Teka Komisji Prawniczej PAN Oddział w Lublinie, vol. XV, 2022, no. 1, pp. 73–84
https://doi.org/10.32084/tkp.4456

ENVIRONMENTAL PROTECTION AND ITALIAN CONSTITUTIONAL REFORM. SOME PROFILES OF INTEREST AND CRITICAL REMARKS

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Abstract. This paper aims to analyse the scope of constitutional reform no. 1/2022, approved last 8th February by the Italian Parliament, with which the Articles 9 and 41 of the Constitution have been modified. Thanks to this amendment, the environment (the ecosystem and biodiversity) has been included as a legal asset subject that needs an expressed protection. Specifically, it is possible to highlight the critical profiles concerning the balance that the legislator has already intended to offer at a regulatory level between respect for the environment and private economic activities. In this field, the Ilva case-law represents a milestone for the Constitutional Court and the Italian legislator.

Keywords: environment, environment protection, constitutional reform, ecocentric perspective

INTRODUCTION

Recently, the Italian legal system has undergone a peculiar reform, through which the level of environmental protection already enshrined in the Constitution has been strengthened. Italy is therefore one of those countries that, in order to react to the effects and disasters of climate change, has – perhaps symbolically – oriented all economic, social and economic activities towards the awareness and need to protect the environment. Since this is a civil law system, culturally close to the Polish and Central European systems, it is worth reflecting on the content of the reform and above all on the effects it may have on the real economy. This is in order to offer a comparative perspective.

In the course of this paper, therefore, we will focus on the analysis of the protection of the environment in the Italian constitutional context, on the process of the reform, its content, and its critical profiles to verify its impact, strength and weaknesses.

ISSN 1899-7694
e-ISSN 2719-7379

1. THE ENVIRONMENTAL PROTECTION. A NEED THAT CAN NO LONGER BE POSTPONED

To understand how the text of the reform and its ratio were arrived at, it may be useful to consider, firstly, which principles protect the environment in the context of the Italian legal system. In this way, it will also be possible to guess what is meant by "environment" according to the Italian constitutional legislator.

In fact, the notion of "environment," outside the legal context, already has different meanings.[1] This fact shows how it is not so easy for the legislator of a country to guide regulatory choices with respect to a protected good whose perimeter is not so clear. And, on this path, the first thing to do is to understand whether the environment is understood as a complex of elements not dependent on the simultaneous need to safeguard the economic, social and political components of human life on the planet or whether the environment should be considered an object of definition and protection only from the perspective of the human being. In short, it is a question of deciding between an "anthropocentric" and an "ecocentric" view of the environment [Kortenkamp and Moore 2019, 261–72].

As mentioned above, in the first case, the environment is instrumental to the well-being of humans. In the second case, on the other hand, the well-being of the environment must be protected regardless of human behavior and necessities. Recently, from a political and international point of view, there has been a slight change of way.

In the last decades the climate emergency was surely perceived as a scientific reality but not as well as a political and consequently as a juridical reality. Indeed, from a political point of view, there was no single vision and, therefore, not a single approach to the "environment" issue.

The very existence of man-made climate change was the subject of great doubt even in countries that were particularly advanced and central to the entire world environmental ed economic balance. It would be enough just to think here about the United States of America. During President Trump's previous administration, not only the country was pulled out of the 2015 Paris Agreement on limiting CO_2 emissions and preventing the Earth's temperature from rising, but also sustained populist approach implied that human race was unable to trigger and facilitate the devastation of the climate balance through the exploitation of natural resources; pollution from industrial activity was being questioned [Tollefson 2017].

[1] One of the most common is "the natural world in which people, animals and plants live," in Oxford Dictionary.

At the same time, in terms of international policy and relations, other countries in the East, such as China, are still investing in the exploitation of coal and fossil energy resources to make their economies more efficient. That because the economic growth comes before environmental protection in a global context.[2]

However, as anticipated, a change of course seems to have taken place with the recent G20 and Cop 26 [Nascimiento et al. 2022, 158–74].

The summit of the Heads of State and Government of the countries belonging to the G20, held in Rome from 30 to 31 October 2021, had the environment as one of its main goals: numerous sessions were dedicated to this issue, leading to the signing of the commitment to contain climate warming within 1.5 degrees through immediate actions such as the reduction of global gas emissions, and the commitment to formulate long-term strategies that establish pathways consistent with achieving a balance between "anthropogenic emissions" and the reduction of CO_2 by or around mid-century, taking into account different approaches, including the circular carbon economy, socio-economic, economic, technological and market developments and the promotion of the most efficient solutions.

