



SOCIETÀ E DIRITTI - RIVISTA ELETTRONICA 2023 ANNO VIII n.16.

Notes on environmental subsidiarity



2023 ANNO VIII NUMERO 16

di Marco Brocca <https://doi.org/10.54103/2531-6710/21907>



NOTES ON ENVIRONMENTAL SUBSIDIARITY

Marco Brocca

NOTES ON ENVIRONMENTAL SUBSIDIARITY

Riassunto

Il contributo intende formulare alcune riflessioni sull'applicazione peculiare del principio di sussidiarietà in materia ambientale, in rapporto all'evoluzione degli approcci pubblici di protezione dell'ambiente e, specialmente, delle potenzialità dell'economia circolare.

Parole Chiave: Ambiente, partenariato pubblico-privato, economia circolare.

Abstract

The contribution aims to formulate some reflections on the peculiar application of the principle of subsidiarity in environmental matters, in relation to the evolution of public approaches to environmental protection and, especially, the potential of the circular economy.

Keywords: Environment, public-private partnership, circular economy.

Summary: *I. The public-private partnership. The public component between administrative power and the reasons of the "center". – II. The private component: from participation to environmental co-decision. – II.1 The private economic operator. – II.2 The private citizen. – III. A new approach and the "opportunity" of the circular economy.*

Autore:

Marco Brocca è Professore Associato di Diritto Amministrativo presso l'Università del Salento

Articolo soggetto a revisione tra pari a doppio cieco.

Articolo ricevuto il 27/10/2023 approvato il 01/12/2023

I. *The Public-Private Partnership: The Public Component between Administrative Power and the Reasons of the “Center”.*

The relationship between the public and private sectors represents a significant observation point for understanding some of the most complex and still unresolved issues related to environmental policies. First and foremost, there is the institutional question, which involves the pursuit of optimal levels of environmental governance. This issue intersects with and is conditioned by another functional question: the pursuit of the best approaches and tools for environmental protection.

This perspective highlights the initial and still, in some ways irreplaceable, dominant approach of public intervention, expressed by the so-called “command and control” model, which translates into the organizational primacy of the public sector and, functionally, the predominance of administrative powers in various forms: constraints, plans, standards, authorizations, controls, and sanctions.

These two dimensions intersect because the preference for authoritative, coercive, and unilateral measures involves the public sector and raises the question of “who” should exercise the relevant powers.

The issue is particularly relevant in our legal system, characterized by a complex and polycentric administrative structure. Moreover, in environmental matters, it becomes even more complex due to the multi-level nature of territorial administrations and the presence of numerous technical administrations with administrative functions (river basin authorities, park authorities, port authorities, etc.). In other words, defining administrative powers for environmental management intersects with the search for an optimal organizational structure, and environmental matters end up becoming a “laboratory of institutional engineering” in which the legislature strives to balance the different institutional levels, often with inevitable “checks and balances”. The regulation of landscape authorizations is a peculiar example. It is a terminal instrument and a “last bastion” of landscape protection that has undergone an extensive history regarding competencies: from state attribution with Law No. 1497/1939 to devolution to the regions, with delegability to municipalities in the 1970s (Presidential Decree No. 616/1977). Then, the state administration regained control through the Galasso Law (Law No. 431/1985) by assigning it a control power over landscape authorizations. This situation changed with the introduction of the Code of the Cultural and Landscape Heritage (Legislative Decree No. 42/2004), and has been repeatedly modified. Currently, the authorization function is attributed to the regions, which can delegate it to local entities (individual municipalities or associated forms or provinces or even park authorities within protected natural areas), but only if two conditions are met: the administrative differentiation between urban-planning functions and landscape protection activities and an adequate level of technical-scientific expertise in landscape matters. On the other hand, the role of the state has been modified so as to be included within the issuance process of the assent act in the form of an opinion, which has undergone several changes: from merely mandatory to binding *tout court*, to binding but “degradable” in binding under certain conditions (approval of the landscape plan, “dressing” of landscape constraints, adaptation of municipal urban planning instruments to the landscape plan), and now even dismissable in case of failure to meet the legal deadline.

