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Task Force on Access to Justice

***STUDY ON THE POSSIBILITIES FOR NON-GOVERNMENTAL
ORGANISATIONS PROMOTING ENVIRONMENTAL
PROTECTION TO CLAIM DAMAGES IN RELATION TO THE
ENVIRONMENT IN FOUR SELECTED COUNTRIES***

France, Italy, the Netherlands and Portugal

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Study on the Possibilities for Non-governmental Organisations Promoting Environmental Protection to Claim Damages in Relation to the Environment in Four Selected Countries

I. SYNTHESIS REPORT

(PREPARED BY *Ms. Elena Fasoli, Queen Mary University of London*¹)

1. Introduction

The aim of the present study is to investigate whether it is possible for the non-governmental organizations promoting environmental protection (ENGOS) to be awarded damages in relation to the environment².

The following countries have been covered: France (FR), Italy (IT), the Netherlands (NL) and Portugal (PT). The national reports, that are included as annexes in this study, have been written by distinguished scholars in environmental law matters:

France (FR): Jessica Makowiak, Université de Limoges

Italy (IT): Elena Fasoli, Queen Mary University of London

Netherlands (NL): Anke Houben and Chris Backes, Maastricht University

Portugal (PT): Alexandra Aragão, Universidade de Coimbra

The task of each national expert was to provide a general picture of the laws and administration on the environmental area and a description of the legal framework, including case-law, concerning environmental damages in general and the available actions for the ENGOS in particular, including costs of procedures. A general evaluation of the national systems with regard to the possibility for the ENGOS to claim damages, including suggestions for improvement, was also required. The main aim of the synthesis report is to aggregate the outcomes of the national reports and draw conclusions in order to answer to the research question as to whether and, if so, to what extent, the ENGOS have the possibility to claim damages in relation to the environment.

The outline and the preliminary findings of the study were presented at the eighth meeting of the Task Force on Access to Justice (Geneva, 15-16 June 2015) and circulated for comments.

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² This report focuses on civil actions for damages brought by the ENGOS whereas the topic of judicial review of administrative decisions has been tackled by “Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union” by Prof. Jan Darpö, available at http://www.unece.org/env/pp/tfaj/analytical_studies.html (accessed July 2015).

2. Legislation, Administrative and Judicial Procedures Relating to the Environment as Described in the National Reports

In this section a general picture of the laws and administration relating to the environment will be provided by utilising the information made available in the four national experts' reports.

The national reports confirm the diverse picture of the legislation in environmental matters. In some Countries the fundamental rights related to the environment are embedded in the Constitution. In Portugal, for example, the main source of environmental law is the Constitution, which establishes the right to a healthy environment as a goal to be achieved by the State (Art. 9). It also establishes the fundamental right of everyone to a healthy and ecologically balanced human living environment and the duty to defend it (Art. 66).

Fundamental rights related to the environment are also laid down in the Dutch Constitution. Art. 21 obliges the Government to secure its individuals with a habitable environment and arrange for the protection and the improvement of the environment. In addition, Art. 11 secures the right to personal integrity and Art. 22 awards a right to health. However, the practical importance of these articles is very limited.

By contrast, in France the Constitution adopted in 1958 lacked an express mention of an environmental right in favour of the individuals. However, in 2005 the Constitutional Environmental Charter entered into force and it introduced a number of "third generation" rights and principles, such as the right to live in a balanced environment in respect of health, the duty to protect it and to prevent any degradation, the duty to contribute to repair damages to the environment, the precautionary principle and the right to participate in environmental decision-making³.

A situation in the middle is that of Italy where the Constitution does not contain an explicit provision protecting the environment. However, some constitutional provisions trace a framework for the protection of fundamental rights linked to the environment (e.g. Art. 9 dealing with the protection of the "natural landscape and the historical and artistic heritage"; Art. 32 on the protection of "health as a fundamental right of the individual and as a collective interest" and Art. 44 on the "reasonable utilization of the soil"). In addition, the case-law of the Constitutional Court has progressively extended the reach of these provisions describing the environment as a "public interest of primary constitutional value"⁴.

Next to the provisions contained in the Constitution, in the Countries analysed the protection of the environment is also granted by laws and regulations, although with a different degree of systematisation. In France and in Italy, for example, the codification efforts to adopt a comprehensive environmental statute are quite recent.

The French environmental code was adopted in 2000 and it covers matters such as the environmental principles and common provisions (access to information and public participation, institutions and liability), provisions on water and air protection, protected areas, biodiversity and protection of species and provisions on pollution and nuisance (e.g. in relation to industrial activities, waste chemicals, etc.)⁵.

In Italy Legislative Decree 152/2006, entitled "Rules on the environment", constitutes the first attempt to codify and systematize the legislation in environmental matters by regulating numerous subject-matters such as the division of powers between central State and the Regions; the required procedures for environmental assessments; soil preservation and water pollution; waste

³ FR (Makowiak), p. 10.

⁴ IT (Fasoli), p. 28-29.

⁵ FR (Makowiak), p. 10.

collection and disposal; air pollution and actions in case of environmental damage, including the role played by the ENGOs⁶.

In Portugal instead the codification efforts date back to 1987 with the adoption of the “Basic Law on the Environment” (Law 11/1987), which stated the principle of strict liability of operators causing environmental damages, including the sanctions to be applied. This act has been recently superseded in 2014 by a new legislative text⁷.

By contrast, in the Netherlands, even though there is a general environmental law act which covers substantial parts of environmental law in a narrow sense, the environmental legislation is still fragmented and spread in many statutes dealing with water, nature protection and planning law. However, legislative proposals are currently under discussion in order to introduce a general law on nature protection and a more general act on environmental law⁸.

The legal systems analysed do not provide for specific judicial bodies or special judicial procedures in environmental matters. There is a degree of uniformity with regard to the set up of administrative (non-judicial) procedures that can be also applied in environmental matters.

In all four Countries a decision by a public authority can be challenged before the administration itself. By way of example, in The Netherlands written decisions by public authorities on specific cases having a regulating effect in public law generally⁹ can be subject to an administrative objection procedure¹⁰.

The decisions adopted by a public authority, including in environmental matters, can also be challenged before the administrative courts. In Italy, for example, the administrative jurisdiction has general competence over the legitimacy of acts issued by the public authority that allegedly infringed upon “legitimate interests” (i.e. a violation of an individual’s interest caused by a decision of the public authority). In this case the court can order the cassation of an administrative decision that has been found invalid due to lack of competence, breach of the law or abuse of power¹¹.

Next to the role of the administrative jurisdiction for challenging unlawful administrative decisions in environmental matters, there is the role played by the civil and criminal courts. In the Countries under examination claiming damages in relation to the environment is in fact mostly based on civil law remedies. Also called tort law, private law claims or civil law liability, they usually find their basis in the civil code (FR, IT, NL and PT) and in complementary laws (PT). The civil action for damages can also be exercised before the criminal courts when crimes against the environment are under consideration (FR, IT and PT).

In the four legal systems analysed tort proceedings generally require the existence of an unlawful act or omission that is attributable to an operator acting intentionally or with fault (except in cases of strict liability) and that is causally linked to the verification of damages. These damages can be material and/or moral. By way of example, Art. 483 of the Portuguese Civil Code provides that: “[a]ny person who, intentionally or with fault, unlawfully violates the rights of others or any legal provision to protect interests of others is obliged to compensate the injured for damages resulting from the breach”¹².

⁶ IT (Fasoli), p. 28.

⁷ PT (Aragão), p. 59.

⁸ NL (Houben and Backes), p. 44.

⁹ There are some exceptions, especially if the uniform public decision-making procedure is applied, which is often the case in environmental licensing.

¹⁰ Under the Dutch legislation the administrative review is in fact not possible with regard to “factual actions” of the administration or other decisions with a general scope or administrative acts based on private law powers such as contracts (ibid., p. 2).

¹¹ IT (Fasoli), p. 30.

¹² PT (Aragão), p. 58.

Against this introductory background, the role played by the ENGOs in the context of the relevant legal frameworks that allow claims for damages in relation to the environment will be analysed in the next sections.

3. Relevant Legal Frameworks Allowing Claims for Damages in Relation to the Environment and the Role Played by the ENGOs

All national reports refer to two main legal frames dealing with the liability of the operators that caused damages to the environment. The first one is the liability of the operators towards the national competent authority, as provided under the 2004/35/EC Environmental Liability Directive (ELD)¹³ and the second one is the liability of the operators on the basis of civil law remedies. The study will analyse the role played by the ENGOs in both these contexts.

3.1. The Remedies Provided under the Environmental Liability Directive and the Role Played by the ENGOs

Under the ELD the operator, who operates or controls the occupational activity (i.e. an economic activity, a business or an undertaking) is liable for the environmental damage and for the costs of the remedial measures to be taken. If these remedial measures are taken by the competent authority itself, the latter is entitled to recover the costs from the operator (Art. 8 ELD). In this context, the ENGOs have the right to submit observations to the competent authority and to request it to take action. The competent authorities have to give reasons for either choosing (or declining) to act and the ENGOs have the right to question the basis of the authority's decision (either in court or before another competent, independent and impartial body) (Art. 12 ELD). The Directive does not envisage the possibility for the ENGOs to bring actions for the reparation of the environmental damage directly against the operators should the competent authority fail to act (or to act promptly).

This approach is confirmed in France, Italy and the Netherlands, where under the national provisions transposing the ELD the ENGOs are not entitled to claim the reparation of the damage to the environment directly from the operator, as only the competent authority holds this power¹⁴.

Interestingly, in France, under exceptional circumstances, when the operator liable for taking remedial measures cannot be identified, the ENGOs can suggest the competent authority to be allowed to take these measures themselves. In Italy, in case of inactivity of the competent authority, the ENGOs are entitled (although it has to be said that this venue is rarely pursued in practice) to go before the administrative judge in order to appeal this inactivity and to ask for the compensation of the injury caused by the delay in taking action. The administrative judge cannot order the competent authority to take action, though.

A totally different approach is applied in Portugal where the ENGOs can exercise the civil action for damages (*civil actio popularis*) asking for the full "restoration" of the environment directly from the operator¹⁵.

¹³ Directive on Environmental Liability with regard to the prevention and remedying of environmental damage (OJ n. L 143 of 30/04/2004).

¹⁴ The Netherlands: Section 17.2 of Environmental Management Act; France: Law n. 2008-757, OJ of 2/08/2008; Italy: Legislative Decree No 152/2006 (Title II, Part VI).

¹⁵ Portugal: Decree-Law 147/2008 adopted on 29 July 2008.

Be that as it may, all national reports confirm that the remedies provided under the transposing legislation of the ELD have a very limited application in practice. This is due to the scope of the Directive itself. In fact only the environmental damage with “significant adverse effect” is relevant. In addition, the Directive and the national transposing legislation only cover certain types of “occupational activities” (see above) causing damage to protected species, natural habitats, water or land.

In relation to the (limited) scope of the Directive it is interesting to note that in Portugal the transposing legislation also applies to cases of personal injuries and/or damage to private property that usually would not be covered under the Directive¹⁶.

More broadly, the limited practical application of the ELD regime should be also read against the relevance of other regimes, such as the environmental permitting regimes, for example, those related to certain high-risk activities under the Industrial Emissions Directive 2010/75/EU¹⁷.

Finally, it must be taken into account that a high number of environmental liability cases are resolved through transactions between liable operators and competent authorities.

The national reports show that remedial actions with regard to the environmental damage are more frequently dealt with by the traditional civil law mechanisms, as it will be explained in the next section.

3.2 Civil Law Remedies and the Role Played by the ENGOS

A tendency has been noticed for the ENGOS to avoid addressing the competent authorities under the “ELD scheme” and instead claiming damages from the liable operators before the national courts. In this regard, a major distinction has to be drawn between *a*) damage to the ENGOS (section 3.2.1) and *b*) damage to the environment (a working definition of this type of damage is “purely ecological damage”) (section 3.2.2).

3.2.1. Damage to the ENGOS

In the four Countries analysed there are examples where the ENGOS that sued operators before courts were awarded material and moral damages. Although the judicial procedures vary considerably in the different legal systems, there is common ground to consider “material damages” as the expenses directly incurred by the ENGOS (e.g. costs for cleaning birds or for raising public awareness). By contrast, “moral damages” are considered, for example, the discredit deriving from the failure to pursue the objectives of environmental protection as stated in the statute of the ENGO.

In the Netherlands, the ENGOS can claim for the costs they made themselves, therefore, they are allowed to sue for damages the polluting operators by claiming clean-up costs. They can claim the expenses incurred to stop (or to limit the consequences of) the pollution. By way of example, an ENGO for the protection of birds litigated against a ship owner that caused oil pollution before the shore of the Netherlands. The ENGO was awarded the expenses incurred for cleaning, taking care and sheltering the smudged birds¹⁸. By contrast, under the Dutch law there seem to be no possibility for a claim regarding the moral damage suffered by the ENGOS. However, case-law on the matter is scarce.

¹⁶ PT (Aragão), p. 61-62.

¹⁷ Directive on industrial emissions (integrated pollution prevention and control) (OJ n. L 334 of 17/12/2010).

¹⁸ District Court Rotterdam 15 May 1991, NJ 1992/91.

In addition, the costs of civil procedures and the fact that there is no duty to obtain financial insurance from the part of the operators constitute a drawback of the system¹⁹.

In France, under the traditional civil law mechanisms, the ENGOs can claim direct, certain and personal damages. These are both material and moral damages suffered by the ENGOs. As to the material damage, the ENGOs can claim the expenses they incurred in restoring the natural resource to its initial status. For example, ENGOs were entitled to claim the expenses they had incurred in cleaning and treating birds after oil spills²⁰. As to the moral damage suffered by the ENGOs, the courts consider that the failure to respect environmental legislation by operators undermines the efforts made by the ENGOs to protect the environment. For both material and moral damages, the remedies granted by the courts usually take the form of compensation, justifying the expenditure incurred by the accredited ENGOs in order to carry out their activities effectively. These damages are not allocated and the ENGOs can use them freely. In practice, though, the national report highlights that it is very difficult to establish a direct and personal damage in environmental matters²¹. By contrast, with regard to the costs of the procedures, a positive trend has been noticed. In fact the high costs of civil procedures are mainly linked to the need of assistance from a lawyer, which is mandatory only depending on the value of the trial and the nature of the jurisdiction.

In Italy the ENGOs can exercise the civil action in order to protect the rights that have been compromised in the occurrence of the harm to the environment. The ENGOs can act for the recovery of the material damages suffered as a consequence of the environmental damage. These include the costs of raising public awareness on the environmental damage or any other cost incurred to undertake activities for the protection of the environment²². The ENGOs can also exercise the civil action to claim compensation for the moral damage suffered. In this case the damage is the discredit deriving from the failure to pursue the objectives of environmental protection expressed by the statute of the ENGO itself²³. In practice, though, these actions are rarely pursued before the civil courts because of the length and the high costs. A trend has been noticed in fact for the ENGOs to join civil actions to on-going proceedings before the criminal courts where fees are much lower²⁴.

In Portugal, through the civil *actio popularis*, the ENGOs can exercise the civil action asking for the full “restoration” of the environment from the operator. The measures to be taken have to be approved by the competent authorities after listening to all the interested parties (i.e. the owners of the properties where the measures are implemented). Only when the remediation measures are not enough to restore the environment *in integrum* and the ENGOs incur in costs, the latter can claim for additional compensation. Portugal gives also relevance to the moral damage suffered by the ENGOs in consequence of the occurrence of the environmental damage. A positive trend is that there are no costs associated to the exercise of the right to civil *actio popularis* by the ENGOs unless the claim is considered “manifestly groundless”²⁵.

¹⁹ NL (Houben and Backes), p. 55-56.

²⁰ FR (Makowiak), p. 27.

²¹ Ibid, p. 21.

²² E.g. Court of Cassation, Section III, 21 June 2011, n. 34761.

²³ E.g. Court of Cassation, Section III, 17 January 2012, n. 19439.

²⁴ IT (Fasoli), p. 36.

²⁵ PT (Aragão), p. 63.

3.2.2. Damage to the Environment (“Purely Ecological Damage”)

In the national reports a trend has been noticed for the ENGOs to trigger civil law remedies also to claim the reparation of the damage to the environment in itself, even if the ENGOs did not “suffer” any damage. The reparation in these cases takes the form of compensation, also symbolic, or a declaratory judgment. A “purely ecological damage” is in fact difficult to be assessed in monetary terms.

In this regard, a distinction has to be drawn between moral damage and purely ecological damage. Both can be claimed by the ENGOs (even if they did not incur in any expense), although the first one is “suffered” by the ENGOs in consequence of the occurrence of the environmental damage, whereas the second one is “suffered” by the environment (damage to the ecosystem in itself).

In the Netherlands when the damage is caused to a collective good (ecological damage) and no individual person can be considered individually a victim and the ENGOs did not incur expenses in its regard, they can ask the court to pronounce a declaratory judgment. However, this possibility seems to be envisaged only in legal literature and seems not to have been applied in practice yet. The national report advocates the need to further clarify the nature of this damage and the forms of reparation²⁶.

In France there has been a progressive recognition of the “purely ecological damage” by way of jurisprudential elaboration. In a landmark case (*Erika*) the French Court of Cassation has recognised the existence of a “substantial harm to the natural environment, in particular to the air, atmosphere, water, land, soil, landscape, natural sites, biodiversity and the interaction between these elements, without repercussion on a particular human interest but at the same time affecting a legitimate collective interest”²⁷. In this regard, an ENGO for the protection of birds (*ligue de protection des oiseaux*) was awarded a sum of money for every bird killed in consequence of the oil spill whereas up until that moment it had only been able to claim the expenses it had incurred in cleaning and treating birds. This was the first time a court awarded damages to the ENGO in respect of dead birds equivalent to the necessary costs for the nesting and breeding of replacement birds. This example seems to demonstrate a tendency, although quite embryonic, to award ENGOs with damages for the reparation of the ecosystem in its composition, structure and functions, which is different from the material and/or moral damages suffered by the ENGOs. The French report, though, advocates the need for a legislative intervention in order to clarify the concept and the forms of reparation of this category of damage to the environment²⁸.

As far as Portugal is concerned it has already been highlighted that thank to the civil *actio popularis* the ENGOs are allowed to act on behalf of the entire community, regardless of having suffered a material or a moral damage. The ENGOs have only to prove the existence of damage to a healthy and ecologically balanced human living environment (Art. 66 of the Constitution).

In Italy the ENGOs cannot exercise the civil action claiming the generic violation of the ecosystem in itself or a right to a healthy environment. The ENGOs in fact can only claim damages to personal goods or expenses encountered. Only the competent authority is entitled to exercise the civil action in order to claim the reparation of the environmental damage as a damage to the public interest to protect the environment (i.e. harm to the environment as a public good)²⁹.

²⁶ NL (Houben and Backes), p. 56.

²⁷ Court of Cassation, 25 September 2012, n. 10-82938.

²⁸ FR (Makowiak), p. 23.

²⁹ IT (Fasoli), p. 31.

4. General Evaluation and Suggestions for Improvement

From the analysis conducted above the following considerations can be drawn:

In the context of the national provisions transposing the ELD, in France, Italy and the Netherlands, the role played by the ENGOs is limited to a right to ask to the competent authorities to take action against liable operators. The emphasis is clearly put on the regulators acting and imposing liability. The Directive has in fact a public law rather than a private law nature. The ENGOs are not entitled to claim damages directly from the operators.

This approach is slightly mitigated in France where the ENGOs can suggest the competent authority to be allowed to take remedial measures themselves if the operator cannot be identified, and in Italy where the ENGOs can appeal the inactivity of the competent authority to take action, although they can only ask for the compensation of the injury caused by the delay in taking action.

A much more active role for the ENGOs is instead provided under the Portuguese legislation where, through the civil *actio popularis*, the ENGOs can exercise the action for damages asking for the full “restoration” of the environment directly from the operators.

All national reports confirm that the remedies provided under the transposing legislation of the ELD have a limited application in practice. This is due to the limited scope of the Directive itself, but also to the fact that other regimes, such as, for example, the environmental permitting regimes, may apply. In addition, it has to be taken into account that cases of environmental liability are also resolved through transactions between the liable operators and the competent authorities.

In light of the above, it could be fruitful to consider the possibility to introduce a judicial or non-judicial remedy that entitles the ENGOs to challenge the inactivity of the competent authorities should they fail to adopt remedial measures in relation to the environmental damage so that they are obliged to take action.

In addition, it could be helpful to establish an on-line database containing information on the (on-going and past) investigations of cases of environmental damage and the costs that the competent authorities were able to recover from liable operators (including the compensations obtained *via* judicial proceedings) along with their utilisation.

Finally, it would be helpful to encourage operators to use financial insurances to cover their liability for damages in relation to the environment as provided under Art. 14 ELD.

The national reports show that the actions taken by ENGOs in respect of the environmental damage are more frequently based on traditional civil law mechanisms (private law remedies). In this way the ENGOs avoid addressing the competent authorities and instead sue the liable operators before national courts.

In France, Italy, the Netherlands and Portugal the ENGOs can exercise the civil action against the liable operators to recover the expenses directly suffered (material damage). In this regard, the ENGOs have to demonstrate that they employed human or financial resources to protect the environment and that these resources have been nullified as a result of the environmental damage caused by the operator. The remedies granted by the courts usually take the form of an award of damages, justifying the expenditures incurred by the ENGOs in order to carry out their activities effectively. A tendency has been noted in France, in Italy and in Portugal for the ENGOs to join a civil action to on-going proceedings before criminal courts.

France, Italy and Portugal give also relevance to the moral damage suffered by the ENGOs in consequence of the occurrence of the environmental damage. The courts consider that the failure to respect the environmental legislation by the operators undermines the efforts made by the ENGOs to

protect the environment. The remedies granted by the courts usually take the form of an award of damages.

An emerging trend has been noticed in France (only in case-law), the Netherlands (only in legal literature) and Portugal with regard to the reparation of the “purely ecological damage”. Case-law on the matter is very scarce and the legislation is not sufficiently developed in order to specify the conditions and the modalities upon which this type of damage has to be repaired. A “purely ecological damage” is in fact difficult to assess in monetary terms. In the very few cases mentioned in the national reports (FR and NL) the reparation of this type of damage took (or would take) the form of compensation or of a declaratory judgment. By contrast, in Italy the ENGOs are not allowed to exercise the civil action claiming the generic deterioration of the ecosystem in itself or of the right to a healthy environment as only the competent authority is entitled to do so.

It appears from the above that the civil law remedies can constitute a useful tool to repair the material and moral damages suffered by the ENGOs. They seem to be ill-suited, though, to the specificities of the damage to the environment in itself (“purely ecological damage”). The national reports advocate the need to further clarify the nature of this damage and the forms of its reparation.

As an overall assessment, though, the reports highlight that it is often difficult for the ENGOs to demonstrate a direct and personal damage in environmental matters before the courts. In addition, it seems that these judicial actions are characterised by excessively high costs. In fact, as highlighted above, in some countries (FR, IT and PT), a tendency has been noted for the ENGOs to join civil actions to on-going criminal proceedings where court fees are much lower.

In light of this, it could be fruitful to reduce the costs of civil procedures in environmental matters. A positive trend has been noticed in Portugal where there are no costs associated to the exercise of the right to (civil) *actio popularis* by the ENGOs unless the claim is considered “manifestly groundless”. Another positive trend has been noticed in France where the high costs of civil procedures are mainly linked to the need of assistance from a lawyer, which is mandatory only depending on the value of the trial and the nature of the jurisdiction.

II. NATIONAL REPORTS

A. FRANCE

(PREPARED BY MS. JESSICA MAKOWIAK, UNIVERSITY OF LIMOGES)

1. General picture of the laws and administration on the environmental area

Environmental legislation

Legislative acts and legal norms relevant to environmental issues can be found at all levels of the French legal hierarchy, from provisions and principles of constitutional value to municipal regulatory decisions.

The Constitution of 1958 lacked an express mention of a citizens' environmental right. Since 2005 the constitutional Environmental Charter entered into force and can be described as containing a number of 3rd generational rights and principles, many of which already were at least in part protected by legislation. The Charter provides - inter alia - the right of everybody to live in a balanced environment that respects health, the duty to protect it and to prevent any degradation, the duty to contribute to repair damages to the environment, the precautionary principle and the right to participate in environmental decision-making.

The most important environmental legislation in France is collected in the Environmental Code. It covers matters such as: environmental principles and common provisions (such as access to information and public participation, institutions, liability), provisions on water and air protection, protected areas, biodiversity and species protection (hunting, fishing ...) and provisions on all pollutions and nuisances (industrial activities, waste chemicals...). A number of other codes contain provisions related to the Environmental legislation, such as The Town Planning Code, the Forestry Code and the Commercial Code.

As a consequence of the French legal hierarchy, environmental legislation and administrative acts must respect the provisions contained in the constitutional block, including the Environmental Charter. They also must respect the conventional block, which includes both European directives and provisions found in international agreements.

System for decision-making and administrative appeal

The environmental administration is still largely centralized, although local authorities (regions, departments, municipalities and community groups) exercise some skills in the matter.

Central environmental policy is the responsibility of the « Ministère de l'Écologie, du Développement Durable des Transports et du Logement » (MEDDTL)¹. The ministry is responsible for environment, sustainable development and territorial planning among other things. The specialised public institutions and administrations (as the Agency for Environment and Energy Management, the National Office for Forestry...) also have tremendous impact on the environmental administration, and some of them make decisions on matters with environmental importance. Some of these bodies are directly supervised by the MEDDTL and others are a joint responsibility between different ministries. The State also has a territorial administration (called "administration déconcentrée"), especially in departments and regions, where the prefects act as State representatives, and specialized administrations as Ministries. Among the most important function of the departmental the *Prefect* is the issuing of environmental permits to Classified Facilities for Environmental Protection. Following the launch of the General Review of Public Policies in 2007 the territorial state administration was substantially amended. Environmental public policies are now implemented at the regional level, by the "DREAL" (Regional Directions for Environment, Spatial Planning and Housing), under the authority of the regional Prefect.

