THE "PRIOLO CASE" IN THE LIGHT OF THE 2022 ITALIAN CONSTITUTIONAL REFORM: HISTORIC JUDGMENT OR DEADLOCK FOR THE PROGRESSION OF ENVIRONMENTAL LAW?

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Abstract

This article examines the Constitutional Court ruling no. 105, issued in June 2024, which pronounced for the first time on the 2022 constitutional amendment in environmental matters on the occasion of the preventive seizure of the IAS S.p.A. depurator, located in Priolo Gargallo. It first analyses the scope of the constitutional reform, arguing that although it brought about some positive changes, it did not generally introduce significant novelties to the Italian legal system. Subsequently, it relates the reform to the Court's ruling, in order to refute the idea of it being a historical decision. It argues, on the contrary, that environmental protection considerations were only marginally addressed, and that no interpretation or application of the new constitutional provisions was offered by the judges. Showing excessive deference to political power, the Court issued a ruling that echoes that of the previous Ilva case and once again sacrifices environmental interests on the altar of economic ones, ignoring both the important role of constitutional jurisprudence in the evolution of the law and the obligations deriving from international and Community law, albeit recalled.

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1. Introduction

In June 2024, the Italian Constitutional Court (henceforth "CC" or "the Court") ruled for the first time on the constitutional amendment made by Law no. 1/2022, which introduced, in Article 1, the first constitutional revision in the part concerning fundamental principles[1] and, in Article 2, the first amendment to the provisions on the so-called "Economic Constitution"[2]. Firstly, the constitutional reform has openly stipulated that among the duties of the States falls the protection of the environment (and that of animals[3], which, however, will not be discussed here), specifying that it must also be safeguarded in the interest of future generations. Secondly, it established the environment as an explicit limit to the freedom of private economic initiative.

The occasion for the Court's pronouncement was the preventive seizure, in May 2022, of a purification plant forming part of the Syracuse petrochemical complex by the Examining Judge (henceforth "EJ") in the context of criminal proceedings alleging the crime of aggravated environmental disaster. This was followed by a government decree-law aimed at circumventing the EJ's decision and allowing the industrial activity to continue in light of its national strategic importance. Subsequently, the EJ raised the issue of constitutionality before the CC, claiming that, since the legislative intervention sanctioned the prevalence of the economic interest over the right to health and a sound environment, a violation of Articles 2, 9, 32 and 41(2) of the Constitution had occurred.

This article relates the constitutional reform to the ruling of the Constitutional Court, to answer the question of whether the former had significant consequences on the latter, i.e. whether the case under examination was decided innovatively compared to the precedents concerning the Ilva affair by virtue of the application of

[1] Articles 1 to 12.
[2] Articles 41 to 47.
[3] In this sense, the Constitution has been aligned with what is already enshrined in Article 13 of the Lisbon Treaty.

the reformed Articles 9 and 41 of the Constitution. The first part examines the scope of the constitutional reform and highlights the positive legal consequences that result from it. However, it rejects the thesis that the amendment introduced new concepts into the Italian legal system and effectively "constitutionalised" environmental protection. The second part reconstructs the main factual and legal considerations of the judgment. The third part offers a critical analysis of the ruling. Here it is argued that, betraying the expectations of many, the Court only marginally addressed the issue of environmental protection and that the constitutional reform played no real argumentative role in resolving the case. In the fourth and final part, the article relates the constitutional reform to the ruling, asserting that the non-innovative nature of the constitutional amendment is only partially responsible for the Court's disappointing judgment. It concludes by arguing that the Court, by showing excessive deference to the Government and essentially limiting itself to summarising the content of the reform, missed the opportunity to recognise that since 2022 the way has been paved for environmental protection interests to take precedence over the right of private economic initiative, thus failing to contribute to the development of environmental law in a more protective direction.

2. The constitutional reform of 2022: the environment "enters" the Constitution

The 2022 constitutional reform intervened on two articles of the Italian constitutional charter, namely Articles 9 and 41. In particular, a third paragraph was added to Article 9, which previously dealt only with the protection of the landscape, under which «[the Republic] protects the environment, biodiversity and ecosystems, also in the interest of future generations»[4]. It was then included that «[t]he law of the State regulates the ways and forms of animal protection». As regards the amendment to the "Economic Constitution", the reform intervened on Article 41 by adding in the second paragraph, after the word «damage» the words «to health, the environment» and at the end of the third paragraph the words «and environmental». Thus, the new Article 41, after establishing the freedom of private economic initiative, states that such freedom

[4] This translation, together with the others in the article, is by the Author.

«cannot be carried out in conflict with social utility or in such a way as to cause damage to health, the environment, security, freedom and human dignity» and that «[t]he law determines the appropriate programmes and controls so that public and private economic activity may be directed and coordinated for social and environmental purposes».

That of 2022 was not the first intervention made on the constitutional text by the legislator. In 2001, the reform of Title V by Law no. 3/2001 inserted for the first time the words «environment» and «ecosystem» into the Italian Constitution, entrusting their protection to the State on an exclusive basis[5]. In truth, even before such amendment, environmental protection was valued by doctrine and, starting in the 1980s, by case law, especially the constitutional one[6]. The latter guaranteed the protection of the environment indirectly, thanks to the combined provisions of Articles 9 and 32 of the Constitution[7] and qualified it as a fundamental constitutional value with a transversal character[8].

[5] Art. 117(2), *s.*

[6] The Court of Cassation has also affirmed the right to a healthy environment: Cass., SS.UU., 9 March 1979 no. 1463 and SS.UU. 6 October 1979, no. 5172. As for constitutional jurisprudence, the first rulings date back to the 1970s (Const. Court, 26 April 1971, no. 29; 17 February 1972, no. 30; 4 July 1974, no. 203). The turning point came in the 1980s: it started with Order no. 184 of 22 June 1983, which explicitly mentioned environmental protection, and was followed by rulings no. 167 and 191 of 1987. However, the most important judgement is considered to be Const. Court, 28 May 1987, no. 210, where express reference is made to the constitutional value of the environment. From sentence no. 617 of 30 December 1987 onwards, the environment has permanently been qualified as a primary good and an absolute value constitutionally guaranteed to the collective (see Const. Court, 30 December 1987, no. 641; 14 July 1988, no. 800; 15 November 1988, no. 1029). In this regard, M. Greco, *La dimensione costituzionale dell'ambiente. Fondamento, limiti e prospettive di riforma*, 41 Quad. cost. 285-286 (2021) says that these rulings of the Court blur the purely anthropocentric dimension typical of the environmental conception, orienting it towards a greater ecocentrism, in the sense that «the object of protection no longer seems to be humankind, as abstractly understood, but its constantly evolving relationship with the surrounding environment; in other words, the value of existence that nature has for humankind and its exsistence».

[7] For a reconstruction of the evolution of environmental protection in the Italian Constitution prior to the 2022 reform, as well as an in-depth analysis of the relationship between Art. 9 and 32 of the Constitution, see C. Della Giustina, *Il diritto all'ambiente nella Costituzione italiana*, 1 *AmbienteDiritto.it* 192 (2020).

[8] See Const. Court, 10 July 2002, no. 407 and the case law cited therein.

However, as has been correctly observed, that of jurisprudential creation is a constitutional right that

> «suffers all the weaknesses and uncertainties of the law of praetorian formation, i.e. of a right inevitably characterised by fragmentation, precariousness and incompleteness that derive from its casuistic origin»[9].

Although the express mention of the word "environment" in the Constitution represented a significant moment in the pathway towards the constitutionalisation of environmental protection, it too was not sufficient in itself to establish what weight should be given to environmental protection in the balance with other constitutionally protected rights[10]. In other words, in the absence of a «noted violation of precise constitutional or ordinary regulatory parameters»[11], the Court was precluded from assessing the merits of the content of the norms, being limited to the sole review on the grounds of manifest unreasonableness of the choices made by the legislator. It must be noted, however, that a high level of environmental protection was in any case imposed both by the obligations of international law and by the constraints deriving from European Union law. The latter, in particular, since the introduction of the Single European Act, functions as a benchmark to assess the validity of Member States' environmental policies[12], dictating both substantive and procedural obligations. With regard to the former, the most relevant provisions are Article 3, paragraphs 3 and 5[13] TEU, Article 191, paragraphs 1 and 2 TFEU (which

[9] M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune*, 3 Forum Quad. cost. 296 (2021).

[10] D. Porena, *Sull'opportunità di un'espressa costituzionalizzazione dell'ambiente e dei principi che ne guidano la protezione. Osservazioni intorno alle proposte di modifica dell'art. 9 della carta presentate nel corso della XVIII legislatura*, 14 federalismi.it 320 (2020).

[11] M. Cecchetti, *Le politiche ambientali tra diritto sovranazionale e diritto interno*, 7 federalismi.it 109 (2020).

[12] As also noted in EU case law: see the Opinion of Advocate General Y. Bot, delivered on 8 May 2013, Joined Cases from C204/12 to C208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, para. 97.

[13] «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 advance»; «In its relations with the wider world, the Union shall uphold and promote its values

respectively dictate the objectives and the principles to be followed by the Union in implementing its environmental policy) and Article 37 of the Charter of Fundamental Rights of the European Union[14], to which the Lisbon Treaty of 2009 accorded the same legal value as the Treaties. With regard to the latter, Article 191, paragraph 3 TFEU (which establishes the parameters of EU's environmental policy) Article 192 (concerning the actions to be taken to achieve the objectives set out in Article 191) and Article 114, paragraph 3[15] are particularly important.

