Transmission also by fax and e-mail

AMICUS CURIAE

EUROPEAN COURT OF HUMAN RIGHTS - FIRST SECTION

Application no. 36742/14

Annamaria Di Caprio and others *v.* Italy and 3 other cases

****

Centro di Ricerca Euro Americano sulle Politiche Costituzionali – (CEDEUAM)
Università del Salento - Lecce - Italy
www.cedeaum.it

Prof. Dr. Michele Carducci, Full Professor of Comparative Constitutional Law

michele.carducci@unisalento.it

Dr. Vincenzo Lorubbio, Junior Research Fellow in Comparative Constitutional Law

vincenzo.lorubbio@cedeuam.it

****

present written observations under the form Amicus Curiae

on the base of Art. 36 § 2 of Convention and 44 § 3 of Rule of the Court

****

§ 1.
The observations concern the points of the questions addressed to the sections no. 3 ("In particular, do the applicants have an effective and accessible internal remedy under Article 35 § 1 to report the alleged violations?"), no. 4 ("As requested by Article 13 of the Convention, did the applicants have an effective internal remedy through which they could raise their complaint of violation of Articles 2 and 8 of the Convention?"), no. 9 ("Have the authorities done everything all that could reasonably be expected from them, also in light of the obligations deriving from EU law and from the rulings of the Court of Justice of the European Union, in order to avoid this risk, and therefore fulfill their positive obligations pursuant to Articles 2 and 8 of the Convention? ").

§ 2.
The reply to Points no. 3, 4 and 9 can be examined in a united manner, on the basis of the following four common premises:

a) in the years 1998-2007 in which the facts under review took place, there was no effective instrument to protect the violation of articles 2 and 8 of the European Convention on Human Rights before the national authorities, in the case of environmental damage;

b) however, even subsequent legislative reforms have not given citizens the possibility of legal actions before competent courts for environmental damages, "effective" according to the contents of art. 13 of the European Convention;

c) In fact, Italian environmental law has never provided individual citizens with the right to act before the judge directly and independently to ascertain responsibility for environmental damage;

d) consequently, no specific rights to environmental information, needed to ascertain these responsibilities, have ever been recognized to citizens.

§ 3.
In fact, in the cases examined, only the public authorities had information to oppose environmental crimes, to ascertain the responsibilities and to claim compensation for damages. Consequently, no citizens could collect evidence and documents capable of identifying damage and responsibility, possibly prosecutable through the appropriate complaints.

§ 4.
Furthermore, from a legal point of view, Italian environmental law has never truly recognized the human right to the environment: in fact, there are no specific provisions in the Italian Constitution, and this right cannot be protected through effective appeals before the courts or other national authorities.

§ 5.
The following historical reconstruction specifies in greater detail what has been specified above:

a) With the Law no. 349/1986, the entitlement to claim compensation for damages fell solely to the State and to the local authorities affected by the environmental damage. This legitimacy was confirmed by the Italian Constitutional Court, with the Sentence no. 641/1987. Furthermore, the environmental associations recognized by the Government were

only allowed to report facts damaging environmental assets, without having the possibility to directly act in the courts, according to the provisions of art. 18 paragraph 4 of Law no. 349/1986

b) The 1998 Aarhus Convention, containing the so-called "Pillar" of the right to access to justice, was introduced in Italy by Law no. 108/2001. However, this Convention did not change Italian environmental legislation[1].

c) The Italian legislation has changed with the implementation of the European Directive no. 35/2004.

d) In fact, the Legislative Decree no. 152/2006 was inspired by this Directive; however, its implementation was very restrictive.

e) This Legislative Decree contains only three changes regarding the assessment of environmental responsibilities:

i - It introduces a distinction between environmental restoration action (Article 305) and action for damages both in specific performance and by equivalent-value compensation (Article 311);

ii - It repeals the art. 18 of the Law no. 349/1986, with the effect of recognizing the right to take legal action for compensation for environmental damage exclusively to the Ministry of the Environment, definitively excluding local authorities and citizens;

iii - environmental associations only retain the possibility of intervening in the prosecutions promoted for environmental damage responsibilities[2].

f) A further regulatory changes were made by Law no. 135/2009 and Law no. 97/2013, which were adopted as a consequence of the infringement procedures opened by the European Commission, precisely in relation to the Italian legislation concerning environmental damage. The complaint concerned the fact that the Legislative Decree no. 152/2006 allowed monetary compensation equivalent, unlike the European Directive no. 35/2004 which provided for a form of compensation based on the adoption of remedial measures. Therefore, the legislator reformed the art. 311 of Decree no. 152/2006, establishing the obligation to adopt remedial measures (primary, compensatory or complementary).