French administration is also decentralised and the country is divided into 26 Regions which are themselves divided into departments and further into municipalities (France has more than 36 000 municipalities). These local authorities are elected by direct universal suffrage and represent the decentralised administration. The State has delegated them responsibilities such as domestic waste, land-use planning and urban permits (municipalities), regional nature parks (regions).

The administrative acts issued by all these administrations can be lodged before the administrative authorities. (Concerning the judicial appeal, see below "the role of the courts").

A citizen can always challenge a decision by a public authority before the administration itself, except where a text provides otherwise. He can either introduce a non-contentious appeal ("recours gracieux") to the authority who issued the decision or a hierarchical appeal ("recours hiérarchique") to the authority supervising the one who issued the decision, in order to obtain the annulment of the act.

In liability matters, it is sometimes necessary to introduce a non-contentious appeal in order to bind the administration to issue a decision (for example if the Prefect fails to prevent a pollution, the public concerned needs to introduce a prior administrative decision to pursue the State's liability before a Court).

The administrative appeals don't have a suspensive effect, but they extend the deadline of judicial appeals.

Increasingly, the law or regulation requires the preliminary filing of an administrative appeal (so-called "RAPO")², in order to stop the explosive growth of litigation. In those cases, the omission to initiate the administrative appeal will result in the inadmissibility of a complaint before the administrative jurisdictions. These compulsory prior appeals must be lodged within different timeframes, depending on matters concerned.

¹ Ministry for Ecology, Sustainable Development, Transport and Housing

² « Recours Administratifs Préalables Obligatoires » (Obligatory Prior Administrative Appeals).

Moreover, since the constitutional act of July 2008 the 23rd (n° 2008-724)³, the Ombudsman (“Médiateur de la République”) has been replaced by the Rights Defender (“Défenseur des droits”). The aim of the reform is, inter alia, to encourage alternative dispute resolution.

The Rights Defender is appointed by the President of the Republic for a period of 6 years, with some guarantees of independence. If the challenged decision concerns the relationships between administration and public, it can be lodged directly by any individual alleging a breach of rights or freedoms by a public authority. The scope for the Rights Defender’s intervention is broad, i.e. the protection of citizen’s rights and freedoms in their relationships with the administration. Its powers are potentially large: inquiry, checking, information, injunction, mediation, and so on. Today we wonder if the Rights Defender will challenge environmental decisions. It is necessary to wait for its annual report.

The role of the courts

The French system is comprised of two judicial branches: the judiciary and the administrative. Each tries cases depending on the nature of the acts or actions involved or on the object of the litigation⁴.

The judicial branch

The judiciary order is divided into civil and criminal courts.

In the civil courts system, the Courts of First Instance are either the Proximity judge (“Juge de Proximité”), Court of Instance (“Tribunal d’Instance”) or the Court of Great Instance (“Tribunal de Grande instance”), depending on the sum of money involved in the case. Before the civil court, any person with a legitimate interest (except if stated otherwise by law) can submit a claim to compensation for damage caused by a breach of environmental law. As in any civil case, the claimant must justify that he suffered a prejudice, that the defendant committed a fault, and that a link of causality connect the fault to the prejudice. Sometimes it is not necessary to justify that a fault has been committed (liability for damage resulting from abnormal neighborhood disturbances in some pollution cases).

In the criminal court system, they will be either the Proximity judge or the Police Court (Tribunal de Police) for petty offences, while the Correctional Court (“Tribunal Correctionnel”) has jurisdiction over misdemeanours and the Assize Court (“Cour d’Assises”) over crimes⁵. For both systems, appeals are lodged with the Appeal Courts, which include different Chambers specialized in different matters. Civil cases are tried in the Civil Chamber, criminal cases in the Criminal Chamber. The Supreme Court for both civil and criminal cases is the court of cassation (“Cour de Cassation”), whose jurisdiction is limited to points of law. It ensures the correct application of law by lower jurisdictions.

³ JO 24/07/2008. See also: organic law n° 2011-333 of 29/03/2011 relative au Défenseur des droits (JO of 30/03/2011).

⁴ In case of doubt, the “Tribunal des Conflits” (Litigation trial) determines which branch has jurisdiction.

⁵ There are also specialized courts, which are not relevant for this study.

Through the Public Prosecutor, who represents the public interest, a criminal action may be initiated by any person who suffered damage owing to an infraction of the legislation. It should also be noted that some other representatives of the public interest in environmental matters can initiate criminal proceedings, such as the Superior Council of Fisheries, the Regional Directorates for Environment (DREAL).

The administrative order

The administrative is a three-tier system.

The Administrative Court (*Tribunal administratif*) has jurisdiction over any litigation between citizens and public authorities, including matters related to damages resulting from government decisions. The Administrative Court of Appeal (*Cour Administrative d'Appel*) addresses any Administrative Court judgments brought to its attention by one of the parties. It was created in 1987 to guarantee respect for the right of appeal. The Council of State (*Conseil d'Etat*) is the last resort in the administrative judiciary. It addresses points of law in cases decided by the Administrative Court of Appeal (and in some cases by the Administrative Court). It is also the only tier dealing with contestation that concerns the most important acts issued by public authorities (such as presidential or prime ministerial decrees).

Litigation related to administrative authorities is the jurisdiction of the administrative judge insofar as the validity of a decision and that decision's consequences are concerned, *i.e.*, in case of damages resulting from an administrative act. Four types of contentious actions are available to persons wanting to challenge an administrative decision: illegality proceedings, full review proceedings, interpretation proceedings and repression proceedings.

As mentioned above, the administrative review (non-contentious appeal) is sometimes a compulsory preliminary to challenge the decision before the court. It is for example the case to challenge a hunting permit, or the allocation and issue of greenhouse gas emissions allowances. But in general, the prior administrative appeal is not required in the field of the environmental protection.

Constitutional Council

The Constitutional Council (*Conseil Constitutionnel*) guarantees the constitutionality of legislation before its adoption and, since 2008 (July, 23th) after it. This is the new possibility for a citizen - during a trial - to apply for a "preliminary ruling on constitutionality" ("question prioritaire de constitutionnalité" or "QPC").

As environmental matters are mainly handled by public authorities, the disputes fall mainly within the jurisdiction of administrative courts.

2. A description of the legal situation (laws and general picture of case law) concerning environmental damages in general and the ENGOs possibilities in more detail. Cases to illustrate pros and cons...

Prior to the intervention of the Law of 1st August 2008⁶ transposing Directive 2004/35/EC of 21 April 2004 on environmental liability⁷, there was no legal definition of environmental damage or any legal framework to structure an understanding thereof. The damage potentially caused to some aspects of the environment (or pollution damage) therefore fell within the remit of various administrative policing schemes; indeed, those not covered by the 2008 Law remain within the scope of those same schemes. There are, for instance, specific offences relating to water pollution or the destruction of protected species, the penalties for which are provided by specific legislation. However, as regards remediation, it is the ordinary law of torts which is destined to apply (see below). In that context, it is the "environmental harm" that is to be compensated, not "damage to the environment". Above all, such special administrative policies do not confer specific prerogatives on environmental protection associations.

2.1. Presentation of environmental damage and the prerogatives of associations in the context of the Law of 1st August 2008

The 2008 Law, codified under Articles L. 160-1 and subsequent of the Environmental Code, establishes the conditions under which are "prevented or compensated (...) the damage caused to the environment by the activities of an operator". The definition of "operator" is broad and understood as "any person, physical or legal, public or private, who exercises or effectively controls, in a professional capacity, a profit-making or non-profit-making economic activity". The link thus established between damage and business activity does, however, limit the very concept of environmental damage. In other words, the law excludes from its scope of application any damage to the environment that may be caused otherwise than in the context of the exercise of a business activity.

As to damage to the environment, the law (like the Directive) essentially covers:

- ▶ damage caused to land, only where this gives rise to a serious risk to human health;
- ▶ damage caused to water, where this seriously affects the ecological, chemical or quantitative status of water;
- ▶ damage caused to biodiversity, where this seriously affects the maintenance or re-establishment, in a favourable conservation status, of species or habitats protected under Natura 2000, together with the breeding sites and resting places of those species. The Order stipulates, fairly restrictively, that "shall be qualified as serious any damage to species and habitats (...) which also have proven impacts on human health"⁸. Furthermore, are also excluded from the scope of the 2008 Law any damage caused

⁶ Law n° 2008-757 on environmental liability and introducing various steps to bring French law into line with European Union law in the field of environment, JO of 2/08/2008.

⁷ Directive on Environmental Liability with regard to the prevention and remedying of environmental damage (OJ n° L 143 of 20/04/2004).

⁸ Art. R. 161-4 of the Environmental Code.

by programmes or projects authorised on the basis of legislation relative to Natura 2000⁹ (and having been the subject of an appropriate impact assessment), together with any damage caused by an activity authorised or approved on the basis of legislation on protected species¹⁰;

► damage affecting ecological services, i.e. the functions performed by land, water and species and habitats to the benefit of one of those natural resources or to the benefit of the public, excluding services rendered to the public by facilities provided by the operator or the proprietor.

Like the Directive, the 2008 Law excludes from its scope a number of types of damage (e.g. that pertaining to international agreements, that caused by armed conflict or that caused by pollution of diffuse character, etc.)¹¹. There are certain prescriptions restricting the scope of the Law, the latter not being applicable, *inter alia*, to damage for which the event in question arose prior to 30 April 2007, or for which the event in question is the result of an activity that ceased definitively prior to 30 April 2007, etc.¹²

As regards associations, the 2008 Law permits their involvement on two levels: prevention and remediation. The request for action (« demande d'action ») allows "environmental protection associations mentioned under Article L. 142-1"¹³ (as well as any person directly concerned or in danger of being so by damage or an imminent threat of damage), which have "serious elements establishing the existence thereof", to inform the relevant administrative authority¹⁴. They may also request that the authority to "implement or have implemented the preventive or remedial measures" required by the threat of damage or the occurrence thereof. The request must be supported by relevant information and data, which raises the issue of expertise and the cost of the same for associations. If the administration "considers that the request (...) reveals the existence of damage or the imminent threat of damage (...), it records the observations of the operator concerned and, where applicable, invites them to [take the necessary measures]"¹⁵. The administration therefore has discretionary power to comply with the association's request. However, whatever its decision, it must inform the applicant in writing of the outcome of their request for action and state the reasons for its decision. Moreover, in the event of an emergency, Article L. 162-15 provides that "when the operator liable to prevent or remedy the damage (...) cannot be immediately identified", environmental protection associations can suggest to the administration that they themselves take preventive or remedial measures.

However, it must be stated that the 2008 Law is not applied in France at all. The Administration uses well-known special administrative police mechanisms (classified installations, water, waste, etc.). Faced with the complexity of the legislation, the Minister for the Environment also plans to issue "clarification" to all prefects, and has not excluded the possibility of "a few adjustments" in future. As for remedial actions in respect of environmental damage, these are based on traditional tort

⁹ Programmes or projects authorised under the conditions determined by the art. L. 414-4 of the Environmental Code.

¹⁰ Activity authorised or approved under the conditions determined by the art. L. 411-2 and L. 411-3 of the Environmental Code.

¹¹ See. Art. L. 161-2 of the Environmental Code.

¹² Art. L. 161-4 and L. 161-5.

¹³ That means any association aims at "the protection of the nature and the environment", without necessarily being approved.

¹⁴ Art. R. 162-3 of the Environmental Code.

¹⁵ Art. R. 162-4 of the Environmental Code.

mechanisms, which are nonetheless ill-suited to the specificities of ecological damage. Furthermore, on a litigation level, French law organises specific rights for environmental protection associations.

2.2. *The traditional foundations for civil liability and remedying ecological damage*

The 2008 Law does not challenge civil liability under ordinary law, as it clearly states that: "a person who suffers damage as a result of environmental damage or the imminent threat of such damage cannot apply for remedies on the basis [of the 2008 Law]¹⁶. Such material damage (moral, material), resulting from damage to the environment, continue to be remedied in accordance with tort law mechanisms. Moreover, and as we have already seen, environmental damage does not entirely fall within the remit of the 2008 Law, the scope of which is ultimately restricted.

There are various grounds which incur civil liability under French law: negligence (for example, the breach of administrative regulations); *trouble anormal de voisinage* (abnormal neighbourhood disturbance, a case law scheme which allows compensation to be paid, without negligence having to be proven, for pollution damage suffered by a neighbour, but under no circumstances may it be used in respect of purely ecological damage suffered by the environment); the acts of things that are in a person's custody (a court having recently found a chemicals company liable for acts of the gas escaping from its workshops¹⁷); liability for defective products (an objective, strict liability scheme organised by the law¹⁸).

Whatever the grounds used, the obstacle lays in the requirement of direct and certain damage (which is difficult to establish in environmental matters) and above all "personal" damage. This is why current liability rules are ill suited to apprehending environmental damage (or purely ecological damage). It is important to look at the way in which the courts have gradually circumvented the obstacle that is personal damage (a), in litigation generally instigated by environmental protection associations. Simultaneously, the legislature has intervened in order to facilitate legal challenged brought by associations before the criminal (and administrative) courts, through a variety of methods (b).

a) The development of case law concerning ecological damage

► Absence of characterisation for ecological damage

The initial decisions allowing compensation to be paid for environmental damage suffered by environmental protection associations (or local authorities) date back to the 1980s. Generally, the damage is not characterised and the court employs the following phrasing: "with the justifications submitted in argument, the court has sufficient material facts to set the sum to be awarded". In 1985, this remedied the damage to the marine environment caused by Montedison (the so-called "red sludge" case)¹⁹. While the court did not use the phrase "damage to the environment", this was nonetheless remedied for the first time²⁰. It is above all in the area of damage to protected species that

¹⁶ Art. L. 162-2 of the Environmental Code.

¹⁷ C. Cass., 2^e chambre civile, 17/12/1969. This is a regime of strict liability, which is favourable to victims. See Article 1384-1 of the Civil Code.

¹⁸ Art. 1386-1 and following of the Civil Code.

¹⁹ TGI Bastia, 4 July 1985.

²⁰ In this case, these are the departments of Corsica that got the compensation.

the majority of decisions are to be found. Thus, in 2005, a criminal court awarded €750 to a association for the illegal capture of a hundred birds²¹; €4000 to the same association²² for the killing of six ortolan buntings and for the 558 birds found in a freezer belonging to the defendant²³.

However, the courts ought now to hear remedial actions in respect of environmental damage from now on. A number of factors come to bear in favour of such recognition: high social demand; the development of European Union law in respect of environmental liability and the protection of the environment under criminal law; the adoption, in 2005, of the constitutional Charter for the Environment, Article 4 of which enshrines a duty to remedy damage caused to the environment.

► The circumvention of obstacles through actions in respect of moral damage

One of the first cases in which the courts agreed to remedy the moral damage suffered by an association relates to the death of an osprey killed by hunters. The Court of Cassation considered, in 1982, that the destruction of the bird of prey had caused the bird protection association "direct, personal moral damage in connection with the aim and purpose of its activities"²⁴.

The same applies to the unauthorised operation of a discharge point in an area of wetland. According to the court, "the association has manifestly suffered moral damage where its efforts are thwarted by failures to respect prescriptions intended specifically to prevent any risk of water pollution"²⁵. This is also the case for the expansion of a pig farm without prior authorisation, which infringed the "efforts made by associations to protect water quality and the fish population (...)"²⁶. A number of decisions mention moral damage following the destruction of protected species (e.g. further to the destruction of 304 chamois in the national park of Mercantour and Les Ecrins by a poacher²⁷; or following the destruction of Cannelle, a female bear, in the Pyrenees by a hunter²⁸).

In the case concerning Cannelle, the female bear, a hunter was found civilly liable for the death of the last local female specimen of brown bear, an animal listed amongst the endangered protected species in France. The Court ordered him to pay €10,000.00 in damages and interest to the associations which stood as civil parties to the proceedings, without distinguishing the various types of damage thus remedied.

The destruction of Cannelle could have led to the consideration of environmental damage (harm to the conservation of the species and its ecological function, which is involved in maintaining biological diversity) and the damage caused to natural and legal persons (such as the financial damage suffered by the State, linked to the costs related to measures for preserving the bear's habitat; the harm to the reputation of local authorities, whose brand image attached to the bear's presence is affected by its death; or the harm to the civil party

²¹ Trib. Correctionnel Mont de Marsan, 1^{er} July 2005, n° 04-006554.

²² The "SEPANSO" (Fédération des Sociétés pour l'Étude, la Protection et l'Aménagement de la Nature dans le Sud-Ouest).

²³ Tribunal correctionnel Dax, 11 May 2006, n° 06-001157.

²⁴ C. Cass., 1^{ère} chambre civile, 16 Nov. 1982.

²⁵ Tribunal de police Guingamp, 6 January 2006, n° 06-00005.

²⁶ C. Cass., Crim., 20 Febr. 2001, n° 00-82655.

²⁷ Cour d'appel Aix en Provence, 13 March 2006, n° 428/M/2006

²⁸ C. Cass., 1^{er} June 2010, 09-87159.

associations' statutory task of environmental protection, characterised by the obliteration of the efforts those associations have made in accomplishing their mission)²⁹.

Occasionally, moral damage is better characterised. The court may mention, for example, "direct harm to the image"³⁰, "the *trouble de jouissance*" (disturbance affecting use and enjoyment) suffered by a fishing federation³¹, or even the harm to the "reputation as a tourist area of coastal tourist resorts" following an oil spill³².

However, while it allows associations to obtain a remedy consecutive to environmental damage, moral damage must not be confused with purely ecological damage, suffered by the environment.

► The gradual recognition of ecological damage: the *Erika* watershed

The courts have not resorted to the concept of moral damage for several years. The Court of Appeal of Bordeaux thus agreed to order compensation for "the damage suffered by the flora and invertebrates of the aquatic environment" owing to works carried out without authorisation and resulting in a waterway drying up³³. The courts have even strived, in several decisions, to clearly distinguish the moral damage suffered by the association from the damage resulting from environmental harm. Thus the death of fish further to river pollution causes "direct and certain damage on a biological level" to the association, and moral damage³⁴. In the case concerning a chemical leak into the tidal waters of a regional natural park, the court ordered that compensation be paid to the park, distinguishing moral and material damage and "the environmental damage suffered by natural heritage"³⁵.

Lastly, in its decision of 16 January 2008³⁶ handed down in the case concerning the sinking of the *Erika*, the *tribunal de grande instance* (regional court) at Paris continued this trend in case law and explicitly enshrined the concept of ecological damage, ordering the remedying thereof independently of the repercussions on human interests. The court considered that "associations may apply for the remedying, not only of material damage and moral damage, be it direct or indirect, caused to the collective interests that they are tasked to protect, but also that resulting from the harm to the environment, which directly or indirectly harms those same interests that it is their statutory task to safeguard".

On appeal, the Court upheld the judgment in a decision of 30 March 2010, reasserting the possibility of remedying ecological damage or "for harm to the environment". It then distinguished two types of damage: the pecuniary and non-pecuniary damage related to "subjective damage" (suffered by persons) and the ecological damage, "objective harm" (not suffered by a person), constituting "harm without repercussions on a particular human interest" but harming "an interest protected by law".

²⁹ V. Laurent Neyret, « Mort de l'ourse Cannelle : une responsabilité sans culpabilité », in *Environnement et développement durable* n° 1, janvier 2011.

³⁰ "Red sludge" case abovementioned.

³¹ After the destruction of the bed of a watercourse, Cour d'Appel Rennes, 27 March 1998, n° 97-00224.

³² Cour d'appel Rennes, 18 April 2006, n° 05-01063.

³³ Cour d'appel Bordeaux, 13 January 2006, n° 05-00567.

³⁴ Tribunal correctionnel Brest, 4 November 1988, n° 2463-88.

³⁵ TGI Narbonne, 4 October 2007.

³⁶ N° 99-34895010.

*It was ultimately the highest court in France, i.e. the Court of Cassation, that, on 25 September 2012 and still concerning the Erika, confirmed the existence of "objective, autonomous damage", which is understood as "any substantial harm to the natural environment, namely, in particular, to the air, atmosphere, water, land, soil, landscape, natural sites, biodiversity and the interaction between those elements, which is without repercussion on a particular human interest but which affects a legitimate collective interest"*³⁷.

This decision must be reconciled with that of the Constitutional Council of 8 April 2011 which had, in some senses, already paved the way. The Council stated first of all that Articles 1 and 2 of the Charter for the Environment (the right to a balanced environment which shows due respect for health and the duty to preserve it) "are incumbent on all persons"; it then concluded on the basis of those provisions that "each person is bound by a duty of vigilance with regard to environmental harm (...)". Lastly, it also inferred an action in tort on based on a failure to fulfil a "duty of vigilance in the event of environmental harm", stating that "the legislature shall be free to establish the conditions under which an action in tort may be brought on the basis of a breach of said duty". As emphasised by doctrine, this enshrining of civil liability in the event of environmental harm makes ecological damage both subjective (harming a right or legitimate interest protected by law) and collective (harming the collective human interests linked to the environment).

Since the *Erika* case, a decision was recently handed down by the Court of Appeal at Nouméa³⁸, in which the court defined the concept of ecological damage, and strove to distinguish it from personal damage potentially suffered by associations. The court took the view that "damage caused to the environment is understood as being all harm caused to ecosystems in their composition, structures and/or functioning; such damage manifests itself in harm to the components and/or functions of ecosystems, beyond and independently of their repercussions on human interests". The court went on to add that such harm is detrimental where it may be qualified as "serious", whereas the Court of Cassation spoke of "substantial" harm.

Lastly, the Court of Appeal requalified the personal damage invoked by the associations as harm connected to "harm to the task of protecting the environment", considering that it had been "improperly characterised by associations as moral damage". This requalification actually causes confusion as, historically, courts have agreed to remedy the moral damage suffered by associations, even indirectly. As a very last point, it will be noted that the Court of Appeal at Nouméa, without specifying its calculations, decided to remedy the ecological damage by awarding damages in the sum of approximately €80,000.00.

All of these points highlight the need for legislative intervention in order to clarify the concept of ecological damage and allow it to be remedied effectively (cf. *infra*, point 3).

b) Prerogatives available to environmental protection associations

The most important of these, in relation to environmental damage, is the possibility for some associations to join a civil action to proceedings before criminal courts³⁹. Mention must also be made,

³⁷ N° 10-82938.

³⁸ CA Nouméa, 25 February 2014, n° 11-00187.

³⁹ The civil action within criminal proceedings allows both action for criminal proceedings and action for civil action.

albeit more briefly, of the presumption of an interest in bringing an action before the administrative courts (which is much less relevant in the context of environmental damage).

- Associations joining civil actions to ongoing criminal proceedings

Insofar as harm to the environment generally went unpunished, the French legislature intervened in 1976 to extend, by a derogation from ordinary law which renders civil actions subject to the existence of direct damage resulting from an offence, the right to bring a civil action to accredited environmental protection associations and, under certain conditions, to officially registered associations.

A civil action may be brought where the Public Prosecutor has already instituted criminal proceedings. Private prosecutions, which are only rarely brought by associations⁴⁰, serve to overcome prosecutorial inertia and initiate public criminal proceedings.

Thus, under the terms of Article L. 142-2 of the Environmental Code: "Accredited associations (...) may exercise the recognised rights to bring civil actions as regards facts directly or indirectly detrimental to the collective interests which it is their purpose to protect and constituting an infringement of legislative provisions relative to the protection of nature and the environment; the improvement of quality of life; the protection of water, land, sites and landscapes; town planning; or intended to combat pollution and disturbances ; nuclear safety and radiation protection ; commercial practices and advertising that are misleading or of such a nature as to mislead where said practices include instructions relating to the environment, together with the texts implementing the same ".

This prerogative extends to associations having existed for over five years, the purpose of which is to protect interests relative to classified installations or the water police, on condition that the environmental protection purpose has expressly featured in their articles of association for at least five years.

The phrasing of Article L. 142-2 is relatively vague, as the legislature does not cite the texts concerned by the institution of civil actions in an exhaustive way. This is why the Court of Cassation, for example, considered that the Article did not apply to infringements of sea fishing policy⁴¹. Indeed, it considered that it was not an environmental offence, even though the damage itself was environmental. Unlike the Court of Cassation, some lower courts have allowed civil actions to be brought for such offences. These uncertainties ought to be resolved by the legislature.

Examples of application: Shall constitute "direct or indirect damage to the collective interests which it is the purpose of accredited associations to protect "the continued operation of a sand quarry in spite of the suspension of prefectural authorisation"⁴²; or the illegal installation of a body of water, in breach of the regulations in force, causing direct damage to an association whose purpose was to "restore and protect water quality and monitor the free movement of fish"⁴³ ; illegal works that compromised a wetland ecosystem of some 20 hectares, the defendants having been ordered to pay €10,000.00 in damages to the association⁴⁴.

⁴⁰ Because of the high cost (it means the amount of deposit required).

⁴¹ C. Cass. crim., 23 May 2000, n° 99-86246.

⁴² CA Pau, 28 March 1991, Sté Laussu, n° 1991-040401.

⁴³ C. Cass. Crim, 28 Nov. 1991, n° 90-84642.

⁴⁴ TGI Besançon, 25 Nov. 2005, n° 01-0067003.

In theory, Article L. 142-2 supposes a criminal offence. However, the Court of Cassation considered, in 2006⁴⁵, that criminal misconduct was not required. This, the act of hunting without a licence constitutes negligence within the meaning of Article 1382 of the Civil Code⁴⁶, without the need to prove a breach of the 1976 Law on the protection of nature.

As seen in the cases above, the remedies granted by the courts usually take the form of an award of damages, justifying *a posteriori* the expenditure incurred by the accredited association in order to carry out its activities effectively. The damages are not allocated (the association may use them freely). Site clean-ups are rarely ordered. Lastly, the damage must be remedied in full, the Court of Cassation having condemned any remedy of a nominal one euro or a manifestly derisory sum⁴⁷.

It must be noted that an accredited association may also, with particular reference to litigation, apply to the interim relief judge (emergency proceedings) to put an end to a manifestly unlawful disturbance. This is an interesting preventive procedure to avoid a situation whereby irreversible damage would occur⁴⁸.

