The Environment, Health, and Employment: Ilva's Never-Ending Story

Marisa Meli*

Abstract

The article describes briefly the history of the Ilva steel plant with particular attention to the facts occurred in the first decade of the new century and analyses deeper both the interventions of the Constitutional Court and the European Court of Human Rights, following the entrance in the market of the new globalized firm, Arcelor Mittal.

I. The Mirage of Ilva's New Deal

The year 2018 should have been a turning point in the history of Taranto for its steel manufacturing site. Ilva, the historical steel plant, known as one of the largest in Italy and in Europe, had been undergoing an insolvency process. The mandate for the commissioners was to improve the factory to attract potential purchasers that would enable the plant to continue to operate. In the meantime, the hope was that the sale of Ilva's assets could help accelerate the urgent environmental clean-up work on the site. This was necessary to protect the health of inhabitants in Taranto and to maintain employment rates.

At the end of 2018, a new firm entered the market, ArcelorMittal, the largest producer of flat carbon steel both in Europe and worldwide. It completed the transactions necessary to acquire Ilva and to put the steel plant on loan.

This has been the second radical change for the Italian firm.

The first change had occurred in the 1990s, when the industry had shifted from public to private ownership, the Riva Group. The second change was no less significant: Taranto became the local seat of a multinational company, and this implied alterations to the relationship with the local population and with the entire nation. The ex Ilva became a globalized firm: ArcelorMittal, known as the steel giant, is one of the world's five largest producers of iron and metallurgic coal. Having already asserted its presence in sixty countries, it strengthened its European presence by landing in Italy.

The European Commission, according to the European Union (EU) Merger Regulation, has approved the acquisition, subject to some conditions.[1]

* Full Professor of Private Law, University of Catania.

[1] More precisely, at the condition of removing Marcegaglia Group (a significant Italian competitor) from the consortium purchasing Ilva and to reduce some presence of AM enterprises in

The same approval came from the labour union, which despite some scepticism, resulted in a positive answer from the referendum consultation.[2]

At the beginning of 2019 everything seemed to be ready for the New Deal.

II. A New Deal also for the Environment and for Health

In the meantime, two important judgements affirmed that the deal had to address appropriate concern towards the serious ecological harm that the steel plant caused to the local population.

This was expressed by the Italian Constitutional Court on the one hand, and by the European Court of Human Rights on the other.[3] Even though they referred to facts that occurred before the arrival of ArcelorMittal, both decisions looked to the future, stating that from then on there would not be anymore tolerance towards the ineffective answers such as those offered in the past.

In both judgements, the Court accused the State of questionable conduct.

The Constitutional Court stated that in taking action to safeguard the continuity of production within sectors that are strategic for the national economy, the Italian government had not complied with the requirement to strike a reasonable and proportionate balance between all relevant constitutional interests when it issued the many decrees so called 'save-Ilva'. This was because the government left out any measure aimed at protecting both the health, the environment, and the bodily integrity of workers.

A few months later, the European Court of Human Rights adopted a landmark decision recognizing that Italy failed to protect the right to private life (Art 8) and the right to an effective remedy (Art 13) of the citizens who were dramatically affected by the extreme pollution levels caused by Ilva's activities.

Both Courts called on Italy to implement, as soon as possible, all the necessary measures in order to ensure protection of the environment and public health. It is definitely time to remedy this public health crisis and to put an end to the years of impunity that benefited Ilva.

III. A Quick Look to the Past

To understand how groundbreaking both these judgments are, it is necessary

Eastern European countries. See European Commission, Decision of 17 April 2019, available at www.ec.europe.eu.

[2] In the daily press: 'Ilva. Siglato l'accordo al MISE. Da Arcelor l'ok a 10.700 assunti' *il Sole 24 Ore*, available at https://tinyurl.com/y93zrh6k (last visited 27 December 2020); 'Ilva, nel referendum tra I lavoratori vince il sì all'accordo col 93%' *Il fatto quotidiano*, available at https://tinyurl.com/y8m6uxmc (last visited 27 December 2020).

[3] Corte Costituzionale 16 November 2018 no 58, *Il Foro Italiano*, 1073 (2018); Eur. Court H.R., *Cordella et al* v *Italy*, Judgment of 24 January 2019, available at www.hudoc.echr.coe.it.

to know what happened during the last decade. More generally, it is necessary to go back to the past and to briefly examine the history of the industrial site.[4]

The history goes back to the 1960s. The steel plant was created in 1965, located in the south of Italy and organized as a State-controlled company (Italsider). In accordance with the prevalent industrial development model of that time, despite the fact that it was a large-scale emission intensive industrial site, it was located very close to residential areas. After all, at that time, nobody paid particular attention to the social costs of production and the unique creed was the mirage of economic development and social well-being.

As in other tragic realities, industrialization was connected to the idea of raising production and transforming economically depressed areas for the national economy. In the case of Taranto, the project was also related to the growing European Coal and Steel Community (ECSC). The south of Italy was seen as the local arm of the great expansion of the European iron and steel industry. At that time, this was considered a winning move. And for a short period it was. This was the time of rising consumerism. Steel was essential for the production of many new consumer goods. These new productions were initially successful and the local community forged its new identity around it.

Did the factory, with its blast furnace, pollute at the time?

Surely it did. Probably even more than today, because at that time there were no elementary rules established to protect the environment and human health. But nobody was willing to see the dark side of industrial growth. As previously mentioned, the common creed was the mirage of economic development. An economic mirage that really occurred but was short lived.

The process of development started with the steel plant but seemed to slow down by the beginning of the 1980s. And when a mirage starts to vanish, intolerance begins.

As in other parts of Italy, it was time to discover the environmental damage, to investigate the increasing death rates, and to reveal the unsafe working conditions.

In Taranto, the community started to perceive a degradation in the suburbs, which was only revealed as the damage was expanding into the city. This is particularly true in the Tamburi neighbourhood (Tamburi), built in the shadow of the industrial site.

The 1980s saw the initial death tolls. Additionally, at this time a series of

[4] It is always very interesting to read the current events in the light of the historical reconstruction. In this case S. Romeo, *L'acciaio in fumo* (Roma: Donzelli, 2019) is strongly suggested. This is an extremely depth and documented history of the relationship between the industrial steel plant and Taranto's community. For a more general overview of the history of industrialization in Italy, see S. Adorno and S. Neri Serneri, *Industria, ambiente e territorio. Per una storia ambientale delle aree industriali in Italia* (Bologna: il Mulino, 2009); S. Luzzi, *Il virus del benessere. Ambiente, salute, sviluppo nell'Italia repubblicana* (Bari: Laterza, 2009).

steel sector crises began, which led to the promise of a new industrial plan and of closing the blast furnace.

In 1990, the areas were identified as areas with 'high environmental risk'. As in many other Italian industrial sites, however, no concrete project of remediation followed.

A few years later, in line with the policy of the time, the industry was privatized. When it happened (with the Riva Group), the factory had already broken the relationship with the local community; the industry was perceived as a cluttered extraneous body.

During this time there were several criminal proceedings against Ilva's management for serious ecological harm, as well as for its failure to prevent accidents in the workplace.

Despite the well-known dangers of air pollution, the dumping of hazardous materials, and the emission of particles, Ilva's management continued its production without paying any attention to the consequences.

IV. The History of Ilva's Unsustainable Development

The history just described reflects the history of most of the industrial sites in Italy.

However, Ilva's history diverges from the others at the end of the 1990s.

At that time, attention was focused on paying for social costs of production, and there was an increase in environmental legislation, mostly thanks to the efforts of the European Community.

But in Taranto, the new property did not invest in the environment, or at least, did not invest enough, probably due to the crisis of the industrial sector.

To reduce emissions, it is necessary to take measures for containment, giving priority to the reduction of emissions of hazardous substances and metals. Another priority is the large deposit of coal, coke, and other minerals necessary for production. They are exposed to weather conditions, and particularly with wind, the deposits can disperse fine dust and dangerous particles. Emissions from other parts of the production process are similarly problematic. In accordance with new European rules, these risks should be reduced with the adoption of Best Available Technologies, but Ilva's production is far from meeting these standards.

