et seq; G. ROSSI, *Diritto dell'ambiente*, 2nd ed., Giappichelli, 2011, 6; M. CAFAGNO, *Principi e strumenti di tutela dell'ambiente*, Giappichelli, 2007, passim, although specifically 297 et seq; R. FERRARA, *L'organizzazione amministrativa dell'ambiente: i soggetti istituzionali*, in R. FERRARA et al, *Diritto dell'ambiente*, 135; P. DELL'ANNO, *Modelli organizzativi per la tutela dell'ambiente*, in *Riv.giur.amb.*, 2005, 957; ID., *Diritto dell'ambiente*, 2nd ed., 2011, 8; M. SALERNO, *Le strutture*, in *Principi di diritto ambientale*, 2nd ed., (edited by G. DI PLINIO, P. FIMIANI), Giuffrè, 2008, 57.

² For reflections that are necessarily inter-related with ethics, see F. FRACCHIA, *Climate change: alla ricerca del corretto approccio metodologico del giurista di fronte ai problemi dello sviluppo sostenibile*, in *Econ.fonti energia e ambiente*, no. 1/2010, 67 et seq.

³ On the organisational framework, see M.RENNA, *L'allocazione delle funzioni normative e amministrative*, in G. ROSSI, *Diritto dell'ambiente*, cit., 135.

The goal of this study is on the contrary to demonstrate that, having regard to positive law (including above all international law and European law) and case law, the role of local government policies and powers in the areas of environmental protection is (by contrast) of absolute significance not only for micro-management issues but also most general questions, such as specifically climate change.⁴

Moreover, it is not by chance that the document that inspires local government action in accordance with the Charter of European Cities and Towns Towards Sustainability states that “climate change is a global issue which undoubtedly reaches beyond borders and the decision-making capacity of any city or region. However, cities may also provide an important contribution to combating climate change, as 75% of greenhouse gases are produced in urban areas”.⁵

Following a brief general overview of the various organisational levels of the environmental system, this paper intends to investigate the role of local government in environmental protection, with specific reference to the way in which supra-national legal

⁴ There is a vast bibliography on this issue: see most recently M. MONTINI, *L'accordo di Copenhagen sui cambiamenti climatici. Riflessioni critiche*, in *Riv.giur.amb.*, 2010, 659; G. ZORZOLI, *Cambiamenti climatici e condizionamenti culturali*, in *Ec.fonti energia e amb.*, 2010, 1, 49 et seq; C.VIVIANI, *La posizione italiana nei negoziati sul clima e l'energia*, in *Ec.italiana*, 2010, 435; WANG L., *Verso Copenhagen. La Cina e i cambiamenti climatici*, in *Riv.giur.amb.*, 2009, 567 et seq; L. DE PAOLI, *I cambiamenti climatici: a che punto siamo?*, in *Ec.fonti energia e amb.*, 2009, 5; G. SILVESTRINI, *I dieci anni decisivi per il clima*, in *Ec.fonti energia e amb.*, 2009, 77; L. CASTELLUCCI, *A note on speculation, emissions trading and environmental protection*, in *Riv.pol.ec.*, 2009, 127; A. POSTIGLIONE, *Sostenibilità ambientale e cambiamenti climatici*, in *Dir.e giur.agr.e amb.*, 2008, 78; L. ECCHER, *Il libro verde della commissione europea sui cambiamenti climatici*, in *Riv.giur.amb.*, 2007, 933; M. D'AURIA, *La direttiva europea emissions trading e la sua attuazione in Italia*, in *Giorn.dir.amm.*, 2005, 4, 455 et seq; M. DENTE, *Il lungo cammino dell'Italia verso Kyoto. La programmazione italiana in materia di politiche dei cambiamenti climatici e le recenti norme di attuazione*, in *Riv.giur.amb.*, 2005, 59.

⁵ Aalborg Charter, as approved by the participants at the European Conference on Sustainable Cities & Towns held in Aalborg on 27 May 1994.

systems view the relationship between local government and environmental protection. It will therefore start from international law, subsequently focusing also on European law.

It will then provide a summary overview of the powers of local government under national law, highlighting the paths along which the system has developed.

This will lead into a description of how specifically local government in Italy has interpreted the role vested in it under positive law in recent years.

Finally, several suggestions will be provided regarding the need for local action also in relation to issues of general scope.