Although this regime applies to a specific administrative function and sector, it reflects the legislative direction taken in environmental matters: the laborious definition of the organizational structure, resulting in a substantial allocation of administrative functions to higher levels, primarily between the state and regional levels. This option is formally based on two arguments: the availability of technical-scientific expertise within state and regional administrations due to the presence of specific structures and resources (dedicated ministry, Ispra, environmental protection agencies, etc.), and the issue of localism. The latter refers to the fact that the entity closest to the territory, such as the municipality,

could either succumb to economic pressures at the expense of environmental protection or, conversely, opt for hyper-environmental protection, thus consistently opposing any territorial transformations¹. These peculiar considerations must be balanced with general and systemic ones, primarily of a constitutional nature, which lead decision-makers to tendentially favor entities closer to the territory (principle of subsidiarity) and allow for a differentiated and non-uniform administrative system (principle of differentiation) based on an entity's ability to best exercise administrative functions (principle of adequacy). These principles are impervious to the legislator and are reflected, inevitably, by the perspective and concept of the entity applying them in an area where the legitimacy belongs to the state legislature. This is due to the constitutional option that assigns exclusive legislative power over “environmental protection” to the state (Article 117, paragraph 2, letter s). Furthermore, confirming the specificity of environmental matters, legislative power takes on a structured and additional dimension compared to the mere textual provisions. According to well-established constitutional jurisprudence, the principle of greater environmental protection allows for regulatory action at the regional level, although these openings concern the functional rather than the organizational level. From a structural perspective, the Constitutional Court has already stated that it violates constitutional provisions if a regional authority, based on the principle of subsidiarity, reassigns a function that the state legislature has attributed to the regional level. This is because «exclusive legislative power over the matters indicated in Article 117, paragraph 2, of the Constitution legitimizes only the national legislature to define the organization of the corresponding administrative functions, including the allocation of competences to entities other than municipalities – generally attributed according to the criterion expressed by Article 118, paragraph 1, of the Constitution – whenever the need for the unitary exercise of the function goes beyond this territorial scope of governance»².

II. *The Private Component: from Participation to Environmental Co-Decision.*

The role of private entities in environmental policies has been considered and valued by environmental law since its genesis, although it has been influenced by the prevailing public-oriented approach. Traditionally, it has been addressed in terms of the participation of private actors in decision-making processes. This refers to the contribution that private entities can make in the process and mechanisms of public decision-making. It encompasses both the stages preceding the adoption of a decision and the subsequent implementation phase, or from another perspective, it relates to safeguards. Following this direction, the theme of participation has been elevated to the status of a fundamental principle (Rio Declaration of 1992; Aarhus Convention of 1998, etc.) and has been translated into institutes (environmental information, procedural standing of environmental associations, advanced forms of investigation such as public inquiries, etc.) that have characterized environmental law. These principles and institutes have also been transplanted into other sectors (urban planning, public contracts, cultural heritage, etc.) or into general laws (first and foremost, the general law on administrative procedures, Law No. 241/1990).

This advanced approach has traditionally stopped at the threshold of the decision-making phase, as it was considered the exclusive prerogative of the public authorities. Nevertheless, even from this perspective, certain decision-making spaces recognized or more commonly shared by both the public and private sectors can be identified in environmental legislation. This perspective calls into play the consensual model, which is well-established in public administration law and is based on a solid general regulatory

¹ M. RENNA, *L'allocation delle funzioni normative e amministrative*, in G. ROSSI (ed.), *Diritto dell'ambiente*, Turin, 2021, pp. 148 ff.

² Corte cost., 7 ottobre 2021, no 189, in *Foro amm.*, 2022, p. 358.

framework (Article 11 of Law No. 241/1990, Article 2, paragraph 203 of Law No. 662/1996, Article 119 of Legislative Decree No. 267/2000, etc.), and environmental law also looks to it.