[1] See *https://www.minambiente.it/pagina/accesso-alle-informazioni-partecipazione-e-giustizia-i-tre-pilastri-della-convenzione-di*

[2] See S. Grassi, *Problemi di diritto costituzionale dell'ambiente*, Milan, Giuffrè, 2012.

§ 6.
The Italian legislation attributes a very limited residual power to Regions, to the Local Authorities, to environmental associations and to individual citizens, as described by the art. 309 of the 2006 Legislative Decree, namely:

> - *the possibility of reporting to the Ministry of the Environment events or productive behaviours of environmental damage, with the request to promote action for compensation of damage and the right to appeal to the administrative judge to ascertain the illegitimacy of the Government's inaction, in case of refusal or inactivity of the Ministry*.

Nothing else. Consequently, the provisions contained in art. 309 had no concrete impact.

In conclusion, all these subjects were still being denied the possibility to take legal action "*iure proprio*" for compensation for environmental damage.

§ 7.
The deprivation of the right of access to the judge for environmental damage was the subject of two judgments of constitutional legitimacy, decided by the Constitutional Court with the Judgments no. 235/2009 and no. 126/2016.

In both cases, the Constitutional Court declared this deprivation as conforming to the Italian Constitution, on the basis of the following reasoning:

> ***a)*** it must be ensured that the exercise of the duties of prevention and repair of environmental damage meets the criteria of uniformity and unity;
>
> ***b)*** only the State can guarantee such uniformity and unity;
>
> ***c)*** this need of uniformity and unity is confirmed by art. 117, second paragraph, letter s) of the Constitution (concerning "protection of the environment, the ecosystem and cultural heritage") which qualifies the theme of the environment as being an "exclusive competence" of the State.

§ 8.
This jurisprudence of the Constitutional Court has been criticized by Italian doctrine for three reasons[3]:

[3] See S. Pinto, *Il problema della legittimazione delle Regioni e degli Enti locali ad agire in giudizio per danno ambientale nella giurisprudenza della Corte costituzionale*, in *Diritti regionali. Rivista di diritto delle autonomie territoriali*, no. 2, 2018, 1-38.

a) It completely ignores the Aarhus Convention, which is binding for the Italian legislator on the basis of art. 117 paragraph 1 of the Constitution, where it recognizes and regulates the right of individuals and associations to access justice in environmental matters;

b) It does not consider the consequences of possible failure to exert the right to take legal action in order to obtain compensation for damage by the Ministry of the Environment, denying citizens and associations any substitute role. In fact, citizens can only report environmental damage to the Ministry but cannot replace the Ministry in case of inaction related to the compensation action;

c) It does not consider the art. 2043 Civil Code, in the matter of non-contractual responsibility, where it allows to act against public and private subjects also in environmental questions, on the basis of the "neminem laedere" principle.

§ 9.
Recently, the civil section of the Supreme Court of Cassation has ruled that the non-observance by any public administration of the management or maintenance of public assets, including environmental ones, can be denounced by citizens before the court, not only beacause the application aims at obtaining the sentence of the institution for compensation of pecuniary damage, but also forcing the institution to enact positive actions ("facere") or negative actions ("non facere"), since the citizen's action is one of the actions protected by the "neminem laedere" principle (see *Supreme Court of Cassation (civil section)* no. 20571/2013 and no. 22116/2014).

§ 10.
Even criminal section of the Supreme Court of Cassation has linked this obligation to the art. 328 of the Italian Criminal Code ("refusal and omission of official documents"), which allows the citizen to report the omissions of the public authorities also in matters of environmental protection and health, but without any guarantee of results.

§ 11.
Therefore, the new position of the Supreme Court of Cassation has not changed the Italian legislative framework.

Despite the implementation of the Aarhus Convention, no Italian law allows citizens and associations direct and effective access to the defence of rights protected by Articles 2 and 8 of the European Convention in the case of environmental damage, as compared to the art. 13 of the European Convention.

§ 12.
In other words, in Italy the entitlement to compensation for environmental damage has a public nature, considered as a mere consequence of a violation of the general public interest in environmental health, which is independent of the individual sphere of human rights, regulated by articles 2 and 8 of the Convention.

As a result, Italian citizens:

a) can never act before a judge for environmental protection directly connected to articles 2 and 8 of the Convention;

b) they do not have any effective action available under the terms of art. 13 of the Convention.

The dissociation between the entitlement to the constitutionally protected interest in the environmental wholesomeness and the legitimacy to take legal action remains.

