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Country Report: Italy

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Introduction: Italian Environmental Law Framework

Italian environmental law is composed by a general part, comprising principles, organizational rules and procedural rules, and a sectional part, dealing with the different environmental problems that arise (and therefore with the different sectors environmental law has been traditionally divided into). In the last three decades the sectional model, based on the command and control system has been progressively teamed up with a cross-sectional model, based both on consensual, pro-active, market-oriented tools and on procedural tools, aimed at considering environment, related issues, and solutions, in a more integrated way.

Like other Member States of the European Union, Italy heavily relies on EU law in order to establish its own set of environmental rules. Principles are borrowed from the Treaties, or simply acknowledged, and specific provisions in statutes seek to comply with EU directives. This does not however mean that Italian environmental law lacks originality; it exhibits its own features and characteristics in both content and structures.

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The Italian Constitution, due to historical, social and political reasons (and to the difficulty in amending it), does not expressly consider, environment as such as a value to be protected in its text. The closest explicit provision relating to landscape features in article 9, under which the Republic safeguards landscape and the historical and artistic heritage of the Nation. In any event, the environment has been accorded politically unchallenged protection, thanks to an evolutionary interpretation of art.9 and art.32 (which protects individual and public health) of the Constitution in the case law of the Constitutional Court.

In 2001, article 117 was amended, explicitly providing central government with exclusive competence for environmental protection (and at the same time entrusting the enhancement of cultural and environmental heritage to the concurrent competence of the State and the Regions). This new structure has provoked many competence conflicts between the State and the Regions, increasing their number and the relevance. The Regions had previously played a substantial role in protecting the environment (mainly in the context of town and land use planning, but also through other matters of regional competence) and the reform of 2001 appears to greatly limit their competence on environmental issues.

Recent Developments and the Never-Ending Reform: The 'Code'

Recent developments in Italian environmental law are heavily influenced by the enactment of the d.lgs. 3 April 2006, n.152, commonly known as the 'Environmental Code' or the 'Consolidated Environmental Act'. At the time the Environmental Code was presented as the final result of a comprehensive reform, thoroughly systematizing Italian environmental law. It has not in fact proved so.

The reform started in 2004 and it has yet to come to an end due in large part to political polarization on the way to deal with environmental issues. Sometimes this polarization concerns the concept of environment itself; and sometimes it a broader political polarization where the environment is both a pretext and the main victim.

The law 15 December 2004, n.308 delegated to the Government the reorganization, co-ordination and integration of the Italian environmental law. After two years the Government enacted the Environmental Code. Just after that elections resulted in a change of government, and a left wing majority coalition replaced the previous right wing led administration. The Environmental Code was threatened with total repeal, and was substantially and extensively amended by two 'corrective decrees' (d.lgs. 8 November 2006, n.284 and d.lgs. 16 January 2008, n.4). Once again new elections followed, in April 2008, and this time the right wing coalition won: unsurprisingly, draft legislation, aiming at restoring the original framework (and spirit) of the Environmental Code has subsequently been put forward.

The political, legislative, and judicial conflicts surrounding the Environmental Code and its implementation have dominated environmental issues in recent years. Italian parties and political coalitions have not been able to centre reform on shared basic values. Environment is considered, formally, as a fundamental principle, but it is treated, practically, as a battlefield. Right wing coalitions tend to prioritise economic expectations over ecologic expectations (left wing coalitions do the opposite). The result is that this contest between development and preservation, which the principle of sustainable development acknowledges , but does not solve, has become an ideological conflict between two sides that do not acknowledge the legitimacy of the other, which leaves little room for compromise.

Moreover, the Environmental Code is in fact neither a code, nor a consolidated act. It is not a code, as the part containing the general principles (added by the corrective decree of 2008, and now under threat of deletion by the latest draft legislation) is so limited, incomplete, and ill-written that it cannot be seriously considered as the basis of a complex branch of law like environmental law. Nor is it a consolidated act as, while the d.lgs. n.152/2006 does deal with (and co-ordinates) a number of sectors, many others are covered elsewhere in the law. The Environmental Code is then mainly a sum and a collection of sectoral consolidated acts (where "location" prevails on co-ordination and regulations on related matters are put together, one following the other in specific parts, but not co-ordinated as such). Up to a point the

Environmental Code has been useful, making (some) environmental laws more 'findable', but the goal of the reform has not been achieved.

The Disputes before the Constitutional Court of 2009: Environmental Competence and Environmental Values

The dispute on the Environmental Code, promoted by some Regions against the State before the Constitutional Court, can be considered the main event concerning Italian environmental law in 2009. It concerns both the contents of the d.lgs. n.152/2006 and the legitimacy of the State regulation of environmental matters. The Regions challenged the competence of the State, despite the fact that article 117 of the Constitution denies their own legitimacy to substantially intervene in that matter. The 'competence issue' is intertwined with the 'contents issue', as the question is not only about who can regulate, but also about the extent to which the State and Regions can regulate. The rulings of the Constitutional Court clearly show the main problem Italian environmental law is facing: the ideological conflict provoked by political polarization is creating both lower quality regulation and continuous change in the applicable legal provisions affecting the environment and all the stakeholders: local communities, individuals, public administration, and companies.

