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Complexity and perspectives of environmental codification in light of Italian law experience

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Complexity and perspectives of environmental codification in light of Italian law experience[1]**.**

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1. Complexity

The codification of Environmental Law has many complexities and difficulties which depend, even before the coding itself, on the nature of environmental legislation.

The transversal nature of the environmental protection leads to the impossibility to clearly distinguish the environmental sector from other contiguous areas of law. Hence, it could be not effortless establishing sharp boundaries from the discipline of agriculture, energy production, land and urban planning, landscape, as well as, first and foremost, health protection.

Environmental regulation is also closely related to the technical and scientific disciplines that describe and establish criteria and parameters for evaluating the impact of human activities on natural elements. Without such a scientific knowledge, it would be almost impossible to understand the deep meaning of environmental requirements, such as the limits and standards imposed for some polluting phenomena. Furthermore, the role of technical disciplines is crucial to the extent that environmental regulation needs to change constantly due to the speed of technological evolution.

A further issue is the considerable information asymmetry that law-makers have to face.

On one hand, the legislator might not be adequately aware of the technical and technological complexity of some industrial sectors, whereby the controlled subject certainly has much more information than the controller.

On the other hand, information asymmetries are significant with reference to territorial specificities, as a consequence of the close relationship between environmental law and the territorial autonomies which have

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[1]The article reports the lecture given by the author within the International Conference on the Translation and Publication of the Environmental Codes of Various Countries, held in Bejing on 21 october 2017.

legislative powers and administrative functions (such as the Italian Regions). The abovementioned aspects entail additional complexity in laying environmental norms and administrative procedures down. It often occurs, in the whole European context, and not only in Italy, that decisions taken from the above encounter the territorial opposition of citizens and sometimes even of municipalities and Regions.

Though the contrast is also at the statutory level, as it is evidenced, for instance, by the recent 2017 Italian Environmental Impact Assessment Act, which has been challenged before the Constitutional Court by ten out of the twenty Italian Regions.

2. Environmental law and codification in Italy

Environmental law in Italy has emerged progressively.

There has been a historic fragmentation of the environmental discipline in Italy depending on the way the environmental interest came to light.

In our legal system, a practice – not positive – was to lay environmental regulation down whenever a specific emergency occurred, caused by extraordinary environmental and territorial conditions (such as floods, earthquakes or other environmental disasters). Actually, all the legislative interventions adopted under emergency conditions have been problematic, even though they have marked the moment of the transition to greater awareness and attention on these issues by the decision-making bodies.

Another important aspect in all the European countries, particularly felt in the Italian experience, is the ever-increasing impact of the European environmental standards, the implementation of which has frequently affected the national legal framework. The abovementioned European discipline has increased the complexity of the production of environmental legislation by creating different and sophisticated standards not always distinguished by high-quality legal examples.

Environmental law codification in Italy has been very peculiar.

On the basis of a law of delegation of 2004, in 2006, the Government has adopted the Legislative Decree no. 152, which is now commonly referred to as the "Environmental Code". It is actually the result of two separate and contextual operations. On a hand, a combination of pre-existing environmental disciplines and, on the other, the implementation of the new European disciplines. These operations have realized a melting between different disciplines of different ages and with different backgrounds.

However, the Legislative Decree no. 152/2006 is not a real Code, in fact it is entitled "environmental rules". There is no structure and code setting, as well as no other features that will be highlighted below.

For instance, during the drafting operations, there has been a logical reversal of the ordinary codification steps. Notwithstanding the fact that each code moves firstly from the provision of the general principles, in the secific case the general principles were incorporated in the text later, in 2008. .

It is not even a true Consolidated Text of the Laws because it does not gather in itself all the environmental regulations of the Italian law. It is a text of unification of environmental norms, which until now, 11 years after its approval, has been a particularly important experience, but with some lights and some shadows.

3. Criteria to evaluate a codification in light of italian experience

It would be impossible to describe all the positive and negative aspects of the Italian environmental codification in one seminar. It would be more interesting pointing out those, which in my opinion, are the most relevant criteria for evaluating a codification operation. Thus, I am going to describe some examples of what has happened in Italian law. This would be an element of knowledge and assessment of the regulatory experience in my country and, on the other hand, it can suggest more effective solutions to the legislator who wanted to begin a coding work today.

A first standard for assessing an environmental code is its completeness.

At the end of my speech, you will be able to understand why I think this is a dubious effectiveness tool.

However, Legislative Decree no. 152/2006 is not a text that encompasses all environmental areas and all environmental regulations. Indeed, it is particularly incomplete. For instance, it misses the law of protected natural areas, as well as the electromagnetic pollution regulation. Furthermore, there is no mention of the renewable energies, the discipline of major accident incidents and many waste sectoral disciplines. Even a series of general authorizations have remained outside the code, such as the Single Environmental Authorization, recently provided for small companies. In addition, the code lacks the entire issue of the environmental management organization. Farther the provisions which regulates the functioning of both the Ministry of the Environment and the Environmental Agencies, recently reformed, remain outside the Code.