The Riva Group has always claimed that compliance costs were prohibitive. However, looking at the economic and financial performance of the Group, it is hard to accept that it was unable to bear the costs of investing in plant renovations since 1995.

The method of production appears to belong to another era. It has forced local mayors to forbid children from playing in open spaces and to order farmers to put down their animals because they were contaminated. In the meantime, the epidemiological data revealed a connection between deaths, sickness rates, and

the industrial site.

This continued until the dawn of the new century, when the relationship between industry and the environment was reconfigured and based on the idea of sustainable development, as affirmed in one of the fundamental rules of the European Treaty (Art 3) and in the European Charter of Human Rights (Art 37). Moreover, according to Art 191 of the Lisbon Treaty, the EU policy contributes to protecting the quality of the environment and of human health, with regulations based on the precautionary principle, the prevention principle, and the polluter pays principle.

Under these new conditions, it seems unbelievable that the biggest steel industrial plant continues to operate in such conditions.

Immediately after the beginning of the new century, in Taranto, the situation became unacceptable according to today's standards. Nevertheless, nobody has adequately intervened, neither the Riva family, nor the public authorities.

The lack of compliance with the elementary rules is well known. Contamination rates among the local population have led to unacceptable and intolerable levels of sickness and chronic illness.

In 2002, the Agenzia Regionale per la Protezione dell'Ambiente (ARPA, the regional agency for environment protection) Report showed that there has been an increase of cancer diagnoses.

In 2005, the High Court found that the management of Ilva was responsible for air pollution, the dumping of hazardous materials, and the emission of particles.[5]

The European Commission, thanks to a petition received from a citizen worried about the conditions of production,[6] started an infringement proceeding, that has been transposed in a decision by the European Court of Justice (ECJ).[7] The ECJ concluded that Italy failed to properly apply EU legislation, with particular reference to the lack of implementation of the Integrated Pollution Prevention and Control (IPPC) Directive,[8] which required a special (integrated) permit from the Integrated Environmental Authorisation (IEA). Ilva did not have such authorisation and nevertheless continued production.

V. Arm Wrestling Between Judicial and Political Powers: The First Intervention of the Constitutional Court (2013)

What follows is the backdrop to the fateful year 2012. As already described,

[5] Corte di Cassazione 24 October 2005 no 38936, *Rivista giuridica dell'ambiente*, 309 (2006).

[6] Petition 30 September 2011 no 60/2007.

[7] Case C-50/10 *Commission* v *Italy*, Judgment of 31 March 2011, available at eur-lex.europa.eu.

[8] The European Parliament and Council Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control (2008) OJ L24/8 is based on a new regulatory model that aims to control together emissions on air, water and soil, waste treatment, energetic efficiency and accidents prevention. It has been introduced in our environmental code with decreto legislativo 29 June 2010 no 128, adding Arts 29-*bis* to 29-*quattuordecies*.

the Italian judiciary had the will to investigate and to intervene, while the public administrative powers did not. There have been several judicial challenges relating to serious environmental crimes and failure to prevent accidents in the workplace.

In July 2012, the prosecutor of Taranto ordered the seizure of the hot working area (meaning blast furnace, mineral parks, the coke plant, the steel mill, the area for managing steel materials and the agglomeration area).[9] This was only the first of several orders, that also concerned finished products or half-processed products. On one more occasion, there was a threat to halt all production activities.

The intention of the judges was to offer a prompt solution to safeguard the multitude of people affected. At the same time, the measures adopted were generating a new conflict: production could not stop because thousands of people would lose their jobs.

The entire country was worried, and so was Europe.

The steel sector was undergoing a crisis, and not just in Taranto.[10] The prospect of closing the biggest industry frightened the European economy because of increasing competition with other economic realities.

The European Parliament intervened with a motion for a resolution to the crisis of the sector.[11]

This motion underlined the necessity to support the steel industry and to make it competitive and responsive to changing market conditions. It emphasized how essential the steel industry is for growth and prosperity in Europe and asked the Commission to take any reasonable step to support it.

In a second resolution,[12] based on a petition of citizens worried about the extremely elevated levels of dioxin emissions from Ilva, the European Parliament stressed that both the Italian authorities and the existing plant owners have a pressing legal obligation to secure a drastic reduction in harmful emissions. The Parliament had admitted that the privatisation of the plant has not led to any

[9] It occurs on 7 August 2012. For a deeper focus on this period see R. Colombo and V. Comito, *L'Ilva di Taranto e cosa farne* (Roma: Edizioni dell'Asino, 2013); A. Bonelli, *Good Morning Diossina. Taranto, un caso italiano ed europeo* (Brussels: Green European Foundation, 2014); A.F. Uricchio ed, *L'emergenza ambientale a Taranto: le risposte del mondo scientifico e le attività del polo "Magna Grecia"* (Bari: Cacucci, 2014); and M. Meli, 'Ambiente, salute, lavoro: il caso Ilva' *Le Nuove leggi civili commentate*, 1017 (2013).

[10] In the same period also the steel plant in Cornigliano closed the doors. See more in R. Tolaini, 'Il peso dell'acciaio. Siderurgia e ambiente e Genova, 1950-2005', in S. Adorno and S. Neri Serneri, n 4 above, 113.

[11] Doc no B7-0541/2012 of 5 December 2012, available at www.europarl.europa.eu.

[12] In line with what has been affirmed by the European Commission, Communication Tackling the Challenges in Commodities Markets and on Raw Materials COM (2011) 25 final of 2 February 2011. The Communication is part of a more general intervention plan, the well known 'Europe 2020': European Commission, Communication Europe 2020. A European strategy for smart, sustainable and inclusive growth (2010) 2020 of 3 March 2010. With more specific reference to the industrial activities see also European Economic and Social Committee, Opinion on A Stronger European Industry for Growth and Economic Recovery - Industrial Policy Communication Update COM (2012) 582 final of 11 July 2013.

improvement in environmental security. Nevertheless, considerations for the future of the steel industry come into play, as the industry employs thousands of workers and is a crucial economic sector of the EU. In conclusion, the Parliament has called on European institutions to work together with all the parties involved in order to ensure a policy that coherently integrates economic objectives with social and environmental priorities. The goal is to build a modern, competitive, and sustainable European steel industry which fully complies with EU environmental law. Above all, it has called on the Italian authorities to ensure the environmental restoration of the polluted steel plant site as a matter of extreme urgency.

According to the European institutions, therefore, production must necessarily continue, but while seeking to restore the site and to improve environmental performance.

The Italian government, with considerable delay, has attempted to cope with this double aim.

Its late action followed the judiciary intervention but with concerns regarding the seizure orders: too many people would lose their jobs and the economy would collapse. The Government enacted therefore a first decree, the so-called 'save Ilva' (decreto legge 3 December 2012 no 207) which, in recognizing Ilva as a plant of 'national strategic interest', allowed it to restart production, notwithstanding the judicial ban.[13]

At the same time, the Government imposed a re-examination of Ilva's permit. This meant that the continuation of the steel plant's activity was permissible under certain conditions: the company had to modernise the plant in order to satisfy the requirements set out in the new IEA. More precisely, the Minister of the Environment was asked to approve the company's new remediation plan, a detailed set of conditions and measures under which Ilva would be permitted to operate.

Under these conditions, the Government could authorise the continuation of the activity for a period of thirtysix months, while Ilva fulfilled the conditions required for the permit. A Guarantee commission was tasked with checking the proper enforcement of the decree.

For the prosecutor of Taranto, the Government had risked too much by going against its own decision. In its opinion, the legal solution adopted excessively sacrificed the local population's right to health and of the environment. It therefore called for the intervention of the Constitutional Court.[14]

But the Court reached a different conclusion. It rejected the question of constitutionality, considering that the legislator had struck a reasonable and proportionate balance between health, environment, and employment in drawing up the decree.