The summit smoothly passed the baton to Cop 26, the UN climate change conference, chaired by the UK and hosted in Glasgow from 31 October to 12 November 2021, where more than 190 world leaders are gathered for twelve days of negotiations.

This was an event that many believe is the world's last chance to bring the devastating consequences of climate change under control, the debate involving society at large: scholars, citizens, activists. The summit has therefore made it possible to transform the certainty of climate change into a political issue, one which no country can shirk any longer or regard in a different sense, for instance, believing that human behavior is not capable of compromising the environment.

In this context, several countries, including Italy, have developed the interest – or the need – to take clear regulatory action to crystallize the principle that human activity must be limited, must be consistent with the reasons for protecting the environment. This new approach can be interpreted as the political will to move from "anthropocentric" to "ecocentric" environmental protection. In fact, as will be seen below, the intervention of the Italian legislator has effectively modified articles of the Constitution that are not directly linked to the right to human health.

[2] *The 2020 China report of the Lancet Countdown on health and climate change*, https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30256-5/fulltext [accessed: 25.03.2022].

2. THE ENVIRONMENT IN THE ITALIAN CONSTITUTION. A LOOK AT THE SYSTEM BEFORE THE CONSTITUTIONAL REFORM

Until the reform of February 2022, Italy's Constitution did not in fact expressly provide for the "environment" as an object of protection [Bartolucci 2021, 212–30].

In fact, within the text of the Charter, it was possible to glimpse a positioning within Article 9 of the Constitution, with reference to the object and the fact that protection should be provided for. Within Article 117 of the Constitution, on the other hand, the environment is still identified with reference to the legislative power – in the division of competences between the central State and the territorial regions – which must provide a reference discipline. In particular, the Italian Constitution assigns to the central State the prerogative of legislating to protect the environment as such [Cerrato 2020, 216–24].

These two articles have a different weight and function within the constitutional system. Article 9 of the Constitution is in fact included in the first part of the constitutional text, which is dedicated to the fundamental values and principles that inspire the Republic. Article 117 of the Constitution, on the other hand, falls within the regulatory provisions of the so-called second part of the Constitution, which regulates the powers of the State, its checks, balances and the various functions they perform. And yet, before the 2022 reform, the object "environment" was explicitly referred to only in Article 117 of the Constitution. In fact, Article 9 of the Constitution did not expressly refer to the "environment," since in paragraph 2 there was only a generic reference to the "protection of the landscape."

In its entirety, Article 9 of the Constitution stated: "The Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the nation."

It is clear, therefore, that the "environment" was not the subject of an express provision. Only over the years, the doctrine, supported at times by the constitutional jurisprudence (Constitutional Court No. 85/2013) [Ceddia, Graziano, Mezzi, et al. 2020, 9–22], has managed to extrapolate from the concept of "landscape," the environmental asset as an independent one to be protected. And this process has certainly been facilitated by the fact that Italy, a founding country of the EU, ratified the Maastricht Treaty of 1992 and the following treaties that followed until Lisbon in 2009. However, let us take a look at the various stages that followed.

The sensitivity that has matured for environmental issues over the last few decades, as mentioned above, has led the doctrine to look for a formal foothold in the text of the Italian Constitution on which to base the legal relevance of the environment as such. And in fact, at first, the evolutionary interpretation of the expression "protect the landscape," in combination with Article 32 of

the Constitution,[3] which qualifies health as a fundamental good of the individual and the community, has allowed to expand the meaning to include the protection of the environment [Mengoni 1996, 121].

In this sense, if Article 9 of the Constitution has represented the normative foundation useful to guarantee the protection of the environment against violations on the landscape and on the territory that could create damage to mankind, Article 32 of the Constitution has turned out to be the juridical key to make the violation of the environment protectable before a judge and the damage caused to it the fundamental element to be able also to ask for a compensation for the damage caused.

In this context, a sentence of the Italian Constitutional Court was significant (No. 5172/1979) which, interpreting Article 32(2) of the Constitution, stated that the protection of human health "extends to the associated life of man in the places of the various aggregations in which it is articulated." For this reason, even the environment, as the place where man lives, must be protected in order to guarantee the human being.

During the following years, the Constitutional Court then made an "extensive" interpretation to protect the environment within the Constitution. In sentence No. 167/1987, it is stated that Article 9 of the Constitution not only contemplates the landscape as a cultural and patrimonial value of the Nation but also the "environment" as a new good to value and protect. It thus obliges the legislator to protect it in all its forms. Landscape and environment are thus taken together as constitutional values of equal level and importance for the Italian legal system.