A second criterion of assessment is the stability of the environmental rules over time.

It is a general evaluation standard for any regulatory provision, but in particular for a code. A rule contained in a code is supposed to have a significant stability over time, so it can be seen as a point of reference through ages.

Under this perspective, the experience of the Italian code is not a very positive one, because the Legislative Decree no. 152/2006 has been amended many times and in sectoral disciplines too. For instance, the discipline on environmental impact assessment has been deeply altered in 2010 and then in 2017, implementing – it should be highlighted – the corresponding changes in European discipline. Waste discipline has also been deeply altered in 2010. It is going to change deeply again thanks to the the EU package on the circular economy that will be approved by the end of the year. The discipline of the Integrated Environmental Authorization was only inserted in 2010. This means that the same regulatory merger is still in progress and cannot be considered definitive.

In addition, we have to mention all those specific norms which, not entering into the scope of the environmental code, modify its application within specific sectors or circumstances (the last aspect can be considered as closely linked to the completeness of the code).

Another element of evaluation is the simplification.

We should wonder whether, compared to the past, the introduction of a code can create a simplification of the rules and the administrative procedures governed by these rules. For example, in the Italian legal system, this assessment is hard to accomplish because sometimes the inclusion in the Environmental Code has led to facilitation for operators and simplification of the system - such as in the case of EIA -, while in other areas this simplification has had much less clear effects - such as in the waste sector.

A further important parameter of evaluation of a code is whether it contains many referrals to secondary legislation, and therefore to governmental implementation rules.

From this point of view, the Legislative Decree n. 152/2006 is an example of consistent referral to secondary legislation. The regulation of many aspects is then postponed by the Environmental Code to the implementation by Ministerial Decrees, which may have a regulatory nature or not.

This is a matter of double value because - on one hand - rather than the heavy norms of ordinary laws-, it allows a faster update of the technical aspects, but, on the other hand, the more referrals to secondary legislation are put in the Code, the weaker the overall effect will be on the completeness of the reconnaissance of all environmental rules.

An important element of evaluation of a coding work is the relationship between the rules on the administrative activity and the rules on to the administrative organization.

Inside the Italian Environmental Code there are no rules on the administrative organization.

This issue, in my view, is particularly important not just in order to give an opinion about the coding work but also in order to produce truly effective environmental standards. At the end of my speech, I am going to express some considerations in this regard.

Another issue, perhaps an obvious one, is that one of drafting. Environmental rules, whether inserted in a code or outside it, are particularly complex, as they include a technical-scientific content.

From this point of view, the Italian experience - but probably the whole European experience too - is certainly improvable, because usually when a legal rule arises from a very specific technical and scientific requirement, its overall coordination, but also its draft, is not particularly effective.

A further more issue is about the overall clarity.

It should be wondered whether the rules system as a whole, inside a code, provides the interpreter with clear guidelines and includes all the detail rules that an operator / administration is required to comply with.

This clarity of the system can be reached only if there is a clear overview.

Without a clear strategy in the environmental regulation policy, no coding work could ever be effective.

In Italy, this approach has been overlooked for sure, as the legislator usually has intervened in environmental matters in an unorganized and contingent way.

4. Contribution to debate on environmental codification. Critical remarks and perspectives

While drawing my conclusions, I would like to rise in the debate some critical remarks, which are not just rhetorical questions, but are points I think that should be discussed, as the different national experiences do not seem to give any clear answer.

First of all, is the completeness really an important standard for a code?

In my view, the completeness of an environmental code is a utopia. The wideness, the detail level and the transversality of the environmental subject will never allow the writing of a complete environmental code.

Perhaps, it would be more appropriate to codify the principles and general rules which are common to environmental law institutes (authorization, EIAs, etc.), as a code does not necessarily have to deal with sectoral disciplines.

In this sense, the gaps in the Italian legal system are also the results of the gaps in the European regulation, which has so far treated in sectorial way transversal institutions, such as environmental impact assessments.

It is necessary to build the general institutes of environmental law around the general principles.

Thus, a coding work can be the most appropriate moment to question which can be classified as the general institutes of environmental law, distinguishing them from the sectoral disciplines and, inside them, which are the general rules that are more stable over time, and which ones instead may remain outside the code due to their detail character.

I want to give you more food for thought by asking if it is possible "to code" and "to reform" at the same; also, if inserting a new discipline into a code is possible or if in a code can only be inserted stable disciplines, already tested in the Italian legal system.

From this point of view, the Italian experience can be an interesting case of study, because the rules that were already in place worked and still work better, while the ones that were later insert in the code have been changed many times.