Indeed, the Court knows very well that the right to health is a fundamental

[13] Decreto legge 3 December 12 no 207.

[14] Corte Costituzionale 9 April 2013 no 85, available in English at tinyurl.com/3nffgtv8 (last visited 27 December 2020).

right and has on many occasions recognized it as a fundamental value that cannot be balanced with others.[15] What the Court has added, is that together with the obligation to protect health, there are some duties for the State including the duty of protecting labour. The State must therefore protect all of the constitutional values and the decree was the right attempt to achieve this balance.

According to the Court, the continuation of business activities was conditional upon compliance with specific limits set out in administrative measures relating to the integrated environmental authorisation and was backed up by legislation providing for specific controls and sanctions.

The reasonable and proportionate balance consists in the re-examination of the IEA, as the protection of the environment and human health will not necessarily end production but will combine production with improvement of environmental performance.[16]

In conclusion, according to the Court, it is not true that the Government only tried to avoid the crisis, because the prospect of an environmental restoration has not yet been abandoned.

VI. The IEA Review as a Pre-Condition for the Prosecution of the Firm's Activity

The Court's ruling of 2013 sparked many comments and perplexities.[17] On the whole, it may be considered a balanced judgment. It was considered balanced to the extent a rule that intervenes in such a critical and exceptionally serious situation, can actually be considered as such, since also required equally exceptional interventions of each of the different branch of state power, including the judiciary and the public administration. As such, it was capable of giving rise to many different conflict situations. The interests at stake were, however, so great that the Court found itself in a very difficult situation.

And yet, the Court managed to make a balanced ruling, starting from the premise on which its reasoning was based: the review of the IEA.

[15] Since the famous judgment of Corte Costituzionale 10 July 1974 no 247, *Giustizia costituzionale*, 2371 (1974) on Art 844 Civil Code. For the historical evolution R. Ferrara, 'Il diritto alla salute: I principi costituzionali', in S. Rodotà and P. Zatti eds, *Trattato di biodiritto* (Milano: Giuffrè, 2010), I, 3.

[16] Coherently, when the decree was transposed into law (legge 24 December 2012 no 231) other guarantees were introduced to protect the environment and health. At the same time another decree was adopted (decreto legge 7 August 2012 no 129), with new urgent dispositions for Taranto's Territory restoration and requalification, allowing news funds and instruments for the purpose.

[17] Between many others see U. Salanitro, 'Il decreto Ilva tra tutela della salute e salvaguardia dell'occupazione: riflessioni a margine della sentenza della Corte costituzionale' *Corriere Giuridico*, 1041 (2013)*;* G. Amendola, 'La magistratura e il caso Ilva' *Questione Giustizia*, 9 (2012); V. Onida, 'Un conflitto fra poteri sotto la veste di questione di costituzionalità: amministrazione e giurisdizione per la tutela dell'ambiente' 3 *Rivista AIC* (2013); P. Pascucci, 'La salvaguardia dell'occupazione nel decreto "salva Ilva". Diritto alla salute vs. diritto al lavoro?' *Working Papers Olympus*, 27 (2013).

According to the Court, the emergency decree (subject of appeal) before being issued was a mere authorization for the continuation of Ilva's activity. Regardless of the damage it already caused to environment and health, it was instead actually issued with the specific intent to properly remedy past errors, trying to bring back business activity following a new sustainability path.

It was not, therefore, a question of giving unconditional priority to the economy over public health, but to proceed with the attempt to avoid the closure of the company. It dictated the conditions to be followed in order to continue the activity, trying to properly adapt it to the requirements of the European legislation.

According to some, in this way the Court would have operated in blind reliance on the work of the public administration, which was competent to issue the IEA.[18]

But perhaps this was not the case. The IEA precisely defines the conditions of sustainability and development and it is obvious that the Court has confidence in the public administration's competence to achieve this balance.

The fact that, in concrete terms, the attempt actually failed and the situation has not at all been resolved, only shows how difficult, if not impossible, it is to address a situation in which the rules had already been ignored for so long. It has to be shared the fact in itself of having attributed confidence to a last and late attempt, operating a presumption of reasonableness about the public authorities work.

It was also reasonable to grant Ilva a period of 36 months to adapt to the new requirements of the IEA to avoid closure, since it was clear that the adaptation process could not take place overnight and necessarily required some time.

The problem, if anything, was related to the following situation: what happens in the meantime? It allowed the exercise of an activity that causes damage to the environment and people, and was in contempt of constitutional regulations for the time deemed necessary? And, above all, did this not recognize a sort of immunity for the company?

According to the Constitutional Court this was not the case.

The contested decree, in fact, referred to the rules of the Environmental Code also with regard to any non-compliance with the requirements of the IEA, and so consequently would apply the relevant sanctions, including criminal ones.

Nor, on the other hand, would the continuation of the activities affect past criminal liabilities, which remain in the investigation phase (there is still an ongoing proceeding) and with respect to which the 'save-Ilva' decree does not, in any way, intend to interfere.

The decree, in other words, does not create immunity by postponing any corrective or sanctioning intervention until the expiration of thirtysix months. On the contrary, the very appointment of a guarantor to monitor compliance with the adjustment measures imposed, shows a strengthening of the control measures, rather than a suspension.

[18] T. Guarnier, 'Della ponderazione di un "valore primario". Il caso Ilva sotto la lente della Corte Costituzionale' *Diritto e Società*, 173 (2018).

According to the Court, this also applies to damage to health or, more generally, to the condition of discomfort that the community is forced to suffer due to living in unhealthy environmental conditions and with the fear of contracting diseases. These inconveniences cannot, of course, automatically disappear as a result of the adjustment to comply with the requirements of the IEA.

According to the Court, this does not mean that the rights of the citizens are cancelled or not considered at all. The latter, if they ever feel their rights have been violated, can always refer to the competent Court in order to obtain the remedial and sanctioning measures provided by law. This right would not in any way be affected by the emergency decree, but like any legal claim it would continue to be included in the reference normative context, which, as already clarified, does not reset or even suspend the legality control. Rather, it brings it back to the verification of compliance with the requirements of environmental and health protection contained in the IEA reviewed.

This very last passage of the reasoning is considered quite delicate, since on one hand the Court does not prejudice the maintenance of the guarantees to protect private rights and interests, including the constitutional ones, while on the other hand it seems to subordinate such protection to the failure to comply with the new conditions for the exercise of business activities which have been set out by the revised IEA. To sum up, what it seems to say is that private individuals can only assert their reasons when they demonstrate that the company has not actually complied with the new imposed requirements.

According to the Court,

> 'the re-examined IEA indicates a new point of equilibrium, which allows the continuation of the productive activity under different conditions, by which the activity itself must be considered lawful within the maximum time span (thirtysix months), considered by the legislator necessary and sufficient to remove the causes of environmental pollution and consequent dangers to the health of the population, even with extraordinary investments adopted by the concerned company'.

According to some, what has actually been stated by the Court represents a retreat of previously established principles, which recognize the protection of the right to health in the ordinary Court regardless of compliance with administrative requirements.[19]

Reasoning in this way, however, does not consider the very peculiar situation that the Court had to examine.

The alternative was whether to block everything or to restart. The path that was actually chosen was to restart under new conditions.

This does not mean impunity. Ilva will pay for all of the damages it has

[19] U. Salanitro, *Il decreto Ilva* n 17 above.

produced and will continue to be held responsible if it disregards the given instructions. As long as this does not happen, it is necessary to give the chance to restart without stopping production by raising the objection of the risk it introduces to society: risk, in fact, that it was actually and properly trying to avoid. This is precisely the balance of interests that the Court is talking about.

Without any doubt, a compromise was necessary, at least at that stage, and did not require sacrificing the citizens' right to health, by giving a concrete way to restart an activity in compliance with the new conditions imposed by the IEA.

Of course, it is unfortunate to note that this choice was made without concern about the hardships suffered up to that moment by the population and that adaptation to the newly imposed measures would not be able, all of a sudden, to cancel everything.