2. LOCAL GOVERNMENT AND ENVIRONMENTAL PROTECTION UNDER INTERNATIONAL LAW

Under general international law, local government is one of the fundamental institutional actors in relation to the environment.

If one skims through the various types of rule, it is immediately evident that local government bodies and authorities are necessarily and inevitably involved in environmental protection policies along with international bodies (which include: the United Nations Environment Programme (UNEP);⁶ the World Health Organisation (WHO) (which encompasses the Radiation and Environmental Hygiene Unit, the ICNIRP⁷ and the

⁶ On this see G. G. NUCERA, *La governance ambientale internazionale. L'UNEP e la necessità di una riforma verso Rio +20*, in *Riv.quad.dir.amb.*, 3, 2011.

⁷ The origins of the International Commission on Non-Ionizing Radiation Protection (ICNIRP) date back to 1973, the year in which a session dedicated to protection from non-ionizing radiation was organised for the first time during the third congress of the International Radiation Protection Association (IRPA). A working group was subsequently formed (1974) followed by a study group (1975) whilst in 1977 the International Non-Ionizing

International Agency for Research on Cancer)⁸; International Union for Conservation of Nature (IUCUN), or the United Nations Educational, Scientific and Cultural Organization (UNESCO)⁹; international administrative river navigation commissions), European administrations (such as the Environment Directorate-General of the Commission, the European Environmental Agency,¹⁰, the European Environment Information and Observation Network (EIONET)¹¹, the European Union Network for the Implementation

Radiation Committee (INIRC) was created, which is the precursor to the ICNIRP. The ICNIRP was created during the eighth international congress of the IRPA in May 1992 as an independent organisation (the scientists who are members of it are not permitted to work for the private sector), charged with the task of investigating health risks that could be associated with various forms of NIR (Non-Ionizing Radiation), developing international guidelines to specify the relative exposure limits and treating all aspects relating to protection from this radiation. The ICNIRP is currently financed by the IRPA, the European Union and the WHO.

⁸ The IARC (www.iarc.fr) is a body within the World Health Organisation specialising in cancer research, which conducts international monitoring on the impact that cancers have on death rates, and divulges scientific information through publications, meetings and research grants.

⁹ These exist alongside the following organisations, which have specific tasks, the World Meteorological Organization (WMO), the Food and Agriculture Organisation (FAO), the World Bank, the G7 and the OECD.

¹⁰ The European Environmental Agency was founded in 1990 (Council Regulation EEC no. 1210/90 of 7 May 1990) and has been operational since 1993.

¹¹ The network was established in 1994 by the same Regulation which established the European Environmental Agency (www.eionet.eu.int). Information collected by the network is essential for the exercise of the Commission's powers during the drafting and implementation of Community law, the enactment of legislation by the Member States within the limits of their jurisdiction and the dissemination amongst the general public of information concerning the environment. On this point see E. CHITI, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Padova, Cedam, 2002, 251.

and Enforcement of Environmental Law (IMPEL)¹² and, above all, the scientific commissions¹³) and the national authorities (in Italy, the Ministry for the Environment and the Territory¹⁴, the Environmental Protection and Technical Services Agency,¹⁵ the National Agency for New Technologies, Energy and Sustainable Economic Development,¹⁶

¹² The network of European environmental operators is informal and has been operating since 1992: its role is expressly recognised under Article 3(2) of the Sixth Community Environment Action Programme. The task of IMPEL is to ensure that the national authorities apply harmonised environmental law in as uniform a manner as possible (thereby avoiding latent discrimination or distortions of competition).

¹³ The various committees include: the waste committee (provided for under Article 18 of Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste); the cosmetic products committee (established under Decision 78/45/EEC of 19 December 1977 in order to ensure that these products do not contain substances that are toxic for humans) and the Committee for Proprietary Medicinal Products (“CPMP”) established under directive 75/319/EEC.

On the stages in the development of the Community administration which resulted in the formation of the committees (from mission administration to oversight and finally management administration), see S. CASSESE, *Lo spazio giuridico globale*, 2003, 93 and S. CASSESE, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in *Crisi dello Stato*, Ed. Laterza, 2002, 74 et seq.