A further point, which I have already mentioned, is the relevance of administrative organization.

One might argue whether or not it should be included in a code. European environmental rules do not affect the organizational aspects because each Member State has its own administrative organization and it is foreseeable that it will continue to be so in the future.

Actually, however, I believe that no environmental regulation can be effectively implemented – or even written - unless it is tailored to the administration that has put it into place. The greater is the correspondence between the administrative organization and the rules set by the code, the greater is the effectiveness of the code.

Finally, an aspect on which I hope that meeting opportunities such as these can be useful for confrontation and future developments is the relationship between environmental law and other branches of law.

I believe that there is a need for greater coordination between environmental law and other pre-existing disciplines, which have more consolidated categories and rules and legal frameworks. In this, Italian and European law certainly have to work a lot.

Think of civil law and the issue of contracts and the importance that contractual rules may have in managing environmental responsibilities, or the issue of ownership in relation to waste discipline and the circular economy/sharing economy; or the importance of coordinating the specificity of environmental administrative regulation with criminal law, as recently realized in Italian law after the approval of the new legislation on environmental crimes, that has lead to an increased the attention on the importance of close dialogue

between a new discipline such as the environmental one and one as consolidated as criminal law.

At the end of my speech, I do not think it is possible not to mention the importance of rules on the production of environmental standards. It is difficult to deny that the stability of environmental rules also depends on the way in which the rules are produced.

It is important to ensure a broad (but proceduralized and controlled) participation of public and private stakeholders in the production of rules (especially technical and sectoral rules). This must be done to fill information asymmetries that the public entity alone could not fill and to ensure (where possible) sharing and compliance by the subjects involved.

Finally, a statutory instrument in general, but codification in particular, requires a comprehensive view and a strong and shared environmental policy strategy.

Without a comprehensive view and a strong strategy, environmental standards are too fragile before stakeholders' interest, especially where they are representative of the important interests of the manufacturing and industrial world. A code, in order to guarantee the stability of the rules and their generality and abstractness, must be able to withstand timely modification requests which, in case of special events or specific conditions of the market and of the economy, are requested by the individual interest groups.

Under this perspective, environmental legal discipline is still weak, and the Italian experience is exemplified but not different from the overall European one. Consider, for example, the package of circular economy directives that was withdrawn by the European Commission in its first version, since many stakeholders judged it too ambitious.

If the goal of coding is to ensure the proper environmental discipline through stability and authority, the environmental rules must be effective and efficient.

I hope that these considerations just briefly exposed will contribute to the debate on how to achieve these goals.

ABSTRACT

Andrea Farì - *Complexity and perspectives of environmental codification in light of italian law experience*

The article examines Italian codification of Environmental Law in his complexity and difficulties. The transversal nature of the environmental protection has led to the impossibility to clearly distinguish the environmental sector from other contiguous areas of law. The article describes the progressive emergence of environmental law in Italy and the struggles in regulating by disjointed regulation. It underlines how it has been an historic fragmentation of the environmental discipline in Italy depending on the way the environmental interest came to light, with the laying down of environmental regulation whenever a specific emergency occurred. Both, this and the ever-increasing impact of the European environmental standards, have had frequently affected the national legal framework. In his conclusion the Author consider how there is a need for greater coordination between environmental law and other pre-existing disciplines, which have more consolidated categories and rules and legal frameworks.

KEYWORDS: *Environmental law codification; regulation drafting; European Environmental law; Italian Environmental law; Environmental principles.*

Andrea Farì – *Complessità e prospettive della codificazione ambientale alla luce dell'esperienza legislativa italiana*

L'articolo descrive le difficoltà occorse nel processo di codificazione ambientale in Italia, evidenziandone complessità e criticità. Parte di queste è dovuta alla natura trasversale del diritto ambientale che ha reso difficile distinguere tra i settori afferenti tale disciplina e quelli tipicamente oggetto di altre disposizioni legislative. Ciò ha condotto ad una particolare frammentazione della disciplina ambientale, aggravata dalla circostanza dell'adozione emergenziale di provvedimenti normativi in materia, dettati

appunto dalle esigenze contingenti e quindi privi di coordinamento con la disciplina pregressa. A ciò si aggiunga la sempre maggiore estensione della disciplina di derivazione europea che ha contribuito ad aumentare la complessità del quadro normativo. Conclude l'autore soffermandosi sui necessari accorgimenti da adottare nel *drafting* normativo, primo fra tutti quello, forse scontato ma osservato raramente, di considerare e coordinare le norme di riforma e/o codificazione con quelle, già consolidate, presenti nell'ordinamento.

PAROLE-CHIAVE: *Codificazione ambientale; drafting normativo; diritto europeo dell'ambiente; diritto ambientale in Italia; i principi del diritto dell'ambiente.*