In our system, within the context of identifying a solution for inter-private conflicts of much smaller scope, the general rule recognizes that for the needs of production, entries that exceed normal tolerability are required, but only upon payment of a fair indemnity that can compensate for the decrease in value forced to suffer (Art 844 of the Italian Civil Code).

This, of course, applies within the scope of available rights. But, more so, the actual choice to continue with production in compliance with the new conditions should have pushed the State to adopt some specific solutions to address the discomforts of the community, starting from the premise that in order to properly restart, an adjustment period is necessary. I am thinking of the realization of specific contrast works or, in the most serious cases, even the temporary placement of the most exposed communities in safer sites.

This would allow the progressive adaptation to the conditions of the IEA which, as the Court rightly points out, represents the indispensable tool to 'achieve levels of air quality that do not lead to significant negative impacts on human health and to the environment' and which, from this point of view, represents the right way forward.

None of this has been done. In any case, the weak point turned out to be its concretization: the owner (the Riva group) has not even been able to start the imposed adjustment measures, with the consequence that other intervention measures were instead necessary.

VII. An Unsuccessful Attempt: The End of Riva's Era

In fact, nothing went in the direction the Constitutional Court had imagined.

The following year (2014) the review of the IEA was replaced by the adoption of a Recovery Plan, through a new decree law that provided new deadlines. With the new decree, which entrusts the fate of the company to the appointment of an extraordinary commissioner, it also recognized the immunity of the same commissioner for criminal or administrative liability related to the measures

put in place in execution of the plan for the first time.

Therefore, all the precautions that the Constitutional Court had recommended were removed: the continuation of the business activity implies a suspension of the rules and of the control over legality.

In 2015, Ilva is placed in extraordinary administration and, as already mentioned, from that moment on, the sale procedure began. A new decree law further extended the implementation of the Plan (by 2023) and the provision of immunity is extended to new buyers.

That moment represented the end of the Riva era.

This history shows how myopic it is to only pursue financial advantages through industrial activity, without paying the right attention to environment and human health. Nowadays, only by adequately investing in new production techniques, modern and sustainable firms can be competitive and win. The steel industry structurally is a 'dirty' industry and so, even if this is not easy, it is actually possible. The steel enterprises that have invested in this direction and have pioneered the best available technologies are now enjoying competitive advantage in a global marketplace, and they are supported, rather than fought, by local communities.

In Europe there are some examples, in Duisburg or in Austria, that show how can steel actually be produced in a different way. Certainly, even these factories are suffering from the economic crisis of the sector, but none of them went bankrupt for not having considered sustainability as a driver of their business model.

On the contrary, in Taranto the battle is still on-going.

The situation in Taranto is still the same: the steel plant continues to pollute.

This means that there are other European warnings, with new infringement procedures[20] and other judicial interventions, with new threats of closure. The Government, on the other side, attempts to save the situation again with other 'save-Ilva' decrees.

VIII. The Second Intervention of the Constitutional Court (2018)

A new tug-of-war between judicial and executive power is thus grafted. The Government so intervenes with new urgent measures.

The decree, as usual, was followed by a new seizure, due to a work accident that occurred in the second blast furnace and caused the death of a worker.[21] The Government again allowed production, despite the judicial order. This time, the

[20] See European Commission, Infringement Procedure 16 October 2014 no IP/14/1151. To understand the attention paid by the European Parliament to the Italian problem see the paper commissioned by the European Parliament's Committee on Environment, Public Health and Food Safety, G.M. Vagliasindi and C. Gerstetter eds, *The ILVA Industrial Site in Taranto* (European Union, 2015).

[21] Decreto legge 4 July 2015 no 92.

authorisation to continue is conditioned upon a submitted plan, where Ilva's management assures to take some exceptional measures to ensure workers' safety.

The Court reached a different conclusion this time.[22] It confirmed on the one hand that, in theory, the legislator is not precluded from taking action to safeguard the continuity of production within sectors that are strategic for the national economy in order to guarantee the respective employment levels. On the other hand, however, it emphasized that the balancing operation must comply with the canons of proportionality and reasonableness, so as not to enable the absolute prevalence of any one of the values involved or to completely sacrifice any of them.

This time, according to the Court, the legislator has not complied with the requirement to strike a right balance. In allowing the continuation of the activity, despite the seizure of the industrial plant for health and safety offences, the legislator has not complied with the requirement to strike a reasonable and proportionate balance between all relevant constitutional values.

In fact, the judgment is not in contradiction with the previous one, as has been noted.[23]

In the previous case, the continuation of business activity was conditional upon compliance with specific limits set out in administrative measures related to the IEA and was subordinated to specific controls and sanctions.

Now, the continuation of business activity is conditioned exclusively upon the unilateral presentation of a 'plan', by the very same private party whose property has been seized by the judicial authorities. Furthermore, in this case, there is not any certainty of any requirement for immediate and timely measures capable of promptly repairing the danger to workers.

Differently from the previous intervention, the legislator has ended up with excessively privileging the interest in continuing production activity, entirely disregarding the inviolable constitutional rights associated with the protection of health and life (Art 32 Constitution), as well as the right to work in a safe and non-hazardous environment (Arts 4 and 35 Constitution). Furthermore, private enterprise must be conducted in such a manner that does not cause harm to safety, freedom, and human dignity (Art 41 Constitution).

Therefore, according to the Court, the decree 'save-Ilva' this time does not comply with fundamental values and does not consider the limits that the Constitution imposes on business activity. In contrast with the previous case, this time the legislator ended up excessively privileging the continuity of production, entirely disregarding the inviolable rights of human health and life.

It is a strong recognition of the right to health as a fundamental value that cannot be balanced with other economic interests. Again, the Court agrees that

[22] Constitutional Court 23 March 2018 no 58, available in English at https://tinyurl.com/1rj5gpx8 (last visited 27 December 2020).

[23] G. Amendola, 'Ilva e il diritto alla salute: la Corte costituzionale ci ripensa', available at questionegiustizia.it, 10 April 2018.

it could be counterbalanced in some circumstances necessary to protect other constitutional values, such as employment. But that balance requires that both interests are taken into consideration and protected and must also operate in a proportional and reasonable way. This balance must be achieved without the absolute prevalence of one interest over the other, as occurred in the last government provision that allowed the continuation of Ilva's activities without any proper assurance.

The measures adopted by the Italian government were undoubtedly aimed at preserving the company's productive capacity, employment rates, and the potential to attract purchasers that would ensure the continued operation of the plant. All these measures were implemented without paying attention to the fact that production continues to generate pollution, negatively affects the health of the surrounding environment, and that the operations necessary to actually repair the damage caused to the territory were incomplete.

In conclusion, according to the Court, it is important to protect employment, production, and the economy, but all this cannot be detrimental to the environment and human health. The trade-off between economic and labour interests and safeguarding fundamental rights cannot be accomplished solely to the detriment of the latter.

The Court ruled that the decree was illegitimate, but what is more interesting is to examine what the Court states when looking towards the future:

> 'only the prompt removal of any factors that constitute an hazard for the health, body integrity and life of workers is in fact a minimum and indispensable prerequisite for the compliance of production activity with constitutional principles'.

It is clearly a warning to the Italian State.

IX. The Final Warning of the European Court of Human Rights

The warning of the Court of Strasbourg is even more peremptory.

The Court has responded to some complaints submitted by citizens in 2013 and 2015. If the process of adaptation to the IEA review had been correctly initiated, the answer probably would have been different. But, as it has already been said, this was not the case and the pollution continued in Taranto. The complaint of 180 applicants actually comes to the attention of the Court and it concerns their complaint about the effects of toxic emissions from Ilva steelworks on the environment and on their health, and about the ineffectiveness of their available domestic remedies.

According to the Court, the responsibility of the Italian State is twofold.

On the one hand, national authorities have failed to take all the necessary measures to provide the effective protection of their citizens.