§ 13.
This conclusion is confirmed by Italian jurisprudence, according to which citizens' actions based on art. 2043 Civil Code and art. 328 Penal Code are admissible only if they are "residual", that is to say based on the protection of peculiar situations different from the one related to the injury caused by environmental damage.

§ 14.
The doctrine of "residuality" is based on a restrictive interpretation of the art. 313, paragraph 7 of the 2006 Legislative Decree, according to which all the victims of environmental damage, in their health or in their property, have the right to take legal action against the subject responsible for the protection of rights and interests harmed.

In particular, the Criminal Court of Cassation has explained that all citizens have the possibility of acting for a direct and specific compensation for damages, on the basis of the art. 2043 Civil Code and art. 313 paragraph 7, providing that they are different from the damage to the environment intended as a mere public interest of the community (Sentence no. 354/2016); in fact, according to the criterion elaborated in this field, the environmental asset can only be protected by the State, although the entitlement of holders of rights (other than the right of environmental integrity) to act for compensation of further damages must remain unaffected (Sentence no. 7543/2017).

§ 15.

However, the Italian legislation and jurisprudence are not fully compliant not only with the criteria indicated by the art. 13 of the European Convention, but also with the jurisprudence of the European Court of Justice, according to which "the health and life of the people occupy the first place" (ECJ C-320/93 – Ortscheit, § 16; ECJ C-434/02, § 58; ECJ C-2010/03, § 60).

§ 16.

In fact, as stated by the Italian Civil Court of Cassation, United Sections, "the exclusion of individual access to judicial protection appears justified by the need to prevent an infinite number of identical interests from being required with an undetermined number of individual petitions" (Cass. civ., SS. UU., no. 7046/2006).

§ 17.

In addition, not even the administrative appeals offer the Italian citizen fully effective means of protection, in case of damages related to articles 2 and 8 of the Convention. Italian administrative judges continue to consider ministerial decisions on environmental issues as an expression of discretion that cannot be fully asserted by citizens[4].

Recently, the citizens' right to request the annulment or revocation of the administrative acts producing damage has been regulated (reform of the Law on administrative procedure in 2005). However, the exercise of this right does not produce any constraint to public power, even in the case of environmental damage[5].

§ 18.

Other procedural tools, such as the "class action" which are both of civil (introduced in the so-called "Consumer Code" - Legislative Decree no. 206/2005, amended by Law 99/2009) and administrative kind (regulated by Legislative Decree no. 198/2009) do not favour effective and immediate protection of human rights (such as those indicated in articles 2 and 8 of the European Convention) but only guarantee the protection of consumers (of products or services, private or public).

[4] See M. Roversi Monaco, *La tutela dell'ambiente nella giurisprudenza amministrativa. Profili ricostruttivi*, Bari, Cacucci, 2018

[5] See F.V. Virzì, *La doverosità del potere di annullamento d'ufficio*, in *federalismi.it* (*www.federalismi.it*), 14, 2018, 1-13.

Furthermore, this type of "class action" has been further reformed in 2019, with Law no. 31/2019, but has no retroactive effect.

§ 19.
In conclusion, the Italian context does not offer specific mechanisms to protect citizens in circumstances that cause environmental damage, such as the ones involving the applicants in the case of "Terra dei fuochi" (Land of fires)**.**

In the past, the establishment of a specialized "Environment Court" was proposed, which was to be composed of ordinary, administrative and accounting judges, competent in criminal, civil, administrative and accounting matters and capable of guaranteeing unitary and effective protection both to citizens and organizations and associations[6].

However, this proposal has never been implemented by the Italian State.

§ 20.
Even the results of the parliamentary inquiry committees did not suggest legislative reforms aiming at ensuring the protection of the rights contained in articles 2 and 8 of the Convention. The situation remains serious for the human rights of all citizens of the "*Terra dei fuochi*"[7].

§ 21.
In point of facts, until nowadays Italy has never observed any good international practice in a comparative relation to the other legal experiences concerning environmental rights provided for by Aarhus Convention[8].

