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Climate Change, Democracy, and the Italian Constitution

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I. How to raise public awareness: A short preamble

This conference offers a timely occasion for a joint comparative reflection on issues of dramatic importance. I underline the word "joint", since the sharing of a few common points can strengthen the role of constitutional courts as constructive interlocutors of policy-makers. Rather than speaking in terms of judicial activism – an expression which may wrongly suggest negative implications – the points to be made relate to effective and urgent means to guarantee the enforcement of constitutional rights. The background to the common challenges that constitutional courts are facing is theoretical and, at the same time, practical: can (and should) constitutional courts take the place of legislators in addressing politically sensitive issues? Do they have the legitimacy to do so, or should they rather call on parliaments to intervene? Is urgency the ground on which these questions lie? And does urgency imply that parliaments have been reluctant to intervene? Both theoretical and practical reasons appear in the foreground.

* President of the Italian Constitutional Court. The opinions presented in this paper are personal and do not involve the Court in its collegiality. I am grateful to Dr Lorenzo Cecchetti, currently on an internship programme at the Constitutional Court, for his generous and competent help in checking references, as well as in providing useful comments to a first draft of this paper. Gratitude goes hand in hand with claiming my full responsibility for omissions and mistakes.
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Constitutional courts are required to take steps forward at a time when new actors are emerging in civil society and on the international scene. Constitutional courts should affirm their legitimacy to intervene whenever the protection of fundamental rights is at stake. Such legitimacy is an expression of democracy and is based on independence and impartiality, as well as on openness in legal reasoning, especially when it comes to acquiring new knowledge resulting from scientific progress. The crucial point is to address scientific uncertainties and to ground constitutional adjudication on reliable data. How can this be done?

Academic institutions of renowned reputation are active in collecting interdisciplinary data and enriching the information on climate change litigation at different levels and within different jurisdictions, be they civil, administrative, or criminal law courts.[1] Such monitoring and cataloguing work, which provides continuous and easily accessible data on climate change, is of paramount importance. Comparative data shed light on issues such as the role of collective organisations and NGOs in strategic climate litigation. Non-state actors are also expected to take an active role in overseeing and facilitating the implementation of the obligations taken at the international level, such as in the context of the Paris Agreement and of the 2030 Agenda.[2]

A comparative analysis is also helpful in strengthening the justiciability of rights, which relies upon efficient sanctions and the evaluation of damages required. A recent UN General Assembly Resolution (29 March 2023) requested the opinion of the International Court of Justice (ICJ) in order to clarify countries' obligations on climate change and consequently decide on damages that can be imposed for acts or omissions affecting others.[3] It is worth noting that this resolution was prompted by law students from the Pacific Islands, fearing the negative impact on their own lives and on the land they inhabit. Rulings of the ICJ, despite not being binding, disseminate relevant legal principles and create moral responsibilities in the international community.

[1] See, for instance, the databases compiled and maintained by the Sabin Center for Climate Change Law of the Columbia University Law School, in partnership with other research institutions, available at https://climate.law.columbia.edu/content/resources; the Climate Litigation Database maintained by the University of Zurich, available at https://climaterightsdatabase.com/; and the Global South Climate Database set up by Carbon Brief with the support of the Reuters Institute's Oxford Climate Journalism Network, available at https://www.carbonbrief.org/global-south-climate-database/.

[2] K. Bäckstrand, J. W. Kuyper, B. O. Linnér, & E. Lövbrand, "Non-state actors in global climate governance: From Copenhagen to Paris and beyond", 26 *Environmental Politics* 561 (2017).

[3] General Assembly of the United Nations, Resolution entitled "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change", A/RES/77/276, 29 March 2023, available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/094/52/PDF/N2309452.pdf?OpenElement.

In October 2022, the International Association of Constitutional Law (IACL) brought together a number of experts on constitutional law from different countries for a roundtable in Ankara to revisit the human rights approach and address the peculiarities of the climate crisis with an "eco-centric legal approach".[4] Fresh approaches in constitutional law are food for thought and can fruitfully be combined with human rights approaches. Remarkably, the Grand Chamber of the European Court of Human Rights (ECtHR) will soon decide three climate cases currently pending before it, namely *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*,[5] *Carême v. France*,[6] and *Duarte Agostinho and Others v. Portugal and Others*.[7] In a nutshell, in the first case, Swiss NGOs and four women aged over 80 have submitted a complaint alleging a violation of their right to life (Art. 2), their private and family life (Art. 8), and the right to an effective remedy (Art. 13). Articles 2 and 8 of the European Convention on Human Rights (ECHR) are also at the core of Mr Carême's application against France for the alleged failure to take all appropriate measures to comply with the maximum levels of greenhouse gas emissions. As regards the last case, suffice it to recall that the applicants – all Portuguese nationals aged between 10 and 23 – have alleged a violation of Art. 14 (prohibition of discrimination) in conjunction with Articles 2 and 8 of the Convention, read in the light of the Paris Agreement on climate change. Given their young age, the effects of climate change interfere with their rights in a most significant way.