In any case, a new constitutional intervention was deemed opportune in light of the changes in sensitivity towards environmental issues that have occurred over the last 20 years and in order not to "leave behind" the Italian legislation compared to that of other countries, both European and non-European, which had already included the protection of the environment and of future generations in their primary legal sources[16]. In this sense, one of the reasons behind the 2022 amendment can also be found in the desire to achieve greater legitimacy for Italy at an international level and to demonstrate more concrete efforts under the European Green Deal. As proof of the urgency of the reform, which was felt

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and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter».

[14] «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».

[15] «The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking into account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective».

[16] It is the Report of the 1st Permanent Commission (Constitutional Affairs, Presidency of the Council and Interior Affairs, General Order of the State and Public Administration) (Rapporteur: Ms Maiorino) on the proposal for the constitutional amendment itself to state that the constitutional amendment is inspired by Art. 20a of the German *Grundgesetz*. Similar references can also be found in the Constitutions of Norway (Art. 110b), Poland (Art. 5), Portugal (Art. 66), Spain (Art. 45), Switzerland (Art. 73), Belgium (Art. 7a) Albania (Art. 59), Argentina (Art. 41) Brazil (Art. 225) and many others: see D. R. Boyd, *The status of constitutional protection for the environment in other nations*, 4 David Suzuki Foundation (2013).

as a shared need by all political parties (and, it could be argued, also of its value-neutral scope) it is significant to note that it was approved by the Lower House after the second reading with a 2/3 majority, thus without waiting for the deadline to request a constitutional referendum.

a. Lights and shadows of the constitutional reform

The reform has been received in different ways by the doctrine. Basically, two opposing currents of thought can be distinguished. On the one hand, some have emphasised its innovative character, believing that it owes the merit of having made the environment a constitutionally protected right and oriented economic activity towards the principle of sustainable development. On the other hand, some maintain that the reform did not bring any significant novelty to the Italian legal system, since the environment was already recognised as a constitutional value thanks to the primacy of EU law over domestic law and that at no time even before the constitutional amendment was it permitted to perform economic activity to the detriment of environmental interests.

In particular, as for the first stance, it has been claimed that the amendment to Article 9 is oriented towards an «ecocentric, almost Franciscan»[17] view of the relationship between man and nature. Although this is a hyperbolic and, in my opinion, also erroneous expression, it is undeniable that the reform is a sign of a gradual shift from a merely anthropocentric conception of such relationship to one that could be described as «integrated anthropocentrism»[18], according to which mankind demands protection as much as animals, plants and every element that makes up an ecosystem. At the same time, human beings (or more accurately, citizens) while remaining at the centre of the legislator's concerns, are seen «no

[17] R. Fattibene, *Una lettura ecocentrica del novellato articolo 9 della Costituzione*, 20 (2022). A more moderate position is taken by F. Fracchia, *L'ambiente nell'art. 9 della Costituzione: un approccio in "negativo"*, 68 Dir. econ. 150 (2022), who speaks of «temperate ecocentrism», while M. P. Poto, *La tutela costituzionale dell'ambiente, della biodiversità e degli ecosistemi, anche nell'interesse delle future generazioni*, (2022), refers to it as «integrated ecocentrism».

[18] In this vein, see M. Delsignore, A. Marra, & M. Ramajoli, *La riforma costituzionale e il nuovo volto del legislatore nella tutela dell'ambiente*, 1 Riv. giur. amb. (2022) and C. Tripodina, *La tutela dell'ambiente nella Costituzione italiana: tra interessi delle generazioni future e responsabilità della generazione presente*, 1 Riv. quad. dir. amb. (2023), according to whom the reform, while enhancing every natural entity, keeps the citizen at the centre of protection.

longer as predators, but as protectors».[19] In other words, the constitutional amendment marks a turning point in the transition from the "anthropocentrism of rights" to the "anthropocentrism of duties", with nature no longer understood as an object of exploitation, but of care. The explicit recipient of such duty of care is the Italian Republic, i.e. all the state and regional bodies, as well as the legislative, executive and judiciary powers[20]. The implicit recipients are, according to the prevailing doctrine, ordinary citizens, by virtue of the «spiritual vocation»[21] of Article 9 that would allow it to be linked not only to the principle of solidarity enshrined in Article 2 of the Constitution[22], but also to Article 4(2), under which «[e]ach citizen has the duty to perform, according to his or her possibilities and choice, an activity or a function that contributes to the material or spiritual progress of society».

Moreover, the reform is said to have untied environmental safeguarding from landscape protection by making it autonomous and by expanding the list of protected subjects not only to the environment but also to biodiversity and ecosystems[23]. With regard to the first point, scholars have pointed out for some time that the concept of landscape protection was such as to also include that of the environment[24]. However, it could perhaps be said that the advantage of having added the reference to the environment in Article 9 was that of determining an inversion of concept, in the sense that it is now in the broader notion of "environment" that that of "landscape" can be considered to be included, rather than the other way around. In this sense, it has been argued that the amended constitutional discipline would impose a new point of equilibrium between the aesthetic and biological dimensions[25] of

[19] Ibid, C. Tripodina, *La tutela dell'ambiente nella Costituzione italiana,* 345.
[20] R. Bifulco, *Primissime riflessioni intorno alla l. cost. 1/2022 in materia di tutela dell'ambiente*, federalismi.it 6 (2022).
[21] F. Fracchia, *L'ambiente nell'art. 9 della Costituzione*, cit. at 17, 147.
[22] See R. Fattibene, *Una lettura ecocentrica del novellato articolo 9 della Costituzione*, cit. at 17 and E. Longo, *Corte costituzionale, diritti e doveri*, Corte costituzionale e sistema istituzionale (2011).
[23] Interestingly, the amendment left untouched the body of Article 117 of the Constitution, which not only contains no reference to the environment and biodiversity but also refers to the «ecosystem», in the singular form.
[24] F. Merusi, *Art. 9*, In G. Branca (ed.), *Principi fondamentali* (1975).
[25] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, 2 Forum Quad. Cost. 467 (2021).

nature[26]. In short, it would have opened the door to the possible balancing of environment and landscape, which arises, for example, with the construction of wind energy infrastructures. With regard to the second point, one might instead wonder what the usefulness of the tripartition is, since the word "environment" also includes the concepts of biodiversity and ecosystem. However, it cannot be overlooked that the Report of the First Permanent Commission on the constitutional reform itself states that such choice «emphasises the need for the legislator to always adopt, in the environmental field, a comprehensive outlook»[27] and that it actually represents «the effort to think of the territory in a non-traditional way, attentive to the depth and volumes, the dynamism and variability of the spaces of sovereignty»[28].

The real novelty of the amendment to Article 9, however, would be the reference to the interests of future generations, which shows the Italian legislator's awareness that the consequences of climate change risk might be irreversible. The amendment requires not only the political-administrative power but also constitutional jurisprudence to take into consideration the «peculiar intertemporal declination»[29] that decisions that may compromise environmental conservation may entail. In truth, and as acknowledged in judgment no. 105/2024[30], the CC has for many years taken into account the interests of future generations, especially in its rulings on water resources and renewable energy. The reform, however, is credited with making the principle of intergenerational equity a «substantive parameter of constitutional legitimacy», which requires judges to assess not only the non-arbitrariness of political choices but also their compliance with the proportionality test[31]. The choice of the term "interest" rather than "right", which would presuppose ownership by a subject whose

[26] See A. Predieri, *Significato della norma costituzionale sulla tutela del paesaggio*, Studi per il ventesimo anniversario dell'Assemblea costituente 38 (1969) in which it is stated that «if the landscape is the form of the country, the environment is the form (and substance) of our existence».

[27] Report of the 1st Permanent Commission, cit. at 16.

[28] R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, 21 Anal. giur. econ. 18 (2022).

[29] M. Greco, *Il diritto costituzionale dell'ambiente dopo la riforma: alcune conferme e qualche (inattesa) novità nella sentenza della Corte costituzionale n. 105/2024*, (2024).

[30] Par. 4.5.

[31] M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione*, cit. at 9, 311.

existence has not yet materialised, can also be deemed appropriate. The same can be said of the adverb "also", which makes us understand that the protection is addressed, first and foremost, to the present generations, who, in addition to being holders of a right, also have a duty to preserve the environment for generations to come[32]. Moreover, this expression enshrines an implicit reference to the principle of sustainable development which, according to its most famous definition provided in the so-called "Bruntland Report", consists in a «development that meets the needs and aspirations of the present without compromising the ability to meet those of the future»[33]. As is well known, sustainable development calls for inter- and intra-generational solidarity and puts two ideas at the centre of its definition: the first one is that of needs, particularly the essential needs of the world's poor; the second one is that of limits, i.e. the idea that the environment cannot satisfy all present and future demands. Last, but not least, one cannot fail to observe that since the environment has been included among the values that constitute the hard core of the Constitution, with respect to which no retreat is possible[34], the constitutional legislator, while being very careful not to mention it, seems to have indirectly accepted the existence of a principle of environmental non-regression.

Instead, with regard to the amendment of Article 41, enthusiasm is more restrained. It has been observed that, having placed a limit on economic initiative and a "finalisation" on both public and private economic activity, the reform has struck at the heart of the model of growth on which the Italian legal system, like all Western ones, has long been hinged[35]. It has also been claimed that the amendment in paragraph 3 has revived a provision that had originally been introduced to ensure the possibility of public power intervention in the economy, which had then been substantially "killed off" following Italy's accession to the European Economic

[32] F. Fracchia and S. Vernile, *Lo sviluppo sostenibile oltre il diritto ambientale*, 50 Le Regioni 25 (2022) hold that the environment remains predominantly a matter of duties, rather than rights.

[33] WCED, *Our common future*, (1987), Ch. 2.