The Court recalls the doctrine of positive obligations, which in this case implies the recognition of a duty upon the State to take active steps in order to safeguard the rights of the Convention.[24]

This kind of duty exists even when the damage is caused by third parties, if the State is tasked with regulating and controlling such activity. This is exactly the case, because the State has not taken any reasonable step to control Ilva's activities. More specifically, the Court affirmed that, looking at the European Convention on Human Rights (ECHR), there have been violations of Art 8 (right to respect for private and family life). The Court recognised the credibility of several alarming scientific reports, concluding that national authorities had failed to take all the necessary measures to provide effective protection of the applicants.

On the other hand, the Court identified a violation of Art 13 of the Convention, which contains the general principle to obtain a judicial national remedy for alleging conduct that is detrimental or threatens to degrade a right guaranteed by the Convention.

According to the Court, with regards to the right to a healthy environment, there is no effective remedy enabling people to complain to the national authorities. For the applicants, and more generally for all the people involved, it has been impossible to obtain measures meant to secure the decontamination of the area contaminated.

The Court emphasized how the work necessary to clean up the factory and the site affected by environmental pollution was urgent, and the environmental plan approved by national authorities, which set out the necessary measures and action to ensure environmental and health protections, ought to be implemented as soon as possible. The European Court, in other words, aims to put an end to years of impunity that benefited Ilva, emphasizing that it is time for the Italian government to fulfil the rights of the population to live in a healthy environment.

It is clearly another warning to the Italian State.

Moreover, in this case, the Court was asked by applicants to give a pilot-judgment. That is a procedure aimed at indicating the right way to solve the problems, imposing on national authorities the type of remedial measures to take.

The Court considered this kind of judgment unnecessary (or, maybe, too difficult). It preferred to confirm the existence of human rights' violations and giving to the Committee of Ministers of the Council of Europe the task to monitor the Italian government so that it may urgently start its action for the decontamination of the site and for the improvement of healthy work conditions.

[24] J.F. Akandji-Kombe, Positive Obligations Under the European Convention on Human Rights (Council of Europe, 2007); A.R. Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights (Oxford: Oxford University Press, 2004).

X. New Efforts to Balance the Environment, Health, and Employment

The two pronouncements, which came as soon as the new management of Ilva took office, reopened a wound that had never actually healed: how was it possible that for many years what actually happened in Taranto was allowed to happen, to the extreme consequence of having to put on two different scales, interests that, according to our constitutional design, were certainly not imagined as antagonistic between them at all: the right to work, already recognized and protected by the opening provisions of our Constitution, related to parameters of dignity that does not allow the concept of working as carried out to the detriment of the most elementary conditions of the workers themselves and the surrounding community.[25] Only a truly short-sighted policy has been able to pull the rope for so long, forcing the Constitutional Court itself into a very difficult equilibrium.

At the same time, the two pronouncements have identified a situation that has already changed and represents, from this point of view, an indispensable key to interpreting the present, in order to evaluate the choices that have accompanied the evolution of the situation in Taranto.

Upstream there is, again, a political choice: to continue with steel production.

In theory, a different choice could also have been made.

It should mean that with ArcelorMittal's leaving a new era would start, with the end of the steel industry in Taranto. A real reboot, where de-industrialisation does not only mean dismantling the enormous site. It should mean also a long-term program, with different new possibilities for land-use.[26] Surely a traumatic turning point, even if not less traumatic than the shift from the naval industry to the steel one, and the opportunity to return to the entire city of Taranto coast with its new potential. Even the employees could be engaged in new activities guiding the transition towards a different goal.

Concretely, it would be a difficult step. It is sufficient to think about the many de-industrialised sites in Italy that are still waiting for restoration and for a new intended use.

In any case the choice was to continue.

Judgments become the new lasses to look at the solution adopted.

They following facts occurred in 2015. With the insolvency procedure and the appointment of new commissioners a new era began and it then culminated with the arrival of ArcelorMittal.

In 2017 the steel plant obtained a new IEA, with a scheduled program and

[25] See S. Laforgia, *Diritti fondamentali dei lavoratori e tecniche di tutela. Discorso sulla dignità sociale* (Napoli: Edizioni Scientifiche Italiane, 2018); P. Tomassetti, *Diritto del lavoro e ambiente* (Bergamo: ADAPT University Press, 2018).

[26] U. Mattei, 'Ilva, servirebbe un piano di cura eco-tecnologica', available at *ilfattoquotidiano.it*, 16 November 2019.

closely monitored.[27] The program comprehends to complete all the measures prescribed in the Environmental Plan, though the deadline for implementing the measures provided in the plan was extended to August 2023. Within the same period, ArcelorMittal could decide to buy the company (at the moment it has only rented the plant). It also invested (2.5 billion) to modernize the plant and to clean up the site.

This agreement has been subject to varied opinions.

For some, it has not done very much. It only achieved little steps towards remediation, that are not sufficient to change the current situation and the deadline for completion is too far. Instead, the time was ripe to request a meaningful effort, like imposing a de-carbonisation process.

According to others, it was the best solution for the time, because due to technical and economic factors, it would not have been possible to ask for any further commitment. The facts are still too recent to completely understand if this has actually been a winning choice.

Seen from the perspective of the indications given by the Constitutional Court in 2013, in some ways it could once again appear as a balanced solution, because once again the continuation of the business activity is subordinated to the attempt to bring production back within the canons of sustainability. But in many other respects there is the doubt that the choice was this time based on a reasonable balancing of the interests involved.

But in many other respects it is doubtful that the choice was this time based on a reasonable and stable balancing of the interests involved.

It is clear, in fact, that the 'accelerator foot' has been pushed too far in favour of the enterprise. First of all, the deadline for the implementation of the recovery plan has been delayed. Above all, however, the choice of immunity has a really heavy weight, which has led to the disappearance of what the Constitutional Court had considered a firm point: such as the continuation of the activity without deactivation of control, sanctions, rules. This time, it has declared itself willing to suspend the judgement on the company's liability, allowing the adjustment process to take place outside any risk and control.

The choice has been the subject of a new appeal and the case is currently pending before the Constitutional Court. But it is very doubtful that the Constitutional Court will be able to acquit the legislator without denying itself.

On the other hand, it is not the only forcing.

The whole situation in Taranto was probably harder than what the globalized enterprise had considered at the very beginning.

Dealing with a multinational firm the answer is simply: it is better to leave and to invest elsewhere without fearing the entrance of new competitors. For everybody the situation would be the same, always with the same difficulties.

[27] With a Permanent Observatory for the Environmental Plan Monitoring, at the Environmental Minister, see www.osservatorioilva.minambiente.it.

On one side, the lasting crisis of the steel industrial sector and the competitive pressure of emerging countries. On the other, the too costly remediation and the renovation of the steel plant.[28] The economic activity is not profitable enough to complete all the investments required while maintaining the jobs. Nobody in these conditions could guarantee the employment level. The steel production in Taranto seems to be condemned to the same destiny, it is not possible to escape from the enormous costs for the previous faults.

This time the State has taken on itself some commitments, that again, it's not yet possible to know the details, but according to the latest reports, are moving towards financing green investments and ensuring the employment rate.

The obvious conclusion is that if the steel industry in Taranto must go on, its continuation cannot be solely put in private hands. The presence of the State is necessary in the search for a model of social and environmental sustainability that the market cannot reach. Obviously, State intervention goes beyond its tasks and its duties to protect human health and the environment. Employment rates and production are on the agenda as necessary goals that are not possible to leave to the fluctuations of the market.

Actually, the Government is aware of its innovative role. In a recent interview, the Economy Minister declared: 'Stop with taboos. The State must intervene when the market fails'.[29]

We can agree with his conclusions, but it is necessary to specify that in this case, there are no market failures. On the contrary, the market worked perfectly in the case of Ilva at first, it put aside an enterprise that was only apparently working, because within its production costs, it was not able to counter the social costs imposed on the community. But also, in ArcelorMittal's experience, the market correctly functioned by not allowing the continuation of a losing enterprise and setting the end of the steel plant.

