

The Changes in the Approach to Environmental Protection by the European Union and its Member States and the Regulatory Innovations in Italy

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This essay analyses the recent changes in the approach to environmental protection by the European Union and its Member States, with particular regard to the Italian regulatory innovations. In particular, it analyses the following topics: the European Union's evolution in protecting the environment and its impact on policies and regulation of the Member States; recognition of the "value" of environmental protection by Italy's Constitutional Court; the Italian environmental reforms (the ecological transition and constitutional reform of 2022 on the matter). The aim of this study is to identify some possible consequences of the new approaches, at European and Italian level, to environmental issues.

Keywords: *Environmental Protection in the European Union and in Italy; Green Deal and Next Generation EU programmes; Ecological transition in Italy; Italian Constitutional reform of 2022 on the matter of environmental protection; environmental, economic and social policies.*

Introduction

This essay analyses the recent changes in the approach to environmental protection by the European Union and its Member States, with particular regard to the Italian regulatory innovations.

The European Union has gradually become aware of the need to take actions to protect the environment. Thus, there has been an evolution of the provisions of the EU Treaties. More recently, the European Union, especially with the "Green Deal" and the "Next Generation EU programs", has strengthened the ecological vision of environmental issues, aimed at ensuring greater protection of ecological elements and sustainable development.

In this context, Italy, as have the other Member States, in compliance with European and international obligations, has launched a process of reforms aimed at strengthening environmental protection. In Italy, in fact, a process of ecological transition has been launched, and there was, in 2022, a constitutional reform on the matter of environmental protection.

Therefore, the purpose of this essay is to examine the following topics: the European Union's evolution in protecting the environment and its impact

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on policies (not only environmental, but also economic and social policies) and regulation of the Member States; recognition of the “value” of environmental protection by Italy’s Constitutional Court; the Italian environmental reforms. More precisely, therefore, the aim of the essay is to identify some possible consequences of the new approaches, at European and Italian level, to environmental issues.

Methodology in the Analysis of Topics Covered and Expected Results

The methodology used in the research on problems related to the environmental protection includes an analysis of the regulation and policies adopted by the European Union and by the Italian State in order to protect the environment.

In addition, the essay takes into account the updated literature expressing the theoretical and scientific, as well as practical, findings of the problematic aspects addressed in this study.

A reconstruction of the regulation and policies relating to environmental protection is carried out, within the European Union and in the Member States — with particular regard to Italy’s regulation — in order to assess how these have taken a new approach to this issue.

The methodological approach is the legal one and the conclusions are aimed at demonstrating how the regulation and policies relating to environmental protection have laid the foundations for a greater protection of ecological elements (climate, ecosystems, biodiversity, etc.) and the implementation of sustainable development, through policy integration (environmental, economic and social policies)

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The European Union’s Evolution in protecting the Environment

First, the regulation and policies relating to the environmental protection will be reconstructed below.

The European Union has gradually become aware of the need to take actions to protect the environment. This is also thanks to greater awareness, at the international level, of environmental problems, which led, among other things, to the proclamation of a series of principles at the Rio Conference in 1992; this Conference started a process of elaboration of the so-called “Global conventions” dedicated to environmental problems.

Thus, there has been an evolution of the provisions of the European Treaties, which now include environmental policy among the fundamental objectives of the European Union and foresee a commitment of the Member States to guarantee a

“high level” of environmental protection¹. Moreover, the Treaties attribute an important role to the principle of integration between the various policies (environmental, economic and social) and the principle of sustainable development. Lastly, the Treaty of Lisbon, which came into force late in 2009, reinforced the Union’s commitment to guaranteeing environmental protection and stressed the need for integration between environmental policies and all other policies, in particular with a view to promoting sustainable development. The principle of sustainable development was reinforced by the Treaty of Lisbon, and it is now no longer regarded as limited to market and economic activities, but rather it is considered in the perspective of economic, social and environmental development². In addition, the Treaty of Lisbon has given the Charter of Fundamental Rights of the European Union, proclaimed in Nice in December 2000, the value of a Treaty, and hence the Charter became binding for European institutions and the Member States. This Charter, as far as it matters here, in article 37, provides that environmental protection should be a policy that must be integrated with other policies that must respect the principle of sustainable development.