¹⁴ The Ministry of the Environment was established by Law no. 349 of 8 July 1986: on the related issues, see G. CAIA, *Il ministero dell'ambiente*, in E. SPAGNA MUSSO (editor), *Costituzione e struttura del governo. La riforma dei Ministeri (parte seconda)*, Padua, Cedam, 1988, 463 et seq and M. MALO, entry for *Ministero dell'Ambiente*, in *Dig.disc.pubbl.*, IX, Turin, Utet, 1994, 496 et seq.

¹⁵ The Agency was established by Decree-Law no. 496 of 4 December 1993, converted with amendments into Law no. 61 of 21 January 1994. On this see V. MOLASCHI, *L'Agenzia per la protezione dell'ambiente e per i servizi tecnici*, in *Giorn.dir.amm.*, 2002, 721 et seq.

¹⁶ The ENEA is governed by Italian Law no. 282 of 1991 which transformed a previous body, the original goals of which concerned the promotion of nuclear energy. Italian Legislative Decree no. 36 of 1999 completed the process of its conversion by vesting it with research and experimentation tasks above all in the area of clean energy. See P. DELL'ANNO, *Manuale di diritto ambientale*, 3rd ed., Padua, Cedam, 2000, 93.

the Central Institute for Scientific Research and Marine Applied Technology,¹⁷ the Water Research Institute¹⁸ and the Superior Institute for Prevention and Workplace Safety).¹⁹

The local authorities and administrations cited, along with civil society (which expresses its views through interventions by private individuals, environmental associations or ad hoc figure such as environmental consortia), comprise a multi-level system, which is able to ensure effective protection in accordance with Article 3-ter and 3-quinquies of the Italian Environmental Code²⁰ solely and exclusively if all of its components interact harmoniously.²¹

¹⁷ The Central Institute for Scientific Research and Marine Applied Technology is a scientific non-profit public research body which provides institutional support for policy making by the central authorities with competence to resolve marine environmental problems (its Charter was approved by the Ministerial Decree of 21 May 2001). It was established by Article 9 of Italian Law no. 41 of 17 February 1982 as the ICRA (Central Institute for Scientific Research and Technology applied to Fishing) with the purpose of supporting the former Ministry for Merchant Shipping. Subsequently, Article 4 of Italian Law no. 220 of 28 February 1992 changed its name to ICRAM whilst its competences were expanded to include the protection of the marine environment and the sustainability of industrial activities. It was subsequently transferred to the Ministry for the Environment and Protection of the Territory under Article 1(10) of Italian Law no. 537 of 1993.

¹⁸ The tasks of the Water Research Institute of the National Research Council are laid down in the "Merli" Law (no. 319 of 1976) and Italian Presidential Decree no. 133 of 1992. On the scaling back of the institute, see P. DELL'ANNO, *Manuale di diritto ambientale*, 2000, cit., 94.

¹⁹ R. FERRARA, *I principi comunitari di tutela dell'ambiente*, in *Dir.amm.*, 2005, 518 effectively describes the enduring vitality of nation states ("after a summary declaration of presumed death") in orienting Community law choices in relation to the environment.

²⁰ The preference in favour of environmental protection powers for local government is expressed in particular in paragraph 3 of Article 3-quinquies of Italian Legislative Decree no. 152 of 06.

²¹ On the principle of loyal cooperation in this area, see also A. ROMANO TASSONE, *Stato, Regioni e enti locali nella tutela dell'ambiente*, in *Dir.amm.*, 1993, 108 et seq.

Since the adoption of the very first provisions dealing with the environment, it has been clear that international law acknowledges the absolutely vital role played by local government.

According to Article 7 of what may be regarded as the very first general declaration on the environment,²² the UN Declaration on the Human Environment in Stockholm in 1972, “*local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions*”.

Twenty years later, the United Nations Conference on Environment and Development (UNCED), which was held in Rio de Janeiro in 1992, which still constitutes one of the linchpins of international environmental law, approved the action plan entitled "Agenda 21" (things to be done in order to protect the environment in the 21st Century), which grants local government a fundamental role in the achievement of sustainable development.

Chapter 28 of that document contains four assertions, which appear to be of absolute significance in highlighting the role of local government in protecting the environment on an international level.

First it is important to stress the assertion that “*because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives*”. According to that declaration, participation by local authorities is regarded as a genuine “determining factor” in achieving environmental protection.