[34] In this vein, see also M. CECCHETTI, *La revisione degli artt. 9 e 41*, 3 Forum quad. cost. 285 ff. (2021) and D. PORENA, *«Anche nell'interesse delle generazioni future». Il problema dei rapporti intergenerazionali all'indomani della revisione dell'art. 9 della Costituzione*, 15 federalismi.it 124 (2022).

[35] R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, 23.

Community[36], based on an open market with free competition. Although the provision had been partly revived thanks to the EU's declared commitment to the circular economy, which requires economic development to be directed and programmed towards its sustainability dimension[37], the fact that the legislator had intervened directly in this paragraph would in any case be an important signal for domestic law. In this sense, the new Article 41 could have the power to direct the market towards greener forms of consumption and production, thus presenting environmental protection no longer as a cost, but as a positive constraint[38]. Whether one agrees with this thesis or not (in fact, Article 41(3) of the Constitution does not only legitimise plans in the Soviet sense), one must in any case recognise that the amendment seeks to overcome the traditional antagonism that characterises the right to private economic initiative and that to a healthy environment[39] by imposing on the State, public administrations[40] and private individuals[41] a clear mandate to ensure that economic activity is carried out with respect for environmental protection. It is also significant that the insertion of the words «health and environment» in paragraph 2 comes first, before «security, freedom and human dignity», as if to indicate that there is a hierarchy between the negative limits to the freedom to excercise private economic initiative[42].

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[36] F. De Leonardis, Il diritto dell'economia circolare e l'art. 41 Cost., 1 Riv. quad. dir. amb 67 ff. (2020).

[37] *Ibidem*.

[38] *Ibidem*, stating that the limits laid down in Article 2 are negative constraints, thus representing a cost.

[39] On the "antagonistic" nature of environmental protection interests, see A. Bonomo, *Governare la transizione ecologica: tra nuovi interessi e nuovi conflitti*, 3 Riv. trim. dir. pubbl. (2024).

[40] By virtue of the extension to paragraph 2 of what is stipulated in paragraph 3, under which limits on private economic initiative can only be imposed by ordinary laws and administrative acts that specify them: see M. Delsignore, A. Marra, & M. Ramajoli, *La riforma costituzionale e il nuovo volto del legislatore nella tutela dell'ambiente*, cit. at 18, 26.

[41] *Ibidem*, 35, according to whom the most profound meaning of the reform of Article 41 lies in the valorisation of private individuals as protagonists in the overall system of economic relations, as they contribute to the realisation of the environmental goals endorsed by the legal system in line with the requirements of Articles 2 and 4 of the Constitution.

[42] In this vein, also L. Cassetti, *Salute e ambiente come limiti "prioritari" alla libertà di iniziativa economica?*, 16 federalismi.it 4 (2021).

As anticipated, not all commentators agree with the positive scope of the reform, often not without reason. Some criticisms have been particularly heated: the constitutionalisation of the environment has been described as «useless, perhaps harmful, even stupid»[43], arguing that environmental protection is not and cannot be an autonomous right, since it exists only if balanced with the provisions of the Economic Constitution and, in any case, it was already amply guaranteed by constitutional jurisprudence. With regard to Article 9, some have noted that a change in fundamental principles represents a dangerous precedent[44] and, consequently, that the amendment should have been operated on a different part of the Constitution[45]. Again, it has been said that the protection of landscape is not always compatible with that of the environment, especially when the former is understood in industrialist terms[46], and that the expression «also in the interest of future generations» could have been better, as it «seems almost an unnecessary appendix to the rest of the constitutional provision»[47]. These remarks are subject to several objections[48] and are,

[43] G. Di Plinio, *L'insostenibile evanescenza della costituzionalizzazione dell'ambiente*, 16 federalismi.it 2 (2021). This is a very strong criticism, based on the (not acceptable) conviction that environmental law is a vacuous term, which indicates a discipline without scientific autonomy.

[44] T. E. Frosini, *La Costituzione in senso ambientale. Una critica*, federalismi.it 3 (2021) and F. Rescigno, *Quale riforma per l'articolo 9*, 13 federalismi.it 2 (2021).

[45] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, cit. at 25, 481.

[46] G. Severini and P. Carpentieri, *Sull'inutile, anzi dannosa modifica dell'articolo 9 della Costituzione*, Giustizia Insieme (2021). The reference is mainly to renewable energy sources: «there looms with all seriousness the risk that the constitutional amendment may cause, as its immediate tangible effect, that of subordinating landscape protection to the overflowing spread of industrial plants producing energy from renewable sources».

[47] G. Sobrino, *Le generazioni future «entrano» nella Costituzione*, 42 Quad. cost. 140 (2022).

[48] See R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, who correctly points out, about Di Plinio's criticism, that he shows «an overly submissive attitude towards constitutional jurisprudence»; sbout Rescigno's claim, he observes that a problem could only arise in the case of revision or modification of the fundamental core of principles, and that the mere addition of the principle of intergenerational equity in the Constitution does not fall into the category; on the criticism of Severini and Carpentieri, he notes that the constitutional amendment moves in the direction of giving autonomy to the concepts of environment and landscape. Instead, R. Fattibene, *Una lettura ecocentrica del novellato articolo 9 della Costituzione*, cit. at 17, in contrast with Sobrino's point, appreciates the wording «also in the interest of future generations», arguing it only grammatically relates to future generations, as

consequently, scarcely endorsed. This does not mean, however, that the constitutional reform could not have been improved. I support the thesis of those who argue that behind an apparently innovative, almost "revolutionary" reform, no significant novelties are to be found in the Italian legal system. If we think of intergenerational equity, now enshrined in Article 9, we cannot ignore the fact that such principle was already known to the legislator, who certainly had it in mind when he introduced the concept of budgetary balance[49] (Art. 81 of the Constitution), drafted the Italian pension system[50] and, above all, explicitly included it in a source of primary rank. Indeed, Article 3-*quater* of the Italian Environmental Code (Legislative Decree no. 156/2006) states that

> «every legally relevant human activity under this code must comply with the principle of sustainable development, in order to ensure that the satisfaction of the needs of present generations cannot compromise the quality of life and opportunities of future generations».

In any case, the doctrine considers that the principle was already inferable from Article 2 of the Constitution, which imposes the duty of solidarity[51]. Moreover, the strong degree of integration between national, international (to which we owe much of the development of environmental law) and European law, enshrined in the Constitution itself in Articles 11[52] and 117(1)[53], as well as in Article 1 of the Administrative Procedure Act (Law no. 241/1990), cannot be overlooked. The latter, in particular, imposes compliance by the public administration with the principles established at the EU

conceptually it takes into account three different interests that coincide in a renewed framework of sustainable development: these are the interest to today's environmental balance, and the interests of present and future generations.

[49] As recognised also in Const. Court, 5 December 2019, no. 18.

[50] See G. Amoroso, *L'«interesse delle future generazioni» come nuovo parametro costituzionale*, 22 Riv. dir. sic. soc. (2022).

[51] F. Fracchia and S. Vernile, *Lo sviluppo sostenibile oltre il diritto ambientale*, cit. at 32; M. Greco, *La dimensione costituzionale dell'ambiente,* cit. at 6; E. Longo, *Corte costituzionale, diritti e doveri*, cit. at 22.

[52] Which allows the Italian Republic to accept limitations to its sovereignty by virtue of adherence to the international legal order.

[53] «Legislative power is exercised by the State and the Regions in compliance with the Constitution, as well as with the constraints deriving from Community law and international obligations».

level, which include not only sustainable development[54], but also all the other principles of environmental law that derive from it. It follows that the 2022 reform alone cannot be credited with having constitutionalised environmental protection.

Even by looking at Article 41, it can be noticed that the reform did not produce any notable changes[55]. In fact, the protection of health and the environment was already subsumed by case law under the limits set forth in paragraph 2[56] and considered to be a source of positive obligations for the State under the notion of «social ends» in paragraph 3[57]. Furthermore, given the growing importance of environmental protection policies at EU level, even in the absence of the amendment one might have expected increasing public control or planning interventions to protect natural resources[58]. However, in view of the new formulation of the provision, it remains, in any case, in the hands of the legislator to carry out the balancing act between the freedom of economic initiative and its limits[59], provided that such choices can then be reviewed by constitutional judges.

All for nothing, then? I do not think so. The reform deserves the praise of having enshrined in the supreme legislative source of the Italian legal system the need to steer the development model towards greater farsightedness and solidarity, requiring efforts from all components of the Republic, from public authorities to ordinary citizens. But above all, it is my opinion that it has laid the foundations to give greater weight to environmental protection in the balance with other constitutionally protected rights, placing it at the top of the hierarchy of values, together with the right to life, dignity and health, to which it is inseparably linked. In this vein,

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[54] In addition to the provisions enshrined in the primary EU sources referred to in § 1, some derived sources impose compliance with sustainable development, such as the European Green Deal and the Next Generation EU plan.

[55] For an extended discussion in this regard, see E. Mostacci, *Proficuo, inutile o dannoso? Alcune riflessioni a partire dal nuovo testo dell'art. 41*, 52 DPCE online 52 (2022) who, among the various criticisms he makes of the constitutional reform, also includes the failure to address the other articles of the Economic Constitution, such as Article 44.

[56] Const. Court, 9 April 2013, no. 85, discussed below.

[57] *Ex multis*, Const. Court, 6 June 2001, no. 190 and 23 May 2018, no. 158.

[58] In this vein, see also L. Cassetti, *Salute e ambiente come limiti "prioritari" alla libertà di iniziativa economica?*, cit. at 43.

