RIVISTAGIURIDICA DELL' AMBIENTE

diretta da

FAUSTO CAPELLI
STEFANO NESPOR
TULLIO SCOVAZZI

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Abstract

MARIA CLARA MAFFEI

Ursus arctos – Protected species
Bern Convention – Alpine Convention – Habitat Directive

Daniza and KJ2 were two female brown bears (Ursus arctos) killed, respectively, in 2014 and 2017, following two orders of the President of the Autonomous Province of Trento (Italy). The orders were adopted after the two bears, who were accompanied by puppies, had attacked and injured two hikers in the woods of Trentino. As a threatened species, Ursus arctos is protected by some international treaties – like the Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979) and (presumably) the Alpine Convention (Salzburg, 1991) and one of its Protocols (Chambéry, 1994) – and by the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. In particular, according to these instruments, all forms of deliberate capture and keeping and deliberate killing are prohibited. Some exceptions, however, are allowed provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned; in particular exceptions may be made in the interests of public health and safety or other overriding public interests. This article deals with the compatibility of the behavior of Italian (national and provincial) authorities with the system of exceptions provided for by the above mentioned treaties and by the Directive, not only with regard to the facts, orders and judicial decisions concerning Daniza and KJ2 but also in the light of the most recent laws of the Autonomous Provinces of Trento e Bolzano (July 2018) affecting the derogation procedure established by the Italian law.

Abstract

LORENZO SCHIANO DI PEPE

Environmental information – Aarhus Convention – Environmental NGOs European Court of Justice – European Commission

Participation tools throughout the European Union legal system deserve a particular attention at a time where the EU itself and the protection it accords to its citizens appears to be heavily scrutinized on a number of different levels.

In this vein, after highlighting the existence and the main features of Regulation (EC) no. 1049/2001 concerning public access to European Parliament, Council and Commission documents and of Regulation (CE) no 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EU institutions and bodies, the paper focuses on the issue of the specific implications of striking a balance between transparency, on the one hand, and governance and institutional efficiency, on the other hand, when environmental protection is at stake. In doing so, the author takes inspiration from a ruling recently delivered by the Court of Justice to carry out a series of considerations. In Client Earth, the Court was faced with the question whether the Commission could deny a private individual (in that case, an environmental NGO) access to certain documents relating to environmental protection in the con- text of proceedings whose outcome was represented by the decision by the Commission to file or not to file a certain legislative proposal. In reaching a different conclusion from the one subscribed to by the General Court, the European Court of Justice stated that the Commission was not entitled to presume that, for as long as it had not made a decision regarding a potential proposal, disclosure of documents drawn up in the con- text of an impact assessment could, in principle, seriously undermine its ongoing decision-making process for developing such a proposal, regardless of the nature, legislative or otherwise, of the proposal envisaged and the fact that the documents concerned contained environmental information within the meaning of Article 2(1)(d) of Regulation no. 1367/2006. The paper praises the finding of the Court of Justice that a higher degree of transparency in the decision-making process increases the level of legitimacy, efficiency and responsibility of the action of the EU institutions as well as a guarantee of independence. By way a of a conclusion, additional comments are made on NGO participation to the environmental policy and actions of the EU from a number of other perspectives, including their participation to consultations carried out by the Commission and the realization of EU-funded projects.

Abstract

FAUSTO CAPELLI

Third sector reform – Public administration reform – ONLUS Administrative action – Environment

The article published in no. 1/2019 of this review is the natural continuation of what appeared in no. 1/2017 of the Environmental Law Review entitled: "How to govern the environment and the territory" written by the same Author. The previous article analysed the constitutional principles underlying a discipline concerning the "Third Sector" and described the fundamental rules introduced by the Third Sector Reform Law no. 106 of 6 June 2016.The present article examines the legislative measures that have been adopted on the basis of the aforementioned Third Sector Reform Law. Therefore, the article analyses the provisions that regulate the entire subject matter, providing appropriate critical assessments. Furthermore, the Author provides several suggestions on how to develop the activities rendered by "Enti" and Associations that can legitimately operate in the Third Sector to protect environment, territory and cultural heritage as well as to help the general public.