II.1. *The Private Economic Operator.*

The analysis of the role of the private sector in the decision-making phase must begin with the fundamental environmental legislation, namely Legislative Decree No. 152/2006. Alongside the predominant range of authoritative tools, this legislation includes modules and solutions based on the consensual principle, particularly concerning the private sector as an economic operator. In the regulation of key instruments such as Environmental Impact Assessment (VIA) and Integrated Environmental Authorization (AIA), this principle and its translation into the agreement module are present. Article 9, paragraph 3, includes the possibility of concluding an agreement between the competent authority and the project proponent subject to VIA, “to regulate the performance of activities of common interest for the purpose of simplifying and enhancing the effectiveness of procedures”. The AIA regulation also allows, under certain conditions, the conclusion of agreements related to the authorization procedure, identifying in this module an additional effect beyond the authorization itself. This effect is related to “compliance with the fundamental interests of the community, the harmonization between the development of the national production system, territorial policies, and business strategies” (Article 29-quater, paragraph 15).

The consensual principle is also present in the subsequent part of the legislation dedicated to environmental sectors. Its relevance is particularly significant in waste regulations, where shared responsibility is a general principle, and the use of agreements serves as the ordinary *modus agendi* for improving environmental performance (Article 206).

If we expand our view to regulations contiguous to the strictly environmental ones, we can identify further relevant elements. For example, in the agriculture sector, there is now a well-established awareness of its correlation with environmental policies and its role in serving environmental objectives. This sector was among the first to introduce modules of administrative action based on consensual and voluntary approaches, as part of its modernization perspective (Legislative Decree No. 228/2001, entitled “Orientation and Modernization of the Agricultural Sector”). These modules include collaboration contracts and agreements between agricultural entrepreneurs and public administrations. Collaboration contracts, expressly derived from the model outlined in Article 119 of the Consolidated Law on Local Authorities (t.u.e.l.), aim to promote the productive potential of the territory and protect high-quality productions and local food traditions (Article 14, paragraph 1). They can also include specific measures to ensure adequate consumer information about the origin of raw materials and the characteristics of the products. From these agreements, measures to support and develop local agricultural entrepreneurship arise, albeit without precise definition (Article 14, paragraph 2). In the case of promotion contracts, which are a specific form of collaboration contracts, there is a clear commitment on the part of the entrepreneur to “ensure the protection of natural resources, biodiversity, cultural heritage, and agricultural and forestry landscapes” (Article 14, paragraph 3). Conventions (Article 15) aim to encourage active involvement of agricultural entrepreneurs in significant functional areas, such as land management and maintenance, safeguarding agricultural and forestry landscapes, the care and maintenance of hydrogeological systems, and the protection of the productive potential of the territory. In this type of negotiation, the obligations of the administrations are better defined, such as financial support, administrative concessions, tariff reductions, or the implementation of public works.

Another sector in which the consensual principle has recently been strengthened is forest management. The article 35-bis of Decree-Law No. 77/2021, converted with modifications into Law No. 108/2021, introduced the institute of the forest agreement, configured as a "tool for the development of business networks," whether private or public-private, aimed at the economic-productive enhancement of forest ownership. Moreover, these agreements serve additional objectives related to forest assets, expressing their recognized multifunctionality (conservation and provision of ecosystem services, promotion of complementary activities in the tourism, social, cultural fields, etc.).

The negotiating perspective considered so far, evocative of the "active" role of economic operators, is mirrored in the field of environmental certifications. This refers to environmental regulation marks, both public (Emas, Ecolabel, etc.) and private (ISO 14000, etc.), which certify the compliance of a product or an entire environmental management system of a company with stringent environmental parameters that exceed ordinary standards. These tools are activated through voluntary adherence by interested parties, with the public sector playing a role primarily in control through both preventive and subsequent verifications. The public sector may also adopt an additional role as an incentive (with various economic and administrative support measures) for economic operators who choose to undertake the demanding path of obtaining environmental certification. A more recent experience, although still limited at the national level, outlines an additional role, where public entities strive to lead by example by directly seeking environmental certification, subjecting their entire organizational structure and activities to evaluation (so-called territorial certification).

II.2. The Private Citizen.

In recent years, the environmental sector has witnessed various forms of citizen involvement in decision-making processes through experiences known by different names (agreements, pacts, contracts, etc.). These initiatives initially lacked a solid legal basis, but the promoters relied directly on international law acts or constitutional provisions, and their significant outcomes prompted and anticipated legislative choices.