In a decision of 7 December 2006, the Court of Cassation also specified that environmental protection associations could bring actions for remedies in respect of harm to the collective interest which it is their purpose to protect, not only before criminal courts but also before civil courts⁴⁹.

- The presumption of an interest in bringing actions before the administrative courts

Article L. 142-1 of the Environmental Code provides that:

“Any association the purpose of which is the protection of nature and the environment may institute proceedings before the administrative courts for any grievance relating to the same.

Any environmental protection association accredited under Article L. 141-1, together with fishing associations, are considered as being entitled to act against any administrative decision with a direct relation to its purpose and its statutory activities and generating harmful effects on the environment on all or part of the territory for which it is approved where said decision arises after the date of their approval.”

This provision (which exempts State-accredited associations from having to prove their interest in bringing an action before the administrative court) does not directly relate to the issue of environmental damage, as its purpose is to facilitate appeals by accredited associations against administrative decisions (actions for annulment) rather than proceedings relating to liability (applications for compensation).

It is therefore more relevant to preventive actions brought by associations (avoiding a situation whereby damage is caused, by applying for the annulment of an administrative decision) than applications for compensation.

It will also be noted that, as regards damage potentially cause by the Administration, the administrative court (which then has jurisdiction) refuses to accept the existence of ecological damage, as shown in this relatively recent decision (and subsequent to the *Erika* decision):

⁴⁵ C. Cass., 2^{ème} ch. Civile, 16 November 2006, n° 05-1962.

⁴⁶ It means a civil fault.

⁴⁷ C. Cass., Crim., 15 January 1997, n° 96-82264.

⁴⁸ CA Caen, 1er February 2000, Greenpeace France : *Dr. env. sept. 2000*, p. 3.

⁴⁹ N° 05-20297.

The statutory purpose of the association is to act in protecting fauna, flora, for the conservation of natural heritage in general and, more specifically, for the “rehabilitation of wild animals”; it carries out a number of activities to raise public awareness of the protection of wild species, particularly those species considered as harmful, the ecological importance of which is, according to the association, unknown. By unlawfully classing two species of mammal and five species of wild bird as harmful species and permitting their destruction without implementing or even examining the possibility of alternative methods to prevent the disturbance attributed to them, the prefect committed an error that harmed the association’s statutory purpose, which resulted directly in damage to said association (...). However, the association has no grounds on which to request that the State be found liable on the grounds of “ecological damage” which allegedly resulted in the unlawful destruction and the harm done thereby to the environment, where such damage is not personal to the association and where there is no rule or general principle which either defines or imposes the principle of such a remedy on the part of the State to the benefit of an accredited environmental protection association. The moral damage suffered by ASPAS is estimated at €1,000⁵⁰.

The courts are equally reluctant to accept the moral damage suffered by an association, whatever the facilities offered under Article L. 142-1, as shown in a recent decision of the *Conseil d’Etat*:

For the court, the provisions of Article L. 142-1 of the Environmental Code relative to the interest of environmental protection associations in bringing actions “do not exempt the association applying for remedies, particularly in respect of moral damage, caused by the harmful consequences of wrongful and unlawful conduct, from proving the existence of direct and certain damage resulting, for the association, from the misconduct on the part of the State”. In this particular case, the association claimed that a number of animals had been killed on the basis of a prefectural order that was ultimately annulled by the court; however, the *Conseil d’Etat* took the view that it has not established the personal nature of the moral damage resulting from the harm done to the interests that it was the association’s purpose to protect⁵¹.

Lastly, it must be stated that the legislature has, in recent years, had a tendency to restrict the legal challenges brought by associations, particularly in the field of town planning, under the pretext of combating “improper claims”. Thus, in 2006, it added a restriction to the abovementioned Article 142-1 relating to the date of the approval or accreditation (the presumption of an interest in bringing an action only applies where the decision challenged by the association follows the date of the association’s accreditation).

The new Article L. 600-1-1 of the Town Planning Code restricts the right of access for non-accredited associations. Thus, since 2006, “an action may only be brought by a association against a decision concerning to the occupation or use of land where the articles of association of said group were filed with the prefecture prior to displaying the applicant’s request at the town hall”.

⁵⁰ CAA Nancy, 19 Dec. 2013, n° 12NC01893, ASPAS.

⁵¹ Conseil d’Etat, 30 March 2015, n° 375144.

3. Conclusions and suggestions to improve

It can be seen from the picture painted above that environmental damage (or ecological damage) is not, properly speaking, covered by French law. Only the 2008 Law, which transposes Directive 2004/35 on liability, defines damage to the environment. However, its scope is too limited and the conditions for its application too complex for it to be implemented effectively.

It is therefore the traditional foundations of civil liability that serve in remedying environmental damage, at the request of the associations concerned (and often further to a criminal offence), in actions in respect of moral damage and, particularly since the *Erika* case, doing so independently. Such damage is gradually being accepted as a collective and objective form of damage.

However, it is imperative that the legislature take steps to set down a stable definition for ecological damage, together with the conditions and modalities for remedying the same.

- Proposals relating to ecological damage

► In 2005, the "Catala" draft bill advocated the introduction of collective damage into the Civil Code, particularly to allow remedies for ecological damage. Article 1343 of the Code was to read as follows: "Shall be remedied any certain damage consisting in harm to a lawful, pecuniary or non-pecuniary, individual or collective interest"⁵².

► In May 2012, a proposal put forward by Senator Retailleau was tabled before the Senate. Its aim was to expressly include the concept of "ecological damage" in the Civil Code, by inserting a Title IV *ter*, "Of liability for damage to the environment", and two new articles:

Art. 1386-19. — Any person who, by their negligence, causes damage to the environment shall be bound to remedy the same.

Art. 1386-20. — Damage to the environment shall be remedied primarily in kind. »

This proposal was amended then adopted unanimously by the Senate on 16 May 2013⁵³, in a sense that was undoubtedly more in line with existing case law and more favourable to the remedying of ecological damage.

It was then proposed that, under Title IV, the concept of "damage" be replaced with the broader notion of "harm to the environment". Above all, the concept of negligence was abandoned in favour of the following wording:

"Any person who causes damage to the environment shall be bound to remedy the same". This new legislation therefore sets down a general principle of objective liability, detached from the concept of negligence, and giving concrete expression to the "polluter pays" principle (enshrined under Article 4 of the constitutional Charter for the Environment) in the sphere of civil law.

As for Article 1386-20 on remedies, this was enhanced by the following paragraph:

⁵² Avant-projet de réforme du droit des obligations et de la prescription, P. Catala (dir.) : Doc. fr. 2006.

⁵³ Cf. Rapport n° 519 fait au nom de la commission des lois (...), rapport de M. Alain Lanziani.

Where it is not possible to remedy the damage in kind, the remedy shall take the form of financial compensation paid to the State or a body appointed by the State and responsible, under the conditions set forth in an Order of the Conseil d'État, for environmental protection.

Another article provides for compensation in the event of expenditure incurred before the damage occurred:

"Art. 1386-21. — Expenditure incurred to prevent the occurrence of damage, the worsening of such damage, or to reduce the consequences of the same, may give rise to the payment of damages where such expenditure has been usefully incurred".

However, the Retailleau proposal was not put before the National Assembly and was therefore abandoned.

► On 17 September 2013, a new report was submitted to the Minister of Justice⁵⁴, who then announced that proposals would be tabled by the end of 2014. At the date of writing, the law has yet to be discussed.

The "Jégouzo" Report sets out ten proposals to effectively introduce remedies for ecological damage into civil law. Insofar as the proposed law has yet to be adopted, we will examine the majority of those proposals, which respond to the current issues and serve to compensate for the inadequacies of existing laws.

→ The definition of "ecological damage" and the creation of a remedial scheme in the Civil Code:

Ecological damage is that which "results from unusual harm to the elements and functions of ecosystems, together with the benefits of the environment to human beings", explicitly excluding individual damage and certain collective forms of damage (covered by Article L. 142-1), which are remedied in accordance with modalities under ordinary law.

Article 1386-19: "Independently from damage remedied in accordance with modalities under ordinary law, shall be remedied any ecological damage resulting from unusual harm to the elements and functions of ecosystems, together with the collective benefits drawn by human beings from the environment".

For the purposes of establishing the various heads of damage mentioned in the preceding paragraph, reference shall be made to the nomenclature laid down by decree"⁵⁵.

This definition is close to that laid down by the court in *Erika*.

The Report proposes that ecological damage be qualified, by rendering remedies subject to the existence of "unusual harm", the court being familiar with that concept.

This threshold of "unusual harm" is undoubtedly preferable to that of "gravity" set down in Directive 2004/35. It is a slight departure from the "substantial" harm set down by the court in *Erika*. The latter

⁵⁴ Rapport « Pour la réparation du préjudice écologique », (groupe de travail dirigé par le Professeur Yves Jégouzo). See www.justice.gouv.fr.

⁵⁵ About the nomenclature of the ecological damages, see *infra*.

expression is nevertheless our preference, as it strikes us as more objective and, above all, less random than “unusualness”.

→ Strengthening the prevention of environmental damage:

Article 1386-20: "Expenditure incurred to prevent the occurrence of damage, the worsening of such damage, or to reduce the consequences of the same, may give rise to the payment of damages where such expenditure has been usefully incurred”.

Article 1386-21: "Independently of remedies for damage potentially suffered, the court may order/prescribe the appropriate measures to prevent or halt the unlawful disturbance to which the environment is exposed”.

Here are the elements of the Retailleau proposals, with the addition of new judicial powers explicitly enshrined for the purposes of dealing with environmental matters.

→ As regards parties bringing actions, the Report suggests that much greater scope be given for bringing remedial actions in respect of ecological damage:

"Without prejudice to procedures instituted under Articles L. 160-1 and subsequent of the Environmental Code⁵⁶, remedial actions in respect of ecological damage covered by Article 1386-19 shall be open to the State , the Public Prosecutor’s Office, the *Haute autorité environnementale* (High Authority for the Environment) [or the *Fonds de réparation environnementale*], local authorities and groups whose territory is concerned, public establishments, foundations and associations, the purpose of which is the protection of nature and the environment”.

→ At the same time, the Report proposes the creation of a *Haute autorité environnementale* (High Authority for the Environment) as a guarantor of remedies. This could be an independent administrative authority, bringing together existing entities and endowed with the appropriate expertise. More generally, it would monitor observance of the principles contained in the Charter for the Environment.

→ Specific limitation rules are also proposed in relation to ecological damage, the limitation period for civil liability actions being ten years "as of the date on which the party bringing the action became aware or ought to have become aware of the manifestation of the damage caused to the environment”. The working party thus gives preference to the manifestation of damage as the starting point for the timeframe rather than the event giving rise to the damage, which is favourable to environmental protection (as pollution may often be revealed after the event giving rise to it).

→ Like the Retailleau proposals, the Report recommends the enshrinement of the principle of remedies in kind for ecological damage. The former proposals are, however, more detailed:

Article 1386-22: "The remedies under Article 1386-19 are to be effected primarily in kind, by means of primary, complementary and, where applicable, compensatory measures.

In the event of the impossibility, inadequacy or financially unacceptable cost of such remedies, the court shall award damages to be allocated to environmental protection. Alternatively, said damages shall be allocated to the *Fonds de réparation environnementale* [or to the *Haute autorité environnementale*] exclusively for environmental remedial purposes”.

⁵⁶ It means the procedures provided by the Law of 2008 on Environmental Liability.

This reference is important because, while the Court of Cassation has constantly accepted the judge's freedom to choose between a remedy in kind or a monetary remedy⁵⁷, in practice, the judge gives precedence to an award of damages in the majority of cases.

However, here is an example of the remedying in kind of environmental damage:

The Court of Appeal at Rennes, on 5 July 1995, ordered the reinstatement of reforestation areas destroyed unlawfully, on pain of a periodic penalty payment per day's delay. The trial judge asserted that "the rehabilitation of the area is the remedy to be favoured, specifically in environmental matters"⁵⁸.

→ The creation of an environmental remediation fund is proposed, so as to allow any damages awarded to be allocated to the remedying of environmental damage.

Currently, the principle applied is that of the free disposal of any damages awarded, for instance, to environmental protection associations.

→ The enshrinement of a civil fine, deterring potential perpetrators of damage to the environment, may in part serve to generate the proceeds for such a fund.

→ The Report also recommends specialist courts of first instance and of appeal in environmental liability matters.

It should be noted that, in France, judges receive little or no training in environmental issues.

→ In the same vein, the Report also proposes that the right conditions be created for specialist independent expertise in environmental matters. To this end, the Report rather opportunely suggests that a list of experts approved by the Ministry of Justice and the Ministry for the Environment be established.

Thus, all the elements necessary to the creation of a genuine civil liability scheme in ecological damage matters, open to associations, are available. It now falls to political leaders to take up and translate these into law.

- Improving the remedies for ecological damage: the "eco-nomenclature"

Current case law shows the variability of the sums awarded to associations (in damages), as well as their relative inadequacy. The sole exception concerns cases involving degassing at sea, where the courts have proved more generous (the sums awarded ranging from €20,000 to €100,000).

In the *Erika* case, record-breaking sums were awarded. The defendants were jointly and severally ordered to pay €192 million to 70 victims, on top of €184 million distributed by FIPOL, and €200 million paid by Total to restore the pumps and pump out the wreck's tanks. For the first time, the *Ligue de protection des oiseaux* (Bird Protection League) was awarded a sum of €75 per bird killed. Up until then, it had only been able to claim the expenses it had incurred in cleaning and treating birds. This was the first time that a court had awarded damages to the association in respect of dead

⁵⁷ *Cour de cassation, 2^e chambre civile, 29 June 1961.*

⁵⁸ N° 95-01694.

birds that were equivalent to the necessary costs permitting the nesting and breeding of replacement birds.

In order to improve the remedies available for different forms of damage, an "eco-nomenclature" was developed⁵⁹ by two university researchers and is now used as a guide for judges. This nomenclature is part of the improvements brought to the existing legal framework; moreover, the Jégouzo Report (above) proposes that the Civil Code make explicit reference to the same.

We will briefly discuss the different aspects of the nomenclature. It distinguishes, first of all, objective damage from subjective damage. Objective damage is damage caused directly to the environment, while subjective damage is that caused to humans via the environment.

NB: The same distinction had already been made in a decision handed down by the *tribunal de grande instance* (regional court) at Tours on 24 July 2008. The case revolved around the discharge of washing residues from chemical containers into a waterway, causing the deaths of thousands of fish. The court ruled that it was appropriate to take into consideration not only the "objective elements" such as fish mortality, but also a "more subjective dimension, qui relates to a nostalgia for landscapes and fishing, the site's original beauty, the country's soul, the history of the people there and what some philosophers and scientists have dubbed the memory of water"⁶⁰.

Damage caused to the environment is "all harm caused to ecosystems in their composition, structures and /or functions. These forms of damage manifest themselves in harm to the elements and/or functions of ecosystems, beyond and independently of their repercussions on human interests". This therefore defines the harm caused to land and its functions, harm caused to the air or atmosphere and their functions; harm caused to water, aquatic environments and their functions ; harm caused to species and their functions.

Damage caused to humans is "all collective and individual damage resulting for humans from environmental damage of the imminent threat of such damage".

The nomenclature then distinguishes collective damage from individual damage. Collective damage includes harm to "ecological services", together with harm to the "task of protecting the environment" (which directly concerns environmental protection associations).

As for individual damage, this includes financial damage resulting from environmental damage, moral damage resulting from such damage, together with personal injury.

In addition to the "Jégouzo" Report submitted to the Ministry of Justice, the nomenclature is a valuable complement to those elements that are essential to the proper understanding and effective remedying of environmental damage, whilst also establishing benchmarks for the claims of environmental protection associations.

⁵⁹ L. Neyret et G.J. Martin (dir.), *Nomenclature des préjudices environnementaux*, LGDJ, 2012.

⁶⁰ N° 1747D.

B. ITALY

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1. The Protection of the Environment Under the Italian Legal System: General Introduction

The Italian Constitution, adopted back in 1948, does not contain an explicit provision protecting the environment even though some relevant foundations can be found in Art. 9 dealing with the protection of the “natural landscape and the historical and artistic heritage”; in Art. 32 on the protection of “health as a fundamental right of the individual and as a collective interest” and in Art. 44 on the “reasonable utilization of the soil”.

The Constitution contains an explicit provision on access to justice, although not referred to environmental matters. Art. 24 provides that “everyone is entitled to take judicial action to protect his or her individual rights and legitimate interests. The right of defense is inviolable at every stage and level of the proceeding”.

Outside the provisions contained in the Constitution, it has to be noted that the protection of the environment, including its judicial protection and the powers given to environmental associations, is a relatively recent concern that is mirrored in quite numerous pieces of legislation and legal sources.

One of the most relevant ones is Law 349/1986 that established the Ministry of the Environment and that adopted rules on the environmental damage and on the powers of the environmental associations (hereinafter, “Law 349/1986”). This piece of legislation has been affected by major changes, as it will be explained further below. During the same years the Constitutional Court was describing the environment as a “public interest of primary constitutional value” (e.g. judgment n. 151 of 1986). These statements were later reiterated and further developed by the Constitutional Court that considered the environment as “a fundamental personal good” (judgment n. 378 of 2007)¹.

Another, and more recent, fundamental piece of legislation on the matter is Legislative Decree 152/2006, as amended, entitled “Rules on the environment” that constitutes the first tentative to codify and systematize the legislation in environmental matters (hereinafter, “the environmental code”). The act is divided into six sections, the first one laying down some general principles mainly dealing with the division of powers between central State and the Regions (the protection of the environment is listed by the Constitution among the State exclusive competence under Art. 117.2.s); the second dealing with strategic environmental assessment, environmental impact assessment, and Integrated Pollution Prevention Control procedures; the third section containing rules concerning soil preservation, fight against desertification, water pollution and management of water resources; the fourth regulating waste collection and disposal, and clean-up of polluted sites; the fifth focusing on measures against air pollution and measures to reduce harmful emissions and the sixth, which has been amended several times and derives from the transposition of the provisions contained in the environmental liability Directive 2005/35/CE, concerning actions in case of environmental damage, including the role played by environmental associations.

Furthermore, it has also to be mentioned that the Italian Parliament is currently discussing a

¹ For the role of the Constitutional Court in the Italian legal system see further below.

legislative proposal for a set of crimes against the environment to be introduced in the criminal code as well as a series of administrative offences and sanctions to be introduced in the environmental code². Among the environmental crimes under discussion there is “environmental pollution” (*inquinamento ambientale*); “death or injuries as a consequence of environmental pollution” (*morte o lesioni come conseguenza del delitto di inquinamento ambientale*); “environmental disaster” (*disastro ambientale*); as well as a general crime called “criminal offence against the environment committed with negligence” (*delitti colposi contro l’ambiente*). This proposal is important because in the area of protection of the environment through criminal law, in presence of criminal law cases concerning the environment, it would be possible to apply the above mentioned environmental provisions instead of the general rules (that are not dedicated specifically to environmental matters) contained in the criminal code. By way of example, the application of the new provision on environmental pollution would supersede the utilisation of the more general provision on “collapse of buildings or other disasters committed with intention”, generally referred as to “unnamed disaster”, contained in Art. 434 of the Criminal Code³.

Finally, along with the above-mentioned major pieces of legislation, the protection of the environment is also granted by a series of instruments regulating specific aspects of the environment as well as by many regional laws and regulations⁴.

2. System for Decision Making and Administrative Appeals (Non-Judicial Procedures)

The Italian legal system provides for the following non-judicial procedures that can be also applied in environmental matters (*ricorsi amministrativi* – Decree of the President of the Republic 1199/1971):

- the *typical hierarchical appeal*: submitted to the organ of the Public Administration (PA) that is superior to the one that adopted the decision;
- the *atypical hierarchical appeal*: submitted to an organ of the PA that is different from the one that adopted the decision, in absence of a hierarchical relationship;
- the *opposition appeal*: submitted to the same organ of the PA that adopted the decision.

These non-judicial procedures review not only the legality, but also the merits – the appropriateness – of the decision and they are not a precondition to the judicial administrative appeal. On the other hand, these procedures do not preclude the possibility to go before the courts (see further below the role of courts) in case the PA dismissed the appeal.

Furthermore, the system of non-judicial procedures provides for an extraordinary and residual remedy, so-called *Appeal before the President of the Republic*, through which only the legality (not

² At the time of writing (April 2015) the Legislative proposal N. 342-957-1814-B has been modified by the Senate and sent to the Parliamentary Commission for further reading on 5 March 2015. The latest text of the proposal is available at http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0028970.pdf. (accessed May 2015).

³ Art. 434 of the Criminal Code provides that “1. Anyone who commits an act intended to cause the collapse of a building or another disaster can be punished with imprisonment from one to five years if the act causes danger to public safety. 2. The punishment shall be imprisonment from three to twelve years if the collapse or the disaster occur”.

⁴ For a detailed and comprehensive enumeration of Italian *lex specialis* on the protection of the environment see A. Scarcella, “La normativa ambientale” in AA.VV., *Manuale Ambiente* (IPSOA, 2014) .

the merits) of a definitive act of the PA can be challenged. Once this remedy is chosen, the judicial administrative appeal is precluded.

The ombudsperson is appointed only by the local administrations (Regions, Provinces and Municipalities) as there is no national ombudsman. His or her main tasks consist in the collection of the complaints of the citizens regarding the activity of the PA and in providing for remedies against the denial of access to administrative acts.

Another important role in environmental matters is played by the National Superior Institute for Environmental Protection and Research (*ISPRA*), which is a public body subject to the vigilance of the Ministry of Environment (MOE), together with the Regional Agencies for Environmental Protection (*ARPA*) and the Provincial Agencies for Environmental Protection (*APPA*), whose main activities are:

- environmental research and monitoring (e.g. of coasts, soil, watercourses, pollution meteorology);
- providing technical support for the environmental impact assessments;
- surveying the territorial impact of human activities by conducting technical inspections.

Finally, the national police forces (that have also a specialized section of maritime police), the local police forces, the specialized section of *Carabinieri* for the environmental protection, the forest guards and the customs officials have wide powers of inspections to ensure the compliance with the environmental law provisions. Should these authorities find a breach of the environmental legislations or a lack of permits requirements, they are entitled to:

- apply administrative fines;
- suspend the permits;
- report the violation to the public prosecutor.

3. Judicial Protection of the Environment

Courts play a major role in terms of judicial protection of the environment. The Italian legal system does not provide for specific judicial bodies or for special judicial procedures in environmental matters. These are first of all dealt with by the administrative jurisdiction that follows the general rules of the administrative procedure. The administrative jurisdiction is constituted of the Regional Administrative Tribunals (*TAR*), on first instance; and the Council of State (*Consiglio di Stato*) on second instance.

The administrative jurisdiction has general competence over the legitimacy of acts issued by the PA that allegedly infringed upon “legitimate interests” (i.e. a violation of an individual’s interest caused by a decision of the PA). In this case the court can order the cassation of an administrative decision that has been found invalid due to lack of competence; breach of the law; abuse of power. Furthermore, the administrative jurisdiction has a residual exclusive competence over some matters (Art. 133 of Legislative decree 104/2010, as amended – so-called Law on the administrative proceeding – *Codice del processo amministrativo*), for example:

- access to administrative documents;
- decisions of the PA regarding energy production;
- management of waste cycle;
- decisions adopted in violation of environmental damage regulations.

Next to the function of the administrative jurisdiction for the challenging of unlawful administrative decisions there is the role played by the civil and criminal courts (ordinary jurisdiction). The ordinary jurisdiction is administered by the following bodies (the Constitutional Court is not part of the judiciary even if its functions are substantially judiciary):

- Judges of the Peace (*Giudice di pace*);
- Trial Courts;
- Court of Assize (*Corte di Assise*);
- Juvenile Courts (*Tribunale per i minorenni*);
- Courts of Appeal;
- Supreme Court of Cassation.

As it will be specified further below, actions to claim compensation for environmental damages that have been caused through intentional behaviour or negligence can be brought before civil or criminal courts.

These actions can be brought under Art. 2043 of the Civil Code before the civil judge and under Art. 185.2 of the Criminal Code before criminal courts, respectively. As far as the latter is concerned, only the public prosecutor has the power – which is also an obligation – to initiate criminal proceedings (Art. 112 of the Constitution), but at the same time other public and private parties may take part into the judicial proceeding for the recovery of the environmental damage, as it will be explained in the following paragraphs.

4. The Procedures for the Recovery of the Environmental Damage and the Role Played by the Environmental Associations

Section six of the environmental code provides that the action in order to claim compensation for the damages caused to the environment is entirely in the hands of the MOE, acting mainly through the competent *Direzione Generale*⁵ and the other competent offices⁶.

As it will be explained further below only the MOE, acting in the public interest, is entitled to claim compensation for the environmental damage as such, whereas the environmental associations can only claim compensation for the material and non-material damages that they have directly suffered as a consequence of the environmental damage.

In fact, the environmental code sets forth a series of actions that the MOE may (this wording, which is

⁵ *Direzione generale per lo sviluppo sostenibile, per il danno ambientale e per i rapporti con l'Unione europea e gli organismi internazionali* <http://www.minambiente.it/pagina/direzione-generale-degli-affari-general-e-del-personale-agp> (accessed April 2015).

⁶ See, in general, L. Prati, *Il danno ambientale e la bonifica dei siti inquinati* (Kluwer, 2008); P. Dell'Anno-E. Picozza, *Trattato di diritto dell'Ambiente* (Cedam, 2012) and A. Scarcella, *supra* note 5.

a non binding obligation, derives from Directive 2005/35/CE) undertake to prevent and to mitigate the environmental damage (Arts. 304-306).

In practice the MOE can order the wrongdoer to take preventive measures when there is a risk of environmental damage and also order to restore the environment to the previous status when the damage has occurred. More precisely, when an environmental damage has occurred the operator (the polluter) has an obligation to take the necessary recovery measures (see Arts. 239-250 and Arts. 304-308 of the environmental code). If the operator does not abide by its obligation, the MOE can order, with an ordinance (*ordinanza*), the accomplishment of the necessary recovery measures within a peremptory time limit (Art. 313.1). If the operator does not respect the obligation provided for in the ordinance, the MOE may undertake itself the recovery measures and can order the polluter, with an ordinance, to pay the related costs (Art. 313.2).