Furthermore, the European Union, especially with the “Green Deal” and “Next Generation EU programmes”, has recently taken on a new perspective with respect to traditional environmental policies as defined by the Treaties. There was a progressive strengthening of an ecological vision of environmental issues, aimed at ensuring greater protection of ecological elements (climate, ecosystems, biodiversity, etc.) and sustainable development; this principle should be the basis of any European policy, including economic ones³. The goal of the Green Deal, indeed, should be to integrate environmental, economic and social policies. This has the purpose of guaranteeing the well-being not only of citizens but also of future generations who must be able to satisfy their needs⁴ with the awareness that the excessive deterioration of the environment endangers not only the well-being but also the survival of individuals.

The Impact of the European’s Evolution in protecting the Environment on Policies and Regulation of the Member States

It is important to take into account the European evolution in protecting the environment; this is because the European Union’s primary and

¹See Caravita (1990); Caravita (1991); Cassese (1995); Chiti (1999); Maddalena (2000); De Sadeleer (2002); Usui (2003); Bonomo (2005); Ferrara (2005); Lee (2005); Holder & Lee (2007); Scott (2009); Krämer (2011); Krämer (2012); Dell’Anno & Picozza (2012); Nascimbene & Garofalo (2012); Macrory (2014); Caravita & Cassetti (2016); Cordini (2021); Chiti (2022a); Chiti (2022b); Monteduro (2022); Police (2022).

²See Chiti (2022a); Chiti (2022b).

³See Bruti Liberati (2021); Chiti (2022a); Chiti (2022b); Passalacqua (2021); Moliterni A. (2021).

⁴See Bifulco & D’Aloia (2008); Celotto (2022); Clementi (2022); D’Aloia (2016); D’Aloia (2022); Bartolucci (2021); Bartolucci (2022); Bifulco (2022c); Guarnier (2022); Palombino (2021); Palombino (2022); Bilancia (2023).

secondary law — but also its soft law acts — and European actions have a strong impact on policies and regulation of the Member States⁵.

First, each Member State, in drawing up its own environmental policies, had to take into account the “high standards” of environmental protection and had to integrate these policies with all the others, guaranteeing the principle of sustainable development. More recently, then, the Member States have started to take a new approach to the environment which aimed at ensuring greater protection of ecological elements and sustainable development, as imposed by the Green Deal. It is in this context that, as will be better seen below, the Italian reform processes — including constitutional ones — in the field of environmental protection are inserted.

On the other hand, national environmental policies are influenced by European funding. Various programs aimed at protecting the environment have been funded by the European Union and now the Next Generation EU program funds environmental, economic and social policies. It is thanks to the Next Generation EU program that, as will be explained later, Italy has started a process of ecological transition⁶.

Furthermore, in view of the evolution of the European Union’s approach to environmental issues, some Countries with post-war Constitutions — which did not include environmental regulations, unlike the more recent ones (such as the 1978 Spanish one with specific provisions) — reformed them, introducing provisions for environmental protection. This happened in the Netherlands in 1983, in Germany in 1994, in France in 2005 and in Italy in 2022⁷. In this regard, it must be said that Italy introduced the protection of ecological elements into Constitution only in 2022 but, under the impetus of European policies and regulations, the principle of the value of environmental protection had already been constitutionalised by its Constitutional Court.

Recognition of the Value of Environmental Protection in Italy

Even in the light of the European evolution in considering environmental issues, in Italy the protection of the environment has gradually assumed constitutional importance thanks to the jurisprudence of the Constitutional Court.

In this regard, it should be underlined that, before the recent reform of 2022 — which included an express reference to environmental protection in the Italian Constitution — in the absence of specific constitutional references, environmental protection has been positivised by the Constitutional Court.

⁵See Grassi (2023).

⁶See Luchena (2021); De Santis (2023).