An example of this is the concept of "river contracts," which originated at the local level through the initiative of public entities (local authorities, river basin authorities, regions, etc.) and private actors (industry associations, environmental associations, citizens' committees, etc.). These contracts are based on the principle of participation established by the Water Framework Directive (Directive 2000/60/EC), which emphasizes the involvement of communities and local institutions in water management policies. River contracts have been supported by a series of soft-law provisions, good practices, guidelines, and policy documents (such as the National Charter of River Contracts, signed by several regions in 2010). Eventually, they were officially recognized by regional and then national legislation. Currently, river contracts are regulated by Article 68-bis of Legislative Decree No. 152/2006, which defines them as "voluntary strategic and negotiated planning instruments aimed at protecting and managing water resources, enhancing river territories, and safeguarding them from hydraulic risk while contributing to the local development of these areas." The underlying idea is to promote a renewed, shared, and project-based vision of river territories. It integrates the traditional prescriptive and maintenance-oriented approaches to prevention and management of hydrogeological emergencies with integrated management and valorization based on an ecosystemic view of the multiple underlying interests: safety, risk mitigation and prevention, climate balance, biodiversity, landscape enhancement, sustainable tourism, agri-food chains, and the promotion of water culture.

The landscape contract, which is a more recent and incipient form of landscape management, follows a similar model to the river contract. However, it has yet to be officially recognized at the legislative

level. The first experiences directly invoke the European Landscape Convention (Florence, October 20, 2000) and its participation principle, which also emphasizes the involvement of the public and local institutions. The constitutional principle of subsidiarity (Article 118 of the Constitution), both in its vertical (paragraph 1) and horizontal (paragraph 4) dimensions, is also invoked. The landscape contract is another consensual and voluntary model based on the awareness of the identity and cultural value of the territory. It includes a project-based action method that emphasizes community participation and consultation as creators and producers, rather than just users, of the landscape.

Urban environments have been a privileged field for successful experiences of public-private partnerships at the local level. One example is the "collaboration pacts" (*patti di collaborazione*). These are contractual agreements, often preceded and authorized by specific municipal regulations on the management of civic assets. These regulations derive their legitimacy from the organizational and functional regulatory powers granted to municipalities by Article 117, paragraph 6 of the Constitution. The collaboration pacts involve citizens and the administration in specific interventions for the conservation, management, and enhancement of public or privately-owned spaces used for public purposes. They aim to restore or improve their quality and usability, with private actors actively participating from the planning phase to the implementation phase.

Experience shows the aptitude of these tools for flexibility and scalability based on needs and the reference context. There are many fields of action, including education, health, cultural policies, sports, urban design, and social integration. The environmental dimension is central due to its underlying social and cultural implications. Environmental interventions range from the care of public green spaces to the restoration of parks and gardens, the creation of urban gardens or forests, the restoration of mountain trails, the development of hiking routes, and the management of river environments. These manifestations of shared administration of civic assets have found regulatory support in the Public Contract Code (Legislative Decree No. 50/2016). Among the forms of public-private partnership, the code regulates "horizontal subsidiarity interventions" (Article 189), and the promotion of shared administration models "implementing the principles of social solidarity and horizontal subsidiarity" is elevated to a general option and guiding principle of the regulation of public contracts by the new code (Article 6, Legislative Decree No. 36/2023) and it was regulated as a general institute called "social partnership" (Article 201).

III. A New Approach and the "Opportunity" of the Circular Economy.

The experiences mentioned, along with others³, denote a renewed approach compared to the traditional one: an approach that implies voluntary action, a bottom-up origin and a consensual framework, profiles diametrically opposed to those that characterize the traditional approach composed of coercive and authoritative instruments that come from above. The promotion of this approach requires a clarification: it does not pose as an alternative or antagonist to the traditional one, therefore it does not seek to abolish or replace it, but it can accompany and integrate with it to enrich the range of environmental policies and tools. Moreover, this approach evokes a preliminary reflection on the conception of the environment, which shows its polyhedral and multidimensional nature. It is not only an objective of the public sector that imposes constraints and limits on private activities, but also an element of identification and differentiation for economic operators in the market, as well as for the public entity in the territory. Therefore, it is a resource and a factor of economic and institutional development.