[6] See P. Maddalena, *L'evoluzione della tutela ambientale e l'azione popolare prevista dall'art. 4 della legge 265/1999*. Lecture given at the World Environment Day (Rome - Supreme Court of Cassation, 6 October 1999).
[7] See F. Sironi, *Nella terra dei fuochi si continua a morire, nonostante la beffa delle bonifiche*, 4 October 2018, in *http://espresso.repubblica.it/attualita/2018/10/02/news/fine-veleni-mai-1.327470*; see also Legambiente, *Terra dei fuochi*, 19 November 2018, in *https://www.legambiente.it/terra-dei-fuochi/*.
[8] See comparative data in: *Environmental Democracy Index* (*https://environmentaldemocracyindex.org/*), which places Italy in low ranking positions in relation to the Aarhus obligations and the UN Environmental Rights Database on practices in the use of human rights to protect the environment (*http://environmentalrightsdatabase.org)*, where Italy is absent. On the persistent Italian problems regarding "waste", see the recent *Report* FISE ASSOAMBIENTE, *Necessaria un'efficace Strategia Nazionale per la gestione dei rifiuti. Servono 10 mld di euro di investimenti nei prossimi 15 anni per*

Finally, it is relevant to recall that the EU Council on 11 June 2018 adopted a decision which was meant to strengthen access to justice in environmental issues in order to guarantee uniform compliance with the Aarhus Convention, not yet fully realized[9].

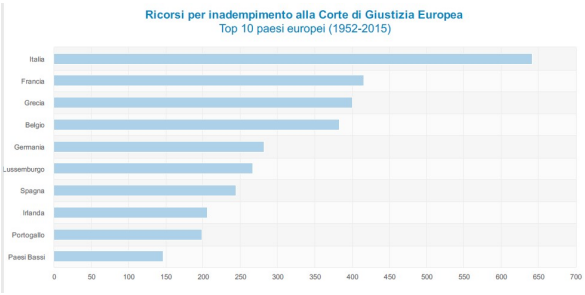
§ 22.

Finally, it is important to point out that the difficulty of access to justice in environmental matters, it also hampers the protection of vulnerable people in Italy, with particular reference to children.

In fact, we must note that the "*Autorità garante per l'infanzia e l'adolescenza*" of the Campania Region has never done anything particularly important to denounce the problems of the "*Terra dei fuochi*". It has only "taken note" of the problem of vulnerability, without proposing anything to solve the dramatic situation of contamination of the territory[10].

§ 23.

The following chart shows the Italian rate of compliance with environmental obligations, we provide a representation of the situation of European environmental infringements, carried out by Italy until 2017 (data processing by "*Openpolis*": *https://www.openpolis.it/numeri/circa-il-20-delle-infrazioni-riguardano-lambiente/*), where it is inferred that the "environment" sector is the main one.

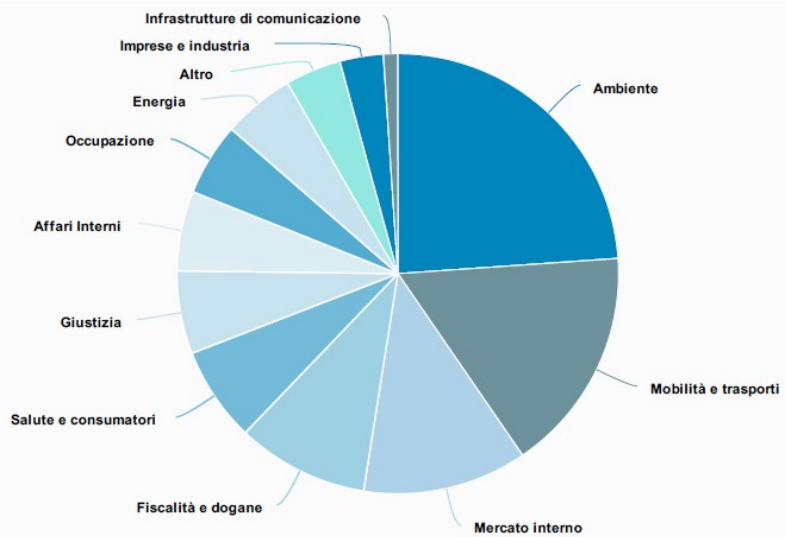


raggiungere gli obiettivi della circular economy, in *http://assoambiente.org/index.php/assoambiente/media_e_stampa/comunicati_stampa*.

[9] *https://www.consilium.europa.eu/it/press/press-releases/2018/06/18/aarhus-convention-council-decision-strengthens-access-to-justice-in-environmental-matters/*. On the European contradictions with regard to the Aarhus discipline, see also: C. Regali Costa Do Amaral, *La Convenzione di Aarhus e la tutela indiretta dell'ambiente: il dovere di garantire una procedura di ricorso non eccessivamente onerosa*, in *DPCE online*, 1, 2019.

[10] *https://www.garanteinfanzia.org/il-garante/editoriali/ridiamo-ai-bambini-e-i-ragazzi-della-campania-il-diritto-di-respirare*

Suddivisione delle infrazioni per settore



Lecce, 28 aprile 2019

Prof. Dr. Michele Carducci
phone: +39 328 9813688

Dr. Vincenzo Lorubbio
phone: + 39 329 2452414