Secondly, it is stated that “*local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and*

²² For a summary and effective overview of the development of international environmental law, see G. ROSSI (editor), *Diritto dell'ambiente*, II ed., 2011, 30 et seq.

subnational environmental policies”, thereby stressing the need to vest the local authorities with specific powers over the environment.

Thirdly - though here from a more specifically educational perspective - it is stated that the local authorities “*as the level of governance closest to the people [...] play a vital role in educating, mobilizing and responding to the public to promote sustainable development*”.

Chapter 28 concludes by directing a specific appeal to all local communities to implement a local Agenda 21 which can translate the general objectives of the Agenda 21 into tangible and specific programmes and initiatives in all contexts.

Fourthly, according to Chapter 28 “*the local authorities must launch a process of consultation in order to achieve consensus regarding the local Agenda 21. Each local authority should enter into a dialogue with its citizens, local organizations and private enterprises and adopt a local Agenda 21. This consultation will enable the authorities to acquire the information needed for formulating the best strategies. The process of consultation would increase household awareness of sustainable development issues. Local authority programmes, policies, laws and regulations to achieve Agenda 21 objectives would be assessed and modified, based on local programmes adopted. Strategies could also be used in supporting proposals for local, national, regional and international funding*”.

The initiatives provided for under the local action plan can only be implemented if there is closer cooperation between all sectors involved and, within this context, if the local authority is regarded as the most appropriate subject for coordinating the entire process.

Amongst the “special” international law instruments that attribute a specific role to local government it is also important to mention the *Aalborg Charter* or the Charter of European Cities and Towns Towards Sustainability, as approved by the participants at the European Conference on Sustainable Cities & Towns held in Denmark on 27 May 1994 (organised by the International Council for Local Environmental Initiatives - ICLEI), which has been

confirmed several times during meetings in Lisbon in 1996, Hanover in 2000, Johannesburg in 2002 and Aalborg in 2004 (Aalborg+10).²³

The Charter was signed by hundreds of European local government bodies (in Italy by around 150 municipalities and provinces, including Florence, Rome, Milan, Palermo and Naples) which undertook to implement the Agenda 21 locally and to draw up long-term action plans to promote sustainable development towards sustainability.

In Italy, the Charter has had particular legal relevance in relation to Article 2 of Italian Decree-Law no. 263 of 9 October 2006 on the waste emergency in Campania, which placed the Extraordinary Administrator under an obligation to adopt measures suitable for ensuring the provision of information to and participation by local residents in accordance with the principles of the Aalborg Charter.

Indeed, it has been applied by the administrative courts, which have annulled orders that had been issued by Prefects that did not comply with the principles enshrined in the Charter.²⁴

Another document of particular importance is the Leipzig Charter on Sustainable European Cities²⁵ signed in May 2007, in which the ministers responsible for urban development in the twenty seven EU Member States voluntarily undertook to enhance energy efficiency in cities and to promote efficient and convenient urban transport networks.

²³ On this see A. GIUFFRIDA, *La Carta di Aalborg*, in F. FRACCHIA-M. OCCHIENA (a cura di), *Climate change. La risposta del diritto*, Editoriale Scientifica, Naples, 2011, 305-311.

²⁴ Regional Administrative Court for Campania, judgment no. 6075 of 12 June 2007: see with note by M. MANNA, *L'informazione ambientale nella gestione dell'"emergenza rifiuti" in Campania*, in *Foro amm.-TAR*, 10, 2008

²⁵ *Leipzig Charter on Sustainable European Cities*. The document is available in Italian at www.a21italy.it

It should be noted that such activities may “effectively combat climate change”.²⁶

Although the Aalborg Charter from 1994 and the Leipzig Charter from 2007 are instruments of soft law, it cannot be denied that they represent essential (albeit not widely known) starting points and provide a further source of legitimation for environmental protection policies (which are made up primarily of positive initiatives) which “should” be promoted by local government.