In such cases, State intervention instead of correcting the market prevents the market from working, because there are some interests that are too important to protect.

This is maybe the most important conclusion to reach for the entire story.

According to our Constitution, the State must entrust the interests of the whole community, like employment and productivity, and it can interfere with the market to protect them.

For many years these basic principles have been outdated and replaced by the idea that the State must only regulate the market without any positive interference, according to the prevailing model of the European Union.

The entire story teaches us that when there is an environmental and human health crisis on one side, and occupational and industrial crisis on the other, this prevailing model could not support the right answers.

[28] S. Romeo, 'L'Ilva e la crisi della siderurgia', available at *rivistailmulino.it*, 15 November 2019.
[29] In his interview, 24 December 2019, available at www.repubblica.it.

XI. Beyond the Emergency: Statements on Environmental and Health Protection. Hazardous Emissions and the Right to a Healthy Private Life

Beyond these aspects involving the political, or economic policy dimension, it is important to see how the principles affirmed by the Courts affect more strictly the legal field and, in particular, the health and environmental protection profile.

From this point of view, it is especially taken into account the ruling of the Strasbourg Court, whose established principles take on a value that goes way beyond the concrete case and whose principles are not so easy to read, requiring instead a systematic framing effort.

The Court found itself deciding at a time when, in fact, nothing had changed with respect to the uneasy situation experienced by citizens of places of residence which were particularly exposed to harmful emissions of Ilva. It took into great consideration the many reports, from which it clearly emerged both the poor air quality conditions and the increase in the mortality rate, as well as the increased risk of incidence of certain diseases. Nevertheless, it saw a profile of a violation of the ECHR, without calling into question the right to health, but in relation to the right to private and family life (Art 8).

The same thing had already been done in the past, through an evolutionary interpretation of the text of the Convention, believing that the right to private life could also include the well-being, determined by environmental conditions (the healthiness of the places where private life takes place). With reference to Italy, the same principle had already been affirmed following a complaint filed by some citizens living in Somma Vesuviana, who complained about the precarious living and working conditions of their life caused by the state of neglect of the area and to the amount of waste abandoned on the roads, which is part of the wider and sadly known phenomenon of the 'land of the fires'.[30]

As it is well known, the Campania affair also had serious consequences, not only from an environmental point of view, but also for public health and because of the loss of many human lives. But the appellants, before the Court, complained about the serious state of deterioration and about the conditions of the places where their private and working lives were normally carried out. The Court identified such protection in Art 8 ECHR.

The violation of this right stemmed from the fact that the situation had degenerated as a result of the repeated failure to comply with the most elementary rules governing the waste management activities and that, therefore, the State had failed to fulfil its obligations to take all the appropriate measures suitable to ensure the effective protection of its citizens.

In the case of Ilva, the Court considered that the absence of adequate

[30] Eur. Court H.R., *Di Sarno and others* v *Italy*, Judgment of 10 January 2012, available at www.hudoc.echr.coe.it.

measures and the previous events were also caused by more recent episodes: such as the failure to comply with the measures imposed by the IEA review and the postponement of the deadline to 2023, for the implementation of the Environmental Recovery Plan. Particular attention, in this context, was also given to the fact that the immunity was attributed to the people in charge of ensuring appropriate compliance with the measures and also to the future purchasers of the company.

In Taranto, as in Naples before, there has been a serious and repeated disapplication of the rules. The inevitable conclusion is that the Italian State has failed in its obligation to protect the right to private and family life of its citizens, by not guaranteeing them an adequate level of well-being and environmental health.

XII. The Right to an Effective Remedy and the Italian System

Another important conclusion that has been reached by the Court (not unlike what was already stated in the Neapolitan case) is that this right to environmental healthiness, in our legal system, would not have adequate instruments of protection, with the consequent violation of Art 13 ECHR (right to an effective remedy).

This is one of the most interesting and delicate aspects of the whole affair, which is grafted onto one of the most complex problems concerning the regulation of environmental damage, namely the difficulty of distinguishing between the collective dimension and the individual dimension of the damage.

According to the Court, the absence of adequate protection measures would be given, first of all, by contingent reasons, such as the economic and financial difficulties of the company, which made impossible any attempt of guaranteeing an actual protection.

But, above all, it is due to structural reasons. These include the peculiarity of our constitutional system which does not allow, unlike in other countries, direct access to the Constitutional Court for citizens who consider their rights damaged.[31]

But this is especially because of the national discipline on environmental damage, which only recognizes the State's legitimacy to act, excluding any direct power of action for citizens who are victims of the harmful action.

This being the case, it could not even be possible to identify a problem of 'exhaustion of internal remedies', such as to justify the Court's intervention.

This aspect, referring above all to the last of the arguments adduced (the first one is only relevant in the context of the Constitutional choices related to

[31] Like in Germany, with the *Verfassungbeschwerde*, or in Spain, with the *Recurso de amparo*. Some references in M. Meli, ' "Sistema internazionale" e sua incidenza nell'ordinamento interno' in *Atti 5° Convegno Annuale SISDIC, L'incidenza del diritto internazionale sul diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2011) 413.

balancing the powers of the State) deserves careful consideration.

XIII. Is Air Pollution an Environmental Damage?

In our legal system, in fact, the environmental damage action may only be exercised by the State (namely, by the Ministry of the Environment), while instead local authorities and natural or legal persons who are or could probably be affected by the environmental damage can only file complaints and give information to the Ministry of the Environment, submitting them to the Prefectures, territorial Government offices (Art 309 of the Italian Civil Code).

This is so in the new legislation, implementing the 2004 European Directive, even if it is not too different from the old regulations on environmental damage from this point of view (introduced for the first time in our legislation by Art 18, legge 8 July 1986 no 349, establishing the Ministry of the Environment) except for the fact that, alongside the legitimacy of the State, it recognized the legitimacy of local and regional authorities as representative subjects of the damaged community.[32]

When passing by the old legislation to the new ones, however, the notion of environmental damage has radically changed.

If before, the environmental damage notion was generically referred to as a damage to the environmental resources, without any particular delimitation. In the new legislation (Art 300, para 2) and even before that, already within the European directive, the environmental damage is defined in a very precise and circumscribed manner.

Pursuant to Art 300, para 2 of the Italian Civil Code (which makes an explicit reference to the text of the directive), environmental damage is identified as deterioration that can be caused to: a) protected species and natural habitats; b) to inland waters, coastal waters and those included in the territorial sea; c) to the soil, through any contamination that creates a significant risk of harmful effects, even indirect, on human health, following the introduction of substances harmful to the environment into the ground, the soil or the subsoil.[33]

In the case of Ilva, the industrial activity has posed many problems, from

[32] It is sufficient to recall M. Libertini, 'La nuova disciplina del danno ambientale e i problemi generali del diritto dell'ambiente' *Rivista critica del diritto privato*, 547 (1987).

[33] U. Salanitro, *Il danno ambientale* (Ariccia: Aracne, 2009), 39; B. Pozzo, 'La responsabilità civile per danni all'ambiente tra vecchia e nuova disciplina' *Rivista giuridica dell'ambiente*, 815 (2007); Id ed, *La responsabilità ambientale* (Milano: Giuffrè, 2005); Id, 'La nuova direttiva 2004/35 del Parlamento Europeo e del Consiglio sulla responsabilità in materia di prevenzione e riparazione del danno' *Rivista giuridica dell'ambiente*, 11 (2006); Id, 'La direttiva 2004/35/CE e il suo recepimento in Italia' *Rivista giuridica dell'ambiente*, 1 (2010); F. Giampietro, *La responsabilità per danno all'ambiente* (Milano: Giuffrè, 2006); E. Gallo, 'L'evoluzione sociale e giuridica del concetto di danno ambientale' *Amministrare*, 261 (2010). See also M. Meli, 'Il principio chi inquina paga nel codice dell'ambiente', in I. Nicotra and U. Salanitro eds, *Il danno ambientale tra prevenzione e riparazione* (Torino: Giappichelli, 2010), 69.

an environmental point of view, so many that the area in which Ilva is located, was recognized and declared in the early 1990s as a high environmental risk area and was subsequently included in the Sites of National Interest (SIN) in order to properly identify a remediation program (like most industrial sites in Italy).