Even more important is sentence No. 641/1987 of the Constitutional Court, which states that: "the environment is protected as a determinative element of the quality of life. Its protection does not pursue abstract naturalistic or aesthetic purposes but expresses the need for a natural habitat in which man lives and acts and which is necessary for the entire community" [Corriero 2020, 106–20; Bin 1992, 136].

Yet, as can be seen from the words used, the Constitutional Court used the term "value," which legally can be understood in a non-univocal way. For this reason, the doctrine tried to affirm that more than value it would be necessary to speak of legal interest, which requires effective protection that can be exercised before a judge [Bin 1992, 136]. It was only in the 2000s, thanks to the European Union, that Italy adopted a regulatory system capable of giving substance to the environment as a legal asset and as an object of protection.

[3] Article 32: "The Republic protects health as a fundamental right of the individual and the interest of the community and guarantees free health care to the indigent. No one may be obliged to undergo a given health treatment except by provision of law."

It can be just seen that Article 3 of the TEU states that the European Union and thus the Member States must act to promote economic sustainability and the environment.[4]

Without going deep into the European regulatory framework that has been adopted on this subject and with which Italy has had to comply, it is sufficient to recall that it is thanks to Legislative Decree No. 152/2006 "Environmental Code" that Italy has been able to regulate the institution of "environmental damage." The legislative act thus gave an identity to the concept of environmental damage and consequently provided terms of reference within which to place the meaning of the environment within the Italian legal system [Salanitro 2008, 373–86; Cerbo 2008, 533–40].

The "Environment Code" also introduced into the Italian system a set of measures aimed at providing rules for companies and citizens on compliance with a whole series of prerogatives and models to be observed in order to avoid environmental damage of various kinds. The "polluter pays" principle was also highlighted, which requires the party causing the damage to restore the situation ex ante as well as compensating the injured parties and the community [Salanitro 2020, 33–37; Leonardi 2019, 1548–566; Lo Sapio 2018, 40–44; Moramarco 2017, 175–94; Corriero 2016, 509].

Concerning our particular interest in this context, it is clear, how the Italian legal system was, until the constitutional reform of February 2022 fundamentally equipped it with a system of rules for the protection of the environment based on ordinary law, on parliamentary or regional laws (Article 117 of the Constitution) which, as is known in the system of sources, has a subordinate position to the Constitutional one. In addition, the concept of the environment has nevertheless remained implicit in the constitutional fabric and enhanced by the activity of the Constitutional Court's jurisprudence.

Moreover, as can be deduced from the references made to some of the Court's rulings, the good of the environment has always been linked to the well-being of mankind; a perspective therefore more anthropocentric than ecocentric, in which, although the environment assumes a fundamental value in the constitutional order, it must be contemplated and regulated with regard to human activity and its development.

[4] Article 3 TEU: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological progress."

3. THE REFORM OF ARTICLE 9 AND 41 OF THE ITALIAN CONSTITUTION

It is only in recent years, also in the light of the more mature political reasons to do with the subject, that Italy has arrived at the formulation of a constitutional reform law aimed at protecting the environment in a more stringent and reinforced manner.

Constitutional Law No. 1 of 11 February 2022 on "Amendments to Articles 9 and 41 of the Constitution on environmental protection" has been published in the Italian Official Gazette on 22 February 2022, after having been definitively approved in the second reading by the Chamber of Deputies in the session of 8 February 2022 with a majority of two thirds of its members.

The constitutional reform, as mentioned above, inserts in the Italian Constitutional Charter an express reference to the protection of the environment and animals, by amending Articles 9 and 41 of the Italian Constitution [Sciascia 2021, 465–76]. More specifically, with the integration of the second paragraph of Article 9,[5] the reform amends one of the twelve articles of the Italian Constitution relating to the fundamental principles, introducing not only environmental protection but also the protection of biodiversity and ecosystems in the interest of future generations, also stating that the law of the State must regulate the ways and forms of animal protection. This is therefore a fundamental change of course. The environment is to be protected regardless of the reasons and needs of mankind. The environment is the future of the planet and must be preserved as it is.

It also amends Article 41 of the Italian Constitution,[6] which affirms that economic undertakings may not be carried out in such a way as to damage health and the environment, and that the law shall determine the programmes and appropriate controls so that public and private economic activity may be directed and coordinated for environmental purposes.

Here, too, the difference from the past is evident. It is no longer the environment, as a fundamental constitutional value, that must be assessed and protected in relation to economic performance. This time, the economy must always be oriented towards respect for the environment, the ecosystem and biodiversity.