This brief summary of the international law instruments that attribute a specific role to local government in relation to environmental protection cannot be concluded without citing the European Landscape Convention adopted on 19 July 2000 by the Committee of Ministers of the Council of Europe, and which entered into force in 2004.²⁷

Under that Convention, which pursues the objective of protecting the landscape as “a form of the territory and environment”,²⁸ a “European Network of Local and Regional Authorities for the Implementation of the European Landscape Convention” was established in Strasbourg in 2006, which may be defined – strangely - as a non-governmental international organisation established by local government bodies.²⁹

²⁶ M. PAPARELLE – P. QUAIA, *La politica urbana dell’Unione Europea e la Carta di Lipsia*, in *Dir.com.scambi internaz.*, 2007, 853

²⁷ On this see G.F. CARTEI (editor), *Convenzione europea del paesaggio e governo del territorio*, Il Mulino, 2007. The Convention entered into force in Italy on 1 September 2006 following its ratification by Italian Law no. 14 of 2006.

²⁸ According to the renowned definition of A. PREDIERI, *Paesaggio*, in *Enc.dir.*, XXXI, 1981, 506

²⁹ See on this point R. PRIORE, *La convenzione europea del paesaggio: matrici politico-culturali e itinerari applicativi*, in G.F. CARTEI (editor), *Convenzione europea del paesaggio e governo del territorio*, Il Mulino, 2007, 79

Once again, as is clear from the persistent references to the principle of sustainable development, local government bodies are vested with front-line environmental protection powers.

3. THE ROLE OF LOCAL GOVERNMENT IN ENVIRONMENTAL PROTECTION UNDER EUROPEAN LAW

An analysis of European law starting from environmental action plans³⁰ also brings to the fore the central status of the role of local government and its policies in the area of environmental protection.

If it is considered that the territory of the European Union covers more than four million square kilometres, includes a population of four hundred and ninety million inhabitants and collectively generates around one third of world GDP and that sixty percent of Europeans live in urban areas with more than fifty thousand inhabitants,³¹ it is inevitable that European law, including first and foremost environmental action programmes, must enable local government to play a decisive role.

³⁰ European environmental action programmes (see further M. TRIMARCHI, *La tutela dell'ambiente nel diritto comunitario*, in A. TIZZANO (editor), *Il diritto privato dell'Unione europea*, Turin, Giappichelli, 2000, I, 204) have been spread over a number of years: the first action programme, which was drawn up in 1973 (in *OJEC C 112/I*), covered the period 1973-1977 whilst the second action programme, approved in 1977 (in *OJEC C 139*) concerned the period 1977-1981. The first significant environmental directives were adopted during the term of the first two programmes. The third programme was adopted in 1983 (in *OJEC C 46*) and covered the period 1982-1986; the fourth programme, adopted in 1987 (in *OJEC C 328*) following the entry into force of the Single European Act, applied to the period 1987-1992. The sixth environmental action programme was adopted by Decision no. 160/2002/EC of the Parliament and of the Council of 22 July 2002 (in *OJEC L 242* of 10 September 2002) and applied from 1 January 2001 until 31 December 2010.

³¹ M. PAPARELLE – P. QUAIA, *La politica urbana dell'Unione Europea e la Carta di Lipsia*, in *Dir.com.scambi internaz.*, 2007, 846.

The fifth EU environmental action programme³² states that “*local and regional authorities have a particularly important part to play in ensuring the sustainability of development through the exercise of their statutory functions as 'competent authorities' for many of the existing Directives and Regulations and in the context of practical application of the principle of subsidiarity*”.

The programme also stated that “*the purpose of the Community policy must therefore be to encourage local authorities to rise to the challenge that the environmental problems of many cities and towns pose today, and to assist them to find the best way of doing this*”.

The sixth Community environmental action programme,³³ which moreover seeks to emphasise “change as an outstanding challenge of the next 10 years” (Article 2 (2)), also promotes “*extended dialogue and exchange of experience with the national and local administrations in the Candidate Countries on sustainable development and preservation of their environmental assets*”.

The role of local authorities is not mentioned a great deal in that programme, partly because it is taken entirely for granted, *inter alia* in the light of the principle of integration (which is referred to in recital 13) according to which “*environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development*” (Article 11 TFEU),³⁴ and

³² The fifth programme from 1993 (in *OJEC C 138/1*) covered the period 1993-1999.

³³ The sixth environmental action programme was adopted by Decision no. 160/2002/EC of the Parliament and of the Council of 22 July 2002 (in *OJEC L 242* of 10 September 2002) and applied from 1 January 2001 until 31 December 2010.

