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Guest Commentary: New Italian Constitutional Reform: What it Means for Environmental Protection, Future Generations & Climate Litigation

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On February 8, 2022, the Chamber of Deputies of the Italian Republic gave its final approval to the proposed constitutional law A.C.3156-B providing environmental protection amendments to Articles 9 and 41 of the Italian Constitution. The proposed constitutional bill, already approved by the Italian Senate, was passed with an overwhelming majority – with only 1 vote against and 6 abstentions – and has already entered into force without the need for a confirmatory referendum. The right to a healthy environment was previously recognized in the Italian constitution by means of interpretation of Article 32 on the right to health. The reform follows a global trend of increasing recognition of new obligations and rights in the field of environmental protection. This post examines the reform and highlights the important changes it introduces to the Italian legal system. The post also illustrates the positive impact the reform is likely to have on climate litigation initiatives in Italy. Adopting a comparative perspective, we draw on constitutional frameworks and recent climate litigation cases in other European jurisdictions.

What does the reform bring about?

The adopted constitutional law adds an express reference to the protection of the environment and animals, by amending Articles 9 and 41 of the Italian Constitution. With the reform, for the first time, the fundamental principles recognized by the Constitution are amended. In particular, by amending Article 9, the law introduces the protection of the environment, biodiversity and ecosystems, as well as animal protection into the fundamental principles of the Italian Constitution. Particularly relevant is a refence to the "interests of future generations." The text of Article 9 previously in force limited itself to providing for *"the promotion of the development of culture and scientific and technical research"* and *"the protection of the landscape and the historical and artistic heritage of the Nation."* The "*protection of the environment, biodiversity and ecosystems, even in the interest of future generations*," is included in a new paragraph of Article 9 and, therefore, among the fundamental principles of the Italian Republic. The reform also amends Article 41 of the Constitution, stating that economic initiative may not be carried out *"in such a way as to damage health and the environment"*, adding these two limits to those already in force – "*security, freedom and human dignity"*. Additionally, the law shall determine the programs and appropriate controls so that public and private economic activity may be directed and coordinated for environmental purposes. The amended Article 41 is particularly innovative within the realm of European Constitutions insofar as it explicitly relates the carrying out of economic activities to the protection of the environment and – one might argue – to the fight against climate change. This reform bears thus a two-fold implication. First, it provides solid legal ground for public bodies in Italy to steer economic activities to pursue environmental (and climate) objectives. Second, it could influence decisions by administrative and judicial bodies, for example with regard to the approval of specific projects, such as oil and gas infrastructure and undertakings not in line with the Paris Agreement (see Section 3 below).

Prior to the reform, constitutional environmental protection was developed in the case law of the Constitutional Court. This case law revolved around the notion of landscape protection enshrined in the original text of Article 9 (which relates to the country's natural, historic and cultural heritage) to recognize the environment as a primary and systemic value under the Constitution. Moreover, the protection of the environment was grounded on Article 32 of the Italian Constitution, which protects health "as a fundamental subjective right of the individual and as a collective interest." As recently stated by the Constitutional Court, such recognition has come at the end of an evolutionary process aimed at establishing a tight mutual relationship between society and the environment; where the environment should serve as a critical element of health, entailing a social function and encompassing a multitude of interests, also from an intergenerational standpoint (Judgment no. 179/2019).

In addition, supra-national obligations related to the recognition of sustainable development and other key principles of environmental protection stem from EU treaties, such as Article 3 of the Treaty of the European Union and Article 37 of the EU Charter of Fundamental Rights. Positive obligations upon the Italian State to ensure a fundamental right to a healthy environment can be drawn from Article 2 and 8 of the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights in Strasbourg. Several recent climate litigation cases in the European Union have drawn on these (see i.e., *Neubauer* in Germany, *Urgenda* in The Netherlands, *Klimaatzaak* in Belgium).

From a comparative perspective, the reform aligns the text of the Italian constitution with two other fundamental texts in Europe, which were amended over the last three decades. In Germany, the 1994 reform to the Fundamental Law introduced Article 20a, which both specifically obliges the State to protect "the natural foundations of life and animals by legislation, by executive and judicial action," but also recalls the State responsibility towards future generations. Similarly, in France, the 2004 *Charte de l'environnement*, which bears constitutional legal value, clearly states in its preamble that "the environment is a common heritage of mankind." Article 2 of the *Charte de l'environnement* sets a general obligation on all individuals (*toute personnes*) to contribute to the preservation and betterment of the environment. Notably, Article 6

mandates that all public policies must promote sustainable development while reconciling the protection of the environment, economic development and social progress.

In sum, the Italian Constitutional reform, which codified a series of guidelines by the Constitutional Court, will enhance the weight given to the environment and health relative to other constitutionally recognized interests. This may have, among other things, an important positive effect on the current (and future) climate change litigation initiatives in Italy.

The constitutional reform's impact on climate change litigation in Italy: drawing on comparative perspectives

The express recognition of the environment as a primary value protected by the Italian Constitution might play a relevant role in current and upcoming climate change litigation in Italy.

Rights-based climate litigation has been increasing substantially in recent years. Climate litigation cases that rely on human rights have achieved some success in Europe and beyond and prompted courts to demand increased ambition from governments. While the majority of cases are still pending, a few have reached a decision. Some broadly rely on general human rights while others are grounded in the constitutionally recognized right to a healthy environment (see here). For example, in *Urgenda Foundation v. State of the Netherlands*, the Dutch Supreme Court found a positive obligation of the Dutch government to protect the rights to life and private and family life under the ECHR from the threat of climate change. *Urgenda* marked one of the first successful challenges to climate policy grounded on human rights. The rights-based claim has already prompted changes in government policy in the Netherlands.