In alternative to the administrative instruments described above (Art. 315), the MOE, acting in the public interest, is entitled to claim compensation for the environmental damage by exercising the civil action in criminal proceedings (art. 311.1). Provided that in Italy only the public prosecutor can start a criminal proceeding against the alleged perpetrator of an environmental crime, such as, for example, an “unnamed disaster”, the MOE can participate to this proceeding and ask the judge to condemn the wrongdoer (polluter) to repair “in kind” the environmental damage or, if necessary (when it is impossible to repair the damage) to compensate it in favour of the State (Art. 311.1 of the environmental code). In this role the MOE acts in the public interest for the recovery of the environmental damage considered as “a public good and as a fundamental right with constitutional status”⁷. The environment is conceived in a broad sense as including lands use, richness of natural resources, aesthetic and cultural value of the landscape, condition for a healthy living⁸.

The awarded damages are in favour of the State and it is the duty of the Ministry of Economics to redirect (by Decree) the money to the benefit of the Ministry of the Environment so that the latter can utilise it for the needed preventive and recovery measures as provided under the environmental liability Directive (Art. 317.5 code of the environment). Figures relating to the amounts of these compensations and their actual utilisation are not publicly available.

Against this background, the role played by the environmental associations has to be addressed. This analysis will first start with the definition of environmental damage.

4.1. The Notion of Environmental Damage

The notion of environmental damage was first contained in Law 349/1986. The environmental damage was described as any fact in contravention of a legal norm, which compromises the state of the environment through its partial, or whole, modification, deterioration or destruction (Art. 18.1). This provision was then repealed and substituted by the environmental code, which now, as far as the objective element is concerned, defines environmental damage as “any significant and measurable, direct or indirect, deterioration of a natural resource or of the utility deriving therefrom” (Art. 300) with the substantial reproduction of the definition contained in the 2004/35/CE Directive. In fact, art.

⁷ See, *inter alia*, Court of Cassation, Section III, 21 June 2011, n. 34761.

⁸ See e.g. Council of State, Section IV, 19 February 1979, n. 1463 and Court of Cassation, United Sections, 1979, n. 1463 and Constitutional Court, 1986, n. 184.

300 of the environmental code describes the environmental damage as the deterioration, compared to the original conditions, caused to:

- species and natural habitat protected under national and European laws (Art. 300.2, lett. a);
- internal waters (Art. 300.2, lett. b);
- coastal and territorial waters (Art. 300.2, lett. c);
- the soil, through any contamination that would create a significant risk, also indirectly, to human health (Art. 300.2, lett. d).

As far as the subjective element of the environmental damage is concerned, Art. 311.2 of the environmental code requires that the wrongdoer acted with intentional or negligent behaviour⁹.

It is worth mentioning that Art. 303 of the environmental code enumerates a long list of exclusions, i.e. cases of environmental harm that will not be considered environmental damage. It is interesting to highlight, by way of example, that the environmental code excludes cases of harm caused by armed conflicts (art. 303.1, lett. a.1) and by natural disaster (art. 303.1, lett. a.2) and also cases in which the environmental harm, or the risk thereof, is caused by diffuse pollution and it is not possible to ascertain the causal nexus between the harm and the activities of each operators (art. 303.1 lett. h).

The investigations on the environmental damages and the calculations of the costs for the recovery measures are usually carried out by *ISPRA*¹⁰.

As to the quantification of costs for preventive and recovery measures, Art. 311.3 of the environmental code assigns to a decree to be issued by the MOE (not adopted yet) the identification of these criteria. The annexes to Section 6 of the environmental code provide for some guidance as to these criteria, such as the preference that has to be accorded to the restoration of the environment to the previous status, when feasible, rather than compensation.

As anticipated, environmental associations are not entitled to claim compensation for the environmental damage in the public interest. However, they can act for the recovery of material and non-material damages suffered directly as a consequence of the environmental damage. These include, for example, the costs of raising public awareness on the environmental damage (material damage) or the discredit deriving from the failure to pursue the objectives of environmental protection expressed by the statute of the association itself (non-material/moral damage)¹¹. In particular, the moral damage is recognised by the majority of case law as the damage caused to the partnership (*sodalizio*) of the association¹². The amount of the compensation for the moral damage is generally determined by the judge in light of Art. 1226 of the Civil Code, which provides that a damage that can

⁹ See, for example, *TAR Trieste, Friuli Venezia Giulia*, Section I, 13 January 2011, n. 6. See L. Villani, “Il danno ambientale e le recenti modifiche del Codice dell’Ambiente nel sistema della responsabilità civile”, 10 *Responsabilità Civile e Previdenza* (2008) 2173 ff; U. Salnitro, “Il risarcimento del danno all’ambiente: un confronto tra vecchia e nuova disciplina”, 6 *Rivista giuridica dell’ambiente* (2008) 939 ff.; S. Bolognini, “La natura non patrimoniale del danno ambientale e il problema della legittimazione attiva”, 9 *Responsabilità civile e Previdenza* (2009) 1841 ff.

¹⁰ More information available at: <http://www.isprambiente.gov.it/it>. (accessed May 2015).

¹¹ Court of Cassation (Criminal) Section III, 11 February 2010, n. 14828; Court of Cassation (Criminal), Section III, 21 June 2011, n. 34761; Court of Cassation (Criminal), Section III, 17 January 2012, n. 19439.

¹² See, *inter alia*, Court of Cassation (Criminal), Section III, 11 February 2010, n. 14828.

not be proved in its precise amount is compensated at the discretion of the court (*in via equitativa*).

4.2. Actions Taken by Environmental Associations

In order to be entitled to enhance a series of actions for the protection of the environment, including participating in court proceedings to claim damages, the environmental associations have to be “officially recognised” (Art. 13 of Law 349/1986).

For being recognised environmental associations must be identified by a decree of the Ministry of the Environment on the basis of the statutory goals of the associations so long as they can demonstrate a democratic organization at the internal level, continuity of action as well as its external relevance. In addition, their activity must be nation-wide or based on at least five regions (out of twenty)¹³.

It has been highlighted that the geographical requirement (nation-wide activity or reaching at least five regions) could discriminate against local associations when they ask to be granted legal standing in court. However, this legislative criterion is mitigated by judicial practice. In fact, the majority and more recent Italian case-law, especially in the context of the administrative jurisdiction, tends to confer legal standing not only to the “officially” recognized associations, but also, on a case-by-case basis, upon the representatives of the local associations, not acting on behalf of the national organization¹⁴. The environmental associations are thus granted standing by the judge upon recognition of the following cumulative criteria: that the association pursues by statute the objective of the protection of the environment in a not occasional manner; that the association is “adequately representative and stable” and that “it carries out its activity in the area where the environmental damage has occurred”, once a concrete and stable connection with the territory is established¹⁵.

A very recent example is constituted by the starting of the criminal proceeding against the executives of the ILVA steel works in *Taranto* (Region of *Puglia*) where heavy pollution of air, soil, surface and ground water in the vicinity of the steel plant were detected. The judge of the first preliminary hearing (GUP) rendered in February 2015 pronounced, among other things, on the preliminary admissibility of the claims put forward by the environmental associations. Among these, *WWF Italia*, *Legambiente Italia* and *Legambiente Puglia*, *Italia Nostra* and *Peacelink* exercised the civil action for damages. For the granting of legal standing it was considered relevant that the associations were officially

¹³ The official list of environmental association recognised by the MOE can be found at <http://www.minambiente.it/pagina/elenco-delle-associazioni-di-protezione-ambientale-riconosciute> (accessed April 2015).

¹⁴ See, among others, E. Fasoli, “Legal Standing of NGOs in Environmental Disputes in Europe”, in N. Boschiero, T. Scovazzi (eds.), *International Courts and the Development of International Law, Essays in Honor of T. Treves* (2013) 337 ff. and F. Goisis, “Legittimazione al ricorso delle associazioni ambientali ed obblighi discendenti dalla Convenzione di Aarhus e dall’ordinamento dell’ Unione Europea”, 1 *Diritto processuale amministrativo* (2012) 101 ff.

¹⁵ “A condizione che svolgano la propria attività in un’area di afferenza ricollegabile alla zona in cui è situato il bene a fruizione collettiva che si assume leso”. See Council of State, Section III, 15 February 2012, n. 784; Council of State, Section VI, 23 December 2013, n. 6223; Council of State, Section IV, 21 August, 2013, n. 4233; *TAR Genova, Liguria*, Section I, 21 November 2013, n. 1404; Council of State, Section IV, 19 June 2014, n. 3111. By contrast, in the past courts were adopting a more restrictive approach. E.g. Council of State, Section VI, 16 July 1990, n. 728; Council of State, Section VI, 14 October 1992, n. 756; Council of State, Section IV, 14 April 2006, n. 2151.

recognised by the MOE, that they clearly pursued objectives of environmental protection and that they were very active in the territory of Taranto¹⁶.

Against this background, in the context of the actions taken by the MOE to prevent and mitigate the environmental damage (see above) the “recognised” environmental associations (along with Regions, local authorities, citizens, legal entities) are entitled to file a request for action. The associations can submit information and complaints asking the MOE to take action regarding an alleged environmental damage. It could be said that the associations in this case collaborate with the MOE, although this could be also seen as a very limited role left to the associations. This request is made before the competent administrative office (*Prefettura*) (Art. 309.1 and 2 of the environmental code).

Furthermore, in case of inactivity (*silenzio inadempiamento*) of the MOE in adopting preventive or mitigating measures environmental associations are also entitled to go before the administrative judge in order to appeal this inactivity and to ask for the compensation of the injury caused by the delay (Art. 310.1 of the environmental code). This venue is hardly ever pursued in practice.

Alternatively, they can pursue the administrative procedure of the appeal to the President of the Republic (*Ricorso Straordinario al Presidente della Repubblica*) against the inactivity of the MOE (Art. 310.4 of the environmental code – this remedy checks only the legality, not the merits, of this inactivity). This venue has hardly ever been pursued in practice.

In a wider context, outside the actions taken by the MOE to prevent and mitigate the environmental damage, the environmental associations play also a role in proceedings for the recovery of the environmental damage, as it will be explained in the following paragraph.

4.2.1. ...when Taking Part in Judicial Proceedings for the Recovery of Environmental Damages

The “centralisation” of the action in order to claim compensation for the damages caused to the environment in the hands of the MOE (see above) does not rule out the possibility that the environmental associations could act autonomously for the protection of their rights that are contextually compromised in the occurrence of the harm to the environment.

Law 349/1986 provides that environmental associations “may take part in judicial proceedings for the recovery of environmental damages” (Art. 18.5). The expression “judicial proceeding” potentially refers to both actions for damages brought before both the civil judge and actions for damages exercised in the context of criminal proceedings. As to the former, the environmental code, although not addressing directly the environmental associations, provides that, next to the legitimation of the MOE to exercise the civil action for the recovery of the environmental damage, still remains “the right of other subjects that have been injured in their health or in their properties by the environmental damage to take legal action against the wrongdoer” (Art 313.7). As to the latter, the Criminal code states that every criminal offence that has produced a material or non-material damage obliges the wrongdoer to compensate not only the victim but also “anyone that has suffered a damage form of the wrongdoer’s actions” (Art. 185.2 of the Criminal code).

¹⁶ See the decision of the GUP, 16 December 2014 at <http://www.interforum-ong.net/attachments/article/40/Ordinanza%2016%20dicembre%202014.pdf> (accessed April 2015).

It follows that the legislation allows the environmental associations to exercise the civil action before the civil judge or to take part in criminal proceedings by exercising the civil action in order to claim compensation for the damage suffered, although it has to be anticipated that in practice the action for damages before the civil judge is rarely pursued because of the high costs of the civil procedures (see further below) and because of their length¹⁷. For this reason the analysis will focus on the exercise of the civil action before criminal courts.

The majority of the case-law on the matter confirms that environmental associations can exercise the civil action in criminal proceedings in order to claim compensation for the damage suffered (a different jurisprudential trend on this matter will be described further below)¹⁸. As already anticipated, the MOE can act in the public interest (before the civil or criminal courts) to recover the environmental damage “as an interest of everyone”, whereas the environmental associations cannot claim compensation for this type of damage but only (like any other private individual) for the damages directly and individually suffered. Therefore, the environmental associations do not intervene in criminal proceedings to recovery the environmental damage as an interest of everyone¹⁹, as it happens with the action taken by the MOE, but they act “on their own behalf” (*iure proprio* - Art. 2043 of the Civil Code) for the protection of their own interests (Table 1). According to this view, when an environmental association is established and decides to pursue objectives of environmental protection, “the environment ceases to be an interest of everyone and becomes an interest of that association, so that an injury to the objectives expressed in its statute becomes an injury to the association itself”²⁰.

Table 1

Ministry of Environment	It can claim the reparation of environmental damages in the public interest
Environmental associations	They can only claim damages directly suffered in the context of the the harm to the environment

In light of this, the associations exercise legal action for the recovery of material as well as non-material damages. As to the former, the associations must demonstrate to have suffered damage to a personal property, such as an injury to the activities undertaken for the promotion of the territory where the interests protected by the criminal offence operate²¹. One could make the case, for example, of an activity harmful to the environment that has destroyed the premises of the association (material damage) that so decided to exercise the civil action in the context of the criminal proceeding (initiated by the public prosecutor) where the MOE is already participating to recover the environmental damage in the interest of the State. In these cases the contextual exercise of the civil action by the associations with the public action of the MOE before the criminal judge finds its justification in the need to avoid conflicting judgments. As far as the non-material damage is concerned, environmental

¹⁷ See *The 2014 EU Justice Scoreboard* (2014) 8 available at http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2014_en.pdf (accessed May 2015).

¹⁸ On this issues see, among others, N. Furin, E. Sbabo, “Intervention of Environmental Associations in Criminal Proceedings: Plaintiffs and no-Plaintiffs”, *7/8 Cassazione Penale* (2012) 2735 ff.

¹⁹ Court of Cassation, Section III, 25 January 2011.

²⁰ Court of Cassation, Section III, 11 February 2010, n. 14828.

²¹ Court of Cassation, Section III, 21 June 2011, n. 34761.

associations could claim damages for the injury (discredit) deriving from the failure to protect the environmental objectives expressed in their statutes²².

In judicial practice, in the context of the exercise of the civil action in criminal proceedings, the criminal judge, when pronouncing on the entitlement to damages, at the same time can “refer” the association before the civil judge for the assessment of the amount of damages to be awarded or, in alternative, establishes him/herself the amount of damages to be awarded when there is sufficient evidence (so-called *provvisoriale*) (Art. 539 of the Code of Criminal Procedure). It has to be specified, though, that these damages are enforceable only provisionally until the final confirmation as to their entitlement is rendered by the last instance judge.

4.2.2. Relevant Case-law

Among the case-law that upholds the above described position, one can certainly recall the asbestos judgment that has been rendered, on first instance, by the criminal court of Turin in February 2012 and, on second instance, by the Appeal Court of Turin in June 2013, with the final pronouncement of the Court of Cassation in November 2014²³. On that occasion, the two former executives of the fibre cement company Eternit (a steel plant based in *Piemonte* Region, but with branches also in other parts of Italy) were charged of intentional omissions of precautions for workers²⁴ and of unnamed disaster²⁵ and, on first instance, were convicted both of failing to comply with safety rules as a result of which thousands of Italians died from asbestos-related diseases and of causing permanent environmental disaster²⁶. On second instance, the Appeal Court of Turin found that the Swiss defendant, Stephan Schmidheiny, should have been prosecuted only for the second offence (given the prescription of the first one) and was sentenced to 18 years in jail²⁷. Finally, the Court of Cassation in November 2014 decided that the statute of limitations in the case against Schmidheiny had expired and therefore that the judgment already passed against him was therefore revoked²⁸. It is interesting for our purposes that on appeal, next to the sums awarded to individuals, Regions and Italian agencies²⁹, the court awarded sums also in favour of the environmental associations *WWF Italia* and *Legambiente*³⁰, although the appeal did not grant the temporary execution of them and the last instance finally revoked the judgment. However, it is important that the appeal court stated that, as a general rule, environmental associations are entitled to exercise the civil action in criminal proceedings. The appeal court also highlighted the requirements that they must have in order to be entitled to claim damages. First of all, the court noted that both *WWF* and *Legambiente* were officially recognized associations;

²² Court of Cassation, Section III, 17 January 2012, n. 19439.

²³ Criminal Court of Turin, 13 February 2012, n. 5219, Appeal Court of Turin, 3 June 2013, n. 5621 and Court of Cassation (Criminal), Section I, 19 November 2014, n. 7941.

²⁴ Art. 437.2 of Criminal Code.

²⁵ Art. 434.2 of Criminal Code.

²⁶ Usually, in this type of proceedings, the public prosecutors charge the defendants with manslaughter. The choice to charge them with the “intentional behaviour” (i.e. not “negligent conduct”), though not murder, derives from the need to highlight the social disvalue that rests behind this kind of conducts, where those who have the power to make the relevant and strategic choices decide to underestimate (therefore, to accept) the risk that a certain event happens.

²⁷ The other defendant, Louis de Cartier de Marchienne, died during the proceeding.

²⁸ Court of Cassation (Criminal), Section I, 19 November 2014, n. 7941.

²⁹ E.g. the Italian General Confederation of Labor (CGIL).

³⁰ *WWF* and *Legambiente* were initially awarded, respectively, of 70.000 and 100.000 euros.

secondly, that they clearly pursued objectives of environmental protection, such as the conservation of the ecosystems and the fight against pollution (in fact, these associations carry out research and analysis with regard to ecological, environmental, territorial and socio-economic problems and they promote the redevelopment of agricultural and industrial areas). Finally, the court highlighted that for both these associations there was strong evidence of their connection with the territory. As far as *WWF* was concerned, the court reported the requests submitted since 1999 to the competent Ministries of the Environment and Justice to reclaim the areas of the former Eternit plant in *Casale Monferrato*. With reference to *Legambiente*, the court highlighted that since 1998 the association was organizing events for raising public awareness on the risks of asbestos-related diseases and on the need to reclaim those areas. In light of this, the court of Turin stated that the environmental objectives of the associations had to be considered injured provided that the human and financial resources that had been employed to protect the environment had been nullified as a result of the criminal offence and, therefore, they were by law entitled to receive compensation. However, as already anticipated, the last instance court revoked the judgment.

The type of damage for which the environmental associations can ask for reparation is very well described also in a recent pronouncement of the Criminal Section of the Court of Cassation. In a judgment rendered in November 2014 the Court rejected the argument upheld by both the first and second instance's judges to the effect that the associations were potentially entitled to claim damages on behalf of the environment. More precisely, in the context of a criminal proceeding against the executives of a company that were engaged in the activity of illegal trafficking of waste in the area of *Rieti* (Region of *Lazio*), *Legambiente* claimed damages deriving from the pollution of the territory where the illegal activity took place. The appeal judge, although finding that in the specific case the association did not provide sufficient evidence of suffering an economically assessable damage deriving from the pollution, at the same time established that at least in principle this type of claim could have been brought. However, as anticipated, the last instance court reversed the previous judgments' and considered the civil claim put forward by the association illegitimate on the grounds that it could only claim the expenses incurred to pursue the objective of the protection of the environment³¹. It also confirmed that "only the MOE was entitled to exercise the civil action in judicial proceedings dealing with environmental criminal offences in order to claim the reparation of the environmental damage as a damage to the public interest to protect the environment"³².

In another interesting case the Court of Cassation dwelled upon this type of requests. In a case regarding the criminal charges of the legal representative of a company responsible of illegal dumping (without authorization) of rough fragments of stone coming from a construction site, the first instance criminal court (*Tribunale di Vicenza*) granted standing to exercise the civil action and awarded damages (600 euros) to *Legambiente Volontariato Veneto*. According to the Court's reasoning, the illegal dumping in contravention of the national legislation on waste management constitutes in itself a damage to the environmental associations that had set the protection of the environment as their

³¹ "Nocumenti suscettibili di valutazione economica in considerazione degli eventuali esborsi finanziari sostenuti dall'ente per l'espletamento dell'attività di tutela dell'ambiente".

³² Court of Cassation (Criminal), Section III, 5 November 2014, n. 6184. In the same vein, see Court of Cassation (Criminal), Section III, 11 November 2010, n. 14828. See also Court of Cassation (Criminal), Section III (hearing 29 November 2011), 12 January 2012, n. 633 where the Court reversed the decision of the first instance's judge to consider admissible the request put forward by *Legambiente, Comitato Regionale Puglia* to be awarded material and non-material damages caused by a "lesione del diritto collettivo all'ambiente salubre proprio della collettività di cui essa è ente esponenziale e dal relativo discredito alla sua sfera funzionale".

main objective. These types of activities in fact are harmful for those entities that are established for (and precisely aim at) pursuing the correct functioning of the legal system set up for reducing the pollution. For these reasons, the *Tribunale di Vicenza* concluded that the association was entitled to be awarded damages even if there was no evidence of a permanent pollution deriving from the material activity. However, the case was then referred to the Court of Cassation in order to challenge this pronouncement. The Court revoked the judgment and reiterated that as in the case at hand it was not possible to establish “direct and specific” damages suffered by the association, distinct from the harm to the environment as a public good, it was necessary to reverse the previous judgment and consider illegitimate the civil claim put forward by the association³³.

Finally, an additional example is constituted by a decision rendered by the first instance criminal court (*Tribunale di Brindisi*) in the context of a criminal proceeding against the individuals responsible for the prolonged dumping and storage of tons of coal in proximity of a thermal power plant in the Region of *Puglia*. The individuals did not adopt the necessary precautions to avoid the risks of spreading coal dust in the nearby lands used for agriculture and in the residential areas. After considering this activity as amounting to “environmental damage” under the environmental code, the Court dwelled upon the requests of damages put forward by the environmental associations. *Legambiente Comitato Regionale* and *Greenpeace* claimed that, because of the pollution, the associations’ image suffered damages deriving from the frustration of their statutory aim and that they also encountered expenses to inform the local communities about the risks of contamination. These requests were considered preliminary admissible by the Court. By contrast, the requests by *WWF* and *Italia Nostra* were considered preliminary inadmissible in so far as they only invoked the generic violation of the right to a healthy environment and not damages to personal goods of the association or expenses encountered³⁴. This judgment confirms once more that only “direct and specific” damages suffered by the associations are admitted in court.

It has to be noted, though, that there is also a less conspicuous number of case-law, with the support of some legal scholars³⁵ that still deny the possibility for environmental associations to exercise the civil action in criminal proceedings in order to claim compensation for the damages suffered. This jurisprudential trend relies on Art. 91 of the Code of Criminal Procedure that allows non-profit associations protecting the interests injured by the offence to exercise the same powers owed by the victim. According to these views the associations can intervene in criminal proceedings only upon the consent of (and exercising the same powers of) the victim. In substance, the associations could only give their support especially when particularly complex subjects matters are under consideration. According to this view, the associations show an interest in the assessment of the criminal charges towards the alleged perpetrator of the crime, but they cannot claim damages. Therefore, they could, for example, submit documents at every stage of the proceeding, ask for the taking of evidence or ask the public prosecutor to appeal the judgment. By way of example, an Italian non-profit organization

³³ Court of Cassation (Criminal), Section III, 17 January 2012, n. 19439. See also Court of Cassation (Criminal), Section III, 11 March 2009, n. 19883 and Court of Cassation (Criminal), Section III, 21 June 2011, n. 34761.

³⁴ Criminal Court of *Brindisi*, 14 January 2013, 1312.

³⁵ Court of Cassation (Criminal), Section III, 18 April 1994, n. 7275; Court of Cassation (Criminal), Section III, 1 March 1988, n. 5412; Court of Venice, ord. 10 October 2000. In legal doctrine see, among others, S. Cinelli, “Sulla legittimazione a costituirsi parte civile delle associazioni ambientaliste”, 7 *Cassazione Penale* (1995) 1934 ff.; P. Landi, *La tutela processuale dell’ambiente* (Cedam, 1991) 99 ff; F. Morlacchini, “Danno ambientale e costituzione di parte civile *iure proprio* delle associazioni ambientaliste: un passo indietro nella labirintica giurisprudenza della Corte di cassazione”, 5 *Cassazione Penale* (2004) 1714 ff.

(*Verdi Ambiente e Società Onlus*) brought an action before the Court of Cassation in order to obtain the annulment of a dismissal decree regarding a criminal proceeding (for illegal waste disposal activities) against persons unknown, pronounced by the investigating judge (*GIP, Tribunale di Foggia*). The environmental association appealed the decision to the Court of Cassation arguing that, since it believed to be entitled to participate in the procedure according to Art. 91 of the Code of Criminal Procedure, it had not been notified of the dismissal decree like it was done in favour of the victim. Finally the court stated that since the organization did not legitimately intervene in the criminal procedure in question, absent the consent of the victim person, *Verdi Ambiente e Società Onlus* was not entitled to the notification of the dismissal decree and consequently it dismissed the claim³⁶.

4.2.3. The Role of the Associations before the Entry into Force of the Environmental Code

The judicial action in order to claim compensation for the damages to the environment before the civil or the criminal judge has not always been “centralised” in the hands of the MOE. Before the entry into force of the environmental code, along with the MOE, also local authorities (Regions, Provinces and Municipalities) were entitled to exercise this action, provided that these entities were directly affected by the environmental damage (*enti territoriali sui quali incidano i beni oggetto del fatto lesivo*). It could be said that the MOE and the local authorities were co-entitled to claim compensation for the damages caused to the environment³⁷.

In this context, also recognised environmental associations used to play a role. In those cases where local authorities (Regions, Provinces and Municipalities), even though being affected by the environmental damages, did not claim compensation for it, the environmental associations could claim these damages on their behalf³⁸. This action was provided by Art. 9.3. of Legislative Decree 267/2000 that has been repealed by the environmental code. It has to be specified, though, that in case of successful judicial action brought by the environmental association these damages were awarded in favour of the local authority (on whose behalf they had acted), therefore, even under the former legislation the associations were not allowed to be granted damages in favour of the environment, i.e. in the public interest.