[59] R. Bin, *Che cos' è la Costituzione?*, 27 Quad. cost. 23 ff. (2007).

the reform has supported the increasingly widespread opinion that the environment should be understood as «a prerequisite for all other rights» that, as such, «constitutes a challenge to the entire structure of what, on the basis of the constitutions born in the second half of the last century, can be defined as the constitutional State»[60]. Indeed, by virtue of its public interest nature, the idea of a prevalence of the right to a healthy environment over private rights had already been put forward by some scholars[61]. However, it had been widely contested, not least by the Constitutional Court itself, which had stated that

> «[t]he fundamental rights protected by the Constitution are in a relationship of reciprocal integration and it is therefore not possible to identify one of them that has absolute prevalence over the others [...]. If this was not the case, an unlimited expansion of one of the rights would occur, which would become a "tyrant" over the other constitutionally recognised and protected values»[62].

Indeed, the constitutional amendment paves the way to the possibility of modifying this approach. In particular, the combined reading of the two articles affected by the reform seems to suggest that, at least where a balance must be struck between environmental and economic interests, there is no longer room for uncertainty[63]: the latter must succumb.

[60] S. Grassi, *Ambiente e costituzione*, 3 Riv. quad. dir. amb. 1 ff. (2017).

[61] G. LIGUGNANA, *Corte di giustizia, interessi ambientali e principio di proporzionalità. Considerazioni a margine della sent. 21 luglio 2011, C-2/10*, in Riv. it. dir. pubbl. comunit. (2011), according to whom Community law is quite clear in finding, as a matter of principle, that the interest in the protection of the flora and fauna present in certain sites prevails over all other elements that are not of overriding public interest; D. Sorace, *Tutela dell'ambiente e principi generali sul procedimento amministrativo*, In S. GRASSI and M.A. SANDULLI (eds.), *Trattato di diritto dell'ambiente* 25 (2014), who states that «it is primarily with the environmental interest that other interests must be compared».

[62] Paragraph 9 of the Court's legal reasoning in judgment no. 85/2013.

[63] Indeed, by comparing judgment no. 85/2013 with judgment no. 58/2015, both concerning the Ilva case, it can be observed that in the former, economic interests prevail, while in the latter, environmental ones do.

3. The Priolo case

A. *Facts*

The case concerns the Syracuse petrochemical cluster, which extends between the municipalities of Syracuse, Priolo, Melilli and Augusta, with a crude oil production capacity of approximately one-third of national demand. The dispute originated following the preventive seizure, on 13 May 2022, of the purification plant operated by Industria Acqua Siracusana (IAS S.p.a.), located in Priolo Gargallo, into which flowed, in addition to civil waste, the waste deriving from oil refining, the transformation of its derivatives and the production of energy generated by large industries in the area, namely ISAB S.r.l., Sonatrach Raffineria Italiana S.r.l. and Versalis S.p.a. This took place in the context of criminal proceedings against these companies during which, among other offences, the crime of aggravated environmental disaster under Article 452-*quater* of the Italian Criminal Code was alleged. A judicial administrator was then appointed with the task of limiting the operation of the plants to the purification of civil waste only. Later, on 5 January 2023, Law Decree no. 2/2023 (the so-called "Priolo Decree") was issued, introducing several «[p]rovisions on criminal matters relating to plants of national strategic interest». In particular, Article 6 provided for the introduction in Article 104-*bis* of the implementing rules of the Code of Criminal Procedure of paragraph 1-*bis*, which provides that

> «when the [preventive] seizure concerns industrial establishments or parts thereof declared to be of national strategic interest pursuant to Article 1 of Decree-Law no. 207 of 3 December 2012, converted, with amendments, by Law no. 231 of 24 December 2012[64], or plants or infrastructures necessary to ensure their continuity of production, the judge shall order the continuation of the activity with the aid of a judicial administrator [...]».

The next sentence requires that

> «[w]henever it is necessary to strike a balance between the need to ensure the continuity of the productive activity and preservation of employment and the

[64] Pursuant to which, in order to be qualified as a nationally strategic plant, it is necessary that (i) the plant has employed not less than 200 workers for at least one year and (ii) there is an absolute need to safeguard production and employment.

> protection of workplace safety, health, the environment and any other legal assets harmed by the offences committed, the judge shall dictate the necessary prescriptions, also taking into account the content of the administrative measures adopted to that end by the competent authorities».

These provisions do not apply «when the continuation may result in a concrete danger to public health or safety or to the health or safety of workers that cannot be avoided by any prescription». The fifth sentence, which, as will be seen, was censured by the Constitutional Court, provides instead that

> «the judge shall authorise the continuation of the activity if, as part of the procedure for the recognition of national strategic interest, measures have been adopted by which it has been deemed feasible to strike a balance between the requirements of continuity of production activity and preservation of employment and the protection of workplace safety, health and the environment and any other legal assets damaged by the offences committed. In any case, the measures issued by the judge pursuant to the preceding sentences, even if negative, are transmitted, within forty-eight hours, to the Presidency of the Council of Ministers, to the Ministry of Enterprises and Made in Italy and to the Ministry of the Environment and Energy Safety».

Consequently, the Decree of the Prime Minister of 3 February 2023 conferred the status of «industry of strategic national interest» on the plant owned by ISAB S.r.l. and that of «infrastructure necessary to ensure continuity of production» on the purification plant owned by IAS S.p.a. On 11 July 2023, the Department of the Environment issued an Integrated Environmental Authorisation (henceforth "IEA") containing a series of prescriptions for IAS S.p.a., but nevertheless directed at the continuation of the purification of waste by the petrochemical plant. The inter-ministerial Decree of 12 September 2023, issued under the jurisdiction of the Ministry of Enterprises and Made in Italy, in agreement with the Ministry of the Environment, then indicated the balancing measures prescribed by the fifth sentence of Article 104-*bis*, paragraph 1-*bis*, as amended by Decree-Law no. 2/2023. However, the inter-ministerial Decree allows the discharge into the purification plant managed by IAS S.p.a. of effluents containing certain pollutants at a considerably

higher concentration than that generally provided for by Tables 3 and 5 of Annex 5 to the third part of Legislative Decree no. 152/2006. Therefore, the Syracuse EJ, deeming that the plant was still unsuitable to ensure the adequate treatment of wastewater, ordered the adoption of a timetable for the safe interruption of its delivery. Moreover, he raised the issue of constitutionality before the CC, complaining that the set of norms introduced by the legislator following the preventive seizure to ensure the continuation of the activity would have severely limited his precautionary powers and asserting that the fifth sentence of the amended Art. 104-*bis*, paragraph 1-*bis*, would have established the «prevalence of the continuity of the productive activity [...] over the legal goods of environment and health, both of workers and of the population residing near the areas affected by pollution», thus violating Articles 2, 9, 32 and 41, paragraph 2, of the Italian Constitution. The three companies of the Syracuse industrial area then entered an appearance together with the Prime Minister, defended by the State Attorney's Office, as predictable on the basis of the last part of the fifth sentence of Article 104-*bis*, paragraph 1-*bis*.

B. *Law*

After rejecting all the objections presented by the defendants and the Prime Minister as groundless, the CC made a general preliminary remark, noting the close connection between the genesis of the legislative amendment to Article 104-*bis* and the judicial proceedings that led to the preventive seizure of the purification plant. It clarified that this was a general and abstract provision that could be applied in all similar cases. Moreover, the legislative intervention was intended to fill the gaps in the previous discipline, laid down in the so-called "Ilva Decree" (Decree-Law no. 207/2012), which referred only to plants of national strategic interest (and not also to those necessary to ensure their continuity of production) and presupposed the review of the IEA by the Ministry of the Environment alone.

Turning to the examination of the merits of the case, firstly, the CC confirmed the correctness of the EJ's interpretative assumption: the wording «the judge shall authorise» in the fifth sentence of paragraph 1-*bis* is peremptory and, operating together with the provisions of the sixth sentence, it represents «in the logic – indeed, not quite transparent – of the legislator [...] a sort of emergency

brake» when the EJ orders a halt to industrial activity. That is to say, it indicates the impossibility for the EJ to carry out an «autonomous balancing of the interests at stake», obliging him to passively accept the balancing measures established by the Government even where he recognises a concrete danger to health or the environment.

Secondly, referring to judgment no. 85/2013 on the "Ilva Decree", repeatedly mentioned by the referring party, the Court notes that the case under review differs from it for two fundamental reasons. The first: that judgment claimed the infringement of different articles of the Constitution[65], relating to the alleged undue impact of the "Ilva Decree" on judicial measures already entered into force through rules lacking generality and abstractness and to its alleged derogation to the constitutional principles of criminal liability and exercise of criminal action[66]. The second: although a violation of Articles 4 and 32 of the Constitution was also raised in judgment no. 85/2013, the Court notes that this was issued prior to the constitutional amendment of 2022. On the one hand,

> «[t]he 2022 reform directly enshrines in the Constitution the mandate to protect the environment, to be understood as a unitary good [...] but autonomously recognised with respect to the protection of landscape and human health, despite being naturally connected to them; thus, it explicitly binds all public authorities to take action towards its effective defence».

In addition, the CC notes that the amendment has extended protection also to future generations, while acknowledging that in its own case law the interests of the unborn were safeguarded even before the reform[67]. On the other hand, the Court observes that the reform provides that private economic initiatives may not harm the environment. It therefore states that

> «these clear indications of the constitutional legislator – read also through the prism of the European and international obligations on the matter – must be taken in punctual account by this Court in assessing the petitioner's complaints».