Abstract

VINCENZO CASAREGOLA

Eco-crime – Poseydon operation – Fishing Poaching D.Lgs. n. 4/2012 – Blue Desert Operation

In all legal systems, behaviors with criminal relevance give the perception of a "disvalue" of the same as perceived by the community, as well as the recognition of a "threat" underlying the actualization of certain conditions.

In this perspective, it is immediate to understand how, in our system, illegal un- regulated and unreported (IUU) fishing is not perceived as detrimental to some particularly relevant interests for our Country, given the poor criminal protection of fish stocks and the biodiversity of our seas, as offered by the regulations in force. There- upon, of course, it is possible to argue that, against the offending crimes provided for by the previously in force Legislative Decree 4/2012, whose enacting measures normally would be settled with the conviction of the offenders for the payment of derisory fines, and the decriminalization of some cases entailed a serious increase in the administrative sanctions referred to them. However, the above mentioned measures have a significant impact exclusively on professional fishermen and fisheries entrepreneurs, who – without considering the economic impact of the mere administrative sanction – under certain conditions, risk to lose their fishing license, with subsequent negative employment and social repercussions, which make the "business risk" too ex- posed, and connected to the integration of offenses in this specific sector. Contrariwise, the professionals of fish poaching are not discouraged by the consequences of new rules, which do not determine any uneconomical effects. In fact, it generally involves previous pluri offenders – very often coming from the organized crime – usually unemployed and without any official certified source of income, so that whichever administrative sanction imposed on them is completely ineffective. What has been said, however, prove to be in significant countertrend with the increased social need to see protected the "common good" represented by the Environment, ultimately resulting in the addition in the Criminal Code of the "Environmental Crimes", via the Law May 22nd 2015, no. 68. Moreover, illicit phenomena connected to the world of fishing are increasingly characterized by a systematic and organized feature, thus the action of contrasting them, in the absence of specific incriminating rules, will be difficult and ineffective, forcing police officers to search in the legal system innovative and more profitable solutions.

In this work, therefore, we will analyze the best practices represented by two surveys conducted by the Naval Operating Section of the Guardia di Finanza of Taranto, which have determined innovative stances by the Court of Cassation regarding the grounds of environmental pollution crime, with respect to fish poaching and they have inspired the Lawmaking to safeguard a fish species previously not protected by the legal system. The judicial police operations that have been analyzed, tangibly testify a very strong economic interests that gravitate around fish poaching – as never the less pointed out by the UNODC in a report on fisheries crimes – highlighting the need for a multidisciplinary approach to fight this crime in a profitable manner, through an appropriate involvement of judicial authorities, police bodies and scientific and research institutions, without whose engagement any investigation would be ineffective.

Abstract

VALENTINA JACOMETTI

Climate warming – Urgenda case Hague Court of Appeal

The essay builds on two significant events for climate change law that took place in October 2018: the decision of the Hague Court of Appeal in the Urgenda case and the IPCC special report "Global Warming of 1.5° C". First of all, the article presents the essential elements of the phenomenon of climate litigation as it has developed in recent years as an alternative to the traditional regulatory approach to climate change mitigation and adaptation. The article then proceeds to an analysis of the decision of the Hague Court of Appeal, trying to highlight the aspects that may have an impact on the future developments of climate litigation, such as the arguments based on the violation of obligations arising from customary and treaty international law and the violation of human rights of those affected by climate change. In particular, the approach based on the protection of human rights could further expand in the future, given that the link between human rights protection and climate change is being strengthened more and more.