In *Neubauer, et al. v Germany*, the constitutional complaint argued that a fundamental right to an ecological minimum standard of living (*ökologisches Existenzminimum*), along with other human rights such as the rights to life, physical integrity and personal freedom, the right to property, and the right to a future consistent with human dignity, requires the German government to increase its climate ambition. In 2021, the German Federal Constitutional Court ruled in favor of the petitioners and struck down parts of Germany's climate law as incompatible with fundamental rights for failing to set sufficient provisions for emissions cuts beyond 2030. Accepting arguments that the legislature must follow a carbon budget approach to limit warming to well below 2°C and, if possible, to 1.5°C, the Court found that that legislature had not proportionally distributed the budget between current and future generations. The Court therefore relied on fundamental rights to recast climate protection in constitutional terms.

In *VZW Klimaatzaak v. Belgium*, the Brussels Court of First Instances similarly established a positive obligation of both the Belgian Federal State and all three Belgian Regions (i.e., Brussels Region, the Flemish Region and the Walloon Region) to take all necessary measures to prevent the adverse consequences of dangerous global warming on their lives and private and family lives under Articles 2 and 8 ECHR. A violation of the duty of care for all the above government bodies towards their citizens was therefore recognized and framed as a lack of prudence and diligence in light of Article 1382 of the Belgian Civil Code, which serves as general clause for non-contractual liability. Similar to the Dutch courts in *Urgenda*, the Brussels Court in *Klimaatzaak* thus linked the violation of human rights obligations to the existence of a duty to protect the climate under domestic tort law as applied also to State bodies.

Litigants also recently filed the first rights-based climate case in Italy, which came to be known as the "*Giudizio Universale*" ("Last Judgment"). On June 5, 2021, the environmental justice NGO A Sud and more than 200 individual plaintiffs filed a suit with the Civil Court of Rome alleging that the Italian government, by failing to take actions necessary to meet the Paris Agreement temperature targets, is violating fundamental rights, including the right to a stable and safe climate. On December 14, 2021, the first hearing was held and, in its reply, the Presidency of the Council of Ministers requested the Court to declare the complaint inadmissible and to dismiss the applicants' claims. The next hearing is scheduled for June 21, 2022 (*A Sud et al. v. Italy*, see here for some early reflections on the case).

Whether the new Articles 9 and 41 of the Italian Constitution will further inform the judiciary in its appraisal of the *Giudizio Universale* remains to be seen. However, it is fair to maintain that, also in light of the above judgments in Germany, the Netherlands and Belgium, the newly amended constitution could further consolidate the claim for further action by the Italian government to protect the environment and its citizens.

Furthermore, the new Article 41 of the Italian Constitution might bear relevant consequences for climate lawsuits launched against public and private companies. In *Milieudefensie v. Royal Dutch Shell* case, human rights obligations of businesses as enshrined in hard and soft law instruments played a crucial role in establishing the Royal Dutch Shell's duty to achieve a higher level of CO2 emissions cuts throughout its whole operational chain. Royal Dutch Shell's obligation to protect human rights was recognized by the Court in light of Articles 2 and 8 ECHR, Articles 6 and 17 of the International Covenant on Civil and Political Rights, the UN Guiding Principles and the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. The decision contributes to the establishment of a global standard of conduct for all businesses to protect the right to life and private and family life as threatened by climate change, whereby the same businesses must take all necessary measures to cease or prevent adverse human rights impacts arising from their operations.

More recently, two complaints ('specific instances') were filed with the Italian National Contact Point of the OECD, further seeking broader emissions reductions from multinational companies. In December 2021, the *Rete Legalità per il Clima* – a network of Italian lawyers and researchers committed to enforcing climate justice – challenged the compatibility of the practice of intensive livestock farming with the climate emergency (*Rete Legalità per il Clima (Legality for Climate Network) v. Intense livestock farming multinational companies operating in Italy*). In February 2022, the same network, together with a group of environmental NGOs, alleged the inadequacy of the new business plan pursued by the oil company ENI (*Rete Legalità per il Clima (Legality for Climate Network) and others v. ENI*). Specifically, the complaint highlights that ENI has committed to net zero emissions by 2050, but its actions run contrary to this goal. Both cases are based on the OECD Guidelines for Multinational Enterprises and are still at a preliminary stage.

Conclusions

The recently adopted reform of the Italian Constitution was long awaited and undoubtedly marks a relevant development to reinforce environmental protection in

Italy. The reform was also subject to criticism insofar as its final version was less comprehensive and far-reaching than expected. For example, several commentators have criticized the limited reach of this reform, including the missing explicit reference to the fight against climate change.

Yet this reform is important as it finally embeds environmental protection as one of the key fundamental principles of the Italian legal system. Moreover, the amended text of Article 41 provides a unique legal provision insofar as it explicitly orients economic activities towards, among other things, the achievement of the overarching environmental objectives set out in the international and EU environmental and climate change regimes. A crucial development, however, will come in the future concrete application of these new legal provisions in both the legislative and executive actions to fight climate change and protect biodiversity, as well as the judiciary's stances when dealing with environmental and climate change cases.

* This blog post is part of the Sabin Center's Peer Review Network of Global Climate Litigation and was edited by Maria Antonia Tigre. Dr. Luporini and Dr. Fermeglia are the rapporteurs for Italy.

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