The CC's judges conclude that the EJ correctly concluded that the «point of balance» enshrined in Article 1 of Decree-Law no. 207/2012, assessed in ruling no. 85/2013, had not been reached in

[65] Namely, Articles 3, 101, 102, 103, 104, 107 and 111 of the Constitution.
[66] Articles 25, 27 and 112 of the Constitution.
[67] Paragraph 5.1.2.

the Priolo case. Indeed, Article 1 of such Decree-Law provided that the continuation of the production activity subject to seizure was possible upon revision of the IEA by the Ministry of the Environment, to be carried out through a procedure open to the effective participation of the public, aimed at ensuring compliance with the principle of prevention by adopting of the best available technologies and at guaranteeing «the most adequate protection of the environment». Furthermore, the duration of the continuation should in any case not exceed a 36-months period.

According to the CC, the provision under scrutiny differs. First, it contains no reference to the authority responsible for adopting the balancing measures. However, the Court admits in that regard that that authority is indirectly identifiable in the Prime Minister. Second, it does not give any indication as to the procedure to be followed in identifying such balancing measures. In this sense, it ends up

> «shaping a system of environmental protection parallel to the ordinary one, by entrusting it to a provision with entirely generic contours: as such, this [system] is unsuitable for ensuring that, when fully operational, the exercise of the activity of the factories and plants is carried out without harming health and the environment».

This originates a conflict with the principles of transparency, public participation, the use of the best available techniques and the need to submit the authorisation of the activity to a careful analysis of the factual situation, as required by Decree-Law no. 207/2012. Moreover, it not only disregards the provisions of the Aarhus Convention and the European Convention on Human Rights (ECHR), but also the relevant case law. It is no coincidence that in this passage the CC cites the recent *Verein KlimaSeniorinnen Schweiz* case in which the European Court of Human Rights, in line with its previous rulings[68], has most recently reaffirmed that the right to a healthy environment is among the values that enable the concretisation of the right to private and family life under Article 8 ECHR.

[68] *Ex multis*: ECtHR, *Powell and Rayner v. United Kingdom*, 21 February 1990, Application no. 9310/81; *Lopez Ostra v. Spain*, 9 December 1994, Application no. 16798/90; *Guerra and Others v. Italy*, 19 February 1998, Application no. 14967/89; *Taskin and Others v. Turkey*, 10 November 2004, Application no. 46117/99; *Di Sarno v. Italy*, 10 January 2012, Application no. 30765/08; *Dees v. Hungary*, 9 November 2010, Application no. 2345/06.

However, the constitutional judges, at this point, surprisingly proceed to "rescue" the part of the provision where a generic and unspecified reference to the measures to be taken is made: thanks to what is defined as a «constitutionally oriented interpretation», they contend that the measures legitimately adoptable by the Government during crises to temporarily allow the continuation of activities of national strategic interest «must, if anything, be functional to the objective of gradually bringing the activity itself, in the shortest possible time, within the sustainability limits generally established by law».

It is on the third point of the Court's reasoning, therefore, that the constitutional censure focuses. The Court notes that Art. 104-*bis*, paragraph 1-*bis*, unlike Art. 1 of Law Decree no. 207/2012, does not prescribe any final term for the continuation of the activity of the purification plant,

> «thus ending up allowing, potentially without any time limit, a mechanism based on an authorisation coming directly from the national Government, whose effect is to indefinitely deprive the judge responsible for the seizure of any power to assess the adequacy of the measures to protect the environment and public health, and human life itself».

The provision at hand should therefore be declared unconstitutional under Articles 9, 32 and 41 of the Italian Constitution. Indeed, according to the latter Article 41, the continuation of a dangerous economic activity may continue only as long as it is «strictly necessary to carry out the necessary environmental remedial measures and reactivate the ordinary procedural mechanisms provided for by Legislative Decree no. 152/2006».

4. Some comments on the Court's ruling

The ruling was hailed as «historic»[69] for having for the first time provided the authoritative interpretation and application of the reformed Articles 9 and 41 of the Constitution. It has been said that with this judgment the CC clarified the layout of the new constitutional mandate, introducing a «direct constraint for all public authorities and an equally direct limit for all economic

[69] Rete dei Comuni sostenibili, *Costituzione e ambiente: sentenza storica della Corte costituzionale per la prima volta con i nuovi principi contenuti negli art. 9 e 41*, at www.https://www.comunisostenibili.eu/, 17 June 2024.

activities, both public and private»[70]. Indeed, the CC, after recalling its jurisprudence prior to the reform which had already identified the environment and the interests of future generations as goods worthy of constitutional importance, declared its intention to take into account the «clear indications of the constitutional legislator [...] read also through the prism of European and international obligations on the matter [...]», thus raising hopes for a possible greater weight attributable to the environment in the balancing with the other interests at stake[71]. On closer inspection, however, it appears evident how the following considerations on the new constitutional discipline are almost incidental, the Court's argumentation being mainly aimed at establishing the boundary between the powers of the judiciary and those of the political-administrative power in cases where the suspension of production activity is decided. In other words, in reaffirming that the balancing of the interests at stake is the judge's task, not the Government's (except crisis situations[72]), the Court seems more concerned with ensuring the balance between the powers of the State, rather than dictating the future course of action to ensure the protection of environmental interests. Indeed, in its reasoning concerning the conservation of the environment, on the one hand, the Court refers back to previous case law, reconfirming that the environment is a unitary value and a «fundamental right of the individual and a fundamental interest of the collective». In this respect, by no means does the Court add anything new. On the other hand, in emphasising the reasons in light of which the case at hand must be decided differently from the previous ruling no. 85/2013, it essentially limits itself to stating the obvious, namely that the

[70] M. Carducci, *Il duplice "mandato" ambientale tra costituzionalizzazione della preservazione intergenerazionale,* neminem laedere *preventivo e fattore tempo. Una prima lettura della sentenza della Corte costituzionale n. 105 del 13 giugno 2024*, DPCE Online 3 (2024).

[71] In this sense, see also C. Ruga Riva, *Il conflitto tra ambiente e attività produttiva strategica: ogni cosa al suo posto? La Corte costituzionale sul c.d. decreto Priolo*, Sistema Penale (2024).

[72] The judgment, at paragraph 5.4.1, states that «in a crisis determined by the need to ensure continuity of production of a plant of national strategic interest subject to criminal seizure, the provision of a mechanism allowing the national government itself to intervene to dictate, on a transitional basis, measures enabling such risks to be contained as far as possible in the immediate future, while at the same time binding the court to allow the continuation of the activity, cannot be considered *per se* incompatible with the Constitution».

constitutional amendment has taken place in the meantime. In this regard, it would have been more appropriate to emphasise that the main difference between the present case and the Ilva one lies in the outdatedness of what was stated in paragraph 9 of the 2013 judgment, according to which one constitutionally guaranteed right can never prevail over another. Moreover, if the constitutional amendment was merely intended to suggest the need for an additional motivational burden in cases where environmental protection is compromised for the sake of other interests[73], it would provide no additional value beyond what is already outlined in the second paragraph of Article 3-*quater* of the Environmental Code.

It seems, therefore, that no real interpretation of the reform has been offered, with two exceptions. The first one concerns Article 41: the Court states that the protection of the environment, being a limitation to the freedom of private economic initiative, is «in the interest [...] of individuals and the collective at present, as well as of the unborn». In this sense, it seems to link the intergenerational dimension of the reformed Article 9 to Article 41, suggesting that the expression «to cause damage» of Article 41 refers not only to current damages but also to future ones[74]. The second one is inherent in the expression «fundamental right of the individual and fundamental interest of the collective», which belies the observation made by the doctrine according to which the constitutional amendment would have eliminated the subjective dimension of protection[75], showing that the latter has only been supplemented with the collective one[76]. In general, however, the Court missed the opportunity to acknowledge, *apertis verbis*, that the 2022 reform opened the way for environmental interests to prevail over economic ones. To be fair, an attempt in this sense can be found in the statement that the 2022 constitutional amendment resulted in the «change [...] of the constitutional parameters based

[73] F. Fracchia and S. Vernile, *Lo sviluppo sostenibile oltre il diritto ambientale*, cit. at 32, 31.

[74] M. Greco, *Il diritto costituzionale dell'ambiente dopo la riforma,* cit. at 29.

[75] This is the observation made by M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente*, at 9, 307-308, who asserts that if the protection of the environment is considered as a subjective right, the question remains as to what the object of the protection actionable by individuals might be, even though the protection of the environment is dependent on that of other legally relevant interests of individuals.

[76] Although in only one judgment had the Court qualified environmental protection as a subjective right: Const. Court, 28 May 1987, no. 210 (para. 4.5).

on which this Court's scrutiny must be conducted». The use of the term «change», rather than "supplement" or "addition", seems to signal an awareness on the part of the judges that the amendment in question should alter their approach to the provisions under scrutiny towards an enhanced level of protection. Nevertheless, this is an overly timid assertion by the Court, which does not explain what this change should consist of and which is, in any case, not emphasised in the remainder of its reasoning.