⁷See Amirante (2000); Cordini (2002).

In fact, the consolidated constitutional jurisprudence has regarded the environment as a “primary constitutional value” that must be guaranteed by balancing it with other constitutional values⁸.

In reality, in Italy, the legislator, the administrations and the judges — namely the subjects called to balance interests — have often made economic interests prevail over environmental ones. If this approach was already questionable in the past, now a number of elements — such as the more ecological perspective of the European Union and the constitutional reform of 2022 — make it unacceptable⁹.

The Italian Reforms aimed at Strengthening Environmental Protection

Italy, in the European and national contexts examined above, has launched a process of reforms aimed at strengthening environmental protection.

On the one hand, the Italian Government, with the implementation of the National Recovery and Resilience Plan¹⁰ has started the ecological transition¹¹, laying the foundations for a strong commitment to address environmental/ecological issues. In this regard, it should be stressed that Mission 2 of this Plan, dedicated to the “Green revolution and ecological transition”, is the one that, in compliance with European guidelines, is destined to have more funds if compared to the other missions.

On the other hand, an important change in the approach to environmental/ecological issues took place in Italy with the recent approval by the Italian Parliament of constitutional law no. 1 of 2022 implementing “Amendments to Articles 9 and 41 of the Constitution regarding environmental protection”¹². This law introduced the protection of the environment among the fundamental principles of the Italian legal system. Protection of the environment which was originally mentioned in the Constitution for the sole purpose of distributing the legislative competences between the State and Regions even though — as

⁸See judgments of the Constitutional Court n. 196/2004 and n. 85/2013. See Cecchetti (2000) at 6-47; Cecchetti (2009); Cecchetti (2020a); Cecchetti (2020b); Cecchetti (2021) at 7-58; D’Alfonso (2006); Dell’Anno (2009); Caretti & Boncinelli (2009); Cordini (2009); De Giorgi (2010); Rocella (2011); Maddalena (2012); Michetti (2015); Caravita & Morrone (2016); Riviezzo (2021).

⁹See Ronchetti (2021) at 59-117.

¹⁰See Bilancia (ed.) (2023).

¹¹See Papa (2023).

¹²See Cassetti (2021); Cassetti (2022a); Cassetti (2022b); Cecchetti (2021); Cecchetti (2022a); Cecchetti (2022b); Cozzi (2021); De Cesaris (2021); Di Plinio (2021); Frosini (2021); Greco (2021); Guerra & Mazza (2021); Rescigno (2021); Riviezzo (2021); Santini (2021); Bifulco (2022a), Bifulco (2022b); Camerlengo (2022); Cavino (2022); Cioffi & Ferrara (2022); De Leonardis (2022); Di Salvatore (2022); Fattibene (2022); Fracchia (2022); Iannella (2022); Montaldo (2022); Morelli (2022); Morrone (2022); Sorrentino (2022); Flick (2023). See also the speeches of Morrone, Maddalena, Amendola, Palici Di Suni, Porena, D’Amico, Cecchetti, Azzariti, Grasso, Fracchia, Hearings at the 1st Permanent Commission of the Senate of the Republic (Constitutional Affairs) in the context of the examination of the draft constitutional law n. 83, no. 212, no. 1203 and no. 1532 containing amendments to art. 9 of the Constitution on environmental protection (24 October and 14 November 2019; 16 January, 4 February and 23 September 2020). <https://www.senato.it>

mentioned above —it has been positivised by the Constitutional Court. The recent constitutional law — through the amendment of article 9 — has instead included in the Constitution an explicit reference to the protection of the environment, biodiversity and ecosystems, also in the interest of future generations. Furthermore, the amendment to article 41 specifies that business activities must not be harmful, among other things, to the environment¹³.

The Innovative Scope of the Reform of Articles 9 and 41 of the Italian Constitution with an EU Oriented Interpretation

The Constitutional reform is considered not only timely and useful but also necessary; this in light of the recent more “ecological” orientation of the European Union which emerges above all from the Green Deal but also from the Next Generation EU¹⁴.