³ For further reference on these experiences, see M. BROCCA, *Interessi ambientali e decisioni amministrative. Profili critici e nuove dinamiche*, Turin, 2018, pp. 249 ff.; ID., *Nuovi modelli di amministrazione del paesaggio. La rilevanza del paesaggio agrario*, in N. FERRUCCI - M. BROCCA, *Il paesaggio agrario: dal vincolo alla gestione negoziata*, Milan, 2019, pp. 111 ff.

This approach can find fertile ground in the current trend of implementing the so-called circular economy, a new model of economic and institutional development (known as the “circular state”⁴), which draws its rules from the functioning laws of natural ecosystems based on the sense of the finiteness of resources and their reusability. In this model, key words include the “limit” of resources and the “relationship” between the parts of the system, as what may be waste and unusable residue for one component can be a useful element for others. These distinctive profiles require a rethinking of the concept of the value chain of goods and services along interrelated lines that aim for temporal extension, environmental sustainability, and integration of phases and the involved parties. In this renewed context, economic operators are called on to take an active and propulsive role in the search for circular-oriented solutions, such as in the design phase, with considerations of durability and reparability of goods, choice of raw materials, and other aspects that concern the beginning rather than the end of the life cycle of goods. At the same time, local communities can also be active participants in promoting circular forms of territorial management because it is evident that, from the perspective of the circular economy, it is necessary to start with the resources available locally, avoiding the costs and impacts associated with obtaining them from elsewhere (known as zero-kilometer sustainable economy⁵). An induced effect and assumption of this involvement is the acquisition or maturation of awareness by local communities that each territory possesses unique and identified (environmental, cultural, productive, etc.) resources that can serve as socio-economic development factors.

This path evokes a reflection on the dynamics of relationships between the public and private sectors, which leads to renewed solicitation. For the private component it entails enhancing the role of private entities in decision-making processes, especially in the constitutive moment of decisions, and this is the case whether they are economic operators or community subjects. For the public component, it implies that public decision-makers are called on to adopt different and additional approaches and modalities of interaction with private entities compared to the traditional authoritative and coercive ones: supporting and incentivizing virtuous conduct or engaging in negotiation and seeking forms of co-decision.

New scenarios are emerging for environmental law, which is still expected to fulfill the function that in the 90s Federico Spantigati recognized and defined as “probing law” as a branch of law ready to identify critical points, deficits, and critical issues within the system, and to translate them into original options and tools necessary to address the complexity of environmental matters and contribute to the progress of the entire legal system⁶.

⁴ F. DE LEONARDIS, *Economia circolare: saggio sui suoi diversi aspetti giuridici. Verso uno Stato circolare?*, in *Dir. amm.*, 2017, 163 ff.; ID., *Il diritto dell'economia circolare e l'art. 41 Cost.*, in *Riv. quadr. dir. amb.*, 2020, p. 70; ID., *Economia circolare (diritto pubblico)*, in *Dig. disc. pubbl., Agg.*, Milan, 2021, p. 180.

⁵ F. DE LEONARDIS, *Economia circolare*, no. 4 above, p. 182.

⁶ F. SPANTIGATI, *Le categorie giuridiche necessarie per lo studio dell'ambiente*, in *Riv. giur. amb.*, 1999, p. 236. In this sense, contemporary and subsequent doctrine recognizes in environmental law the function of a «research laboratory and lever of the system», R. FERRARA, *Introduzione al diritto amministrativo. Le pubbliche amministrazioni nell'era della globalizzazione*, Rome-Bari, 2005, p. 259; more recently, the same author expressed that «environmental law can be defined as the “good parlor” of public law, in which themes and institutions are born that later spill over into other sectors», A. CIOFFI - R. FERRARA, *Ambiente e Costituzione*, in *giustiziainsieme.it*, April 7, 2022; G. MORBIDELLI, *Il regime amministrativo speciale dell'ambiente*, in *Scritti in onore di Alberto Predieri*, II, Milan, 1996, p. 1164, speaks of it as the “respiratory organ” of the legal system.; F. DE LEONARDIS, *Le organizzazioni ambientali come paradigma delle strutture a rete*, in *Foro amm. CdS*, 2006, p. 273, refers to it as a “precursor law”.