In light of the foregoing, there are good reasons to believe that events and judicial decisions have combined to increase public awareness. Responses from courts are expected and can, in different ways, help to create a coherent frame of reference for lawmakers. This conference is thus an ideal occasion to elaborate common positions and disseminate ideas. It also offers an opportunity to discuss communication as part of a common strategy and of mutual learning among courts.

II. Italy: A constitutional reform on environmental protection

Despite the lack of specific decisions on climate change delivered by the Constitutional Court, Italian scholarship is engaged in forward-looking discussions, which may contribute to a comparative analysis. Furthermore, the Court's case law, developed over the years, offers an example of the different nuances that the word "environment" acquires in constitutional adjudication.

[4] IACL, Roundtable on "Environment, Climate Change and Constitutionalism", Ankara, 20-21 October 2022.
[5] ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* (GC), No. 53600/20, pending case.
[6] ECtHR, *Carême v. France* (GC), No. 7189/21, pending case.
[7] ECtHR, *Duarte Agostinho and Others v. Portugal and Others* (GC), No. 39371/20, pending case.

1. The 2022 amendment to the Italian Constitution

Before outlining this case law, it is worth recalling that in 2022 the Italian Constitution was amended to include new provisions dealing with the environment.[8] A new paragraph was added to Art. 9, encompassing different areas of protection. A new paragraph was also added to Art. 41, to be read in conjunction with the aforementioned one. Following the amendment, the two constitutional provisions read as follows:[9]

Art. 9 – The Republic shall promote the development of culture and of scientific and technical research.

It shall safeguard natural landscape and the historical and artistic heritage of the Nation.

It shall protect the environment, biodiversity and ecosystems, also in the interest of future generations. The law shall regulate the ways and forms of animal protection.

Art. 41 – Private economic enterprise shall be free.

It may not be carried out against the common good or in such a manner that could damage health, the environment, safety, freedom and human dignity.

The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and coordinated for social and environmental purposes.

The reform was cautiously received by commentators. On the one hand, it raises important theoretical questions as to the overall structure of sources governing these matters. The "crisis" of legal sources is put forward in connection with an increasing relevance of scientific data. The latter are an indispensable starting point for legislators. Such data are released by international organisations and globally operational institutions whose reputation is built on accountability and trust. Trust is also the outcome of the constant dialogue that global institutions active in the field of climate change have with scientists and national governments.

A point to raise at a high-level conference that brings together constitutional courts is the centrality of scientific data in constitutional adjudication, where courts are faced with dramatic contemporary

[8] Constitutional Law No. 1 of 11 February 2022, "Amendments to Articles 9 and 41 of the Constitution regarding environmental protection", *Official Journal of the Italian Republic*, General Series, 22 February 2022, No. 44. On this constitutional amendment, see 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", *Forum di Quaderni Costituzionali* 3, 285 (2021). Regarding the protection of the environment in the Italian Constitution, see S. Grassi, "Ambiente e Costituzione", *Rivista quadrimestrale di Diritto dell'Ambiente* 3, 4 (2017).

[9] The newly introduced paragraphs are emphasised in italics.

events such as climate change. Reliable sources are sources made available by accountable and independent institutions. Scientific data on which legislation is based – both at national and international level – become a shared ground also for constitutional courts. If constitutional courts rely on the same scientific sources, they can refer to each other in a circular and potentially virtuous form of communication. This joint reliance upon scientific sources shows that constitutional courts share a number of common points in constitutional adjudication on such politically sensitive matters, adding to the soundness of science and to the reasonableness of legislative initiatives. The Italian Constitutional Court has recently faced this test, dealing with legislation on vaccines to combat the COVID-19 pandemic.[10]