But the main problem on which the whole story is related to, is air pollution linked to iron and steel processing and, in particular, to the emissions of dioxin, heavy particulate matter, benzopyrene, deriving from the use of obsolete plants (in particular in the coking plant, the so-called Blast furnace).[34]

Complaints received by the European Court refer to this type of pollution and a problem of the same type is at the base of the seizure proceedings initiated by the judicial authorities (from 2012).

It is clear that this is not related to the discipline of environmental damage, as above described. In other words, it is obvious that air pollution can cause damage to the ecosystems: particulate matter and acid rain can certainly have repercussions on the protection of water resources, land and biodiversity, that fall within the scope of the legislation on environmental damage.

What is not considered here is the specific aspect related to air quality and the effects it may have on the health and life quality of the individuals involved.

It results that, regarding the problems identified by the Court, it is completely irrelevant that in our legal system the action for environmental damage can only be exercised by the State.

This, of course, doesn't make it easy to answer to the question of whether, and in what way, the health and well-being of citizens is adequately protected.

In this regard, a recent ruling by the Court of Cassation reached a different conclusion, considering that, in spite of the normative data, the notion of environmental damage should be extended in order to also include air pollution.[35]

The judging body, in order to support the proposed interpretation, uses various arguments, first of all the fact that the environmental damage notion, dictated by Art 300, para 2, would only have an illustrative and exemplary value, compared to the provision of para 1, according to which 'environmental damage is any significant and measurable deterioration, direct or indirect, of a natural resource'.

This is, to date, an isolated and, to tell the truth, unconvincing opinion. Both because it values a textual data which is actually identified as a result of the overlapping of two different regulations (domestic and European); and, above all, because it does not consider that the whole structure of the discipline is now modelled on the European one, which essentially revolves around the idea of restoring the environmental resources which have been attacked.

[34] An overview in M. Neglia ed, The Environmental Disaster and Human Rights Violations of the Ilva Steel Plant in Italy (Paris: FIDH, 2018).

[35] Corte di Cassazione 14 November 2018 no 51475, available at https://tinyurl.com/yboqkrh7 (last visited 27 December 2020).

From this point of view, not to indicate the air among the possible resources that are subjected to aggression appears as a very precise choice, as it is not possible to proceed with its restoration with any adequate repair measures (primary, complementary and compensatory).[36]

It is true, however, that the European Parliament itself is considering the possibility of revising this choice, suggesting that the field of application of the directive should also be extended to air pollution.[37]

From this point of view, the Supreme Court's ruling was intended to be as an anticipation of this evolutionary trend, by providing for the condemnation of those responsible to actually pay compensation for damages rather than to order restoration measures (that as it has been said is impossible).

This, however, gets to the heart of the problem reported by the Court: would such compensation be an adequate instrument of protection, regarding the violation of the rights mentioned by the Court? And could it be an adequate instrument of protection, if the legitimacy of the action for environmental damage was also recognized to other parties than the State, such as representative bodies of the damaged community?

In other words, in this case are we facing collective damage or an individual and private one?

XIV. Environmental Damage and Private Damages

It has always been clear, since the entry into force of the first environmental damage regulations (1986), that this case concerned the damage to the so called common interests, usually represented as widespread interests that concern the community as a whole, as well as the fate of future generations.

It has always been equally clear that the same damage can result in a reflected damage, or a direct and demonstrable damage to the health of specific persons or to the rights of public or private individual property, and that it can continue to find protection within the ordinary protection instruments.[38]

This is confirmed today by the provisions of Art 313, para 7 of the Environmental Code, according to which 'in any case, the right of persons

[36] On environmental remediation critera see more in U. Salanitro, *Il danno ambientale* n 33 above; V. Giampietro, 'Danno ambientale: breve disamina degli eterogenei criteri di risarcimento' *Ambiente&Sviluppo*, 811 (2010); M. Franzoni, 'Il nuovo danno all'ambiente' *Responsabilità civ*ile, 785 (2009); M.C. Alberton, 'La valutazione e la riparazione del danno ambientale nell'esperienza dell'Unione Europea e degli Stati Uniti: problemi, soluzioni, prospettive a confronto' *Rivista italiana di diritto pubblico comunitario*, 867 (2010). See also the European project REMEDE, available at http://www.envliability.eu/index.htm.

[37] See European Parliament, 'Report on the application of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage', 11 October 2017.

[38] Recently, on the issue see P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Milano: Giuffrè, 2019), 275.

damaged by production of environmental damage, in their health or in their property, to take legal action against the person responsible for the damage in order to protect the law and the interests damaged' remains unaffected.

The provision refers to the general rule on civil liability, which is represented in our system by the general clause of injustice of damage, pursuant to Art 2043 of the Italian Civil Code. However, it textually mentions both property right and health right, on which there has never been any doubt that it could be a reflected damage (and that it can actually be protected separately from the action for the environmental damage).

There are also some concrete examples with respect to Ilva.

With reference to property rights, recently, the Court of Appeal of Lecce permitted compensation of damages suffered by some owners in Tamburi, due to the powder that depreciated the value of their buildings.[39]

The City of Taranto also acted against Ilva for the damage to the image of the town and its goods, there are pending analogous requests from some farming corporations.[40]

But considering the aspect that more closely concerns us, it is obvious that, among the private reflected damage, the right to health comes first and foremost.

Without any doubt, the right to health is recognised and protected. But undoubtedly, as shown by the Smaltini case (which also concerns the city of Taranto and which has come before the European Court),[41] this right is quite difficult to protect, where those who take legal action complain about the onset of certain pathologies strictly linked to industrial emissions, due to the well-known problems connected to the assessment of the causal link.

On the other hand, it has to be said that our judicial power today tends to broaden the health damage notion, to the actual point of even including within the health damage, the discomfort of having to undergo regular medical examinations, even in the absence of an established or medically ascertainable injury.[42]

Likewise, especially as a preventive measure, it also tends to give importance to the fear of contracting diseases or of being exposed to undesirable consequences by disagreeing with the emergence of a new work or activity that can be a source of danger.

This principle was for the first time affirmed by the jurisprudence in the 1970s and it is still prevailing. At that time, with reference to an issue concerning the need to stop the construction of a nuclear power plant, the

[39] Corte d'Appello di Lecce 31 January 2018 no 45. Ilva must pay damages to the owners of one of the stabiles of Tamburi equal 20 percent estate value for each owner (about twelve thousand/sixteen thousand euro for each).

[40] tinyurl.com/ybfoq9s7 (last visited 27 December 2020).

[41] Eur. Court H.R., *Smaltini* v *Italia*, Judgment of 24 March 2015, available at www.hudoc.echr.coe.it.

[42] Corte di Cassazione-Sezioni unite 21 February 2002 no 2515, *Giurisprudenza italiana*, 691 (2003) for what concerns the toxic cloud arised from Seveso accident.

Supreme Court affirmed for the first time a principle that is still applied today, concerning the jurisdiction of the ordinary court (despite the fact that it was a public work), due to the fears, advanced by the plaintiff according to whom that work, if realized, could actually cause a danger to people's health.[43]

Another leading case, considered of extreme importance, emerged shortly afterwards. It concerned the construction of a water purification plant and the Supreme Court considered the applicants' concern to be equally well-founded, on the basis of the observation that the activity that was carried out could affect, although not exactly people's health, but the wholesomeness of the environment and therefore the applicants living and working conditions, as a source of malodorous fumes and noises that could harm their psychophysical well-being.[44]

From that moment on, it seemed that the right to a healthy environment had to be affirmed: the right to carry out a private life in healthy and environmentally safe conditions are relevant as such, beyond and independently of the occurrence of a real damage to health.