³⁴ On this principle, also enshrined in Article 37 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice in 2000, see L. KRAMER, *Manuale di diritto comunitario per l'ambiente*, 2002, 90; P. DELL'ANNO, *Principi del diritto ambientale europeo e nazionale*, 2004, 75-79 and M. WASMEIER, *The integration of environmental protection as a general rule for interpreting community law*, in *Common Market Law Review*, 2001, 159 et seq.

secondly because EU law is not interested so much with the aspect of how the national organisations operate, as rather that the objectives set are achieved.

In addition, the essential role of local government is referred to in practically each individual constituent sector of environmental law (planning instruments, soil, water, waste, air, damage, etc.).³⁵

Finally, it is also important to refer to the Covenant of Mayors,³⁶ which is regarded by the European institutions as an excellent model of multi-level governance: starting from the position that cities play a decisive role in reducing climate change, with the aim of achieving ambitious CO2 reductions, the signatories have undertaken to carry out various acts and to submit to monitoring as regards the achievement of targets (including the adoption of a sustainable energy action plan).³⁷

4. THE ROLE OF LOCAL GOVERNMENT UNDER NATIONAL LAW

In contrast to the position under international law and EU law where the role of local government may be said to have been asserted in an essentially continuous manner, under national law the relationship between administrative powers over the environment of

³⁵ See for example the position paper (in http://ec.europa.eu/environment/air/review_air_policy.htm) submitted to the Commission by several regions from various European countries (in Italy Piedmont, Lombardy, Veneto and Emilia Romagna) in order to highlight the need to simplify the system of pollution emissions thresholds and to focus action “where there are the greatest impacts on human health”. In fact, the air quality directives are currently being reviewed.

³⁶ www.eumayors.eu and www.pattodeisindaci.eu

³⁷ On this see S. PICCHIOLUTTO, *Il patto dei sindaci per l'energia sostenibile in Europa*, in *Ambiente e sviluppo*, 2010, 457 et seq.

local government and the powers of central government has been characterised by repeated swings between the view that the latter should be regarded as the sole protagonist of environmental protection policies and the more inclusive view that it should also be assisted by other actors (i.e. local government).

There has been a cyclical alternation between periods of absolute predominance of the centre and periods marked by greater openness towards local government, with varying levels of consideration to the contribution that local government can make towards environmental protection.³⁸

At present, following the Constitutional Court judgments from 2009,³⁹ the prevailing view favours a “predominance of the centre”.⁴⁰

The role attributed to local government under part six of the Environmental Code, transposing the Environmental Liability Directive, is emblematic of this centralising

³⁸ For an account of these swings back and forth, see M. RENNA, *L'allocation delle funzioni normative e amministrative*, in G. ROSSI, *Diritto dell'ambiente*, 2008, 145.

³⁹ The following judgments have been issued: no. 225 (written by Maddalena) on challenges to the entire Code; no. 232 (Silvestri) on soil protection; no. 233 (Finocchiaro) on water; no. 234 (Quaranta) on the EIA; no. 235 (Cassese) on environmental damage; no. 246 (Gallo) on water; no. 247 (Napolitano) on packaging and clean-up work; no. 249 (Tesauro) on waste; no. 250 (De Siervo) on the air and the atmosphere; no. 251 (Saulle) on water. In judgment no. 248/2009 (Tesauro) on significant accidents involving specific hazardous substances, the Court upheld the constitutionality of Puglia Regional Law no. 6 of 7 May 2006. On this see A. CIOFFI, *L'ambiente come materia dello Stato e come interesse pubblico. Riflessioni sulla tutela costituzionale e amministrativa a margine di Corte Cost. n. 225 del 2009*, in *Riv.giur.amb.*, 2009, 970. See also my own article, *La Corte Costituzionale sul codice dell'ambiente tra moderazione e disinvoltura*, in *Riv.giur.ed.*, 2009, 1455.

⁴⁰ It should be noted that the judgments from 2009 (no. 225 relating to the entire Code; no. 232 on soil; no. 233 and no. 246 on water; no. 234 on the EIA and no. 235 on damage) came in the wake of two judgments from 2007 (no. 367 and no. 378) and two judgments from 2008 (no. 104 and no. 105).

drive⁴¹ and the heavy restriction of local government powers which, for the reasons noted above, breaches both international and EU law (even though there may be reasons for such a choice).

According to Article 309 of Italian Legislative Decree no. 152 of 2006, local government is granted the power merely to control and report to the Italian Ministry for the Environment in order to enable the latter to pursue a damages claim or order restoration.