2. The Italian Constitutional Court's case law on environmental protection

The environment has long been central in the Constitutional Court's case law, within the framework of an extensive interpretation of the expression "natural landscape". This was one of the examples quoted by Paolo Grossi – a legal historian, constitutional judge and President of the Italian Constitutional Court – to support the theory of "inventive" interpretation, which implied finding within the Constitution the grounds on which to base the enforcement of new rights, where "inventive" needs to be understood in light of its Latin etymology ("inventio" or "invenire") in the sense of "searching in order to find something".[11]

The preconditions for constructing such an extensive interpretation were established in a landmark decision dating back to 2007.[12] It is worth recalling the wording adopted in some of its passages, since it reveals an approach mainly oriented towards an evaluation of state and regional competences, with a view to guaranteeing the broadest possible protection. The prevailing issues, in fact, deal with the distribution of competences. The protection of "natural landscape" – the Court maintains – refers to the "morphology" of the territory, that is to say the environment in its "visual aspect". This is why even the early version of Art. 9 paved the way for interpretations which did not require the further specification of an overarching notion of the goods to be protected. Landscape, as a concrete rather than abstract notion, was considered by the Court to include environmental and even cultural elements. Territory, embracing all these elements, is "in itself a constitutional value" of primary and

[10] Italian Constitutional Court, Judgment No. 14 of 2023, available at the following link: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Sentenza%20n.%2014%20del%202023%20red.%20Patroni%20Griffi.pdf; Judgment No. 15 of 2023, available at the following link: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%2015%20del%202023.pdf , and Judgment No. 16 of 2023, available at the following link: https://www.cortecostituzionale.it/stampaPronunciaServlet?anno=2023&numero=16&tipoView=P&tipoVisualizzazione

[11] P. Grossi, *L'invenzione del diritto*, Roma-Bari, Laterza, 2017.

[12] Italian Constitutional Court, Judgment No. 367 of 2007, available at the following link: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2007&numero=367.

absolute importance, a concrete combination of all these elements. Protecting the landscape – the Court specifies – implies a dynamic representation of all the values involved, namely the "needs posed by socio-economic developments" at a national level, which have an impact on the territory.[13] The protection of the landscape rests on cultural roots and reflects the humanistic approach that prevailed among the members of the constituent body.[14] Whereas the competence of the state is to legislate in order to guarantee uniform protection, both state and regions must cooperate in "governing the territory". In the territory, local peculiarities can emerge and can be dealt with; however, environmental protection has "cross-cutting" implications and functions as a limit to regional competences. The unitary notion of the environment – as it emerges from the Court's case law and as it is now set out in the new version of Art. 9 – requires fair cooperation with the regions. On the one hand, there is the conservation of the artistic and cultural heritage of the nation; on the other hand, governing the territory implies intervening with specific measures. So-called "landscape plans" are drafted by the regions, within the framework provided for in national legislation and under the supervision of the Ministry in charge of environmental and cultural policies.

Another interesting stream of the Court's judgments deals with renewable energy sources and in particular with the requirement that wind power plants and solar power plants be located in the territory in ways that do not interfere with the environment. The production of energy – the Court clarifies – may not encroach upon the protection of the landscape and local biodiversity. In 2010, a ministerial decree issued binding national guidelines to be enforced throughout the country. Regions can indicate sites unsuitable for the installations of plants, thereby facilitating all procedures and favouring local choices towards renewable energy sources.[15] The latter are – in the words of the Court – of "crucial relevance with regard to the vital goal of protecting the environment in the interest of future generations".[16] In all these decisions, the Court is aware of the impact that renewable energy has in combatting the negative effects of climate change. This is, however, only mentioned between

[13] Italian Constitutional Court, Judgment No. 94 of 1985, available at the following link: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:1985:94. Comments in A. Lamberti, "Ambiente, sostenibilità e principi costituzionali: questioni aperte e prospettive alla luce della legge cost. 1/2022", *Nomos-Le attualità del diritto* 3, 1 (2022).

[14] It is worth recalling the speech delivered at the Constituent Assembly by Professor Concetto Marchesi – a leading academic, Latinist and politician –, in which he stressed the direct link between the protection of the Italian historical and artistic heritage and the landscape and passionately advocated for state intervention in this sector. For an account of this speech, see O. Licandro, "Concetto Marchesi e le politiche culturali: un'agenda per il Governo", *Classica Vox-Rivista di Studi Umanistici* 31, 32-36 (2019), available at http://www.classicavox.it/images/7.ClassicaVox_2019%20Licandro%2031-48.pdf.