4.2.4. Costs of Procedures

The costs that environmental associations face when seeking access to justice in environmental matters are:

- the court fee (*contributo unificato*);
- the stamp duties;
- the lawyer fees;
- the expert fees (when needed).

³⁶ Court of Cassation, Section III, 14 November 2006, n. 554.

³⁷ See e.g. Court of Cassation (Criminal), Section III, 11 June 2004, n. 38748. For all the different views on the matter see L. Prati, *Il danno ambientale*, 99 ff.

³⁸ See e.g. Court of Cassation (Criminal), Section III, 24 March 2009, n. 19081.

The amount of the court fee is established by the Decree of the President of the Republic 115/2002, as amended. It varies depending on the type of proceeding and on the value of the dispute declared by the applicant.

- In the civil proceeding it goes from a minimum of € 43 to a maximum of € 1.686 (Art. 13);
- in the administrative proceeding, before TAR and the Council of State, it goes from a minimum of € 300 to a maximum of € 6.000 (Art. 13.6-bis);
- in the civil participation in criminal proceeding when the judge grants compensation it goes from a minimum of € 43 to a maximum of € 1.686 (Art. 12);
- in the administrative appeal before the President of the Republic it is € 650 (Art. 13.6-bis)

For the appeal judgment in civil proceedings the court fee is increased of 50%. For the judgment before the Court of Cassation the court fee follows the above-mentioned rules but is doubled (Art. 12.1-bis).

In some matters the law provides for the exemption from the court fee, considering the importance of the rights involved. By way of example, there is no court fee for access to information cases.

The Italian legal system applies the loser pays principle for the costs of procedures (Art. 91 of the Code of Civil Procedure and Art. 535 of the Code of Criminal Procedure). Nevertheless, the judge can limit the losing party's liability for costs when he/she finds that there are justified grounds to do so (Art. 92 of the Code of Civil Procedure and Art. 541 of the Code of Criminal Procedure).

The lawyer fees may vary considerably depending on the value and the nature of the dispute and the length and complexity of the inquiry phase. For example, an average of lawyer fees in the administrative proceeding on first instance can be € 5.730 (value of the dispute between € 5.200,01 and € 26.000,00), whereas an average of lawyer fees in the criminal proceeding on first instance can be of € 3.420 (Decree of the Ministry of Justice n. 55/2014 and Art. 13 of Law 247/2012, see in particular the tables annexed to the Decree).

Environmental associations can benefit from the activity of lawyers that work on a voluntary basis. In practice, lawyers are usually reimbursed of the expenses (e.g. travel costs), while they receive fees only when the other party is condemned by the judge to pay the legal expenses in application of the "loser pays principle".

As to the expert fees, it must be noted that in civil and administrative proceedings each part generally bears the costs of the expert they appoint (so called *CTP - consulente tecnico di parte*), whereas the costs of the expert appointed by the judge (so called *CTU- consulente tecnico d'ufficio*) may be anticipated by the parties to the dispute but eventually follow the "loser pays principle". As far as the expert fees in criminal proceedings are concerned, it has to be noted that the Public Prosecutor has the power to appoint experts under Art. 359 of the Code of Criminal Procedure. If the Prosecutor decides to do so, the State bears the related costs; whereas if the Prosecutor does not appoint an expert, the environmental associations that participate in the criminal proceeding are entitled to name their own experts, although in this case they have to bear the costs thereof.

Practitioners have highlighted that, in judicial practice, the costs related to the experts' fees may affect significantly the ability of environmental associations to bring their claim before the courts, especially

when the other party is able to afford high experts' fees to undertake complex studies and research.

In the Italian legal system the right to financial assistance for indigents is enshrined in the Constitution (Art. 24). The right to benefit from financial assistance is a fundamental right granted by the a specialised commission or by the judge on a case-by-case assessment. The financial assistance for indigents may be of some help also for environmental associations. The mechanism is regulated by the Decree of the President of the Republic 115/2002, and its subsequent amendments³⁹. The legal aid offered by the State (*Patrocinio a spese dello Stato*) can be requested by:

- Italian citizens;
- foreign nationals that reside legally on the Italian territory;
- stateless persons;
- non-profit organizations.

The above mentioned subjects can request the legal aid offered by the State when they have an annual income less than € 11.369,24 (this threshold is periodically updated by a decree of the Ministry of Justice according to the inflation increase). It must be noted that, although Art. 119 of the Decree of the President of the Republic 115/2002 extends the right to legal aid offered by the State also to non-profit organizations, the law does not provide for a different threshold of annual income that distinguish natural persons from non-profit organisations. As a consequence, environmental associations often happen to have an annual income above the allowed threshold and are excluded from the legal aid offered by the State.

5. Evaluation and Suggestions for Improvement

In Italy only the MOE, acting in the public interest, is entitled to claim compensation for the environmental damage as such, whereas the environmental associations can only claim compensation for the material and non-material damages that they have directly suffered as a consequence of the environmental damage. The associations can only submit information and complaints asking the MOE to take action regarding an alleged environmental damage. It could be said that in this context only a minor role is left to the associations and that they “collaborate” with the MOE.

In addition, in case of inactivity of the MOE in adopting preventive or mitigating measures in relation to the environmental damage the associations are entitled to go before the administrative judge in order to appeal this inactivity and ask for the compensation of the injury caused by the delay. It must be noted that this venue has hardly ever been pursued in practice and it is also questionable that the rationale of such action is not to oblige the MOE to take action in order to protect the environment but only to compensate for not acting.

³⁹ In practice, in civil and administrative proceedings, if the request of legal aid is upheld, the applicant can choose a lawyer from the list held by the bar association and the court fee, as well as the lawyer fees, are paid by the State. If the request is rejected, the applicant can renew it directly before the judge competent to hear the case. In criminal proceedings the request must be submitted to the judge competent to hear the case. The judge upholds or dismisses the request within 10 days through a motivated decree that must be communicated to the applicant. If the request is upheld the applicant can choose a lawyer from the list held by the bar association and the court fee, as well as the lawyer fees, are paid by the State. If the request is rejected, the applicant can appeal the decision before the President of the trial court or of the court of appeal that issued the decree.

The role of the environmental associations in relation to the action for environmental damages is usually played by bringing a civil action in criminal proceedings where they act for the reparation of the material and non-material damages suffered directly as a consequence of the environmental damage that has occurred. These include, for example, the costs of raising public awareness on the environmental damage (material damage) or the discredit deriving from the failure to pursue the objectives of environmental protection expressed by the statute of the association itself (non-material damage).

Before the entry into force of the environmental code in 2006 the environmental associations were entitled to claim environmental damages on behalf of local authorities (Regions, Provinces and Municipalities) when they did not take action although being affected by the environmental damage. It has to be noted, though, that in case of successful judicial action these damages were awarded in favour of the local authority on whose behalf they had acted. Therefore, even under the former legislation, the associations could not be granted damages in favour of the environment, i.e. in the public interest. With the entry into force of the environmental code experts have highlighted that the “centralisation” of the action for damages in favour of the environment in the hands of the MOE has certainly enhanced a more coordinated and consistent action (or reaction). At the same time, though, this has reduced the role of important “players”, such as the local authorities that are usually the most directly affected and knowledgeable about the problem and, as a consequence, also the environmental associations that were initially entitled to act on behalf of the local authorities where the latter did not act.

Therefore, it can be concluded that under the Italian legal system a limited role is played by the environmental associations in relation to the action for environmental damage in the public interest.

The following suggestions for improvement can be put forward:

As far as the “centralised” action brought by the MOE, it would be helpful to establish an online database containing information on the (on-going and past) investigations on cases of environmental damage and on the amount of the compensations obtained along with their utilisation.

As to the actions brought by environmental associations for the recovery of material and non-material damages, it would be helpful to reduce the costs of the procedures. This could be obtained through either the elimination of the court fee specifically for the environmental association, or through the adjustment of the thresholds for the access to the legal aid offered by the State so that different thresholds of annual income (higher for associations) are adopted.

Finally, it would be helpful to introduce a judicial or non-judicial remedy that entitles the associations to appeal the inactivity of the MOE (when failing to adopt preventive or mitigating measures in relation to the environmental damage) and that could order the MOE to take action.

C. NETHERLANDS

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1. Introduction

In this country study, an overview will be given of the possibilities for environmental non-governmental organizations (ENGOS) to claim for damages on behalf of the environment in the Netherlands. Paragraph 2 of this report concerns a general picture of the laws and administration on the environmental area in the Netherlands. The third paragraph covers a description of the legal situation concerning environmental damages in general. Moreover, this paragraph includes the possibilities for ENGOS to claim damages in more detail. Finally in paragraph 4, we draw some conclusions about the effectiveness of the environmental liability rules.

2. Overview of the administrative and judicial structures regarding environmental law¹

2.1 Environmental legislation

In the Netherlands, environmental law is embedded in the structures of general administrative law. Although there is an Environmental Management Act with a quite general scope, a totally integral environmental statute is lacking. In spring 2015, the environmental law is enshrined in about ten statutes on environmental law in a narrow sense, an integral act on water (Waterwet), two acts on nature protection (one on the conservation of special areas and one on the conservation of species) and some provisions in physical planning law. In June 2014, the government submitted a proposal for an integral law on nature protection to the parliament.² This proposal is now discussed in the Second Chamber (Tweede Kamer) and the government expects that this proposal will come into force at the end of 2015. The government also submitted a proposal for an integral act on environmental law in the broadest sense (Omgevingswet), which will cover almost all environmental law, including water law, physical planning law and nature protection law. At this moment, the government expects the entry into force in 2018, but this is rather uncertain. An important aim of all these law reforms is to simplify environmental law, to reduce the amount of environmental law, permit requirements, administrative procedures and judicial review procedures.

2.2 System for decision-making and administrative objection procedure

Ordinary procedure of decision making

¹ This part of the report is based on the country Report of the Netherlands, regarding The implementation of Article 9.3 of the Aarhus Convention on access to justice in the Netherlands, written by Chris Backes, Maastricht University.

² In this proposal, the Nature Protection Act (Natuurbeschermingswet 1998), the Flora and Fauna Act (Flora- en Faunawet) and the Forest Protection Act (Boswet) are integrated.

Decisions are prepared by the competent public authority, whereby it must adhere to certain principles of good governance stipulated in section 3.2 General Administrative Law Act (hereafter: GALA, Algemene wet bestuursrecht), such as thorough preparation. A decision upon request in this “ordinary procedure” has to be taken within eight weeks after the application has been submitted.

Uniform public decision making procedure

However, on most applications for environmental permits, section 3.4 GALA is applicable, the so-called uniform public decision making procedure. This means that a draft decision will be published by the competent public authority and interested parties will be invited to present their views on the draft, either in writing or orally, within six weeks after publication. This decision making process should not last longer than six months.

Administrative objection procedure and judicial review by administrative courts against “decisions”

A violation of environmental law by an act of a public authority can be subject to an administrative objection procedure if it fits the description of an “administrative decision” as stipulated in art. 1:3 GALA. The objection procedure is skipped if the uniform public decision making procedure was applied.

Only written decisions on specific cases having a regulating effect in public law can be qualified as a “decision” as meant by art. 1:3 GALA. Therefore, administrative review and judicial review by administrative courts is not possible with regard to factual action of the administration, regulations or other decisions with a general scope and administrative acting based on private law powers (like contracts). Then the civil law division of the district court is competent. The role and the structure of the civil court will be explained in 2.4.

2.3 Administrative courts

The Netherlands is divided into 11 judicial districts as courts of first instance and three administrative courts of appeal. The district court is competent to decide about administrative decisions. Article 8:1 GALA stipulates that an interested party may bring a claim to the district court. Appeal of district court judgments in environmental cases is handled by the Judicial Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State). This Council also acts as the court of first and only instance for some categories of cases related to environmental law.

A complaint may be filed against decisions (art. 8:1 and 1:2 GALA). A complaint may also be filed against the refusal to take a decision, and against the fact that a decision is not taken in due time (art. 6:2 GALA). Certain decisions are excluded from judicial review by the administrative courts (art. 8:3 and 8:5 GALA). Judicial review is open to all interested parties (art. 8:1 GALA). Since section 3.4 GALA is applicable to the preparation of most environmental decisions, only those interested parties who have submitted a view on the draft decision may lodge a complaint (art. 6:13 GALA). In those cases in which section 3.4 GALA is not applicable, judicial review is open only to those interested parties that have lodged a notice of objection against the decision (art. 7:1 and 6:13 GALA).

2.3.1 Standing

Standing for individuals

The Dutch legal system follows the interest-based model. An individual must show a specific interest in the decision at stake. The concept of the interested party (in Dutch ‘belanghebbende’) is described in art. 1:2 GALA. It is also required to have a legitimate interest in the proceedings (procesbelang): the interested party must be able to gain or win something by the procedure. The standing requirement of art. 1:2 in conjunction with art. 8:1 GALA contains several sub conditions, developed in case law: the interested party must have 1) direct, 2) own, 3) personal, 4) objective and 5) actual interest. The interest of the person that wants to contest the administrative decision must be directly influenced by that decision. This is one of the most important sub condition in practice. In environmental and planning law cases, some sub-criteria were developed, like a distance and sight criterion, to determine whether a person’s personal interest is affected by an environmental decision. Only people living in a certain distance to an industrial installation (mostly a few hundred meters) or people who are able to see a tree which is cut from their apartment, have such a personal interest. In the end, it is the spatial influence that determines at which distance parties can still be considered to have an interest.

Standing for ENGOS

Just as with natural persons, the notion of ‘belanghebbende’ (interested person) is the starting point. Some of the sub-criteria developed by the courts are applied differently or in a specific manner however for NGOs who represent a general interest. Art. 1:2 (3) GALA stipulates that the general and collective interests that legal persons specifically represent shall be considered to pertain to their interests. If a legal person wants to have standing with regard to any general or collective interest, this interest has to be reflected in the specific statutory objectives and in the actual activities of the interest group.³ The requirement to be a legal person is easily met and in fact not seriously applied. In Dutch law, groups of persons do not have to register to be able to legally act. It is even sufficient if the legal person was established after the objected decision was taken and published. The most important requirement is that the task and collective or general interest the legal person wants to represent must be specific. Political parties serve an unspecific purpose and do not have standing at the administrative courts. Recently, there have been some tendencies to interpret this requirement more narrowly.⁴ The criterion that the interest group has to undertake actual activities which serve the interest it is representing was not seriously applied in the past. The factual activities were more or less used to further interpret the statutory aims of the organisation. Some NGOs did nothing else than objecting to certain types of decisions. Since the 1st of October 2008, the Council of State has narrowed access to justice of (mainly environmental) NGOs by using the factual activities as a separate criterion.⁵

³ ABRvS (Judicial Devision of the Council of State) 29 January 2014, ECLI:NL:RVS:2014:170 and ABRvS (Judicial Devision of the Council of State) 12 November 2014, ECLI:NL:RVS:2014:4099.

⁴ ABRvS ((Judicial Devision of the Council of State) 28 October 2008, ECLI:NL:RVS:2008:BG1844 and ABRvS (Judicial Devision of the Council of State) 26 November 2008, ECLI:NL:RVS:2008:BG5311.

⁵ ABRvS (Judicial Devision of the Council of State) 28 May 2008, *AB* 2008, 238 and ABRvS (Judicial Devision of the Council of State) 1 October 2008, *JB* 2008, 239.

2.3.2 Remedies

The only possible judgments that are given in administrative proceedings are: the court is not competent; the complaint is not admissible; the complaint is not justified; the complaint is (partly) justified (art. 8:70 GALA). If the complaint is found to be (partly) justified, the decision is quashed. The competent public authority may be ordered to take a new decision. The court can determine that the judgment replaces the decision. Basically, this is possible if the administrative authority does no longer have discretion how to decide (8:72 (3) (b) GALA). The court may also decide that the legal effects of the decision that has been quashed stay in place (art. 8:72 (3) (a) GALA). The judgment also contains a decision on compensation of court fees. If the court is about to conclude that the objected decision infringes the law, it may abate the proceeding and offer the administrative authority the possibility to correct the faults in the contested decision within a certain time limit (art. 8:51a and 8:51b GALA). If the administration agrees on that, the proceedings before the court continue after the authority has submitted the “repaired” decision.

2.3.3 Costs

Court fees do not relate to the ‘value’ of the case. In first instance administrative law cases, natural persons have to pay 167, - EUR (except for those that have a very limited income), and legal persons, including NGOs, 331, - EUR. In appeal, the fees are respectively 248, - EUR and 497, - EUR. Each party has to pay its own experts and other costs. In an administrative procedure, representation by an attorney is not required. Parties are free to choose to represent themselves or to receive help from any other person who represents them (article 8:24 (1) GALA). If an applicant is successful, the individual is awarded compensation by the losing public authority to cover the court fees (art. 8:74 GALA). Additionally, in principle the individual must also be compensated for other court costs (e.g. counsel’s fee, experts, witnesses, etc.), but deviations are possible. These costs must be reasonable (art. 8:75 GALA). There are standards for these costs. If the actual costs of applicants are above these standards, these costs will not be compensated. If the applicant loses the case, he or she does not have to pay the expenses of the public authority or third parties (one way cost shifting). The only reason for awarding compensation to the winning public authority is, if the individual has abused his rights. Court orders which require compensating the public authority by the losing applicant are very rare. Hence, the loser pays principle is not common to the Dutch administrative law. It is only the authority which has to pay the applicants costs if the authority loses, but not the other way round.

2.4 Civil courts

Since claiming damages on behalf of the environment is mostly based on a civil law regulation, it is important to mention the structure of the civil court. As said, the Netherlands is divided into 11 judicial districts. There is a civil law division in each district court. District court judgments in civil law cases may be appealed (under certain conditions). The appeal is brought before one of the four Courts of Appeal. In principle, appeal is ensured in each case in which a judgment has been reached in first instance. After appeal, the Supreme Court is accessible for a legal review of the judgment given by the Court of Appeal (*cassatie*, Article 78 Judiciary Act). The Supreme Court will not give a judgment on the facts, only on specific legal issues, as stipulated by Article 80 of the Judiciary Act.

In civil law cases, passiveness (*lijdelijkheid*) is the judge's stance with regard to the facts presented to him by the litigants. This means that the judge will only consider facts that are brought forward by the parties appearing in the case at hand, and will not actively search for other relevant facts.

2.4.1 Standing

In civil procedures, standing rules are different from the rules in administrative procedures. Basically, everyone who argues that an act or omission to act infringes his or her rights has access to the civil court. Access to justice is available to any natural person or legal person (minors and persons in ward only through proper legal representation). Representation by an attorney-at-law is required, except in cases heard by the Cantonal Court (Article 79 Code of Civil Procedure, Wetboek van Burgerlijke Rechtsvordering). At all times (legal) persons initiating a procedure before a civil court need to demonstrate their having a legal interest in the case at hand.

Civil Society Organisations may initiate civil proceedings. However, the law provides for special requirements (Article 3:305a, Civil Code), being:

- The organisation must be a foundation or association with complete legal capacity; this means that the organisation must be formally registered and must have bylaws;
- The claim should aim to protect similar interests of other persons;
- The interests at stake should be promoted according to its bylaws;
- The organisation must have tried sufficiently to negotiate with the respondent in order to settle the claim out of court.

Different from administrative law cases, in civil law cases representation by an attorney-at-law is required.

Procedures may be initiated by serving a writ of summons on the natural or legal person that is held responsible for an environmental violation (Article 111 and 45 Code of Civil Procedure). The writ of summons is drawn up by an attorney-at-law and served to the defendant by a bailiff.

2.4.2 Evidence

At the civil court a party who claims something has to provide full evidence for its claim. In principle, the party who claims that a legal consequence follows from a fact has to prove this fact unless a different burden of proof follows from a specific rule, or from equity (Article 150 Code of Civil Procedure). However, public facts, procedural facts, facts laid down in a contract, and facts - recognised - or not sufficiently disputed - by the other party do not have to be proven (Articles 149, 153 and 154 Code of Civil Procedure). In principle, any type of evidence is allowed in civil proceedings, unless the law provides differently. The judge is responsible for determining the value of the given evidence (Article 152 Code of Civil Procedure).

2.4.3 Costs

At the civil courts, costs and cost risks are significantly higher than in administrative proceedings. In first instance, ENGOs have to pay court fees between 613, - and 3.864, - EUR. In appeal, the fees are between 711, - and 5.160, - EUR. The amount charged depends on the value of the trial. Furthermore, the loser pays principle applies. Hence, the party who loses the case has to pay the costs of the total procedure, including the court fees, costs for experts etc. from the other party.⁶ On top of that, applicants must be represented by a lawyer.

3. Legal situation concerning environmental damages⁷

There are two varieties of regulations that concern liability of environmental damage. The first category consists of all kind of public regulation, as we speak about liability towards the government for damage caused to the environment. The most important example of such a regulation is section 17.2 of the Environmental Management Act (hereafter: EMA, Wet milieubeheer) which is the implementation of the Environmental Liability Directive. The second category has a civil law character and will be explained in paragraph 3.2.

3.1 Public law regulations

The implementation of the Environmental Liability Directive in the Netherlands

The Environmental Liability Directive (ELD)⁸ aims to ensure that business focuses on the environmental effects of their activities by encouraging operators to avoid causing environmental damage and to proactively remediate such damage rather than gambling on whether regulatory action will be taken once the damage occurs. The Netherlands implemented the ELD on 1 June 2008 by the entry into force of section 17.2 of the EMA. To increase clarity and accessibility, the legislator chose to introduce the ELD in one single regulation that applies to all the activities that are mentioned in annex 3 of the ELD.

The first step that needs to be taken is to stipulate whether a certain case is covered by section 17.2 EMA.

This section covers the following situations:

- There has to be damage to protected species, natural habitats, water or land,
- The damage has significant adverse effects,
- The damage is caused by an occupational activity, depending on the continuity, the nuisance, the surroundings, the scale of the activity etc.,
- The damage is caused

⁶ An example: District Court Gelderland 29 April 2015, ECLI:NL:RBGEL:2015:2832.

⁷ This part of the report is mainly based on M.G. Faure ea., *Milieuaansprakelijkheid goed geregeld?*, The Hague: Boom Juridische Uitgevers 2010.

⁸ Directive 2004/35/EG of the European Parliament and the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, Pb EU 30.4.2004, L 143, p. 56-75.

- By one of the activities mentioned in annex III of the ELD, like the manufacturing, collection, release and transport of dangerous substances and the introduction of GMOs into the environment (strict liability; no need to proof fault, risicoaansprakelijkheid) or,
- To protected species or natural habitats, provided that the damage is due to negligence (fault-based liability, schuldaansprakelijkheid), according to article 17.7 EMA.

-The damage is not excluded in article 17.8 EMA. This is the case when the damage is the result of war acts, armed conflicts, hostilities, civil war or insurrection. When a natural phenomenon of exceptional, inevitable and irresistible character occurs, the damage is not covered by section 17.2 EMA. When the damage is covered by an international treaty, it is also excluded from this section. According to article 17.8, there is no liability when the damage is caused by acting in accordance with the licence of the Nature Protection Act (Natuurbeschermingswet 1998) or the Flora and Fauna act (Flora- en Faunawet).

Hence, damage to land and water that is caused by an activity that is not mentioned in annex III of the ELD is not covered by section 17.2 EMA. Furthermore, to define the scope of section 17.2, knowledge and understanding of the range of annex III is required, since this annex refers to several other European Directives.

The operator, who operates or controls the occupational activity, is liable for the environmental damage and for the costs for the remedial measures (art. 17.6 EMA). If the competent authority has to take preventive or remedial measures itself, they are able to recover these costs from the operator. Individuals and ENGOS are not able to claim damage from the operator, as only the competent authority has this competence (article 17.6 EMA). Affected natural or legal persons and ENGOS have the right to request the competent authority to take remedial action if they deem it necessary (article 17.15 EMA). The Dutch legislator decided to designate multiple administrative authorities as competent authorities. According to article 17.9 EMA, in the case the damage is caused due to the exploitation of an installation, the answer of the question which administrative authority is competent depends on the category of this installation. In case of damage that is caused outside the activities of an installation, the competent authority is determined on the base of other regulations than the EMA. This can create a situation wherein there are more competent authorities for one case. Therefore article 17.9 EMA stipulates that the concerned administrative authorities are obliged to deliberate with each other.

Relevance for ENGOS

For ENGOS, the practical relevance of section 17.2 EMA is very limited. Firstly, ENGOS are not able to claim damage from the operator. The only competence they have is to request the competent authority to take remedial action if they deem it necessary. Secondly, since the scope of section 17.2 EMA is particularly limited, it is imaginable that a lot of cases that cause damage to the environment fall outside the scope of this section. Furthermore, section 17.2 EMA does not provide the possibility to oblige a financial insurance for the operator. There is no case-law available about section 17.2 EMA, which is a (strong) indication that this section is not very useful in practice.

A legal basis for recovering of costs can also be found in other public law regulations, like article 75 Land Protection Act (LPA, Wet bodemscherming). Different from section 17.2 EMA, article 16 LPA provides the possibility to oblige a financial insurance. Such an obligation is missing in section 17.2

of the EMA. According to all these public law provisions, only the administrative authorities are competent to claim for the damage. Hence, there is no opportunity to claim damage for individuals and ENGOs.

Article 8:88 GALA

Different from the public law provisions on state liability in special areas of law discussed above, there is one article in the General Administrative Law Act (GALA) that provides – at least in theory - the opportunity for ENGOs to claim for damages. Article 8:88 GALA stipulates that the district court can order the administrative authority to compensate an applicant for the damage suffered or for the damage that is going to be suffered if the damage occurs due to an unlawful decision or if the damage occurs due to an unlawful actual activity which is connected with an unlawful decision. When the judge has quashed a decision, it is automatically deemed to have been unlawful. The damage occurred has to be a direct consequence of the unlawful decision.

The administrative judge is only competent if the damage to the environment amounts to less than 25.000,- EUR. However, next to the administrative court, the civil court is also competent to hear such a claim. Hence, the claimant may choose where he or she wants to raise the claim. When the damage amounts to more than 25.000,- EUR, only the civil court is competent (article 8:89 GALA).