This represents a decline in protection since previously, under Article 18 of Italian Law no. 349 of 1986, the local authorities were able to launch damages actions on their own initiative.⁴²

The analysis of the development of national law points to a substantial discontinuity and cyclical operation, swinging between periods of greater or lesser local government involvement, in contrast to the continuity position highlighted under international and EU law.

In layman's terms, it could be said that central government currently does the most important things, the regions have a bit more space (though are often unable to decide),

⁴¹ For this centralising perspective, see also Constitutional Court judgment no. 193 of 4 June 2010, with note by V. SESSA, *Il riparto di funzioni tra Stato e Regioni in materia di aree protette: un altro passo avanti nel consolidamento delle prerogative statali*, in *Riv. quadr. dir. amb.*, 2011, 2 and Constitutional Court judgment no. 227 of 22 July 2011, with note by L. CORTI, *I limiti della potestà normativa regionale in materia di procedimento per la valutazione di impatto ambientale: la Corte Costituzionale ribadisce la prevalenza della legge statale*, in *Riv. giur. Ambiente*, 2012, 1, 49.

⁴² On the evolution of protection in this area see R. CHIEPPA, *commento all'art. 310*, in *Codice dell'ambiente* (edited by V. ITALIA), Giuffrè, 2008, 2681 and F. FONDERICO, *Le competenze degli enti locali in materia di danno ambientale: profili generali*, in F. GIAMPIETRO (editor), *La responsabilità per danno all'ambiente*, Milan, 2006, 171.

whilst the municipalities and provinces are left with minor scope for intervention, and are unfortunately granted only oversight and control powers.

5. THE REACTION FROM LOCAL GOVERNMENT

Under these circumstances in which its powers have been limited so severely, local government has attempted to eke out some room for manoeuvre by interpreting the law creatively.

For example, attempts have been made to interpret Article 8(6) of Italian Law no. 36 of 2001 on electro-magnetic pollution extremely broadly. This provision grants the municipalities the power to issue regulations to minimise emissions, and the municipalities were extremely imaginative, adopting the most fanciful constructions over the ten years following its enactment (different limits, distances, allowed and forbidden areas, etc.). However, most of these attempts have been struck down by the administrative courts at both first and second instance.⁴³

When the local authorities act directly in order to achieve environmental protection objectives, they come up against resistance in the courts, which cannot avoid applying the terms of the legislation.

Consider the prohibition on the generation of green energy by local authorities, which has been substantially endorsed by the Court of Accounts:⁴⁴ there are “significant doubts (...)

⁴³ On this point see my own book, *Il principio di precauzione*, Giuffrè, 2006, 241

⁴⁴ See Court of Accounts, Regional Control Division for Lombardy, opinion 861/2010/PAR. On this point see broadly M. RAGAZZO, *Le politiche sull'energia e le fonti rinnovabili*, Giappichelli, 2011, 254 et seq.

over the power of municipalities to intervene directly in the production and sale of energy, including renewable energy, under both national and EU law”.⁴⁵

Under these circumstances, it must certainly be recalled that the provision of new scope for action to local authorities is precluded not only by positive law but also by a series of critical issues which have arisen out of the practices followed by local government: although local policies and local government are certainly more aware of problems and their solutions, they are more exposed to the "proximity of politics" (which means that the regulator is no longer impartial) than central government, which by contrast often operates within a kind of ideal world far-removed from tangible problems.

In many cases (although - it must be stressed - not in all), this leads to deadlock and an inability to make decisions, resulting in absolutely ineffective solutions, as is demonstrated by the way in which the emergency has been treated in Campania⁴⁶ or in the City of Rome.⁴⁷

⁴⁵ With specific reference to national law, the accounting courts have specified that “this activity appears to reach beyond the goals of local government, amounting to a typically commercial activity in that it is aimed at the production and sale of goods (...)”. On the other hand, as far as EU law is concerned, it has been noted that “the direct involvement of the local government body, even and above all where this occurs through a publicly owned company which could be facilitated as regards the location and construction of facilities, appears to be in stark contrast with competition law and the prohibition on state aid laid down in the EC Treaty, and could in any case distort the free operation of the market. In fact, the involvement as a shareholder of the municipality with powers over planning and territorial oversight in relation to the construction of installations for generating renewable energy is liable to condition the local market”.