[15] Italian Constitutional Court, Judgments Nos. 77 and 121 of 2022, available at the following links: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2022&numero=77 and https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2022:121, respectively.

[16] Italian Constitutional Court, Judgment No. 216 of 2022, available at the following link: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2022&numero=216.

the lines. When dealing with cases brought by the state against the regions or vice versa, the Court is constrained within the limits of the points raised in litigation – based on political choices made by central and local governments – mainly in the area of the violation of respective competences. However, the environment as an "organic entity"[17] is a solid concept in the Court's case law, setting an upper threshold for regional laws. Lowering that level of protection is incompatible with the Constitution.

What does the constitutional reform add to such a balance of competences? It places further emphasis on the state's duty to comply with environmental protection requirements; it forces the national legislator to act coherently and absorb scientific data in order to prevent dramatic events; it should also have implications in terms of ensuring greater compliance with international obligations.[18] A similar coherence, together with far-sighted political vision, is also required to put flesh and bones on the new version of Art. 41. Duties prevail over rights when environmental protection is enshrined as a mandatory goal. Choices made by private economic actors must comply with the resulting constitutional limits; consequently, the issue of sanctions needs to be addressed. This is a new challenge for the Court. Sustainable development and the complex relationship between "nature and human activities" has been dealt with in the past by the legislator in the so-called Environment Code, in which production and consumption are measured against the availability of resources, and the principle of solidarity is applied to environmental protection.[19] The new version of Art. 41 should serve to reinforce the implications inherent within existing legislation and inspire new measures.

In this field, constitutional adjudication is crucial for granting protection to fundamental rights. The Italian Constitutional Court has provided numerous examples in which a balancing of interests is undertaken, such as the protection of employment and health[20] and the costs of reducing industrial

[17] Italian Constitutional Court, Judgment No. 24 of 2022, available at the following link: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2022:24.

[18] Italy has ratified the Paris Agreement with Law No. 204 of 2016. As is well known, the Paris Agreement is closely interconnected with the UN 2030 Agenda. Indeed, both initiatives aim to address pressing global challenges and promote sustainable development. However, whilst the former is specifically addressed at mitigating climate change by reducing greenhouse gas emissions, the Agenda encompasses a broader spectrum of sustainable development goals (SDGs) that include social, economic, and environmental dimensions and provides a comprehensive roadmap for those goals across various sectors, including poverty eradication, health, education, gender equality, and climate action. The two initiatives are mutually reinforcing. Climate action, as outlined in the Paris Agreement, is essential for achieving several SDGs related to environmental sustainability, such as affordable and clean energy and climate action. At the same time, the achievement of other SDGs, such as eradicating poverty, ensuring access to clean water and sanitation, and promoting sustainable cities and communities, can contribute to climate resilience and mitigation efforts.

[19] Art. 3-*quater* (3) of the Legislative Decree No. 152 of 3 April 2006, added by Legislative Decree No. 4 of 16 January 2008.

[20] Italian Constitutional Court, Judgment No. 58 of 2018, dealing with a company producing steel in a highly polluted area in Southern Italy, available at the following link: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2018:58.

emissions in order to protect both the environment and health.[21] In these judgments, the balancing process is based on a comparative evaluation of the interests at stake and may vary, following a proportionality test. These cases remain visible in the background as valuable precedents. However, the impact of climate change on the protection of fundamental rights requires new and more incisive legal techniques.

Another point to be made is that the legitimacy of constitutional courts is enhanced when analogous – sometimes common – standards are adopted. Sharing experiences in comparative terms implies reflecting on deliberative techniques and on the criteria adopted in balancing rights. Legislation dealing with the environment and climate change should match international standards and comply with the case law of constitutional courts ruling on climate change.

III. Future generations: A controversial issue

The interests of future generations are expressly mentioned in the new version of Art. 9. In the past, elements of Italian legal scholarship were cautious: how can those who are not yet in the public sphere make themselves heard and exert influence on those who make decisions? There is a contradiction between those who are here now and those who are not. The time gap is such as to break the balance between rights and duties: moral responsibilities arise for those who make strategic choices with an impact on future generations.[22]

The Italian Constitutional Court has occasionally referred to future generations when dealing with pensions, using the expression of "intergenerational solidarity" adopted in legislation, in compliance with a court's ruling. Reasonableness is the key to interpreting the choices made by the legislator: it is "a pillar of the entire system" of justifying pensions cuts. Objective data on the financial situation must be disclosed in technical reports accompanying legislation.[23] The interests of future generations also underlie judgments dealing with the postponement of the retiring age, which the Court found unreasonable in situations of financial constraints such as those addressed by the law in question. Denying that there was a "right" to prolong employment in the state sector, the Court envisaged further options for younger people to be hired.[24] It is worth noting that most of these decisions