The 2009 dispute on the Environmental Code differs substantially from the previous Constitutional case law: the d.lgs. n.152/2006 broadened and at the same time concentrated the dispute. The wide-ranging environment-related issues, stemming from the deteriorating relationship between State and Regions, found an institutional outlet before the Constitutional Court. The judgments may be analyzed for their specific contents, but, in order to understand where environmental law stands, and where it may head, it is more interesting and meaningful to focus on more general aspects: the changes in the constitutional case law dealing with environmental issues, the definition of the environment as a constitutional matter entrusted to the legislative competence of the State, and the setting of the boundaries between the protection of the environment, as a legislative matter, and other legislative matters entrusted to the competence of the Regions.

Until the conflict between the State and the Regions is openly acknowledged and addressed as reflecting the ideological conflict expressed by national political coalitions, there is little prospect of enacting good quality and consistent legislation that can be promptly and accurately implemented. The conflict is clearly political and/or ideological, and the environment is only one of the possible battlefields in a costly war among public bodies. The danger is that specific environmental issues become 'lost in litigation'.

Numbers concerning the rulings of July 2009 help to illustrate the ratcheting up of the environmental law dispute before the Constitutional Court compared to what it used to be before the adoption of the Environmental Code. Twelve Regions (out of twenty), all governed by left-wing coalitions, (with thirteen appeals) challenged the d.lgs. n.152/2006, both in its entirety and with reference to most of its specific articles (241 out of 318); the Court reorganized the questions raised according to a subject-matter criterion, and passed eleven 'sector-based' judgments; the Court addressed 278 specific issues, but declared the constitutional illegitimacy of only 13.

The first judgment of the Constitutional Court (n.225/2009) reconstructed the history of the d.lgs. n.152/2006, showing that the constitutional dispute is in continuation of the legislative and political disputes about environmental protection. This clearly conveys the idea that the environment is something that each coalition considers very differently from the other, and that each coalition wants to regulate the environment according to non-sharable principles and criteria. There are no common political dialectics on fundamental values; instead there is a reciprocal denial of the legitimacy of the "other" to regulate the environment, which leads to on-going "restoration reforms". The risk is that the legislative drift, determined by this political drift, will lead to a jurisdictional drift involving the State, the Regions and the Constitutional Court.

On a more substantial level, the Constitutional Court deals with the interpretation of art.117 of the Constitution. Article 117 entrusts the protection of the environment, the ecosystem and cultural heritage to the State. The Regions argue that the regulation of the environment by the Environmental Code substantially affects other matters,

entrusted to them. Therefore, the Regions challenge the competence of the State to legislate in the environmental field without reaching a pre-emptive agreement with them when other matters are touched upon (which happens very frequently, due to the extension of environmental issues). As art. 117 stands however, environmental protection is a matter of exclusive competence for the State and not concurrent competence between State and Regions. The Constitutional Court ruled that environmental protection limits the regional competence (setting a minimum, untouchable, protection level), but that Regions can ensure higher levels of environmental protection while carrying out their competence on other subject matters. However, as environmental protection is the competence of the State: if Regions want to challenge the way it has been carried out, they cannot simply say that it affects one or more of the subject-matters entrusted to them, but they must show precisely how, to what extent, there has been an unjustified invasion of their competence.

The point is that the boundaries between environmental protection and, to give some examples, land use planning, health protection, agriculture, and so on, are quite hard to define. This means that both the State and the Regions are likely to try and stretch their boundaries, when dealing with 'their' competences, and that the Constitutional Court is likely to be called upon to intervene more and more often in a polarized and conflicting political system.

The Constitutional Court rejects the assumption that a legislative subsidiarity principle (or a more specific environmental subsidiarity) may apply. To some extent in common with what happens in the EU legal system where there are other interests to be considered: environmental protection is one of the most important values in our society, but it cannot be used as a Trojan horse to distort the distribution of legislative powers.

The Constitutional Court reaffirms its own criteria, making them stronger and clearer, but is fully aware that other disputes will follow, as there is no way to foresee the extreme multiplicity of environmental and connected issues. Environment is both a constitutional value and a subject-matter. It is not however a subject-matter like

others, as it is by nature cross-sectional (it affects other subject-matters), goal-oriented (it aims at a high level of protection) and extremely broad.

Conclusions

The Constitutional Court judgments of July 2009 have not had substantial impact on the specific environmental provisions challenged - only few of them (and those not particularly relevant) were deemed unconstitutional. Nor they have singled out either new interpretative criteria suitable for preventing future disputes or suggested new institutional ways to effectively face environmental issues.

Still, the judgments of July 2009 have shown the depth of the crisis in the relationship between State and Regions and the deterioration of the political debate when environment, a shared and treasured valued to which mere lip-service is paid, is concerned. It is too soon to say whether this awareness will lead to a change, invoking cooperation and effectiveness, in dealing with environmental issues. The other option is the destructive continuation of ‘back and forth’ environmental legislation in a quarrelsome institutional arena.