When an administrative judge has to decide on such a claim it will stay close to the (interpretation of the) civil law articles on (state) liability (as will be discussed in paragraph 3.2). So in the end, there will not be so much difference between the case-law from the civil court and the administrative court. Article 8:88 GALA does not grant ENGOs more substantive rights than private law does.

The possibility for ENGOs to claim environmental damage on the basis of article 8:88 GALA may be rather theoretical as environmental damage will not often occur as a direct consequence of an unlawful decision of an administrative authority. There is no case-law available yet and we do not expect that there will be many cases in the future on this legal basis. Similar to article 3:305a Civil Code we suppose that article 8:88 GALA could – in theory - offer the possibility to claim or to receive financial compensation for environmental damage (see paragraph 3.3).

In conclusion, article 8:88 GALA creates the possibility for an ENGO to lodge a claim at the administrative court to compensate any damage which has occurred due to an unlawful decision if the damage is not more than 25.000,- EUR. In practice however, the relevance of this possibility for ENGOs will be quite limited because of the strict requirement that only damage caused by an unlawful decision can be claimed.

3.2 Liability on the basis of civil law (private law claims)

Civil law liability finds its basis in the Dutch Civil Code (Burgerlijk Wetboek) and can be challenged through tort proceedings. Article 6:162 Civil Code is the general tort clause in the Netherlands.

3.2.1. Article 6:162 Civil Code (fault-based liability)

The general tort proceedings are based on article 6:162 Civil Code. The requirements mentioned in paragraph 1 of this article are:

- there has to be a tortious act (unlawful act)
- which can be attributed to the ‘perpetrator’
- damage must have occurred
- a causal link between the tortious act and the damage
- the violated standard of the behaviour (the violated legal norm) has to intend to offer protection against damage as suffered by the injured person (relativiteitsvereiste, article 6:163 Civil Code).

According to paragraph 2 of this article ‘an unlawful activity’ is:

‘As a tortious act is regarded a violation of someone else’s right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.’

The first category is ‘a violation of someone else’s right’ and this category could be relevant for violations of environmental law. Examples are an infringement of property when a person’s soil is polluted, caused by an adjacent factory or damage to crops due to the pollution of the surface water. For approving such an infringement it is necessary that there must be some form of negligence. The second category contains of ‘an act or omission violating of a duty imposed by law’. Of course this is of great importance for environmental law, since the existence of the multiple written environmental rules. Acting against such a legal duty is regarded as unlawful towards the people who are protected by these regulations, like ENGOs and people living in that area.⁹ For ENGOs, there is not much case-law available on this topic. The case-law that is available, will be described in paragraph 3.3.

The second category covers also the requirements added to a licence. When these requirements are violated, the perpetrator acts against a legal duty.¹⁰ In some cases, even if the licence regulations are met, the court still judges that there is an unlawful act.¹¹ The third category concerns violating a rule of unwritten law has to be regarded as proper social conduct. This is the so-called ‘standard of care’ (zorgvuldigheidsnorm or standard for carefulness). This category is specified by case law and is very casuistic. However, according to case law it is an important category, because there are many examples wherein the acting of individuals and companies is qualified as unlawful on the base of a violating of the standard of care. The court even developed a special standard of care about eliminating polluted land.¹²

It is often hard to determine who caused the damage to the environment. When the area around a chemical factory is polluted with substances which are used during the operation procedure, it is plausible that the operator of the factory is the causer. But it is impossible to be for 100% sure. Therefore case law has developed a system in which a suspected perpetrator has the opportunity to prove that someone else was responsible for the substances which have contaminated the environment. In fact, it regularly appears that environmental damage is caused by several perpetrators.

⁹ District Court Rotterdam 15 March 1991, *NJ* 1992/91.

¹⁰ Supreme Court 9 January 1981, *NJ* 1981, 227.

¹¹ Supreme Court 23 September 1988, *RvdW* 1988, 150.

¹² Supreme Court 14 June 2002, *NJ* 2004, 127.

Think of factories losing polluted water on a river and several companies dumping waste on a dump. In general, the rule is that every single perpetrator is only liable for his share.

One of the requirements of article 6:162 Civil Code is the existence of damage. When there is only ecological damage, it is hard to calculate this damage. The courts found a solution for this problem and have specified that not the damage to nature can be claimed, but that it is possible to claim for the costs that were made to reduce the damage or to recover the polluted area.¹³

Next to the general article 6:162 Civil Code, there are some specific articles which contain a form of strict liability, so when these articles are applicable, it is not necessary that the behaviour that caused the damage can be attributed to the perpetrator. When the damage occurs, they are liable, regardless of whether it is their fault.

3.2.2. Forms of strict liability

Liability for dangerous substances

Article 6:175 Civil Code applies that a person who in the course of his professional practice or business uses a substance or keeps it under control, while it is known that this substance has such characteristics that it causes a special danger of a serious nature for persons or property, is liable when this potential danger is realized. Everyone who works with these substances is liable; the producer, the transporter, the keeper and the user of them. When the damage consists of pollution of the air, the water or the land, then the person who brought them in the environment is liable.

Liability for the dump holder and operator of a borehole

Due to article 6:176 Civil Code, the operator or owner of a waste site is liable for the damage which arises before or after the closing of the waste site, resulting from pollution of air, water or soil with substances that were dumped there before the closing. The people who dumped the materials that caused the damage cannot be held liable, as the legislator chose to transport this liability to the owner or operator of the dumping ground. If, after the moment on which the damage has become known, the waste site is taken over by another operator, then the liability continues to rest on the person who was the operator at the moment on which the damage became known. The same system applies to the operator of a mining work when an effusion of minerals or movements of the soil or underground occurs, according to article 6:177 Civil Code.

Liability for dangerous substances during transportation

There is also a specific regulation about liability for dangerous substances during transportation, according to section 8 of the Civil Code. This section covers the liability for dangerous substances which are on board of a sea ship, a barge, a vehicle or a railway vehicle. Notwithstanding the general system of liability for dangerous substances in article 6:175 Civil Code, section 8 is a closed system of liability. The section is only applicable when the specific substance is enumerated in a delegated regulation (Algemene Maatregel van Bestuur). Section 8 covers a form of strict liability, so the

¹³ District Court Rotterdam 15 March 1991, *NJ* 1992/91.

owners of the sea ship or the barge and the operator of the vehicle are liable, regardless whether they are to blame for this damage. When they are obliged to pay damages, this amount will also cover the damage caused to the environment like the sea, the surface water or the land.

To determine which costs have to be compensated, article 6:184 Civil Code stipulates that the 'reasonable costs' include the costs for the measures which have prevented or lowered the more serious consequences.

Exceptions

Article 6:178 Civil Code contains some exceptions from the rules pointed out in article 6:175, 6:176 and 6:177. No liability under Articles 6:175, 6:176 or 6:177 exists if:

- a. the damage is caused as a result of an armed conflict, civil war, insurrection, internal riot, rebellion or mutiny;
- b. the damage is caused by a force of nature of exceptional, inevitable and compelling characteristics;
- c. the damage is caused exclusively due to the observance of a command or mandatory regulation of the government;
- d. the damage is caused due to an operation or activity with a substance as meant in Article 6:175 in the interest of the injured person himself, where it was reasonable to expose him to the danger of damage;
- e. the damage is caused exclusively by an operation, activity or omission of a third person, performed with the intention to cause damage;
- f. it concerns nuisance, pollution or another impact as far as the persons who are held liable for these effects would not have been liable under the previous Section, even if they would have deliberately caused this nuisance, pollution or other impact.

3.3 Possibilities for ENGOs to claim damage

All the options mentioned above can be used by ENGOs when they fulfill the requirements mentioned in article 3:305a Civil Code. In article 3:305a Civil Code it is stipulated that a foundation or an association with full legal capacity, that, according to its articles of association, has the objection to protect specific interests, may bring to court a legal claim that intends to protect similar interest of other persons. The Supreme Court explains this by using the requirement that the interests which are at stake must be suitable for pooling. Hence, it must be possible or expected that the claim of the NGO substitutes a range of claims of private parties. This requirement applies because effective and efficient legal protection must be guaranteed.¹⁴ The legislator had the intention that a collective action prevents potential perpetrators of violating the law, as for collective groups it is less onerous to go to court.¹⁵

This article covers both actions from groups with collective interests as actions from legal persons who represent a general interest. ENGOs fall under the last mentioned category and are able to litigate on the basis of article 3:305a Civil Code, as they represent environmental interests.¹⁶ It is also possible

¹⁴ Supreme Court 26 February 2010, *NJ* 2011/473.

¹⁵ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1991/92, 22486, 3, p. 2.

¹⁶ Supreme Court 18 December 1992, *NJ* 1994/139.

for an ENGO to have standing when it represents the interest of preventing climate change.¹⁷ The legislator considers this interest as an interest of a substantial group of citizens.¹⁸ Foreign ENGOS do also have the opportunity to go to the Dutch civil court. Furthermore, it is possible for Dutch ENGOS to claim when the harmful activities took place abroad led by Dutch companies. In order for this, the ENGO must mention in its statutory objectives that it stands up for the environment in the affected area.¹⁹ An important case to illustrate this is mentioned below. In this case, the ‘Vereniging Milieudéfensie’ (a Dutch ENGO) went to court to claim restitution for damages caused by oil leaks in Nigeria, wherefore Shell was held responsible.²⁰ The Dutch court decided that the ENGO had a collective interest, since the whole environment was polluted by the oil leak, people living in the neighbourhood had less income due to the oil leak and it could be more difficult for each individual to go to court. Interesting fact is that the court requires that the ENGO performs factual activities, while this requirement is not mentioned in article 3:305a Civil Code. Perhaps, the civil court would reach out to the approach and requirements mentioned in article 1:2 (3) GALA. However, the judge determined that campaigning against the pollution of the environment in Nigeria, fulfils the requirement of factual activities.

Paragraph 2 of article 3:305a Civil Code stipulates that a legal person filing a claim is inadmissible if he, in the given circumstances, has made insufficient attempts to reach a settlement over its claim through consultations with the defendant. If a legal person was founded just before the claim was brought to court, it cannot be admissible.²¹

Reading article 3:305a, third paragraph, Civil Code, it does not seem to be possible to claim compensation in money. However, the district court of Rotterdam has determined that ENGOS are able to claim for the costs they made to clean up the environment. This was emphasized in a case filed by the Dutch ENGO for the Protection of Birds. In this case, the ENGO for the Protection of Birds litigated against the ship owner of the ship *Borcea*, which caused huge oil pollution before the shore of the Netherlands.²² The ENGO claimed for the costs it had to make because it had to cleanse, take care of and shelter the smudged birds. The court considered:

‘Due to the statutory objectives of the ENGO, the general interest (of protection seabirds) has to be regarded as an interest of the ENGO itself and since this interest is affected, it receives compensation for damage it has suffered when acting to limit the consequences of the pollution.’²³

Hence, when organisations take necessary measures to prevent further damage to the environment or its recovery, it is still possible to receive compensation for this.²⁴ The court also has the competence to publish the judgment, the so-called ‘naming and shaming’ (article 3:305a (3) Civil Code). Beside, an ENGO is able to claim for a prohibition or for a commandment on the base of article 3:305a Civil Code. Unfortunately, there is no case-law that provides some examples of this competence of the court. In literature, it is mentioned that the court can oblige a perpetrator to stop the polluting

¹⁷ Supreme Court 8 June 2007, ECLI:NL:HR:2007:BA2075, conclusion.

¹⁸ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1991/92, 22486, 3, p. 22.

¹⁹ District Court Leeuwarden 25 January 2010, *JM* 2010/80.

²⁰ District Court The Hague 14 September 2011, *LJN* BU 3529 and *LJN* BU3538.

²¹ District Court Arnhem 10 October 2007, *LJN* 5975.

²² District Court Rotterdam 15 March 1991, *NJ* 1992/91.

²³ District Court Rotterdam 15 March 1991, *NJ* 1992/91.

²⁴ Proceedings of the Second Chamber of States General, *Kamerstukken II*, 1991/92, 22486, nr. 3, p. 21.

activities, or that the court is able to require that the perpetrator adapt their activities so that the consequences for the environment are less.²⁵

The options of a declaratory judgement, a prohibition or a commandment are only possible when there is some form of liability on the base of the articles mentioned in paragraph 3.2.

Court fees and other costs

Claiming damages on behalf of the environment is mostly based on a civil law regulation. At the civil courts, the court fees and the cost risks for ENGOs are high, at least if compared with Dutch administrative courts. In first instance, ENGOs have to pay court fees between 613,- and 3.864,- EUR. The amount charged depends on the value of the trial. Since representation by an attorney is required, the total costs can be high. As an example, in the famous and wide-spread Urgenda case, the costs of the attorney were estimated on 12.840,- EUR. Furthermore, in civil procedure, different from administrative law suits, the loser pays principle applies. Hence, the party who loses the case has to pay the costs of the total procedure, including the court fees, costs for experts etc. from the other party. We contacted several (relatively small ENGOs) and they explained that they do not have the money to go to the civil court in case they would like to do so. Their resources are limited so they have to make choices. Usually they decide to use the administrative court procedures to get decisions quashed. However, as the Urgenda case and some famous other cases demonstrate (amongst which cases where restitution of environmental damage was claimed), the big ENGOs, like Stichting Natuur en Milieu and Greenpeace, sometimes file civil court cases if they think that the situation urges to do so. Nevertheless, even for the big ENGOs, it is without doubt that court fees and cost risks prevent to file civil court cases on a regular base.

Compared to that, the court fees in administrative court cases (which are used by ENGOs quite often), are much lower. For example, in first instance administrative law cases ENGOs have to pay 331,- EUR. In appeal the court fee is 497,- EUR for ENGOs. In addition to the lower court fees, the risks are much lower since representation by an attorney is not required and the principle of 'one way cost shifting' is applied. If the authority loses the case, it has to reimburse the costs of the claiming party (at least to a certain extent). If the applicant loses the case, he is not obliged to reimburse the costs of the authority. However, as described in the previous chapters, one has to notice that the possibilities for ENGOs to start proceedings before administrative courts in order to claim costs for cleaning up the environment are very limited.

4. Conclusion

4.1 The public law regime

The effectiveness of section 17.2 EMA

Since section 17.2 EMA is only applicable on damage caused by activities mentioned in annex III of the ELD or on damage caused to protected species or natural habitats, significant adverse effects must be proven and there is no duty for the operators to obtain a financial3, it seems that the incentive to prevent pollution is very limited. Therefore, the effectiveness of this section is rather confined. In literature, it is recommended that operators should be obliged to take out an insurance. Since the

²⁵ M.G. Faure ea., Milieuaansprakelijkheid goed geregeld?, The Hague: Boom Juridische Uitgevers 2010, p. 134.

threshold of 'significant adverse effects' is high, lots of cases are not covered by section 17.2 EMA. On top of that, it is rather difficult for the competent authorities to determine a) if they are competent and b) whether the harmful activities fall under the scope of annex III of the ELD. ENGOs are not able to claim damage from the operator. The only competence they have is to request the competent authority to take remedial action if they deem it necessary. There is no case-law available about section 17.2 EMA, so this is a strong indication that this regulation does not work in practice.

4.2 The private law regime

Effectiveness of the civil law regime

According to Dutch literature, the civil rules about liability for environmental damage don't provide a real incentive to prevent and recover this damage.²⁶ There are several reasons for this statement. At first, there are often multiple perpetrators which are not joint and several liable. Another factor in this is the fact that it often takes a very long time for the damage, caused by the pollution, is revealed (the so-called long tail risk). Then it is quite difficult to find out who actually is responsible for the damage. When the damage is not caused to an individual victim but to a collective good, only article 3:305a Civil Code can be helpful.

However, this article does not fulfil the need to claim money for the damage that is caused to the environment. The possibilities which article 3:305a Civil Code reflects are claiming damage for the costs that an ENGO made for stopping or preventing the damage caused to nature. When there is only ecological damage, no individual person is a victim and an ENGO has not spent any money, the only solution they have is to claim for a declaratory judgment, a prohibition or a commandment, according to scholars. This is rather a theoretical option, since no examples in case-law are available yet. I contacted several dutch ENGOs and most of them do not have the knowledge about all this, or do not have enough employees in order to claim damage or ask for a prohibition. They usually focus on preventing the damage before a licence has been granted, or go in appeal against a licence. The main judicial procedure they take advantage of is the administrative procedure, rather than the civil procedure, because there the costs and the risks are higher.

The requirement that the legal person has to have full legal capacity may disadvantage local and regional ENGOs. In order to form a legal person with full legal capacity, it is necessary that the legal person comes to existence by a deed signed by a notary. This will cost, depending on the notary, between the 500,- and 850,- EUR. For many local ENGOs, this is a large amount of money and it can be a serious threshold.

The most important shortcoming in the effectiveness of the civil procedure is the fact that there is no duty to obtain financial insurance for the operators. The recommendations in literature to improve the civil law on this topic are the same as for the public regulations.²⁷ It should be obliged for operators to take out an insurance to cover the costs if they are made.

²⁶ M.G. Faure ea., *Milieuaansprakelijkheid goed geregeld?*, The Hague: Boom Juridische Uitgevers 2010, p. 141.

²⁷ M.G. Faure ea., *Milieuaansprakelijkheid goed geregeld?*, The Hague: Boom Juridische Uitgevers 2010.

Another great disadvantage is the costs and especially the risks of costs in these civil procedures. Not only the court fees are higher in civil procedures, when the ENGO loses the case, they have to pay also the costs that are made by the other party, including the costs for experts etc.

Concluding, it seems that claiming damage on behalf of the environment by ENGOs is rather difficult, since the public regulations only provide this competence to administrative authorities and civil law excludes the option to claim damage, unless the ENGO has made investments itself to recover the environment. It is not only rather difficult, it is also quite uncommon that an ENGO takes advantage of article 3:305a Civil Code. There are only a few judgments available (which are mentioned above), so the practical relevance is quite limited. Therefore it cannot be said that the legal system in the Netherlands leads to efficient and effective legal protection.

D. PORTUGAL

(PREPARED BY MS. ALEXANDRA ARAGÃO, UNIVERSITY OF COIMBRA AND INSTITUTE FOR LEGAL RESEARCH¹)

This report was preceded by meetings and fruitful discussions with ENGO lawyers and ENGO members representing some of the most relevant Portuguese NGOs to whom I thank for the support and valuable contributions. The engaged associations were: SPEA (*Domingos Leitão*), LPN (*Miguel Geraudes*) GEOTA and PLATAFORMA SALVAR O TUA (*Ana Brazão* and *Pedro Santos*), A ROCHA (*Joaquim Sabino Rogério*), QUERCUS and FAPAS (*Carlos Maia* and *César Marques*).

1. Introduction

In this report we will describe the legal possibilities for ENGOs to claim damages on behalf of the environment in Portugal. Before describing the legal framework, it is important to understand that in Portugal “acting on behalf” does not mean acting “*in the name*” of. Granting standing to ENGOs (and individual citizens) to claim environmental damages is not a sort of *subrogation* of environmental components. The ENGOs do not act as substitutes of non-human entities which cannot be present *per se* in court. Standing for ENGOs is not a *legal fiction* based on an implicit recognition of legal personality to nature as a whole or to individual natural components, living or non-living. The ENGOs do not represent the alleged interest of wolfs, trees, rivers or landscapes. Granting legal personality to Mother Earth was a genuine constitutional option in Ecuador and an understandable legal move in Bolivia, both countries where traditional communities have a strong social weight².

Quite differently, in Portugal and Portuguese speaking countries in Latin America and Africa³, granting legal standing for ENGOs to go to court “on behalf of the environment” is a legal construction based on another assumption: the *sui generis* nature of environmental goods. The environment is *ubiquitous* (it is everywhere around us), it is *indivisible* (in the sense that every single component is strongly interconnected with all the other) and it is *diffuse*. Being *diffuse* means that it does not have a privileged holder. The good status of the environment is everyone’s interest. The environment concerns each and every person, family, community, organization, region, state, ultimately, all the humanity.

¹ E-mail: aaragao@ci.uc.pt, website: http://www.ij.fd.uc.pt/membros/aaragao_en.html (Project: *Crisis, sustainability and citizenship* UID/DIR/04643/2013).

² In 2008, Ecuador’s Constitution recognized legal rights of Mother Nature. (Chapter 7, article 71: “Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem”. Articles 72 to 74 go into a detailed description of Mother Nature’s rights. See https://www.constituteproject.org/constitution/Ecuador_2011?lang=en).

Also in Bolivia, since 2010, a Law regulates the rights of Mother Earth (<http://bolivia.infoleyes.com/shownorm.php?id=2689>).

³ Especialy Brazil, Angola, Moçambique, Guiné and Cape Verde.

As spelt out in the Portuguese Constitution and in Portuguese Laws, the environment is a **diffuse** interest. Therefore, each and every individual person — as well as ENGO —, is entitled to claim environmental damages.

The concept of *diffuse interest*, *actio popularis* and their role in Portugal and Portuguese speaking countries will be developed in the Annex entitled: “diffuse interests, instruments for environmental justice and democracy”.

We will next explain the substantial and procedural legal rules applicable to liability claims in Portugal.

2. Liability for damages

The possibility of ENGOs or citizens claiming environmental damages is clearly stated in the Portuguese Constitution and in the laws. The enabling laws are the basic framework environmental law⁴, the environmental liability law, the ENGOs law and, of course, the *actio popularis* law.

Before analyzing the legal right to claim damages we will start with a brief explanation on the legal framework on liability for damages such as those established in the Civil Code and complementary laws to give a broad picture of the functioning of the legal institution of liability for damages under Portuguese law.

2.1. Liability in the Civil Code

Section V of the Civil Code, dating back to 1966⁵, is on “civil responsibility”. It starts with Subsection I on “liability for unlawful acts”. The general principle is written in article 483: “Any person who, intentionally or with fault, unlawfully violates the rights of others or any legal provision to protect interests of others is obliged to compensate the injured for damages resulting from the breach”.

Civil liability can cover both subjective (or fault based) and objective (or strict) liability, but in the Civil Code the general rule is fault based liability whereas “the duty to pay damages regardless of fault is limited to the cases specified in the law”.

As a consequence, fault liability is the rule and strict liability is the exception.

Finally, the civil code expressly recognizes the right to claim non-material damages (so called *moral* damages) side by side with material damages (property *latu sensu*).

Article 496 of the Civil Code establishes that “in setting compensation [for damages] account shall be taken of the non-material damages which, by their gravity, deserve the protection of law”⁶.

⁴ *Basic Laws* are those that establish the normative framework and legal principles applicable to some major public policies. Only the Parliament (and not the Government) can approve *Basic Laws*. The Government is subsequently allowed to adopt ordinary laws to implement the Basic Laws. Besides the Basic Law on the environment there are also Basic Laws on soils, spatial planning and urbanism, on maritime planning, cultural heritage, education, health, social security, sports and so on.

⁵ Decree Law 47344/66, of 25th de November, amended 60 times.

⁶ The article goes on detailing the conditions for compensation:

2.2. Environmental liability

In the case of environmental damages, strict liability was, since 1987, established in the Basic Law on the Environment⁷: “there is an obligation to pay compensation, regardless of fault, where the agent has caused significant damage to the environment due to a particularly dangerous action, although in compliance with the applicable regulations”⁸. The quantity of compensation for environmental damage would be established in complementary legislation... but which was never adopted.

Moreover, on “rights and duties of citizens”, the Law declared: “it is the duty of citizens in general and the public, private and cooperative sectors, in particular, to cooperate towards the creation of a healthy and ecologically balanced environment and towards the progressive and accelerated quality of life improvement”⁹. Besides, the “citizens directly threatened or harmed in their right to a healthy and ecologically balanced human life environment may request, in accordance with general legal rules, the cessation of the causes of harm and compensation for damage”. “Notwithstanding the preceding paragraphs, it is recognized to local authorities and citizens, who are affected by activities that may prejudice the use of environmental resources, the right to compensation by the entities responsible for damages”.

Almost three decades later, in 2014, this law was revoked and a new Basic Environmental Law was adopted. The new law, although more updated in what concerns environmental instruments and principles, was much more laconic on addressing the issue of liability.

Liability is a “material environmental principle” that requires the “responsibility of all those who cause threats or damage to the environment, directly or indirectly, intentionally or negligently”. The application of appropriate sanctions is up to the State, and “the possibility of compensation pursuant to the law is not excluded”¹⁰.

Another complementary principle is the “recovery principle”, which “compels the causer of environmental damage to restore the state of the environment as it was found prior to the occurrence of the harmful event”¹¹.

“2 - On the death of the victim, the right to compensation for non-material damages rests with the spouse (not separated) and with the children or other descendants; in their absence, to the parents or other ascendants; and, finally, to brothers sisters or nephews and nieces who represent them.

3 - If the victim lived in a *de facto* union, the right to compensation provided for in the previous paragraph rests with the civil partner and their children or other descendants.

4 - The amount of compensation is fixed equitably by the court, taking into account, in any case, the circumstances referred to in Article 494 (on limitation of compensation in case of simple fault: “Where liability is based on simple fault, compensation can be fixed equally, in an amount lower than that corresponding to damage, as long as the degree of culpability of the agent, the economic condition of the victim and the agent, and the other circumstances of the case so justify it”); in case of death, not only the injuries suffered by the victim, but also those suffered by persons entitled to compensation under the preceding paragraphs can be taken into account”.

⁷ Law 11/1987 of 7th April 1987.

⁸ Article 41.

⁹ Article 40, no.1

¹⁰ Article 3 f).

¹¹ Article 3 g).

Isolated from the general legislative context, this looks like a legal *regression* but in fact, there are two major laws still regulating the matter of liability:

- a) the Law on *Actio popularis* (in force since 1995)
- b) The Law on Environmental Liability (in force since 2008).

2.2.1. Law on *actio popularis*

The Law on *actio popularis*¹² distinguishes subjective and objective liability and goes into the detail of the legal regime.

In subjective liability, the “causative agent” is bound to compensate all those harmed for damages caused intentionally or with fault¹³. But, while the holders of interests that are individually identified are entitled to compensation under the general terms of civil liability¹⁴, the holders of interests that are not individually identified will have to claim the compensation later. In this case, the compensation for the violation is set globally¹⁵. The right to receive compensation prescribes after three years, counting from the date when the sentence transited as *res judicata*. The amounts corresponding to prescribed duties will be handed to the Ministry of Justice, that will keep it in a special account and affect it to the payment of attorneys and to support on the access to justice for the benefit of any holders of *actio popularis* that so require on reasonable grounds¹⁶.