Overall, the constitutional judges appear to have betrayed the expectation placed on them to decide the case in light of the new discipline delineated by the 2022 legislator and the obligations under European and international law. These were referred to by the Court but played no role in the resolution of the case. Indeed, the Court did not censure the whole of the fifth sentence of paragraph 1-*bis* of Article 104-*bis*, but only the part in which no time limit is set for the continuation of the plant's activity[77]. This is, firstly, unreasonable, especially if one considers that the Court had found that the provision did not contain any reference to the procedural obligations and principles to be followed in identifying the balancing measures, which derive from European and international law. What was the point of recalling the necessary adherence to the principles of transparency, public participation and prevention in the environmental sphere if it then avoids censuring the entire provision under review, limiting itself to evoking the need for an «adequate preliminary investigation activity» and a «congruous motivation» pursuant to Article 3(1) of Law no. 241/1990[78]? Secondly, it could represent a dangerous precedent. The Court does not emphasise the fact that the requirements set out in the revised IEA represent an «indispensable element»[79] of the authorisation for the continuation of the activity, the compliance of which conditions its validity. Indeed, compliance with the obligations enshrined in the IEA ensures sustainable

[77] In this respect, see also R. Bin, *Il "caso Priolo": scelta politica vs. bilanciamento in concreto (in margine alla sent. 105/2024)*, 3 Consulta Online (2024).
[78] M. Ceruti, *Bilanciamento governativo degli interessi e sindacato giurisdizionale per gli impianti industriali di interesse strategico. Le due facce della prima pronuncia della Consulta sulla riforma degli artt. 9 e 41 della Carta*, 57 RGA online (2024).
[79] E. Frediani, *Decisione condizionale e tutela integrata di interessi sensibili*, 1 *Dir. amm.* 485 (2017).

protection for the entire life of the plant[80], since it «takes as its logical starting point, not an activity (to be circumscribed as to its effects) but a value: that of guaranteeing health and the "natural foundations" of life»[81]. Moreover, the Court disregards the fact that the balancing measures are drawn up by the Ministry of Enterprises and Made in Italy, «in agreement» with the Ministry of the Environment. This differs from the "Ilva decree", which required these measures to be adopted during the revision of the IEA by the Ministry of the Environment alone. Paradoxically, the Court constantly refers to the IEA revision obligations dictated in the Ilva case but fails to point out that in the Priolo case the Ministry of the Environment is relegated to a marginal role, secondary to that of the recently established Ministry of Enterprises and Made in Italy whose main concern, as its very name says, is the promotion of business interests. As a matter of fact, the inter-ministerial Decree raised certain threshold values for the treatment of effluents, thereby choosing to «sacrifice environmental interests on the altar of national economic, employment and business needs linked to the Priolo petrochemical plant, with a genuinely political assessment»[82]. On this point too, however, the Court remains silent. Indeed, it envisages the possibility of "saving" the provision under scrutiny by means of a *reductio ad legitimitatem*, to be accomplished by introducing a maximum time limit to the duration of the economic activity.

Further criticism can be made of the ruling. The Court dwells at length on the previous judgment no. 85/2013, but fails to devote due attention to another precedent, also related to the Ilva affair, namely judgment no. 58 of 2018. The latter had declared incompatible with Article 41 of the Constitution (as well as Articles 2, 3, 4 and 32), Articles 3 of Decree-Law no. 92/2015 and Articles 1(2) and 21-*octies* of Decree-Law no. 83/2015 for letting the economic interest prevail over the other constitutionally relevant values in a disproportionate and unreasonable way. The background was the deadly accident of a worker at the Ilva plant,

[80] See S. Vernile, *L'Autorizzazione Integrata Ambientale tra obiettivi europei e istanze nazionali: tutela dell'ambiente vs. semplificazione amministrativa e sostenibilità socio-economica*, 6 Riv. italiana di dir. pubb. com. (2015).
[81] E. Frediani, *Decisione condizionale e tutela integrata di interessi sensibili*, cit. at 79, 210.
[82] C. Ruga Riva, *Il conflitto tra ambiente e attività produttiva strategica: ogni cosa al suo posto?*, cit. at 71.

which had been followed by the preventive seizure of the plant and the consequent adoption of Decree-Law no. 92/2015, later censured by the Constitutional Court, which authorised the continuation of the company's activity provided that the conditions set out therein were met. The provisions had been condemned, in particular, insofar as they provided that the continuation of the business activity for twelve months was conditional solely on the arrangement, within thirty days, of an (even provisional) plan by the same private party affected by the seizure, without requiring the participation of other public or private entities, the removal of the dangers to the security of workers and without any reference to laws related to occupational safety or to alternative organizational and prevention models.

This shows, firstly, that it should not be the mere application of a time constraint the reason for saving a provision from a declaration of unconstitutionality. Secondly, that the Court's intent is not that of issuing a ruling that would mark a turning point in environmental protection. Quite the opposite. Indeed, the 2018 judgment shows that the Court is more rigorous in evaluating provisions that risk posing a danger to the safety of workers, so much so that the 12-month time limit is insufficient to avoid a declaration of unconstitutionality. Rather, when environmental protection comes into play, the censure rests solely on the absence of such a deadline. This not only could suggest that, in the Court's view, the protection of workers' lives demands greater attention than the preservation of environmental soundness, but also an amnesia on the part of the constitutional judges (who had just before recalled Article 8 ECHR) that the safeguarding of the life and health of individuals is also carried out through the protection of the environment. Yet, the 2018 ruling had already been pointed out as significant « to dismantle the much-vaunted, as much as fictitious, contrast between the rationale of the economy and that of the law, or rather, of the rights of individuals»[83]. In short, it seemed to mark the beginning of a rethinking of the approach adopted in

[83] R. De Vito, *Health, work, judges*, Questione Giustizia online (2018), adds that the importance of Article 8 ECHR is that the protection of the life and health of individuals is also carried out through that of the environment. Although this ruling had already been pointed out as a significant «fictitious contrast because it had already been resolved by the constituent legislator, even if we sometimes ended up neglecting or removing such information». The reference is to the fact that the Constitution only qualifies the right to health as expressly fundamental.

case no. 85/2013. Nevertheless, the Court omitted to deal with it, merely recalling such judgment where it asserts that

> «promptly removing hazardous elements to the health, safety and life of workers constitutes [...] a minimum and indispensable condition for a productive activity to be carried out in harmony with constitutional principles, which are always primarily concerned with the basic needs of individuals»[84].

Ultimately, the Court's decision has the effect of taking responsibility away from the Government by legitimising unwise choices on its part, on the sole condition that these can later be subjected to judicial scrutiny. It has been pointed out in this sense that

> «what the Court leaves untouched (apart from the addition of a defined term) is a political decision that suspends the balancing act and provides for a hierarchy of interests at stake in a control-free arena»[85].

It might be possible to raise an objection in this regard in light of the fact that the Court recognises that the balancing measures «must, if anything, be functional to the objective of gradually bringing the activity itself, in the shortest possible time, within the sustainability limits generally established by law». However, this statement remains sterile as the Court does not shed any light on which path to follow[86]. What should the EJ do after the judgment? Should he abide by the ruling, issuing the authorisation and refraining from intervening for 36 months? Or should he waive the inter-ministerial Decree? The Court gives no indication on this matter. The choice of the second option was thus mainly attributable to EJ's caution. Indeed, the chronicles tell us that the EJ of Syracuse waived the inter-ministerial Decree and denied the authorisation. In response, the State Attorney's Office appealed to the Rome Review Court, which, without entering into the merits and without suspending the effectiveness of the EJ's decision, referred the question of territorial jurisdiction to the Constitutional Court, which will rule on the issue in the coming months. However, despite the various judicial vicissitudes, the plant's activity has

[84] Paragraph 3.3.
[85] R. Bin, *Il "caso Priolo"*, cit. at 77.
[86] *Ibidem*.

never stopped since it was seized[87], continuing to pose real risks to the safety of individuals and the territory. This is even more serious if we consider that, as in the case of Ilva (which, however, has gained much more media attention) the Syracuse petrochemical plant has been carrying out a silent slaughter[88] for years, with the tacit consent of politics and the support of organised crime[89]. In the years of malfunctioning, polluting and dangerous substances have been discharged into the sea and released into the atmosphere, with disastrous consequences for human health: it is no coincidence that the provinces of Augusta, followed by those of Priolo, Syracuse and Melilli, have the highest cancer incidence rates in the region[90]. Under these conditions, it is regrettable that the Court would have accepted the Government's decision to continue the dumping under the sole condition of setting a deadline.

In other words, the Court showed excessive deference to political power. Given the acknowledgement that in crisis situations the executive enjoys a certain freedom in deciding whether to ensure the continuity of production at a plant of national strategic interest, it would have been possible for the judges to interfere more in the Government's powers, not in the sense of overstepping them, but of directing them, by, for example, drafting obligations to which it must be subjected that are additional and/or different from those referred to in judgment no. 85/2013[91]. This would have been all the more necessary considering that, in the aftermath of the enactment of Decree-Law no. 207/2012, many concerns had already been raised by scholars, which, however, did not find comfort following the Court's ruling. In particular, with regard to the Decree-Law, it was observed that it was such that the

[87] Siracusa Post, *Ias, incontro urgente a Roma ma l'attività di depurazione non si è mai fermata*, 8 December 2024.

[88] See F. Lo Verso, *Il mare colore veleno: indagine su uno dei più grandi disastri ambientali del paese* (2023).

[89] A. Fraschilla, *La vergogna senza fine del petrolchimico di Siracusa: «Da 40 anni il depuratore non funziona: tutto va in aria e in mare»*, L'Espresso, 12 September 2022; S. E. Cutuli, *Polo petrolchimico di Siracusa, una storia di mala politica tra immobilismo e disastro ambientale*, Italia che cambia, 10 April 2024.

[90] S. E. Cutuli, *Il mare colore veleno: tutto ciò che non sappiamo sul dramma del polo petrolchimico di Siracusa*, Italia che cambia, 15 January 2024.