Abstract

MARCO LAVATELLI

Integrated Environmental Authorizations – Substantial modifications
tacit acceptance rule – Waste management – Non-compliance with authorizations Penal responsability

According to this decision, the tacit acceptance rule can be considered legitimately operative only for requests of non-substantial modifications of the Integrated Environ- mental Authorizations (I.E.A.). Instead, the variations that could directly affect environmental parameters can not be accepted outside an express provision by the competent Administration. The variations concerning storage, recovery and disposal of waste, due to their close connection with the waste management activity, fall within the substantial modifications and therefore they cannot be tacitly authorized. These principles have been formulated by the judges in order to declare the criminal responsibility of a company administrator, in charge of waste management, who has exceeded the previously authorized limit of waste treatment, without having received an express act of modification of the I.E.A by the competent administration. This comment aims to enlighten how the judgment oversteps the limits of the incidental judicial review on the administrative acts' legitimacy admitted in criminal judgement. In this way, the court ignores the necessity to protect the administrative discretion, thus also allowing a substantial enlargement of the alleged offenses' typicality.

Abstract

PAOLO VERRI

End of waste – Ministerial decrees ex art. 184-ter, co. 2, D.Lgs. 152/2006
Lack of emanation – Regional power to authorize – Exclusion

The article, summarily retraced the concept of waste through the times, analyzes different facets of process by means of which the reject has been valorized, dwelling particularly on so-called end of waste. The review of theme starts from the origins until current european and national legal regulation. In the examination, particular attention is palced on the authorizing system in order to stop the qualification of waste, especially in the face of recent judicial drift, tending to deny that regional administration have got the power to authorize on their own end of waste. This specific problem will be discuss through a critial analysis of doctrine and in light of aspiration for the circular economy, recently rekindled by Ue Directive 2018/851, in order to try finally, de jure condito, to identify the best interpretation of law.

Abstract

ANTONIO CELELLA

Environmental protection – Waste management
Minimal standards for environmental protection
Exclusive legislative jurisdiction of the State – constitutionally consistent interpretation
Regional waste management plans – strategic environmental assessment - SEA
Environmental report; protection zones – Absolute safety zones – respect zones
Single authorization revocation – Single authorisation suspension
Regionalism with different degrees of autonomy – Environmental federalism

The judgement under consideration refers to the petition filed by the Prime Minister and pertaining to the constitutionality of articles 13, 15 (4) and 23 of Law no. 34 of 20th October 2017, enacted by the Italian Autonomous Region Friuli-Venezia Giulia. According to the petitioner, the above-mentioned regional provisions unlawfully overstep the legislative jurisdiction of the State in the matter of environmental and eco- system protection under article 117, subsection 2, letter s) of the Italian Constitution. On this occasion, the Court confirmed its case law on the subject, stressing that waste management belongs to the exclusive legislative jurisdiction of the State, while being – at most – susceptible to more rigorous intervention through regional local authorities. The Court proceeded to rule the unfoundedness of all matters of constitutional legitimacy raised by the petitioner, since no constitutionally relevant violation of the provisions established in the Environmental Code and serving as 'interposed parameter' was discerned with regard to the regional regulations under examination. Nevertheless, the ruling falls within the long-standing and unresolved issue of Italian regionalism and differentiated degrees of autonomy under article 116, subsection 3 of the Italian Constitution.

Abstract

MARSELA MERSINI

Energy – Renewable sources – Economic incentives – European Court of Justice
Legitimate expectations – Charter of fundamental rights of the European Union
Treaty on the European Energy Charter

The renewable energy and, in particular, photovoltaics represent a very current topic, by virtue of its fast and substantial growth in the last years. The adoption of renewable energy systems represent a better solution for the environment, because it produces less emissions than conventional energy sources, which means primarily the reduction of the pollution and secondly the improvement of our environment. Thus, like the article shows, there is a requirement of not only a precise regulatory framework, but also the need of simple and efficient procedures of authorization: indeed the frequent modification to the legislation jeopardizes not only the relationship between citizens and Public Administration, but it undermines the necessity of stability and certainty, fundamental criteria in order to protect the principle of the legitimate expectation.