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[5] Article 9: "The Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation. It protects the environment, biodiversity and ecosystems, also in the interest of future generations. State law regulates the ways and forms of animal protection."

[6] Article 41: "Private economic initiative is free. It may not be carried out in conflict with social utility or in such a way as to damage health, the environment, security, freedom or human dignity. The law determines the programmes and appropriate controls so that public and private economic activity can be directed and coordinated for social and environmental purposes."

Lastly, it contains a safeguarding clause to the legislative powers granted to the Regions with special statutes and to the Autonomous Provinces of Trento and Bolzano by their respective statutes.[7] Therefore, it is clear that the Italian legislator wanted to include a plurality of new legal assets to be protected at a constitutional level, not only the environment. We thus move from an abstract consideration of the good to be protected to a concrete one, made up of tangible elements that have their own dimension. "Biodiversity" and the concept of "ecosystem" are included in the text as if to reiterate a conceptual distinction, which is also fundamental for the purposes of protection [Predieri 1981, 503ff].

The environment is no longer just the "landscape," but takes on a visible and physically perceptible dimension getting beyond something static, becoming dynamic. This explains also the direct protection of animals [Merusi 1975, 445ff]. This differentiation of protection objects could lead to "a potential and unresolvable conflict between different and, in theory, non-coincident objects (landscape, environment, ecosystems and biodiversity), whose protection requirements are not always unequivocally convergent, imposing, much more often than one might think, complex operations of reciprocal weighting and balancing, all «internal» to the macro-objective constituted by environmental protection" [Cecchetti 2021, 299ff].

The reason why the Italian legislator decided to separate the terms "biodiversity and ecosystems" from the term "environment" is both the desire to comply with especially supranational and international practice, which has long used these terms, and the desire to guide the behaviour of the community and institutions. The amendment to Article 41 is also along the same lines.

4. THE AMENDMENT OF ARTICLE 41 OF THE ITALIAN CONSTITUTION. A NEW START BY ILVA CASE

Article 2 of the Italian constitutional reform modifies Article 41 of Constitution concerning the exercise of private economic initiative. As anticipated, the revision added to the original provision a further limitation according to which the private economic activity may not be carried out in such a way as to cause damage to health and the environment.

Reading the reports and the draft concerning constitutional laws, it emerges that the Italian constitutional legislator wanted to give a practical and effective dimension to environmental protection: the economy cannot damage the ecosystem and threaten biodiversity and the animal world. In this way, the Italian legislator is also trying to take on board, but at the same time overcome, a number of rulings given by the Constitutional Court on the relationship between

[7] See https://bit.ly/3M4llUo [accessed: 25.03.2022].

the economy and the environment. In the past, in the absence of strong politics, the Constitutional Court has had to find very delicate solutions.

An example can be given talking about the Ilva case (Cosst. N. 85/ 2013) [Corso 2019, 405–409]. In this verdict, the judges focus on the balance between constitutional rights and goods, in particular, on private economic initiative in relation to work and health and reiterate that the legislature cannot be considered precluded in abstract terms from intervening to ensure employment levels and safeguard production continuity in strategic sectors for the economy. Then the Court was called upon to judge the constitutionality of the so-called Ilva Decree of 2015, which allows Ilva to continue its activities despite the preventive seizure order issued by the judicial authorities for offences relating to workers' safety.

The case involving the Ilva plant in the city of Taranto had seen the adoption of rules under which – even in the presence of preventive seizures ordered by the authority – the continuation of economic activity was not denied, as long as there was a reasonable and balanced dimension of the constitutional values at stake.

According to the Court, such a balancing act must be carried out "without allowing the unlimited expansion of one of the rights," which would become a "tyrant" in relation to the other constitutionally recognised and protected legal situations which, taken as a whole, constitute an expression of the dignity of the person. In this regard, the Court affirmed that the balancing must respond to criteria of proportionality and reasonableness, in such a way as to allow neither the absolute prevalence of one of the values involved, nor the total sacrifice of any of them, so that a unitary, systemic and not fragmented protection of all the constitutional interests involved is always guaranteed[8] [Corso 2019, 405–409]. "It seems clear – the Court concludes in its ruling – that, unlike in 2012, the legislator ended up by excessively privileging the interest in the continuation of production activity, completely neglecting the requirements of inviolable constitutional rights linked to the protection of health and life itself (Articles 2 and 32 of the Italian Constitution), to which the right to work in a safe and non-dangerous environment must be considered inseparably connected (Articles 4 and 35 of the Italian Constitution). The sacrifice of such fundamental values protected by the Constitution leads to the conclusion that the contested legislation does not comply with the limits imposed by the Constitution on the activity of an undertaking which must always be carried out in such a way as not to harm safety, freedom and human dignity. Promptly removing factors that pose a danger to the health, safety and life of workers is in fact a minimum and indispensable condition for production activity to