In strict liability there is also the obligation to compensate regardless of fault for damage whenever the agent’s acts or omissions, in connection with a dangerous activity, result in an offense of rights or interests protected under this law¹⁷.

One of the advantages of *actio popularis* is the fact that there are no costs associated with the procedure. The law on court fees is quite clear: “any person, foundation or association when exercising the right to *actio popularis* under paragraph 3 of article 52 of the Portuguese Constitution and ordinary legislation providing or regulating the exercise of popular action” is exempt from costs¹⁸ unless the request is declared “groundless”¹⁹.

2.2.2. Law on environmental liability

In 2008, when the Liability Directive was transposed by Decree-Law 147/2008, of 29th July, the issue of liability for environmental damages was addressed in some detail

¹² Law 83/95, of 31st August.

¹³ Article 22 no.1.

¹⁴ Article 22 no.3.

¹⁵ Article 22 no.1.

¹⁶ Article 22 no.5.

¹⁷ Article 23.

¹⁸ Article 4 b) of Decree law 34/2008, of 26th February, amended twelve times, the last one by Law 72/2014 of 2nd September. For instance, in ‘normal’ standing, an interim measure would cost €300 or €800 (depending on the value of the action being below or above €300000). In extremely complex injunction, the cost can raise from €900 (minimum) to €2000 (maximum).

¹⁹ Article 4 no.5 of the same law on judicial costs.

It is quite clear that the Environmental Liability Directive “does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding this type of damages”²⁰.

Therefore, “without prejudice to relevant national legislation, this Directive shall not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage”²¹. But, as stated in the preamble, the Directive does not “prevent Member States from maintaining or enacting more stringent provisions in relation to the prevention and remedying of environmental damage”²².

And the Portuguese law on environmental liability²³ did use the possibility allowed under the directive, to go further and combine the legal regime of *environmental damage* (damages to protected species and natural habitats, water and land) and the legal regime of *human damage* (as a consequence of environmental degradation).

In both cases there is the possibility of subjective (fault based) and objective (strict) liability.

Liability for *environmental damage* is configured like this: the operator who intentionally, negligently, or regardless of the existence of intention or negligence, causes environmental damage or an imminent threat of such damage as a result of the exercise of any of the occupational activities listed in the law, is responsible for taking preventive and remedial measures²⁴.

Strict liability for *human damage* is thus defined: anyone who, in the exercise of an economic activity in annex, offends rights or interests of others by means of damage to any environmental component is obliged to repair the damage resulting from that offense, regardless of fault or willful misconduct²⁵.

Fault based liability for *human damage* is described as follows: anyone who, intentionally or with fault, offends rights or interests of other by means of damage to an environmental component is obliged to repair the damage resulting from that offense²⁶.

²⁰ Paragraph 14 of the Directive.

²¹ Article 3 no.3.

²² Paragraph 29.

²³ Decree-Law 147/2008, of 29th July.

²⁴ Article 12 and 13 of the Law.

²⁵ Article 7 of the Law.

²⁶ Article 8 of the Law.

This is the current legal structure of the liability regime.

	L i a b i l i t y f o r ...	
	Environmental damages	Human damages
Objective liability	Occupational activities	Occupational activities
Subjective liability	Occupational activities	Every other activity

As stated in the law²⁷, the liability for *environmental damage* does not affect the civil liability for *human damage* which may also be incurred.

To avoid double repair, those who suffered *human damage* may not require reparation or compensation for damages insofar as these damages can be fully repaired according to environmental damage liability²⁸.

3. The right to claim damages in court

The basic principle in what concerns access to court is set out in the Constitution: “everyone is guaranteed access to the law and to the courts to defend their rights and legally protected interests, and justice may not be denied for insufficient economic means²⁹.”

Article 52 no.3 of the Constitution on the right to present petitions to public entities and on the right to *actio popularis* is quite clear on the right to claim damages:

“Everyone is granted the right of *actio popularis*, including the right to apply for a compensation for injuries, in the cases and under the terms provided for by the law, either personally or via associations for the defense of the interests in question, in particularly to:

a) promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life, the preservation of the environment and the cultural heritage”³⁰.

²⁷ Article 12 no.2 and 13 no.2.

²⁸ Article 10 of the Law.

²⁹ Article 20.

³⁰ Full article 52:

“1. Every citizen has the right to individually, or jointly with others, submit petitions, representations, claims or complaints in defence of their rights, the Constitution, the laws or the general interest to the entities that exercise sovereignty, the self-government organs of the autonomous regions, or any authority, as well as the right to be informed of the result of the consideration thereof within a reasonable time limit.

2. The law shall lay down the terms under which collective petitions that are submitted to the Assembly of the Republic and the Legislative Assemblies of the autonomous regions are considered in plenary sitting.

According to the recent Basic Environmental Law, “everyone shall have the right to full and effective protection of their rights and legally protected interests in the environment”³¹.

The procedural environmental rights include:

a) The right of action for defense of subjective rights and legally protected interests, as well as the right of public action and *actio popularis*;

b) The right to promote the prevention, cessation and the repair of violations of environmental goods and values as quickly as possible;

c) The right to request the immediate cessation of the activity causing threat or damage to the environment as well as the restoration of the previous situation and the payment of the respective compensation under the law.

The Law on ENGOs³², goes further in the description of the types of cases that can be raised by ENGOs. Article 10, on procedural legitimacy, declares: “the NGO, regardless of having or not direct interest in the claim, are entitled to:

a) propose legal actions necessary for prevention, correction, suspension and termination of acts or omissions by public or private entities that are or could be a cause of environmental degradation;

b) initiate, under the law, legal action to enforce civil liability in respect of the acts and omissions mentioned in the above paragraph;

c) ask for judicial review of administrative acts and regulations that violate the laws for protection of the environment;

d) complain, accuse or act as civil parts in criminal proceedings for crimes against the environment and follow processes of administrative offense, when required, with memorials, technical advice, examination suggestions or other evidence gathering initiative until the case is ready for a final decision”.

In the Law on *actio popularis*³³ the judicial rights of the holders of the right of popular action can assume any form, be it civil, administrative or criminal.

3. Everyone is granted the right of *actio popularis*, including the right to apply for the applicable compensation for an aggrieved party or parties, in the cases and under the terms provided for by law, either personally or via associations that purport to defend the interests in question. The said right may particularly be exercised in order to:

a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage;

b) Safeguard the property of the state, the autonomous regions and local authorities.”

³¹ Article 7.

³² Law 35/98, of 18th July, amended in 2014, by the law 82-D/2014, of 31st December

³³ Law 83/95 of 31st August.

3.1. *Civil actio popularis*

As for civil popular actions, they can assume any of the forms provided for in the Code of Civil Procedure³⁴. This includes injunctions, declarative and executive processes.

The Code of Civil Procedure reaffirms that those entitled propose and intervene in the actions and injunctions for the protection of diffuse interests such as public health, environment, quality of life, cultural heritage and the public domain, as well as for the protection of the consumers of goods and services, are “any citizen in the enjoyment of their civil and political rights, associations and foundations defending the interests at stake, the local authorities and the public prosecutor”³⁵.

According to the law on environmental liability, in a civil action for damages the citizens or ENGOs can ask for restoration of the environment³⁶. The appropriate restoration measures shall be approved by the competent authorities after listening to all the interested parties, namely the owners of the properties where the restoration measures will be implemented³⁷. The one who causes the damage has 10 days to prepare a restoration plan³⁸ which shall include primary restoration measures, complementary restoration measures and compensatory restoration measures³⁹ and submit it to the competent authorities. If full restoration is possible the victims (citizen or ENGO) cannot claim other damages. There is an interdiction of “double restoration”⁴⁰.

However, any actions for compensation brought against the one who causes the damage do not exonerate him from the duty to fully restore the damaged environment. Moreover, priority shall be given to natural regeneration measures, and specially to those that aim at removing risks for human health⁴¹.

Only where the restoration measures⁴² taken were not enough to restore the environment *in integrum* and/or there were costs incurred by the victim or ENGOs, there can be additional claims for compensation. Besides covering the costs of cleaning up or containing the damage, the compensation can also cover moral damages under the general terms of the law (article 496 of the Civil Code).

3.2. *Administrative actio popularis*

Administrative popular actions cover both actions to protect the diffuse interests and appeals on grounds of illegality against any administrative acts harmful to the same interests⁴³.

The Code of Administrative Procedure⁴⁴ reaffirms the constitutional right to an effective judicial protection, explaining that “the principle of effective judicial protection includes the right to obtain, within a reasonable time, a

³⁴ Law 41/2013, of 26th June, article 12 no.2.

³⁵ Article 31.

³⁶ Articles 15 and 16 of Decree law 147/2008 of 29th July.

³⁷ Article 16 no. 2.

³⁸ Article 16 no.1.

³⁹ Annex 5 of the same law.

⁴⁰ Article 10 no.1.

⁴¹ Article 16 no.3.

⁴² Restoration measures are “any action or set of actions, including provisional measures, aiming at restoring, rehabilitating, or replacing the natural resources damaged or offering an equivalent alternative to those resources or services” (article 11 no.1 n).

⁴³ Article 12 no.1.

⁴⁴ Law 15/2002, of 22nd February, amended in 2003, 2008 and 2011.

court decision, with *res judicata*, for each claim regularly deducted in court, and the possibility of obtaining interim measures, be it anticipatory or protective, to ensure the *effect utile* of the decision⁴⁵”.

Moreover, any right or legally protected interest must correspond to adequate protection before the administrative courts, namely for the purpose of obtaining the condemnation of the Administration to the natural restoration of damages and the payment of compensation⁴⁶.

3.3. *Actio popularis in criminal cases*

In criminal procedures, holders of the right of *actio popularis* have the right to denunciation, complaint or report to the public prosecutor as well as the right to act as private parties (“assistants”) in criminal cases⁴⁷.

The “assistants” cooperate with the public prosecutor and their role is crucial for the judgement of certain crimes⁴⁸. In public crimes, such as damages against nature⁴⁹ or pollution causing serious damage⁵⁰, the “assistants” are entitled⁵¹:

- to intervene in the investigation and instruction, offering evidence and requiring the initiatives considered necessary;
- to be notified of the decisions concerning such initiatives;
- to present charge against the indicted independently from the public prosecution;
- to appeal from decisions affecting them, even though the prosecution has not done so;
- to have access to essential procedural elements for the purpose of appealing.

⁴⁵ Article 2.

⁴⁶ Article 2 f). The other possible measures also listed in article 2 of the Code of Administrative Procedure are: “a) Recognition of subjective legal situations arising directly from administrative laws and regulations or from administrative acts under administrative law provisions;
b) Recognition of having qualities or fulfilling conditions;
c) Recognition of the right to refrain from behaviour and, in particular, the abstention of issuance of administrative acts, where there is a threat of future injury;
d) The annulment or declaration of nullity or inexistence of administrative acts;
e) The condemnation of the Administration to the payment of amounts, to the handing over things or the provision of facts;
g) The resolution of disputes concerning the interpretation, validity or enforceability of contracts the appreciation of which belongs to the scope of administrative jurisdiction;
h) The statement of illegality of norms issued under administrative law provisions;
i) The condemnation of the Administration to the practice of owed administrative acts;
j) The condemnation of the Administration to practice acts and operations necessary for the restoration of subjective legal situations;
l) Intimation of the Administration to provide information, allow the consultation of documents or pass certificates;
m) The adoption of appropriate precautionary measures to ensure the effectiveness of the decision”.

⁴⁷ Article 25 of the Law on *actio popularis*.

⁴⁸ In “private crimes” the criminal prosecution depends on complaint and accusation by the victim of the crime (article 50 of the Criminal Procedure Code (Decree Law 78/87, of the 17th February, amended 20 times). This is not the case in environmental crimes which are “public crimes”, whose prosecution isn’t dependent on private accusation.

⁴⁹ Article 278 of the Criminal Code.

⁵⁰ Article 279 of the Criminal Code.

⁵¹ Article 69 of the Criminal Procedure Code.

3.4. *Damage compensation as a condition in sanctioning cases*

In the application of both criminal and administrative⁵² sanctions there is an indirect way of performing precisely the same outcome as a compensation claim based on environmental damages. Under certain circumstances, in punitive lawsuits, money can be “transferred” by court order, from the offender to ENGOs, as a compensation, a contribution or a provision.

This happens in those cases where, after the condemnation of the offender of the environment, the judge determines the suspension of the execution of the sentence⁵³. This possibility is often used when the judge concludes that, considering the circumstances of the case, the mere judicial reproach of the criminal act and the threat of imprisonment are adequate and sufficient to fulfil the purposes of rehabilitation and responsabilization aimed by the punishment.

First of all, in criminal cases, the premises for the suspension of the sentence are the following:

1. Condemnation to imprisonment (fines or types of other criminal sanctions cannot be suspended);
2. Length of imprisonment not exceeding five years;
3. The agent's personality, conditions of life, conduct prior and after the crime and the circumstances of the crime, all lead to the conclusion that rehabilitation and responsabilization are possible without effective imprisonment of the offender.

Besides, the enactment and maintenance of the suspension are always dependent on certain duties or on the observance of certain rules of conduct⁵⁴ or probation⁵⁵ imposed on the convicted person. The duties and rules of conduct can be imposed cumulatively, the period of suspension will have the same length as the prison sentence (and never less than one year) and the verdict must in any case specify the grounds for suspension and its conditions⁵⁶.

As stated in article 51 of the Criminal code, the duties imposed on the offender are intended “to repair the damage of crime”, and include in particular, duties to:

1. pay, within a certain period, compensation to the injured⁵⁷ (or secure the payment through an adequate financial guarantee); or
2. give the victim adequate moral satisfaction; or

⁵² Criminal Law is subsidiary law, also applicable to administrative infractions.

⁵³ Article 50 no.1 of the Criminal Code (Decree Law 48/95, of 15th March, amended over 30 times).

⁵⁴ The rules of conduct are positive or negative behaviors such as: a) residing in one place; b) attending certain programs or activities; c) complying with certain obligations; d) not engaging in certain professions; e) not to go to certain social contexts or places; f) not residing in certain places or regions; g) not following, housing or receiving certain persons; h) not frequenting certain associations or not participating in certain meetings; i) not holding objects used to commit crimes (article 52 of the Criminal Code).

⁵⁵ Consisting on a social reintegration plan, performed with monitoring and support by the Probation Services during the suspension period (article 53 of the Criminal Code).

⁵⁶ Article 50 no.2-5 of the Criminal Code.

⁵⁷ The compensation can cover all the damages or just those that the court considers possible (article 51 *a*) of the Criminal Code).

3. hand over to institutions (public or private, charitable or state owned), a monetary contribution or a provision in kind, of equivalent value.

Cases 1 and 3 are the most relevant for the purposes of this study. The first one, amounts to an official granting of compensation which was not even required by the victims of the damage. The last one has the same result as compensation although the values involved are not necessarily related with the damages.

The duties imposed can be modified until the end of the suspension period whenever relevant supervening circumstances occur⁵⁸.

It is worth noticing that quite often the compensations or monetary contributions are not handed to the “private parties” (the “assistants” in the trial, litigant ENGOs which *help* the prosecutor offering evidence and requesting the carrying out of some procedural steps) but to other ENGOs active in the same area or specialized in the same field of activity. Afterwards it is up to the ENGOs to decide if they want to reach an agreement on the activities in which they want to use the Money or to carry out those activities jointly⁵⁹.

On the other hand, less serious environmental infractions, that do not amount to criminal offenses, may also give rise to punitive proceedings of administrative nature. In administrative sanctioning procedures there is the corresponding possibility for the suspension of the administrative sanction as well. In this case, considering that imprisonment is not applicable, what will be suspended it's the administrative fines. According to article 39 of the Framework Law on administrative breaches, the sanction may be suspended (fully or partially) by the administrative authority. The suspension may be conditioned to the fulfillment of certain obligations, including those considered necessary for the regularization of illegal situations, to repair damage⁶⁰ or to prevent health hazards, and the safety of people, property and the environment⁶¹. After the period of suspension, provided that the convicted person or company hasn't committed any other environmental administrative offense, and hasn't violated the obligations imposed on him/it, the sanction ends up having no effect and the fine is not applied. In the opposite case, the administrative sanction is immediately executed⁶².

⁵⁸ Article 51 no.3 of the Criminal Code.

⁵⁹ This was the case of criminal condemnation in 2012 for a deliberate destruction of protected plant species (a priority species *Thymus camphoratus*, and also *Linaria algarviana*, both mentioned in Annex II of the Habitat directive) and priority habitats (*Mediterranean arborescent matorral*), in the south of Portugal in 2010. The criminal actions violated a previous judicial injunction which condemned them to halt all harmful activities in a certain *Natura 2000* site. The suspension of the execution of the condemnation (2 years imprisonment for the crimes of damages against nature and of disobedience) was conditioned to the payment of €150000 to a third ENGO different from the “assistant” ENGO participating in the litigation.

⁶⁰ The “reparation of damage” includes, first of all the duty to restore *in natura*, and then the duty to compensate, whenever restoration was not possible or was insufficient. See article 562 of the Civil Code: “Whoever is required to repair a damage shall reconstruct the situation that would exist if the event requiring repair had not occurred”. In addition, article 566 determines: “the compensation is fixed in cash, provided that the natural restoration is not possible, does not fully repair the damage, or is excessively burdensome for the debtor”.

⁶¹ Article 39 no.2 of the Framework Law on administrative breaches.

⁶² Article 39 no.4 of the Framework Law on administrative breaches.

4. Individuals and associations as holders of *actio popularis*

As stated in the Law on *actio popularis*⁶³, the holders of this right are any citizens enjoying their civil and political rights⁶⁴ as well as associations and foundations for the defense of interests referred, regardless of having or not a direct interest in demand⁶⁵.

In order to recognize standing to associations and foundations, three requirements are necessary⁶⁶:

a) having legal personality;

b) including expressly in their competences or statutory objectives the defense of the interests involved in the type of action concerned;

c) not exercising any kind of professional activity competing with companies or independent professionals.

Quite often the existing ENGOs decide to join creating new *ad hoc* associations with more specific goals, like fighting certain activities or projects namely by starting judicial litigation against the operator or the Administration. For this *ad hoc* ENGOs, having no assets can be an advantage in case they lose the trial.

This is only possible thanks to the legal concept of *diffuse interests*, further explained in the Annex to this report.

5. Conclusion

The fundamental concept of *diffuse interests*, in the Portuguese Law⁶⁷ has contributed to the development of a system of generous legal standing both for individuals and NGOs. In Portuguese laws, legal standing is recognized “regardless of having or not a direct interest in demand”.

But the concept of *diffuse interests* is not completely strange to the European Union Law. Since 2004 it is already present in the preamble of the Directive 2004/35, on environmental liability with regard to the prevention and remedying of environmental damage.

In the words of the Directive “persons adversely affected or likely to be adversely affected by environmental damage should be entitled to ask the competent authority to take action. Environmental protection is, however, a *diffuse interest* on behalf of which individuals will not always act or will not be in a position to act. Non-governmental organizations promoting

⁶³ Article 2 no.1 of the Law on *actio popularis*.

⁶⁴ The legal reference to the enjoyment of civil and political rights is considered by the doctrine as irrelevant and inapplicable in practice because nowadays no administrative penalty can have the consequence of losing civil or political rights. Besides, the Constitution does not limit this right to citizens but, on the contrary, extends it to every person. In the wording of article 52 No. 3, "everyone has the right (...)".

⁶⁵ Local authorities are also holders of *actio popularis* rights in relation to the interests of holders who are resident in the area of their competence (article 2 no.2).

⁶⁶ Article 3.

⁶⁷ And in Portuguese speaking countries, as explained in the Annex.

environmental protection should therefore be also given the opportunity to properly contribute to the effective implementation of this Directive”.

This first timid reception of the concept in the context of environmental liability had the narrow effect of recognizing some limited legal standing to ENGOs. To ensure a high level of environmental protection⁶⁸, this trend should be followed by a full reception, in any new legal act on access to justice, adopted at the European level.

Through European Union Law, the concept of *diffuse interests* might trigger important consequences in the national legal systems.

⁶⁸ Article 191 no.2 of the Treaty on the Functioning of the European Union (“Union policy on the environment shall aim at a high level of protection (...)”) and article 37 of the Charter of Fundamental Rights of the European Union (“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”).

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1. Introduction⁶⁹

Diffuse interests are essential instruments to operationalize environmental justice and democracy regarding access to justice. To this end, it is important to introduce the doctrine of diffuse interests in the context of judicial procedures that perform certain social functions. This doctrine is based on the legal recognition of trans-individual interests, i.e., those situated over and above individual interests and beyond public interest. Diffuse interests are a sub-category of trans-individual interests which has been long been laid down in the constitutional laws in Portuguese-speaking countries. Finally, the system of *actio popularis* to implement the protection of diffuse interests through judicial proceedings has the effect of protecting environmental rights, ensuring their effective representation in the courts.

2. The social functions of the legal procedures

The diffuse interests are a legal institution established for the protection of certain social, economic and cultural rights⁷⁰ that emerged almost 20 years ago in Portugal and more than 25 years ago in Brazil⁷¹.

The starting point of the legal construction of diffuse interests is the social function of the rules of judicial procedure. Indeed, procedural rules are an instrument of peace. Particularly in the case of the environment, social pacification is the major objective of judicial procedure⁷².

On the one hand, environmental interests are often held in practice by groups of unorganized citizens deprived of social power to protest — weak majorities — and whose propensity for litigation increases in the direct proportion of the economic value of the case and of the economic benefits obtained from the action⁷³. On the other hand, the usually low value of individual environmental damage⁷⁴ discourages victims to go to court alone. Therefore, only citizens holding a rather strong altruistic motivation will be prepared to face justice the *polluter* — a symbol of economic power, creation of employment and development — in court.

⁶⁹ English version of the article on “Les intérêts diffus, instruments pour la justice et la démocratie environnementale” written in French and waiting to be published at “*La représentation de la Nature devant le juge: Approches comparative et prospective*”, Camproux-Duffrène, Marie Pierre and Sohnle, Jochen (dir.), Strasburg University/SFDE.

⁷⁰ Odette Domingues, “Intérêt collectif et action en justice en matière d’environnement. Analyse Comparée France-Portugal”, *Textos Ambiente e Consumo* Vol. III, Centro de Estudos judiciais, Lisboa, 1996, p. 302.

⁷¹ The institute is common in most of the Lusophone countries. The Community of Portuguese speaking Countries (<http://www.cplp.org/>), is composed by nine Member States, and gathers 260 000 000 people speaking Portuguese.

⁷² António Carlos de Araújo Cintra, Ada Pellegrini Grinover e Cândido R. Dinamarco, *Teoria Geral do Processo*, Malheiros Editores, São Paulo, 1997, p. 41.

⁷³ Miguel Teixeira de Sousa analyzes in detail the economic justifications for collective procedures such as *actio popularis* (*A Legitimidade Popular na Tutela dos Interesses Difusos*, Lex, Lisboa, 2003, p. 94 and ff.).

⁷⁴ Exceptionally, there may be cases of intense and sudden damage, such as the one caused by an oil spill, for instance.

The doctrine of diffuse interests in environmental matters is a response to a request for social justice in access to law.

In a restrictive system of access to justice, the asymmetry of justice deepens the economic asymmetry between the parties. Not recognizing the right of individuals, as holders of the interests of the community, to bring actions before the courts, on behalf of all the community, is to accept an elitist access to justice. The cost of the court's services, the lawyers' fees, the anachronistic rhetoric of the trial, loss of working days, etc. are serious obstacles preventing ordinary citizens from going to court. For the holders of strong economic power, on the contrary, access to justice is professionalized and even massified. In everyday life, offenders are better *armed* to face the justice system because of their economic, informative and technological superiority. Besides, they have legal advisors and are better prepared to put an end to the procedure through plea bargaining and claim settlement. In such a system of access to justice, judicial decisions do not sufficiently reflect either the arguments or the views of the victims.

The concept of diffuse interest arose from an inefficient legal representation of some essential interests⁷⁵ by the State. Joint representation of all the holders of an interest by one judicial actor restores the lost equilibrium between the parties.

3. From trans-individual interests to diffuse interests

In Lusophone countries⁷⁶, the doctrine of diffuse interests follows the doctrine of trans-individual interests. The two doctrinal approaches qualify the environment as a *sui generis* good. This characterization results in a "socialization" of interests, generating a new category of interests: the trans-individual interests, and as a subcategory, diffuse interests. They are placed between the individual and the public interest. The social dimension inherent to the concept of diffuse interest gives rise to an increased antagonism in case of damage to the environment. In this context, the aim of the theory of trans-individual interests is to facilitate access to justice by establishing special means of action.

3.1. The sui generis nature of the environment

Although the doctrine of diffuse interests can be applied to other social values, the environment is the diffuse interest *par excellence*. The environment is a universal heritage⁷⁷, a public good belonging equally to

⁷⁵ Luis filipe Colaço Antunes, "Colocação Institucional, Tutela Jurisdicional dos Interesses Difusos e 'Acção popular de Massas'", *Textos Ambiente*, Centro de Estudos judiciais, Lisboa, 1994, p. 93.

⁷⁶ For a systematic comparison of the Portuguese system with the French system, see Odette Domingues, op. cit..

⁷⁷ Massimo Severo Giannini, La tutela degli interessi collettivi nei procedimenti amministrativi", *Le azioni a tutela di interessi collettivi*, Padova, 1976, *apud* Odette Domingues, "Intérêt collectif et action en justice en matière d'environnement. Analyse Comparée France-Portugal", *Textos Ambiente e Consumo* Vol. III, Centro de Estudos Judiciais, Lisboa, 1996, p. 306.

all citizens. In the words of Antonio Gidi, it does not belong to an individual or to an association, or even the government⁷⁸.