[21] Italian Constitutional Court, Judgment No. 127 of 1990, available at the following link: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1990&numero=127.
[22] *Ex multis*, G. Zagrebelsky, *Diritti per forza*, Torino, Einaudi, 2017, 115 ff.
[23] Italian Constitutional Court, Judgment No. 250 of 2017, particularly point 6.5.1 of the conclusions on points of law, available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_250_2017_EN.pdf.
[24] Italian Constitutional Court, Judgment No. 131 of 2018, available at the following link: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2018&numero=131.

addressed austerity measures and dealt with the issue of time: how long may an emergency situation be invoked as justification for imposing burdens on specific groups of citizens? What is the correct balance between budget constraints and the curtailment of social rights? There is a vast literature illustrating all of these dilemmas; it can be instructive to read it now through different lenses.

Compared with these examples, the implications of climate change for future generations are more complex and require the expansion of new legal arguments. The objectivity of data – unlike in the case of the aforementioned pension cuts – cannot be subordinated to the rationale of budget laws, which may vary based on economic cycles and reflect transitory adjustments in public spending. Reasonable legal choices related to climate change require broader projections, both in terms of the sanctions to be imposed on those whose actions contribute towards altering a healthy environment, and in terms of anticipatory measures such as moderation in energy use, options for reducing CO_2 and other greenhouse emissions, and so on. Anticipating negative consequences for vast sections of the population implies that individuals must be heard and that adequate answers to their aspiration for new forms of justiciability must be found.

Italy too is witnessing its first climate litigation: a complaint lodged with the Civil Court in Rome in June 2021. A first decision is expected in September 2023. A number of NGOs and individual complainants, including minors represented by their parents, brought a civil action against the state to ascertain compliance with international and European obligations to combat the effects of climate change. The litigation aims to oblige the Italian government to ensure a 92% reduction in CO_2 and other greenhouse gas emissions by 2030 compared to the levels reached in 1990 and to adopt an incisive communication plan designed to illustrate all the risks related to climate change. Obligations arising under the Paris Agreement have been adopted by the European Union (with Regulation No. 2018/842)[25] and are binding for all Member States. The complainants also refer to international law obligations, including the ECHR. Hence, one interesting – although not entirely new – aspect of this case has to do with ascertaining the legal sources which can prove most effective.
In constitutional adjudication, "maximising" the enforcement of rights – a recurrent expression in the case law of the Italian Court – implies adopting a systematic interpretation of EU and ECHR standards. This technique does not question the centrality of constitutional courts, nor does it diminish

[25] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, in OJEU L 156, 19 June 2018, pp. 26-42.

the impact of their rulings. On the contrary, it adds to their legitimacy and furthers their role as democratic institutions, active within networks of courts in transparent and impartial ways.

IV. Concluding remarks: Science and democracy

In discussing climate change litigation, it has been suggested that the focus should be on "the future rights of present generations".[26] In fact, leading rulings such as the German one[27] deal with rights which can expand into the future and adapt to the changing needs of society, in keeping with the evolution of science. Rights to freedom, dignity and health have a transversal impact on generations; they empower individuals to engage in new forms of litigation which resonate in civil society and generate new dimensions of solidarity. The issues that must be addressed in comparative terms and shared by constitutional courts are multifaceted. The most urgent ones are all concerned with raising the level of public awareness – raising the level of responsibility among policy-makers; making litigation and constitutional courts accessible; properly communicating the achievements made; ensuring the inclusion of intermediary bodies that are recognised as representatives of diverse interests and that appear transparent in the way they operate.

All these issues are intertwined. They imply that constitutional courts should be strengthened in their ability to call on parliaments and policy-makers to take action so as to achieve constructive results and fill in the lacunae in existing legislation. Science and democracy are two pillars upon which the courts should continue to build their role as guarantors of rights.

[26] F. Gallarati, "The future rights of present generations: a new paradigm of intergenerational justice?", *IACL-AIDC Blog*, 19 January 2023, available at https://blog-iacl-aidc.org/2023-posts/2023/1/19/the-future-rights-of-present-generations-a-new-paradigm-of-intergenerational-justice.
[27] German Federal Constitutional Court, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18.