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L'ACCESSO ALLA GIUSTIZIA IN MATERIA AMBIENTALE (DE DOMINICIS)

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Climate change, the ever-increasing global population which will reach nine billon people within the next generation, and the continued loss of biodiversity demonstrate to everybody that the need to protect the environment is one of the big challenges of the present. Worldwide have countries reacted to that challenge and adopted legislations, regulations and agreements to protect the environment, the most recent one being the global climate change agreement of Paris 2016.

The European Union adopted provisions to protect the environment since more than forty years. Today, it has a comprehensive set of rules, which bind its Member States, private companies and individual citizens. These provisions are completed by national, regional and local regulations which deal with the different aspects of the environment, water and air, noise and waste, nature conservation and land use. The regulatory net within the EU to protect the environment is quite dense.

The biggest problem which environmental law faces, though, is that the legislation to protect the environment is only very imperfectly applied. Day by day, pollution of the air, water and the soil occurs. Climate change gases are emitted in quantities which run against the legally binding provisions that were so solemnly agreed by the global community. Town and country planning measures, agricultural activities, fishing practices,

industry and transport, energy and trade – all activities contribute to putting at risk the environment which the EU and all its governments are committed and obliged to protect.

Environmental impairment does not only occur, when a polluter disregards existing protection provisions. In many cases, perhaps even in the majority of instances, it is the administrative permits or allowances which make possible the activities that contribute to the environmental damage. This is one great dilemma of law in the European Union – at EU level as well as in the 28 EU Member States: the protection of the environment was laid into the hands of the public authorities. It is the public authorities which grant permits, plans and realises infrastructure measures; and it is public authorities which are charged to monitor and control the application of environmental law and ensure that the law is observed. Public authorities have enforcement possibilities by applying administrative or penal sanctions; they are assisted by specialised agencies, inspectors and police forces and have multiple possibilities to make sure that the rules which a country – or the EU itself – adopted for itself, are actually respected.

Sociologists use the following rough formula to describe and evaluate societies: when a provision is adopted in a society, five per cent of the population never respect it (criminals, outsiders etc.), twenty per cent always respect it, be it unjust, stupid or impractical; and seventy-five per cent of a population follow the rule, when it is perceived to be fair, when its application is controlled, sanctioned with prudence but strictly, when all parts of the society are subjected to the law in the same way, etc.

This formula has its particular relevance in environmental law, because the environment is a general, not a vested interest; this has as a consequence that there is no strong social group behind it to defend its interests, in difference to agricultural groups, trade unions, employers organisations, chambers of commerce etc. In view of this, public authorities have a considerable responsibility when it comes to the enforcement of environmental protection measures. When the public authorities themselves do not feel subjected to the rules by permitting or tolerating environmental impairment – for reasons of inertia, passivity,

corruption, greed of power or other reasons – , the population adopts a rather cynical attitude with regard to the law: why should it respect the rules on the protection of the environment, when even the public authorities which are instituted to ensure that protection, do not respect them? This situation was very visible in Central and Eastern Europe, before the Berlin Wall came down. And it explains even today the large discrepancies which exist within the European Union where common EU legislation on the protection of the environment exists, but has so different effects in Northern and Southern, Eastern and Western EU Member States.

The question then is, what kind of remedy does society provide, when the public authorities which are charged with the task to ensure the respect of the environmental rules and enforce them, do not comply with their obligation? In other words, who protects the environment against administrative inertia or passivity?

There is an answer to that: give civil society a right of access to the courts in environmental matters; allow civil society to challenge acts and omissions by public authorities and private persons which contravene provisions of law relating to the environment. This would break the present quasi-monopoly of public authorities to decide on the application or nonapplication of environmental provisions. At present – and in the book which is before the reader, Dr. De Dominicis elaborates this point with great care for the EU level – access to the courts in environmental matters is only possible, where a person or an association is individually affected by an environmental measure. This is highly insufficient, because environmental problems are general interest problems, not normally individual problems. Yet, most of the national legislation in the EU Member States as well as the EU provisions on access to the EU Courts themselves follow very closely the 19th century concept of court actions being made possible only, when individual interests are at stake.