⁴⁶ Campania region has been in a state of emergency since 2004. Various extraordinary administrators have been appointed, including initially the President of the Region, and later other non-political experts such as the Head of the Civil Protection Agency. The competent authorities have not been able to resolve the problem, and around ten prime-ministerial decrees have been issued, along with a dozen ordinances and decree-laws, the establishment of a parliamentary commission of inquiry, Constitutional Court judgments (no. 314 of 2009) and ECJ rulings (C-297/08).

⁴⁷ An emergency was declared in the City of Rome in 2011. The Prefect of Rome was appointed as an extraordinary administrator. In ten years (from 2002 to 2012), the region had been unable to approve a waste management plan. No action was taken to set up alternative landfill sites.

Whilst it is of course the case that, despite these instances of maladministration, there have been many other cases in which local government has done its duty, unfortunately the negative example offers the right excuse to those who seek to reduce the power of local government, in the face of international and EU law.

It should also be added that it is difficult for the local authorities to take action without clear guidelines from central government: without a national energy strategy, local (regional, provincial and municipal) policies on the promotion of renewable energy and the reduction of climate-changing emissions have developed in an entirely disjointed manner. Many regions have still not adopted a specific summary indicator to measure the actual reduction of energy consumption and increases in the production of green energy, the consequences of which vis-a-vis verification of compliance with binding European targets may easily be imagined.

With reference in particular to the reduction of greenhouse gas emissions, five regions have set targets that are consistent with national goals, whilst three have set a lower target and one has set a more stringent target. Three have not yet set targets and two have not specified aggregate indicators. On the reduction of consumption front, three regions have stipulated an actual reduction, seven have not set the summary indicator and two have limited themselves to recalling to objectives consistent with 20-20-20. Also in the area of renewable energy, only four have adopted targets that are expressly consistent with 20-20-20.

It is obvious that this lack of a reference framework has a significant overall effect on the policies adopted over time by local government.

6. SUGGESTIONS

The analysis presented in this study leads rather to suggestions for future study, rather than full-blown conclusions. Having emphasised first and foremost that international and EU law grant local government a much more significant role than national law, local

government must take much more robust action on international and EU levels in order to defend its prerogatives.⁴⁸

Moreover, it should be noted that these plans essentially attribute a “positive” and “proactive” role to local government, and not by contrast a negative, blocking role as occurs under national law. It therefore appears that, if local government is interested in recovering the role which it is entitled to perform (though which it is not recognised as having) under supra-national law, it must seek to act above all proactively,⁴⁹ exploiting so to speak powers that may be found within the darkest corners of national legislation and exploiting its own statutory and regulatory powers to the full extent permitted.

Consider the development plans on green public procurement, energy efficiency, renewable energy and traffic regulation (which have practically immediate effects on climate change⁵⁰), but also cultural and awareness-raising initiatives (such as those relating to waste management that favour recycling companies, etc.).

Moreover, such an assumption by local government of greater responsibility and of a more creative and proactive role, which as noted above is called for under positive law and required the very principles applicable to administrative action in relation to the environment, would undoubtedly lead to more effective environmental protection.

⁴⁸ On the significant role of local authorities in the area of renewable energy, see G. CARTEI, *Energia e cambiamento climatico: la disciplina delle fonti rinnovabili*, in this CESIFIN volume (p. 18 type-written)

⁴⁹ For example, as noted by G. CARTEI, *Energia e cambiamento climatico: la disciplina delle fonti rinnovabili*, cit., (p. 5 type-written), it is clear from the 2001 and 2009 directives on renewable energy that the Member States should encourage the regions and local governments to set targets above national levels.

⁵⁰ It is interesting to note the tangible actions proposed in order to reduce CO2 emissions by C. CLINI, *Prospettive del negoziato globale sui cambiamenti climatici*, in *Econ.fonti energia e ambiente*, no. 1/2010, 66.

Therefore, the assertion made in the document initially quoted, i.e. that “climate change is a global issue which undoubtedly reaches beyond borders and the decision-making capacity of any city or region. However, cities may also provide an important contribution to combating climate change, as 75% of greenhouse gases are produced in urban areas” appears to provide the substantive paradigm for a genuine challenge, the decision to engage with which will fall to local government, albeit subject to the economic constraints applicable in the immediate future.