The Constitutional reform read following an EU oriented approach, takes on an innovative scope, imposing a new paradigm of environmental protection on the legislator, public administrations and the constitutional judge¹⁵. The new paradigm is based on innovative pillars: the introduction of an effective “environmental constitutional principle” in the Constitution; the provision of a constitutional obligation for public authorities to pursue the aim of protecting all elements of the environment, biodiversity and ecosystems, also in the interest of future generations; a different conception of development which must be sustainable not only from an economic point of view but also from a social and environmental perspective.

The Consequences of the Italian Reforms on the Matter of Environmental Protection (in the light of the New European Approach): The Impact on Economic and Social Rights

In this context, it is important to reflect on the consequences of the Italian reforms on the matter of environmental protection. It is evident that the start of the ecological transition, on the one hand, and the constitutional amendment, on the other hand, are destined to influence the decisions of public powers.

In this regard, it should be said that the reforms of environmental protection in Italy must be read in the light of the new European approach to this matter. In particular, as mentioned above, at the level of the European Union, the idea of an economic-social model has been strengthened. Economic development must be balanced with the need for an improvement in the quality of life of people, also in relation to environmental protection. More specifically, the Green Deal is aimed at strengthening the ecological

¹³See Cabazzi (2022).

¹⁴See, in this sense: Bifulco (2022a); Bifulco (2022b); Di Salvatore (2022); Fattibene (2022). In the opposite direction, Di Plinio (2021); Frosini (2021); Severini & Carpentieri (2021).

¹⁵Among the authors who wished for a reform with a more innovative character, see Cecchetti (2021); Cecchetti (2022a); Cecchetti (2022b); Santini (2021).

elements and — as mentioned above — integrate environmental, economic and social policies.

Therefore, it can be said that this changes, at both the national and European levels, on environmental matters, imposing a paradigm shift by public powers - a paradigm shift which should lead to consequences not only for the environment.

First consequence: Italian policies should be aimed at strengthening environmental protection, in an intergenerational perspective, and at ensuring greater protection of ecological elements. In particular, a “binding” and “certain” reference, of a constitutional nature, which acts as a parameter of legitimacy of the laws, prevents regressions in the protection of the environment, in line with the principle of “environmental non-regression” recognised at International and European level.

Second consequence deriving from the inclusion of environmental protection as a fundamental principle of the Italian Constitution: the legislator, public administration and the Constitutional Court should consider this protection as a “priority” value in balancing different interests (the interest in protecting the environment with other interests, especially the economic ones)¹⁶. This does not mean that this value must prevail over other values but rather that environmental protection must be taken into consideration as a “priority” when defining other policies (including economic and social ones). From this point of view, economic values should no longer — as it often happened in Italy in the past — prevail over environmental protection, which should be aimed at guaranteeing the equality and dignity of the individual and the well-being of citizens and that of future generations.

Third consequence of an EU-oriented interpretation of the Italians reform: environmental policies should be more integrated, if compared to the past, with economic and social policies. In other words, the ecological issue should be destined to influence the legislator and the public administration also in the shaping of economic and social policies. The State’s intervention should aim at ensuring a balanced economic growth that respects the environment. In fact, economic policies should be inspired by the principle of sustainable development. Moreover, sustainable development should be achieved, by the legislator and public administration alike, through a new approach that aims to combine economic, environmental and social sustainability.

Conclusions

As a conclusion to this essay, it is important to underline that consequences of the new approaches, at European and Italian level, to environmental issues are bound to be significant.

In Italy, in line with the evolution of the European Union on environmental protection, the premises for a strong change have been laid.

¹⁶See Mattarella (2022); Ramajoli (2022).

However, the reforms are too recent to assess the actual impact, which will depend on the future actions taken by the public powers called upon to implement these reforms.

This will be the challenge of the future: taking concrete actions to preserve the ecosystem and the biosphere. This in order to guarantee sustainable development that does not consider only the quantitative data but also the qualitative ones, focusing on the need to guarantee the equality and dignity of the individual, also through greater protection of social rights.

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