At that time the debate was very lively, but it ended up being overtaken by the first regulation on environmental damage. This regulation absorbed into its sphere of action every profile related to environmental health conditions, considering them within a collective dimension, and recognising the legitimacy of the State and local authorities as representative bodies of the damaged community.

Today, however, the question arises again.

In our legal system it is in fact proposed again, for reasons related to the new environmental damage regulations which, as previously stated, by limiting the action legitimacy to the State, has recognised a constitutional legitimacy problem, as it is no longer considered appropriate to ensure a sufficient level of protection of the 'social dimension of the damage'.[45]

But more generally it is also proposed in the world, because, the fact that

[43] Corte di Cassazione-Sezioni unite 9 March 1979 no 1463, *Il Foro Italiano*, 2909 (1979).

[44] The reference is to the well known judgment of the Corte Cassazione 6 October 1979 no 5172, *Giurisprudenza italiana*, 859 (1980). Look at S. Patti, *La tutela civile dell'ambiente* (Padova: CEDAM, 1979), one of the many comments of that period. Nowadays, there are many judiciary interventions on this subject: Tribunale di Modena 5 May 2004, available at lexambiente.it, has recognized that people afraid for the construction of a power line are not only entitled to sue for injunction, but also for compensation. The judgment has been very criticized by M. Libertini, 'La responsabilità d'impresa e l'ambiente', in *La responsabilità dell'impresa*, *Quaderni di Giurisprudenza Commerciale* (Milano: Giuffrè, 2006), 225. But other similar interventions are Corte di Cassazione 12 October 2006 no 23735 and Corte di Cassazione 21 March 2006 no 6218, both available at https://tinyurl.com/yaecflsw (last visited 27 December 2020), and more recently Corte di Cassazione-Sezioni unite 23 April 2020 no 8092, available at https://tinyurl.com/oejvyol (last visited 27 December 2020), for what concerns damage complained for an incinerator.

[45] Corte costituzionale 1 June 2016 no 126, *Foro amministrativo*, 1466 (2016). The Court was asked about legitimacy of Art 311 environmental code, just because the State action could not protect adequately the local community involved in the environmental damage. U. Salanitro, 'Il danno ambientale tra interessi collettivi e interessi individuali' *Rivista di diritto civile*, 246 (2018).

the social dimension of the damage is passing to a private dimension, is a clear sign of the actual times. Nowadays, like many other transformations, even rights that we would have once called 'social' rights, become individual rights, freedom rights, human rights. This is how the environmental right appears in many recent Constitutions, but also in different important international sources, including the Aarhus Convention which, in its Preamble, recognises the right of each person to live in an environment which is appropriate for their health and well-being.

In any case, the matter acquires specific importance when referred to the question that interests us, since air pollution does not fall within the scope of the legislation on environmental damage.

Facing this legal vacuum, the interpreter has to ask himself which is the specific meaning to assign to the Court. And if and in what way, in particular, the protection of the citizens of Taranto (or, better to say, of the areas more contiguous to Ilva) can obtain the recognition of a right to a healthy environment, based on Art 8 ECHR.

The problem arises because if on one hand, on the background the world has changed, on the other hand, there will always be the same problems.

Saying that each individual has a right to live in a healthy and protected environment means giving importance to a need for protection that it is not exclusive, but common to all people in the same conditions. This situation clearly is halfway between an individual and a collective interest. The problem is not numerical, especially since, with the entry into force of the class action, all actions to protect homogeneous rights can be brought together in a single judgement. But this is the real problem: can we talk about homogeneous rights? Considering that the class action leads to an efficient use of the procedural system, but it is not useful to widen the sphere of the protected legal positions by recognising rights that did not exist before.[46]

To answer the question, it should be further clarified that the European Court has not recognised the existence of an infringement of the applicants' right to health, or at least not directly. The Court has given importance to the fact that citizens are forced to live in unhealthy and dangerous conditions.

The Court has identified a differentiated position for the inhabitants of those municipalities indicated in the Reports as high-risk areas (and it did not accept the appeal filed by citizens living in different municipalities). But, even within a limited territorial limit, it recognized importance to the considered environmental conditions, regardless of whether they resulted in an actual damage to anyone's health.

A situation, therefore, that within that perimeter continues to affect the whole community.

[46] Look at the Introduction of B. Sassani, *Class Action* (Pisa: Pacini editore, 2019).

XV. Environment, Health, and Human Rights

What is then the actual meaning that should be recognized in the Court's words? What is the 'right of a private and family life', as referred to environmental condition, about?

Abstractly, the actual recognition of the right recognized by the Court to the citizen could take three different ways:

a) According to a first reading, it is possible that the recognition made by the Court is only relevant within the State-citizens relationship. It should not be forgotten, in fact, that the aim of the Court's intervention was to note the violation of human rights by the Italian State, in breach of its positive obligations. On this basis, the assessment expressed by the Court would exhaust its relevance as a strong argument supporting the public administration responsibility that has actually failed to optimise the use of 'common resources', allowing some privileged actors (Ilva) to make an excessive and reckless use.

As much as in the context under review, this is even more true where regulatory measures are imposed by European standards, the non-implementation of which has been repeatedly highlighted by the Court of Justice and other European institutions.

However, this interpretation, appears to be extremely weak compared to the fact that, traditionally, the recognition of a right by the Court, even if through an extensive interpretation of the textual data, is also effective in the field of peer-to-peer relations;

b) According to a different interpretation, which wanted to give to the Court's interpretative contribution a meaning that goes way beyond the only decision, the recognition of the right to a healthy environment would be relevant within the framework of the regulation of environmental damage. In particular, it would impose an interpretation according to which the legitimacy to act, in addition to the one recognised to the State, should also be recognised to other bodies (territorial or not), as representative of the damaged community. This requires however an extensive interpretation of the environmental damage legislation that includes air pollution. Moreover, it would mean that these damages suffered by local population are 'social damages', and that only a representative body is entitled to sue;

c) According to a third and more convincing reading, its own meaning should be given to the reconstruction of the Court, such as the recognition of a real human right to a healthy environment, definitively overcoming the objection that the environmental dimension, because of its own pervasiveness, cannot represent a completion of the sphere of protection of everyone's personality.

This last reading is undoubtedly more in line with the language of the Court (that is asked to protect human rights) and it also is the most evocative one, because it affirms the idea that the protection of the environment belongs to each individual's personal sphere and that the human being has to be at the

centre of the reflection and before all other economic interests.

As argued here, however, considering the dogmatic framework, it presents many problems, at least if we speak about a right to a private life, as the Court does.

This could be because every reconstruction going through human rights recalls the idea of the incompressible nature of human rights. With the consequence that when those rights intersect with the use of environmental resources common to all, these rights might end up with interfering with the choices made by the public regulator, paralysing any use (even legitimate) of environmental resources and thus ending up creating an uncontrollable litigation, in which the judges will define the conditions to use the resources and not the bodies actually in charge of it.

The rather complex theme shows how the chapter on private environmental law has yet to be written, defining the assumptions but also the content of the protection of these new rights. Of course, the situation is different when the right involved is about health.

And so, without any doubt, is what's happened in Taranto. Even if the Court has considered the right based on Art 8 ECHR, it is quite evident that it is not question of living a decent family and working life, but it directly affects the right to health of the citizens (in the broader meaning that health has assumed in our internal courts). There is a concrete and real risk of getting sick, which, although common, cannot lose sight of the private and individual dimension of damage.

Concerning this right, the Court tells us today that there has been a violation. But what the Court tells us most of all is that there still is a violation and there will be as long as the implementation of the recovery plan is not successful.

This means that if a first attempt to restart, surrounded by all the precautions that the Constitutional Court had identified, was unsuccessful, this cannot legitimise any other attempts to the bitter end, in which all the rules related to control and responsibility of the company are suspended and in which the needs of production become the only objective to be pursued.

The citizens have achieved their moral victory against the State.

But this cannot be enough. The game is still open.