[91] This was also recognised in the *Urgenda* case: when the protection of the life and health of citizens (Articles 2 and 8 ECHR), exercisable through environmental protection, is at stake, such interference is justifiable in the light of the prevalence of EU law over domestic law. See C. Ramotti, *La tutela dell'ambiente e delle generazioni future: il caso Urgenda*, 3 Riv. trim. dir. pubbl. (2024).

economic interest took precedence over that of health and the environment[92] and that the later addition of Article 1 had been made specifically to avoid the doubts of constitutional legitimacy that would arise from the regulatory and concrete character of such Decree-Law, had it been sewn (as seemed evident) on the specific case of the Ilva plant[93]. Again, it was pointed out that the Decree-Law laid the foundations for the expropriation of the judicial function by the Government, albeit not definitively[94]. It was also argued that the Decree-Law constituted an «improvised and partial»[95] solution, since the judge who decides to implement the preventive seizure of plants is not exercising his own impartial law enforcement power but seeks to prevent future crimes, thus performing a task that resembles that belonging to political-administrative authorities in that it abandons the objective enforcement of the law and promotes a public purpose, to be understood as the preservation of the environment and its inhabitants. In short, this argument suggested the need to redefine the relationship between the two powers, not in a competitive and antagonistic sense, but in a collaborative direction, since they are oriented (at least in theory) to the same end. In addition, it was noted that since Article 3 was a norm instead of a regulatory provision, it conflicted with Articles 24 and 113 of the Constitution, under which the choice of plants of national strategic interest should have been made using an administrative measure, and not by a decree of the Prime Minister[96]. This is without prejudice to the fact that the existence of the requirements of necessity and urgency legitimising recourse to the Decree-Law could in any event be considered dubious, especially because for several years the Taranto plant had raised concerns for the threats it posed to the

[92] F. Di Cristina, *Gli stabilimenti di interesse strategico nazionale ei poteri del Governo*, *Giorn. dir*. 377 (2013).

[93] See G. Arconzo, *Note critiche sul "decreto legge ad Ilvam", tra legislazione provvedimentale, riserva di funzione giurisdizionale e dovere di repressione e prevenzione dei reati*, Dir. pen. cont. (2012).

[94] *Ibidem*.

[95] R. Bin, *Giurisdizione e amministrazione, chi deve prevenire i reati ambientali? Nota alla sentenza "Ilva"*, Giur. cost. 1505 (2013), who proposed an amendment to Article 321 of the Code of Criminal Procedure concerning preventive seizure.

[96] G. Sereno, *Alcune discutibili affermazioni della Corte sulle leggi in luogo di provvedimento*, 3 Giur. cost. (2013).

environment[97]. Although in its ruling the Court had, at some point, observed that Article 3 was an administrative measure, it then went on to label it as a norm, leading to negative consequences also for judicial review[98]. Similar considerations had been made concerning the 36-month time limit, which was not indicated in the IEA (the administrative act[99] on the review of which the authorisation to continue the activity depends), it being mentioned only in the Decree-Law under Article 3[100]. Some commentators also maintained that the Court had not adopted a particularly prudent stance, since it had accepted the lawfulness of the undertaking's activity as long as it complied with the revised IEA[101], with the consequence that only the authorisation's invalidity could have led to the unlawfulness of the continuation of the business activity, even if that constituted an offence and posed risks to the environment or health[102]. About the time limit, it was then

[97] See S. D'Angiulli, *Caso Ilva di Taranto: adesso o mai più*, 217 Ambiente e Sviluppo (2013), who noted that as early as 2005 the company's top managers had already been definitively convicted of the offence under Article 674 of the Criminal Code, for the spillage of dust containing iron and other minerals from the plants.

[98] As first observed in Const. Court, 24 November 1958, no. 61 and then reiterated in subsequent judgments, the diversity of the guarantees offered by the legal system between administrative and legislative acts makes it all but irrelevant whether a given measure is adopted in one form rather than the other.

[99] G. Arconzo, *Note critiche sul "decreto legge ad Ilvam", tra legislazione provvedimentale, riserva di funzione giurisdizionale e dovere di repressione e prevenzione dei reati*, Dir. pen. cont. (2012): he suggests that the IEA referred to in Article 3(2) is not an administrative measure but rather has statutory force. In fact, it is the Court itself that establishes that the IEA was not made into a law.

[100] G. Sereno, *Alcune discutibili affermazioni della Corte sulle leggi in luogo di provvedimento*, cit. at 96, who notes that Article 3(1) imposes a maximum time limit of 36 months, whereas Article 3(3) speaks only of a «period of 36 months».

[101] L. Geninatti Satè, "*Caso Ilva": la tutela dell'ambiente attraverso la rivalutazione del carattere formale del diritto (una prima lettura di Corte cost., sent. n. 85/2013)*, Forum Quad. Cost. Rassegna (2013), states that: «This implies [...] the shifting of evaluations regarding the material harmfulness of conduct to the level of the validity of the measures that make it permissible» and that «[t]aking the formal character of law as a dogmatic attitude thus leads to the recognition of the closed character of legal systems, and hence to reverting conflicts between conduct and norms to conflicts between acts and norms».

[102] The Court seems to acknowledge this to some extent in stating that the discipline outlined in the "Ilva Decree" «does not render lawful *a posteriori* what was previously unlawful», but «traces a path of environmental clean-up», the deviation from which «implies the emergence of precise criminal, civil and administrative responsibilities, which the competent authorities are called upon to enforce according to ordinary procedures». However, as correctly noted by L.

questioned whether the period of 36 months was congruous, given that the seizure order issued by the EJ required the *immediate* adoption of all measures aimed at averting the persistence of the hazardous situation[103]. Moreover, it had been correctly suggested that of the two criteria for identifying a plant as being of national strategic interest, the second enjoyed a wide margin of discretion from the political power and, therefore, it needed to be reviewed[104]. However, the Court did not accept these claims: it concluded, to the disappointment of many, that the Decree-Law under its scrutiny had struck the correct balance between the constitutional values at stake.

Against a situation that raises very similar concerns to those of the Ilva case and a new Decree-Law that appears to be even more problematic (it must be recalled that it is the CC itself that points out that the partially censured provision does not reach the «point of balance» of Art. 1 of Decree-Law no. 207/2012), it is surprising that the Court, more than ten years after judgment no. 85/2013 and following a constitutional reform that has placed environmental protection at its centre, has not felt the need to rethink its approach[105]. On the contrary, it continually refers to the Ilva Decree-Law, ignoring the criticisms that were raised following its enactment and that would largely still apply today. It is especially striking that the Court reiterates that 36 months is the appropriate maximum time limit for the continuation of the activity, without going further into considerations as to its appropriateness for the case at hand. In this sense, the Court could perhaps have prompted

Geninatti Satè, "*Caso Ilva": la tutela dell'ambiente attraverso la rivalutazione del carattere formale del diritto*, cit. at 101, «[t]his systematic interpretation [...] does not escape the principles of horizontal coherence and does not constitute a real exception to the assumption of the formal character of the law», since the Court continues in its argumentation by claiming in fact that compliance with the requirements of the IEA entails, in any case ,the legitimacy of the continuation of the business activity.

[103] G. Arconzo, *Note critiche sul "decreto legge ad Ilvam"*, cit. at 93, 19.

[104] G. Sereno, *Alcune discutibili affermazioni della Corte sulle leggi in luogo di provvedimento*, cit. at 96: he recalls the Court's own words according to which «the national strategic interest in one type of production, rather than another, is a variable element, as it is linked to economic circumstances and another series of factors that cannot be predetermined».

[105] See R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, 24, who wondered precisely whether judgment no. 85/2013 could have been decided differently in the light of the reformed Article 41.

the Government to revise such deadline[106] or to introduce a stricter procedure in the elaboration of the balancing measures so as to maximise efforts to ensure that the continuation of industrial activity takes place without the risk of further damage to the territory and its inhabitants.

5. The relationship between the constitutional reform and the Court's ruling

At this point, one might wonder whether the reason behind the unsatisfactory constitutional pronouncement is due to a certain superficiality on the part of the Court, or to the insufficiently pregnant scope of the constitutional reform, and to what extent. It has already been observed that the reform, although generally positive, has essentially limited itself to transposing the "law in action" into the "law in the books"[107], thus refraining from taking more disruptive and necessary steps, also in the wake of the insights given by comparative law. With the exception of the principle of intergenerational equity, now enshrined in Article 9, no reference has been made in the Italian Constitution to the principles of environmental law, first and foremost those of precaution and prevention, which, given their responsibilizing force, are believed to facilitate the coordination with other constitutional values, as is the case at EU level[108]. This is certainly regrettable, especially if we consider that among the rejected proposals for amending the Constitution was the idea of mentioning the principle of sustainable development[109] (now only indirectly inferable from the wording of Article 41), and recalling the principles of prevention and precaution in the body of Article 9[110]. Those who maintain that this

[106] Also in light of the fact that rather than of a "maximum term", one could speak of an "effective term", as it is unrealistic for a business activity to cease before the 36-month deadline.

[107] This phrasing is by E. Mostacci, *Proficuo, inutile o dannoso?*, cit. at 55, 1124.

[108] M. Greco, *La dimensione costituzionale dell'ambiente,* cit. at 6.

[109] Proposal no. 1632 by Senator Bonino; no. 938 by Senator Collina and others; no. 1203 by Senator Perilli; no. 2160 by Senators Calderoli and others (in Art. 41).

[110] Proposal no. 212, by Senators De Pretis and others: «In Article 9 of the Constitution, the following shall be added after the second paragraph: 'The Republic shall protect the environment, biodiversity and ecosystems. The Republic shall pursue the improvement of the conditions of the air, water, soil and territory, as a whole and in its components. The protection of the environment, biodiversity and ecosystems constitutes a fundamental right of the

was not necessary in light of the fact that these principles are already widely rooted at the international, EU and national levels[111], are, in my opinion, mistaken. Upholding such observation would lead to the conclusion that the reform itself was also useless, as it has included in the Constitution concepts that were familiar to the domestic legal system and that, in any case, were already imposed by supranational law. Similarly, I do not agree with the viewpoint that it is to be welcomed that the legislator avoided adding references to principles derived from sustainable development since they would have had the effect of causing the constitutional text to «prematurely age»[112]. Indeed, principles are, by definition, general and abstract and, consequently, susceptible to evolutionary interpretation. Therefore, if one wishes to avoid too invasive an intervention on the constitutional text, the best option could have been to add a new paragraph to Article 9 referring the discipline of environmental protection to an *ad hoc* source, to be drafted in deference to the environmental obligations sanctioned at the EU level and which could thus have imposed itself as a parameter for the validity of ordinary legislation[113]. In essence, it would be a matter of drawing up an environmental charter with constitutional value, following the French model.