Giving civil society members or representatives the possibility to raise the disregard of environmental law provisions before a court of justice does not lead to an inflationary number of court procedures. The United States introduced such a system decades ago, with good success: the private

court action is subordinated to actions by the public authorities: when the public authorities pursue a case, there is normally no room anymore for private action. Within the European Union, the Netherlands introduced a similar approach: an environmental association or foundation may bring a court case in the general or collective interests of persons; the action is, however, only admissible, when the association or foundation has made sufficient efforts to enter into a dialogue with the authorities to have its requirements met. In both the United States and the Netherlands the number of cases brought to the courts is by no means inflationary. Costs and length of the procedure, the necessary investment in human resources and expertise, as well as other barriers on access to justice are sufficient safeguards to prevent an abusive use of such citizen complaints.

Of course, improving the conditions on access to justice does not yet guarantee that the court judgments will better protect the environment. Dr. De Dominicis shows quite well, how the EU Court of Justice itself applies, when interpreting the Aarhus Convention provisions, a double standard, being much more demanding on national judges than on itself. It must not be forgotten – and I was a judge myself – that judges, sociologically seen, are part of the upper middle class of society, conservative and not easily persuaded to tread on new paths. In its interpretation of Article 263 TFEU, the EU Court of Justice itself was inconsistent, giving the European Parliament a right of standing, when the EC Treaty did not provide for such a right, and giving in competition cases, standing to private companies (competitors), though it was more than doubtful that they were individually concerned by an EU or a national measure. This jurisprudence shows that the interpretation of the EU provisions on access to the EU courts by the Court of Justice follows political (ideological) and not strict legal lines. The Court of Justice might have to decide one day, whether citizens may challenge climate change measures taken by the EU institutions, or whether also in such cases, a citizen cannot be concerned, because all citizens are concerned.

The Aarhus Convention Compliance Committee found already in 2013 that the EU jurisdiction on access to justice in environmental matters was not compatible with the provisions of the Aarhus Convention - which the

EU had ratified and which is thus part of EU law. Here we find another of the political judgments by the Court of Justice: the Court decided that Article 9(3) of the Convention cannot be invoked in court by private persons, because its application depends on the adoption of national legislation (no direct effect). It did not comment on the fact that Article 9(3) leaves it at the discretion of EU Member States - and the EU itself - to adopt legislation on access to justice, by adding the words “if any” (“eventualmente” in Italian language). This wording clarifies that the States have a discretion to adopt national legislation, but not, as the Court put it, an obligation. Article 9(3) may also be applied without implementing national or EU legislation.

Overall, the EU Court of Justice succeeded in preventing citizens or environmental organisations to acceed to the EU courts in environmental matters, leaving undecided, how the general interest “environment” can be protected, when the public EU authorities remain passive or infringe themselves environmental provi
sions.

Dr. De Dominicis also describes the (hi)story of the failed attempt of the EU to introduce EU-wide legislation on access to justice: he reveals, how the Member States’ argument that the subsidiarity principle opposes such legislation, is political but not legal. Indeed, all 28 Member States adhered to the Aarhus Convention. But when it comes to the implementation of Article 9(3) of that Convention, the results are poor: in almost no Member State it is possible for individuals or environmental organisations to challenge before national courts acts or omissions by private companies or public authorities which contravene existing environmental legislation. Claiming at EU level that legislation on access to justice in environmental matters should be adopted at national level, and then remaining passive in adopting such legislation, is pure cynicism.

This European continent needs the possibility for citizens and their organisations to ensure that the numerous environmental rules, adopted at international, European, national, regional and local level are actually complied with. Leaving this task alone to the public authorities inevitably leads to the slow, but progressive degradation of the environment, which

Europe faces since decades.
On the one side, Dr. De Dominicis' book illustrates the current failure of the EU institutions and of the Member States to adapt the law to the requirements of the 21st century – and to honour the commitments which they underwent when adhering to the Aarhus Convention. On the other side, however, Dr. De Dominicis examines and makes proposals in order to encourage the European Institutions and citizens to work together for progressively improving access to justice in environmental matters as required by the Aarhus Convention.

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