[8] Cost. sent., 85 /2013; 63/2016; 264/2012.

be carried out in harmony with constitutional principles, which are always primarily concerned with the basic needs of the individual."[9]

More in detail, the Constitutional Court, with pronouncement no. 58 of 2018, in declaring constitutionally illegitimate certain provisions aimed at allowing the continuation for twelve months of the production activity of industrial plants of national strategic interest subject to preventive seizure ordered by the judicial authority in relation to alleged offences related to the safety of workers, – in this case the blast furnace "Afo2" ILVA Taranto – the Court found a violation of the constitutional provisions of Articles 2, 4, 32(1), 35(1), as well as Article 41(2) of the Constitution. So, the Constitutional Court found a loophole in Article 41 of Constitution. It seemed to be necessary to crystallize how the balance among rights should be arrived at.

The censured legislation was considered to be "far from balancing in a reasonable and proportionate manner all the relevant constitutional interests;" rather, it was found to be such as to "excessively favour the interest in the continuation of production activity, completely disregarding the requirements of inviolable constitutional rights linked to the protection of health and life itself (Articles 2 and 32 of the Constitution)." These inviolable constitutional rights linked to the protection of health and life itself must, according to the Court's findings, be considered inextricably linked to the right to work in a safe and non-dangerous environment (Articles 4 and 35 of the Italian Constitution), so that the legislative provisions under criticism constituted a violation of the limits to business activity, which – the Court emphasises – "pursuant to Article 41 of the Italian Constitution, must always be carried out in such a way as not to damage safety, freedom and human dignity."

In this sense, it is thanks to case-law such as that mentioned above that the need to intervene directly in the Constitution to regulate the balance between the interests to be protected that may come into conflict has been perceived as definitive.[10] Instead, according to the Court, it was necessary to ensure a continuous and reciprocal balance between fundamental principles and rights, without claiming absoluteness for any of them.[11] In short, through the reform, the Italian legislator is once again managing at a political and therefore regulatory level the model around which the balancing of the various constitutional interests at stake must take place.

While before the reform, it was the Constitutional Court that was able to bring out, now the right to work, now the economy, now the environment, with this new legislation, the Italian constitutional legislator imposes, once

[9] Dossier n. 405\3 of 7th February 2022 by *Servizio Studi delle Camere*, https://www.senato.it/leg/18/BGT/Schede/Dossier/Elenchi/1_3.htm [accessed: 26.03.2022].
[10] Ibid.
[11] Ibid.

and for all, already at the level of principles, the proviso that the environment can no longer be called into question to favour other rights.

The qualification of the value of the environment as "primary" therefore means that it cannot be sacrificed to other interests, even if they are constitutionally protected, not that they are placed at the top of an absolute hierarchical order.

While it is true that it might be superfluous to explain that economic activities should be functionalised for environmental purposes, given the numerous constitutional provisions concerning the subject, it is also certain that thanks to the reform of Articles 9 and 41, it is possible to talk about the constitutional foundation of a green economic activities programme [Checchetti 2022, 146] and that it constitutes "a real revolution destined to modify the economic Constitution of the country" [De Leonardis 2021, 779ff].

CONCLUSIONS

In the light of the above, however, some initial conclusions must be drawn. At the moment, it should be noted, the subject is still hotly debated in Italy. The subject is really new. The doctrine but also the national and regional legislator are trying to give a concrete and balanced value and effect to this reform.

Basically, it cannot be denied that environmental protection has indeed become expressly mentioned and central to the Italian system. It was a necessity, an ethical duty that should probably also be applied in other European countries.

However, the way in which the text, especially Article 41, has been formulated leaves open a number of perplexities of application which will have to be reflected upon and returned to also by virtue of future case law applications.

The limit is in fact represented by the fact that the Italian legislator has blocked, prevented that work of reconciliation and balance of the values involved, which are called into question from time to time. That work is essential and it can be done. The environment risks becoming a value, a right, a tyrant; a right that – if the economy and politics are unable to manage this moment of ecological transition correctly and effectively, will risk worrying and burdening Italian economic growth, as well as prompting many companies that do not know or do not want to adequately respect the environment to move their establishments elsewhere causing a huge economic damage.

To ensure that this reform has a good effect on the entire socio-economic dimension of Italy, it is necessary to hope that the Constitutional Court will still be able to carry out comparative assessments between economic, work and health needs.

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