However, although a certain «renunciatory attitude»[114] on the part of the 2022 legislature in contributing to the development of EU environmental law is undeniable, I believe that this is only to a minor extent responsible for the result achieved by the CC in its

individual and the collective and is based on the principles of precaution, preventive action, responsibility and correction, primarily at the source, of damage caused to the environment. The Republic shall promote the necessary conditions to make this right effective [...]'»; Proposal no. 83 by Senators De Petris and Nugnes: «In Article 9 of the Constitution, the following shall be added after the second paragraph: 'It shall protect the environment and ecosystems as a fundamental right of the individual and the collective, by promoting the conditions that make this right effective. It pursues the improvement of the conditions of the air, water, soil and territory, as a whole and in its single components, protects biodiversity and promotes respect for animals. Environmental protection is based on the principles of precaution, preventive action, responsibility and correction, primarily at source, of damage caused to the environment'».

111 F. Fracchia, *L'ambiente nell'art. 9 della Costituzione*, cit. at 17, 148.

112 See R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, 21.

113 M. Cecchetti, *La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente*, cit. at 9, 313.

114 G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, cit. at 25, 467.

ruling. It has already been pointed out that the Court's case law had begun to define the contours of the regulation on environmental protection together with its substantive and procedural obligations well before the constitutional amendment. In this case, however, the Court seems to have forgotten the important role played by its own jurisprudence in shaping the law[115], thus disappointing that part of the doctrine that saw in the constitutional reform a great opportunity for interpreters (first and foremost the Constitutional Court[116]) to clarify its scope also through the enunciation of the more precise positive and negative obligations imposed on public powers and to strengthen the weight of environmental protection in the balancing operations with other constitutionally protected values[117].

The Court does none of that. Hence, it could be argued that constitutional judges have not fully understood the significance of the aforementioned *KlimaSeniorinnen Schweiz* judgment, according to which

> «the [European] Court [of Human Rights] considers it essential to emphasise the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field. Furthermore, given the principles of shared responsibility and subsidiarity, it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed»[118].

Invoking its previous case law, the CC states that the protection of the environment requires «the preservation, rational management and improvement of natural conditions», but does not openly mention the principle of progressive protection, nor that of non-regression, understood as the prohibition of lowering the guaranteed level of protection. If these principles had been taken

[115] The case-law is, indeed, one of the legal formants identified by R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 Am. J. Comp. L. (1991).

[116] F. Fracchia, *L'ambiente nell'art. 9 della Costituzione*, cit. at 17, 157 says that the constitutional codification of the principle of environmental protection can be an opportunity for the Constitutional Court and other institutional actors to initiate development paths.

[117] G. Santini, *Costituzione e ambiente: la riforma degli artt. 9 e 41 Cost.*, cit. at 25 and C. Tripodina, *La tutela dell'ambiente nella Costituzione italiana*, cit. at 18.

[118] Para. 639.

into due consideration, also in light of the need to offer an «increasingly modern interpretation»[119] of the constitutional provisions, it might have been possible to reach a different conclusion to the case, avoiding continual reference to the provisions of Decree-Law no. 207/2012. Even the precautionary principle, which requires one to refrain from an activity when there is uncertainty or reasonable doubt as to the existence or extent of risks to people's health, has not been adequately emphasised. Had it been, this would probably have resulted in the IAS plant being prohibited from continuing its activity. Similarly, the Court recalls the importance of the three pillars underlying the Aarhus Convention, namely access to information, public participation and access to justice in environmental matters, but censures the fifth sentence of Article 104-*bis*, paragraph 1-*bis* solely for not having provided for a maximum final deadline[120]. Further, it recognises that future generations have the right to be preserved from the consequences of man's harmful actions on the environment, but at no time, not even when it insists on the importance of the 36-month time limit, does it mention the potential irreversibility of those consequences[121]. In short: the balancing of constitutionally protected values, being carried out on a case-by-case basis, is not objective and, inevitably, it involves a moral judgment. It is also for this reason that the pronouncement under comment is disappointing. Indeed, it tells us something about the sensitivity of the Constitutional Court with respect to the protection of environmental interests, which not only does not seem to have increased since the constitutional reform but also still appears to result in the subjection of such interests to the economic demands put forward as imperative by the political power.

[119] Const. Court, 28 May 1987 no. 207, para 4.5.

[120] See R. Bifulco, *La legge costituzionale 1/2022: problemi e prospettive*, cit. at 28, 16, who, in the aftermath of the reform, stated: «Nor can we exclude a procedural use of the provision in the sense of a strengthening of judicial actions, also by associations and collective subjects, initiated because of the violation of the duties placed on public subjects by Article 9(3) of the Constitution».

[121] By contrast, this concept was referred to in the ruling of the German Federal Constitutional Court of 24 March 2021, based on Art. 20a, which is the provision that inspired the Italian legislator when reforming the Constitution.

6. Conclusion

This paper argued that in ruling no. 104 of last June, the first in which the Constitutional Court was called upon to rule on the constitutional amendment on environmental matters that took place in 2022, there was, contrary to what some have argued, neither interpretation nor application of the new constitutional discipline. The manner in which the case was decided demonstrates the Court's reluctance to recognise the constitutional reform's power to determine concrete consequences in cases where environmental interests are pitted against economic ones, in the sense of giving the former greater weight in the balance with the latter. In this vein, the not particularly innovative scope of the constitutional reform is only partially the cause of the Court's attitude. In issuing such a ruling, the CC ultimately renounces the creative and interpretative force of its case law, which is capable of going beyond the literal interpretation of the norms and contributing to their evolution in a more guaranteeing direction.

Be aware: this paper is not intended to suggest that the protection of the environment and health must always take precedence over other constitutionally guaranteed rights, such as the right to work, which would undeniably be seriously compromised by the immediate closure of the plants. The aim is, in fact, to show how, following the constitutional reform, the words of the EJ of Taranto in the Ilva's order of preventive seizure are even more irreproachable:

> «In the case we are dealing with, a different reasoning would lead to the legal absurdity of making comparisons between the number of acceptable deaths and that of ensurable jobs. [...] it will never be possible to speak of technical or economic unfeasibility when what is at stake is the protection of fundamental assets of constitutional importance, such as the right to health, to which Article 41 of the Constitution conditions free economic activity»[122].

The intent is to highlight, therefore, that if the constitutional amendment is to be recognised as having any reformative capacity, this must be understood as imposing a renewed drive and attention towards environmental protection. This cannot result in the confirmation and re-proposal of the criteria developed by the 2012

[122] EJ of Court of Taranto, Preventive Seizure Order of 25 July 2012, no. 5488/10.

legislator to ensure the continuity of production of plants of national strategic interest, nor, even less so, in a ruling that censures a provision merely because it does not set a time limit, despite having found that the procedural requirements to ensure the satisfactory balancing of the interests at stake are equally missing.

Today, new considerations and increased awareness are being imposed on both the public and private sectors and, with them, more radical and courageous choices are required. And the constitutional judges should know this. Instead, they criticise the Government's discipline rather weakly, showing a certain reverence for the political-administrative power, especially in times of crisis. In this regard, it should be borne in mind that

> «when it is debated whether a given future activity, even if it is hypothetically compliant with the specific prescriptions dictated by law, produces or may produce effects that endanger rights or interests protected by the legal system, the boundary [between the judicial and political power] becomes blurred, all the more so when such effects do not concern individual, clearly identified subjects, but are collective in nature»[123].

From this statement, which was made in 2013 in connection with the first Ilva case, it was inferred that

> «it is not for this reason that we can think that a judge is given the ultimate power to declare that the level of danger is such as to impose the immediate cessation of this or that activity [...] instead, the political powers – both legislative and administrative – can and must be urged to promote appropriate measures and precautions to best address environmental and health risks»[124].

Today, instead, also in the light of the constitutional reform, one could draw the conclusion, firstly, that an expansion of the judicial power towards greater meddling in the merits of political choices can (perhaps must) be authorised if the latter, which is often enslaved to the logic of consensus, fails to outline the way to «best address» health and environmental dangers. Secondly, that the ruling of judgment no. 105/2024 is unsatisfactory as it has not taken

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[123] V. Onida, *Un conflitto fra poteri sotto la veste di questione di costituzionalità: amministrazione e giurisdizione per la tutela dell'ambiente*, 3 Giur. Cost. (2013).

[124] *Ibidem*. This statement led to praise for the Court for issuing a ruling that struck the right balance between the two powers.

any steps forward compared to the past. In fact, it ended up once again favouring economic interests, giving the impression of a lack of awareness on the part of the constitutional judges that the plant's activities had already been taking place for many years to the detriment of the environment, workers and citizens. Therefore, it seems that the Court has not fully grasped the meaning of what it itself had already stated in judgment no. 58/2015 on Article 41, in a passage also recalled in the ruling under comment: namely, that economic activity must *always* be carried out in such a way as not to cause damage to security, freedom and human dignity; that factors endangering the health, safety and life of workers must be *promptly* removed; and that the safety and life of workers constitute the *minimum and indispensable conditions* for productive activity to be carried out in harmony with constitutional principles, which are «always attentive *first and foremost* to the basic needs of the person».