In what concerns use, the environment is an asset to be used in common by the whole community, a good requiring non-exclusive use. Since 1988, the Brazilian Constitution is exemplary in this regard. According to Article 225 "everyone has the right to an ecologically balanced environment, [which is] a common use good of the people and essential to a healthy quality of life, binding the public authorities and the community, which have a duty to defend and preserve it for present and future generations".

Offenses against this heritage globally affect all individuals, in the short and in the long term, including the present and the future generations.

Moreover, to the extent that environmental goods are not fungible, they are difficult to repair *in natura*.

From here, we can assert that the interests in relation to goods having such characteristics, are not limited either in space or in time. This is why they are called diffuse interests. Who owns the air we breathe? Who owns the natural wonders? Who owns biodiversity? Who owns the ecosystems? Environmental goods according to this doctrine belong collectively to all citizens, including future generations.

The rights on environmental goods are also considered to be indivisible: the division into shares or quotas attributable to individuals or groups is impossible. The right to a clean air, the right to silence, the right to biodiversity⁷⁹, is not fragmentable. The rights of each member of the group are so interdependent on each other that to satisfy the interests of a Member, you must satisfy all the others. Similarly, when the interest of a member is impaired, so are all the others⁸⁰.

3.2. "Socialization" of interest

The recognition of the *sui generis* nature of the environment explains the transition from a legal *status quo* where there are only private interests opposed to public interests, to a different legal *status quo* with a third category of emerging interests, the trans-individual interests⁸¹.

⁷⁸ *Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un modelo para países de derecho civil*, Universidad Nacional Autónoma de México, México, 2004, p. 53

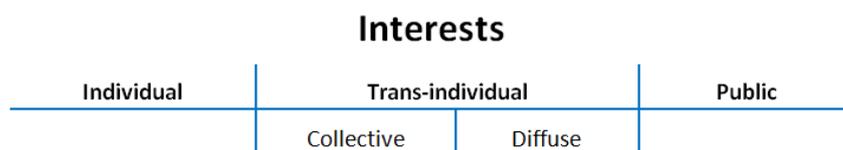
⁷⁹ In consumer law, another bastion of diffuse interests, it is possible to imagine examples such as the right to truthfulness in advertising, or the right to product safety, for example.

⁸⁰ Antonio Gidi, *Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un modelo para países de derecho civil*, Universidad Nacional Autónoma de México, México, 2004, p. 54 and 55. In the same sense, José Carlos Barbosa Moreira, *Tutela Jurisdiccional dos Interesses Coletivos ou Difusos*, Temas de Direito Processual, Terceira Série, Editora Saraiva, São Paulo, 1984.

⁸¹ In this analysis the focus is put mostly in terms of the facts — the interest — rather than in ethical-normative terms — the right. There is, nevertheless, a direct correspondence between *interests* and *rights* and it is also possible to speak about "diffuse rights". For the distinction, see eg André Gervais, "Quelques réflexions à propos de la distinction des droits et des intérêts", *Mélanges en l'honneur de Paul Roubier*, tome 1, Dalloz et Sirey, Paris, 1971, p. 242.

The category of trans-individual interests, different and independent both from the public interest and the individual interest, arises from a process of "socialization of interests." ⁸²

The category of trans-individual interests is subdivided into two sub-categories: the collective interests and the diffuse interests. The following table presents more clearly the different categories and growing level of collectivization.



The following comments should be made about this table:

The fundamental difference between public interests and diffuse interests lies in the fact that the **public interests** concern the State, the citizens and the law, while the **diffuse interests** concern the nation, man, and justice⁸³.

The difference between public interests, collective interests and diffuse interests is related to the right to act before a court.

- The pursuit of the **public interest** belongs as a monopoly, to public corporate bodies such as the State, autonomous regions or local administrative entities. It is for them to ensure the representation of public interest in court.

- The **collective interests** are attributed to members of a non-casual group of people, linked by a permanent legal relationship⁸⁴. For example, there may be union members, shareholders of a company, the taxpayers of the same tax, the insured persons having contracted the same insurance company, or students of a school. They are, therefore, well-defined groups, characterized as associations having a corporate dimension. This is also the case of civic associations, neighbourhood associations, production cooperatives, trade unions, political parties or subscribers of collective contracts. The holders of collective interests are accordingly determinable to the extent that there is either a link among them or a link between them and the

⁸² Eduardo Braga Bacal establishes the relationship between the massification of society and the increasing importance of diffuse interests (Acesso à Justiça e tutela dos interesses difusos, *Revista Eletrônica de Direito Processual*, Vol. V, January June 2010 p. 261 and ff.).

⁸³ Rodolfo Camargo Mancuso, *Interesses difusos. Conceito e legitimação para agir*, Editora Revista dos Tribunais, São Paulo, 1997, p. 75.

⁸⁴ Luis Filipe Colaço Antunes, "Reconstituição Histórica da Tutela dos Interesses Difusos", *O Sagrado e o Profano*, Homenagem a A. J. S. da Silva Dias, *Revista de História e Teoria das Ideias*, Faculdade de Letras, Coimbra, 1987.

other party. It must be stressed that in the collective interests, the group's interest should not be confused with the sum of the interest of the group. There is also a "personal interest" of the group⁸⁵.

- Finally, **diffuse interests** are related to a more or less extended group of people having a number of common characteristics, united by a common interest and sharing a *de facto* communion in the profiteering or enjoyment of the good. Holders of diffuse interests are thus indeterminate (and in most cases indeterminable), they are united only by factual circumstances (and not a legal relationship): for example, living in the same region, using the same park, bird lovers and people living in the same socio-economic conditions⁸⁶. The holder of the diffuse interests is the community, not the individual. In the diffuse interests there is no legal relationship between individuals among themselves or individuals and the other party. These are larger groups, potentially all humanity. Diffuse interests are interests without a defined holder.

3.3. The typical conflicts inherent to environmental damage

Despite the undeniable social importance of the environment, there is no social consensus on whether or how to protect it. The social relationships that occur *via* the environment — in simple words, the relations established between the polluters and the polluted — are generally very confrontational. In fact, the diffuse interests are based on complex social relations⁸⁷, characterized by strong intrinsic multipolar conflicts⁸⁸, opposing both public, private and collective interests as well as a variety of diffuse interests. In such complex conflicts, there is no abstract legal parameter guiding the decision maker on who is right or wrong. These are mostly impersonal conflicts and the discussion centers around values, ideas and ideological options⁸⁹, rather than on the benefits of the applicant or the disadvantages of the defendant. The resolution of these conflicts is usually the result of a highly political choice. This is why the instruments for the protection of diffuse interests are called *ideological actions*⁹⁰.

The typical case of conflicts involving diffuse interests is that of a chemical plant near a lake. Due to an industrial accident, the plant operator causes serious water pollution, damaging particularly the fishermen, but also the residents and all nature lovers. If the damage caused to the fishermen and to the residents is

⁸⁵ Rodolfo Camargo Mancuso, *Interesses difusos. Conceito e legitimação para agir*, Editora Revista dos Tribunais, São Paulo, 1997, p. 46.

⁸⁶ For example, without personal or family insurance without running water or sewage, etc.

⁸⁷ In the words of Gomes Canotilho, called "polygonal". (see "Relações jurídicas poligonais, ponderação ecológica de bens e controlo judicial preventivo", *Revista jurídica do Urbanismo e do Ambiente*, N.1, 1994, p. 58 and ff.).

⁸⁸ Gomes Canotilho, "Privatismo, Associativismo e Publicismo no Direito do Ambiente", *Textos Ambiente e Consumo* Vol. I, Centro de Estudos judiciais, Lisboa, 1996, p. 145.

⁸⁹ Rodolfo Camargo Mancuso, *Interesses difusos. Conceito e legitimação para agir*, Editora Revista dos Tribunais, São Paulo, 1997, p. 120.

⁹⁰ According to Ada Pellegrini Grinover, there are "new groups, new categories, new classes of individuals, aware of their shared interests, their needs and their individual weakness, who get together and unite against the tyrannies of our time, which are no longer the tyranny of the rulers but the oppression of minorities, the interests of large economic groups, the indifference of the polluters, the inertia, the incompetence or the corruption of bureaucrats " ("Novas tendências na tutela Jurisdicional dos interesses difusos", *Revista do Curso de Direito da Universidade Federal de Uberlândia*, vol 13, N.1/2 1984, p. 7).

identifiable and measurable⁹¹, the damage caused to the community is more difficult, if not impossible, to identify and measure. The total damage is larger than the sum of all individual damages. Besides the factory owners and the direct victims, the other parties in the conflict are public authorities, workers, neighbors, suppliers, business partners, competing producers (i.e. similar factories), the banks, the insurance companies, each with different and often conflicting interests.

3.4. The means of action

The ultimate goal of a theory of trans-individual interests is to legitimize easier access to justice for the benefit of individuals and social organizations⁹². Diffuse representation of the environment before the judge through the *actio popularis*, represents the culmination of a higher level of social justice and greater efficiency in environmental protection thanks to the expansion of the opportunities to implement macro environmental justice⁹³, as shown in the following table.

Interests			
Individual	Trans-individual		Public
Exercised individually	Collective	Diffuse	Exercised publicly
	Exercised collectively		
Implementation of micro-justice (isolated and individual litigation)	Implementation of macro-justice (supra-individual litigation)		

The answer to the question of who has an interest to act, always depends on the interests at stake. In the context of an infringement of an individual interest, the holder of the right of action is the victim who has suffered the damage⁹⁴. In the context of environmental damage, in Portuguese speaking countries, the interest belongs to a wide plurality of individuals and even to the entire community.

⁹¹ The interest of fishermen can be considered individual and homogeneous because the fact causing damage to them is the same and they will probably present the same type of request. Here, collective action is a tool to protect the sum of individual interests.

⁹² For a global perspective of collective or group actions to defend collective interests, see *World Class Actions. A Guide to Group and representative Actions Around the Globe*, de Paul G. Karlsgodt (editor), Oxford University Press, 2012.

⁹³ Macro-justice and micro-justice are common expressions in Brazilian law.

⁹⁴ The doctrine also identifies a sub kind of individual interests, the *homogeneous individual interests*, which simply reflect individual subjective rights whose protection is made collectively under the similarity of individual applications that corresponds to the class action in the United States of America.

Of course, the State also has a duty to protect environmental interests. In the Constitution of the Portuguese Republic, the "fundamental missions of the State", include the duty to "promote (...) the realization of economic, social, cultural and environmental rights (...)"⁹⁵ as well as the duty to "protect and promote the cultural heritage of the Portuguese people, to protect of nature and the environment, to conserve natural resources and to ensure good spatial planning".⁹⁶

The public prosecutor represents those who do not have a voice⁹⁷. He is the spokesman for the trans-individual interests. Under the statutes of the Public Prosecutor, he is bound "to assume, as provided for by the law, the defense of collective and diffuse interests"⁹⁸.

However, the practice has proven that even the Welfare State is unable to resolve all social conflicts. The emergence of actions for representation of diffuse interests is a response to the inability of governments to effectively protect the new rights. Now, the State is no longer the only one to defend the interests that go beyond the individual frame. The classic structure of the judicial process, as a process of opposing parties, is abandoned and new forms of collective claim are found. Finally, it's the social actors who support the protection of social rights. This can be done in two ways:

1. Individuals are grouped in associations that are the active parties in the dispute brought before the judicial power.
2. Each isolated individual holds the right to take legal action on behalf of all the collectivity and in the interest of all the society.

The *actio popularis*, originally intended for the protection of public interests, has expanded the protection of diffuse interests. In this sense, *actio popularis* can be defined as the right of action, granted to every citizen or legal entity that allows the holder to request the intervention of the judicial organs of the State, to ensure the protection of certain interests of the community to which the Constitution gives a qualified protection, and to require the reparation of damages⁹⁹.

With the *actio popularis*, procedural legitimacy is no longer assessed using concrete criteria relating to the individual or legal person and must, on the contrary, be judged in general and abstract terms¹⁰⁰.

⁹⁵ Article 9, paragraph d): "to promote the well-being and quality of life of people and real equality between the Portuguese people and the fulfillment of economic, social, cultural and environmental rights through the transformation and modernization of economic and social structures".

⁹⁶ Article 9, paragraph e).

⁹⁷ As the disabled or absent persons.

⁹⁸ Article 3 e) of Law No. 47/86 of 15 October, republished by Law No. 60/98 of 27 August and amended by the laws N. 42/2005 of 29 August; 67/2007, of 31 December; 52/2008 of 28 August; 37/2009, of July 20; 55-A / 2010 of 31 December and 9/2011 of 12 April.

⁹⁹ Nuno Sérgio Marques Antunes, *O Direito de Acção Popular no Contencioso Administrativo Português*, Lex, Lisboa, 1997, p. 27.

¹⁰⁰ Robin de Andrade, *O Direito de Acção Popular no Contencioso Administrativo Português*, Coimbra editora, Coimbra, 1967, p. 3.

4. The laws on the protection of trans-individual interests in the Portuguese-speaking countries

The right of *actio popularis* is the ultimate expression of the fundamental right of access to justice. Our study of this right is limited to the presentation of the popular action laws, without going into details of the legal analysis of subtle legal options¹⁰¹.

In many countries, the right to *actio popularis* is enshrined in the Constitution.

4.1. Constitutional laws

In Portugal, since 1976, there is a constitutional article on *actio popularis*. In the beginning, almost 40 years ago, the Constitution did not have any details either on the subjects, or on the object, or even on the conditions of exercise of *actio popularis*. In 1989, after the third constitutional amendment, the environment is one of the advantages to the use of popular action.

In 1997 the fourth revision of the Constitution says "access to law and effective judicial protection"¹⁰² among the fundamental rights.

Today, the Basic Law, in Article 52, the right of petition and popular action, provides:

"1. Every citizen has the right to individually, or jointly with others, submit petitions, representations, claims or complaints in defence of their rights, the Constitution, the laws or the general interest to the entities that exercise sovereignty, the self-government organs of the autonomous regions, or any authority, as well as the right to be informed of the result of the consideration thereof within a reasonable time limit.

¹⁰¹ For a severe criticism of *actio popularis*, considered a "tragic paradox" in a country without social and cultural conditions to enjoy it, see Luis Sousa Fábica. In a scathing article, the author considers the *actio popularis* in Portugal is useless because it is rarely used due to low education, low "social associative movements", weak social elites with a preference for living at the expense of the State instead of facing the State. The paradox is that *actio popularis* is necessary because the State itself is too weak to protect the people effectively against the interests of large groups, and therefore it is easy for the strong and consistent lobbies (holders of collective interests) to dominate the State (Cadernos de Justiça Administrativa, No. 21, May June). In a softer tone, Odette Domingues also highlights some of the practical obstacles to the exercise of the right of *actio popularis*. "Intérêt collectif et action en justice en matière d'environnement. Analyse comparée France-Portugal", *Textos Ambiente e Consumo* Vol. III, Centro de Estudos judiciários, Lisboa, 1996, p. 330 and ff.

¹⁰² It is Article 20 of the Constitution:

- "1. Everyone is guaranteed access to the law and the courts in order to defend those of his rights and interests that are protected by law, and justice may not be denied to anyone due to lack of sufficient financial means.
2. Subject to the terms of the law, everyone has the right to legal information and advice, to legal counsel and to be accompanied by a lawyer before any authority.
3. The law shall define and ensure adequate protection of the secrecy of legal proceedings.
4. Everyone has the right to secure a decision in any suit in which he is intervening, within a reasonable time limit and by means of a fair process.
5. For the purpose of defending the personal rights, freedoms and guarantees and in such a way as to secure effective and timely judicial protection against threats thereto or breaches thereof, the law shall ensure citizens judicial proceedings that are characterized by their swiftness and by the attachment of priority to them".

2. The law shall lay down the terms under which collective petitions that are submitted to the Assembly of the Republic and the Legislative Assemblies of the autonomous regions are considered in plenary sitting.

3. Everyone is granted the right of *actio popularis*, including the right to apply for the applicable compensation for an aggrieved party or parties, in the cases and under the terms provided for by law, either personally or via associations that purport to defend the interests in question. The said right may particularly be exercised in order to:

a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage;

b) Safeguard the property of the state, the autonomous regions and local authorities.”

The institute of *actio popularis* is common¹⁰³ to several Portuguese-speaking countries.

In Brazil according to the Federal Constitution, since 1988, "every citizen has legitimacy to propose a judicial action to annul an act harmful to public property (...), to administrative morality, to the environment and to historical and cultural heritage, and the author has the right to be exempted from court costs and from the burden of proof of having succumbed, except in cases of proven bad faith."(Article 5, §LXXIII). Furthermore, "the State must provide a complete and free legal assistance to all those who prove to have insufficient funds" (Article 5, §LXXIV).

The more recent Constitution of the Republic of Angola (2010) follows the same path in Article 74: "right of *actio popularis*: every citizen, individually or through associations of special interests, has the right of judicial action in the cases and conditions provided by law, which seeks to avoid acts detrimental to public health, to the historical and cultural public heritage, to the environment and quality of life, to consumer protection, to the legality of administrative acts and to other collective interests ".

The Constitution of the Republic of Cape Verde (1999) also provides for a "right of petition and *actio popularis*:"

1. All citizens, individually or collectively, have the right to submit in writing to the organs of sovereignty or local government and to any authorities, petitions, complaints, claims or representations in defense of their rights, the Constitution, the law or the general interest and the right to be informed in a reasonable delay about the results of their efforts.

2. Petitions addressed to the National Assembly must be submitted to the plenary in accordance with the law.

3. The right of *actio popularis* is guaranteed by law, namely to defend the compliance with the statutes of public office holders and to protect state assets and other public entities assets".(Article 58) .

Similarly, the Constitution of the Republic of Mozambique (2004) also deals with the popular action:

¹⁰³ The legal influence of Portugal and Brazil - the two countries more inspiring of the *legal Lusophony* - is quite strong in all the countries of the *Lusosphere*.

“1. All citizens have personally or through associations for the defense of the interests at stake, the *actio popularis* under the law.

2. The *actio popularis* comprises:

a) the right to ask for the injured party compensation which they are entitled to;

b) the right to promote the prevention, cessation or prosecution of offenses against public health, consumer rights, preserving the environment and cultural heritage;

c) the right to defend the ownership of national and local authorities "(Article 81).

Finally, Macao¹⁰⁴ only recognizes the right of *actio popularis* in the Code of Administrative litigation:

"1. Macao residents, the legal entities whose mission is to defend the same relevant interests and the municipalities are the holders of the *actio popularis* for the purpose of bringing an action for acts that undermine essential public goods such as health, housing, education, cultural heritage, environment, territorial planning, quality of life and, in general, any public property.

2. Residents of Macao have the right of *actio popularis* for the purpose of bringing an action for acts likely to affect other public interests charged for municipalities and public services having legal personality and administrative autonomy" (Article 36).

4.2. The Law on *actio popularis*

In 1995 in Portugal, the Parliament has implemented the Constitution by establishing the legal regime of *actio popularis*¹⁰⁵. According to the Law, the right of *actio popularis* is not envisaged as an exception but rather as a rule.

The catalogue of interests protected by law matches the constitutional list: public health, environment, quality of life, consumer protection (for goods and services), cultural heritage and public property (Article 1, # 2).

The diffuse entitlement of *actio popularis* is recognized specifically: "Every citizen enjoying their civil and political rights¹⁰⁶, as well as associations and foundations for the protection of the interests

¹⁰⁴ Since 1999 Macao is a Special Administrative Region of the People's Republic of China. Previously it had been under Portuguese administration for 400 years, so the Portuguese influence is still very strong today.

¹⁰⁵ See Law N. 83/95 of 31 August 1995. On the history of *actio popularis* since the Roman law, see António Payam Martins, *Class Actions em Portugal*, Edições Cosmos, Lisboa, 1999, p. 101 and ff., and especially Miguel Teixeira de Sousa, *A Legitimidade Popular na Tutela dos Interesses Difusos*, Lex, Lisboa, 2003, p. 107 and ff.. For the history of *actio popularis* in Portugal, see Paulo Otero, "A Acção Popular: configuração e valor no actual Direito Português", *Revista da Ordem dos Advogados*, year 59, 1999, p. 871 and ff.. For its history in Brazil, see Elson de Araújo Capeto, "Da Acção Popular Ambiental", *Revista de Direito Constitucional e Internacional*, N.65, year 16, October December 2008, p. 79 and ff..

¹⁰⁶ The legal reference to the enjoyment of civil and political rights is considered by the doctrine as irrelevant and inapplicable in practice because nowadays no administrative penalty can have the consequence of losing civil or

mentioned in the previous article, holds the right to participation in administrative procedures and the right of *actio popularis* regardless of having or not a direct interest in the matter "(Article 2 No. 1).

Activities harmful to the interests mentioned may be challenged regardless of the complainants. *Actio popularis* can be exercised both against public persons and private persons.

As to the content of the legal proceedings, there are two types of popular action: administrative *actio popularis* and civil *actio popularis*. "The administrative *actio popularis* includes measures to protect the interests referred to in Article 1 and recourse for illegality against administrative actions adverse to the same interests". "Civil *actio popularis* may take any form provided by the Civil Procedure Code "(Article 12).

The *actio popularis* can have different objectives: preventive, repressive or compensatory and is not based only on the illegality.

Of course, to prevent the abuse of the right of access to justice, the judge may dismiss the application when he "believes that the merit of the claim is clearly unlikely, after hearing the public prosecutor and after an initial inquiry considered as justified by the judge or that the author or public prosecutor require"(Article 13).

The most interesting aspect of the legal system of *actio popularis* is the quest for effectiveness. The law created five features specifically designed to ensure the success of the action:

1. On representation: " the author represents in his own initiative, and with no need for a mandate or express consent, all other holders of rights or interests who have not exercised the right to self-exclusion" (Article 14) ¹⁰⁷.

2. On *res judicata*: "The judgments pronounced as having *res judicata* in administrative actions or appeals or in civil actions (except in case of rejection of the application for lack of evidence, or where the

political rights. Besides, the Constitution does not limit this right to citizens but, on the contrary, extends it to every person. In the wording of article 52 No. 3, "everyone has the right (...)".

¹⁰⁷ The detailed description of the regime for self-exclusion is contained in Article 15:

"1. After receiving popular action, the holders of interests involved in the action and not participating in it, will be cited to appear and intervene in the case as authors, within the time limit prescribed by the court, if they want, accepting the action at the stage where it is, and stating whether they accept or not to be represented by the author or, on the contrary, if they want to be excluded from representation, namely for the effect of non-enforcement of court decisions. Passivity is deemed to constitute acceptance, without prejudice to paragraph 4.

2. The citation is made either through announcements published in the means of communication or by edict, according to the interests involved (general public interest or geographically located interests) without the need for personal identification of all the recipients holders of the mentioned rights, and with reference to the action in question, identification of at least the first author, when there are several, of the defendant, and a quite clear reference to the request and the cause of the action.

3. When it is not possible to identify the holders, the citation provided by the preceding paragraph is made by reference to their universe, determined in accordance with the circumstances or quality which is common, in accordance with the geographical area they live in or the group or community that they incorporate (in any case, the identification made by the applicant is not important), and followed by the information mentioned in the previous paragraph.

4. The representation referred to in paragraph 1 is still subject to refusal by the represented, by means of an express statement issued by the end of the phase of evidence gathering or equivalent procedural stage".

judge has to decide differently depending on motivations related to the case), have an overall efficiency, although not any having effect on the holders of rights or interests that have exercised their right to withdraw from representation"(Article 19 No. 1)

3. On the evidence: "In the popular action and the key issues identified by the parties, evidence collection is made at the initiative of the judge, regardless of the parties' initiative" (Article 17).

4. On the effects of appeal: "Even if a particular appeal does not have suspensive effect, in general terms, the judge may, in the *actio popularis*, grant that effect to avoid irreparable damage or damage difficult to repair "(Article 18).

5. On the effects of the decision: "Final decisions are published at the expense of the losing party and under penalty of disobedience, mentioning *res judicata*, in two newspapers read by most stakeholders at the discretion of the judge, who may determine that the publication is limited to an extract of the essential aspects, when the length of the decision does not justify the publication in full"(Article 19 No. 2).

6. On court costs and expenses. The rules in respect of court costs and expenses particularly favourable, transforming *actio popularis* into a truly effective instrument of equity in access to justice: "1 - The exercise of the right to *actio popularis* does not require the payment of any prior court costs. 2 - The author is exempt from the payment of fees in case of partial acceptance of the application. 3 – In case of total rejection of the application, the author shall be liable to pay the sum fixed by the judge between a tenth and half of the costs that would normally be payable, taking into account the economic situation of the author and the formal or substantive reasons for rejection. 4 - Bad faith litigation is ruled by the general law. 5 – The legal costs are joint responsibility of all authors, under the law "(Article 20).

5. Conclusion

The system of *actio popularis* for the protection of diffuse interests is essential in a contemporary and egalitarian legal order to ensure, rather than proclaiming, environmental rights. It is not enough to recognize the solidarity rights. The legal system must adapt to protect the solidarity rights properly, ensuring their effective enjoyment by all the community¹⁰⁸.

The main achievement of this legal development was to overcome the “individualist paradigm of the judicial procedures”¹⁰⁹ replacing it with a social model based on the concept of diffuse interests, a trans-individual type of interests between the public and private interest and different from the collective interest. This evolution seems particularly suited to the protection of the environment considering that the concept of diffuse interests is characterized by the nature of the protected goods and not by the parties in court.

¹⁰⁸ Ada Pellegrini Grinover, “Significado Social, Político e Jurídico da Tutela dos Interesses Difusos”, *Revista de Processo* N.97, year 25, January March 2000, p. 10.

¹⁰⁹ According to the expression of Mauro Cappelletti and Bryant Garth, “The Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation”, W. Habscheid (editor), *Effectiveness of judicial protection and constitutional order* (Gieseking-Verlag, Beilefeld, 1983), p. 158.

Lastly, the legal recognition of diffuse interests and *actio popularis* is firmly related to the challenges posed by the principle of participation and the social demand for "new forms of democracy"¹¹⁰.

¹¹⁰ Ada Pellegrini Grinover, "Novas tendências na tutela Jurisdicional dos interesses difusos", *Revista do Curso de Direito da Universidade Federal de Uberlândia*, vol 13, N.1/2 1984, p. 3.