Striking the Right(s) Balance: Conflicts between Human Rights and Freedom to Conduct a Business in the ILVA Case in Italy

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Keywords: Constitutional Court, human rights and environment, ILVA, Italy

I. Introduction

Driving along Italian state highway no. 7 in the summer and passing by ILVA, Europe's biggest steel plant, is an alienating experience. On one side is the Ionic sea, one of Southern Italy's most impressive pieces of coast, and the city of Taranto, once the beautiful capital of *Magna Graecia.* On the other is an old industrial giant as big as the city itself, now part of the landscape with its 215 industrial chimneys, the biggest of which is 210 metres tall. Everything is coated in red steel dust; it covers the guardrails, the ground, the streets and the houses, and fills the air.

For 25 years, ILVA has spread death, pollution and disease that are still ongoing in Taranto and the surrounding area despite scientific studies and judicial decisions demanding that managers and authorities take preventive and remedial actions.[1]

This case illustrates how harmful industrial activities are not the unique prerogative of developing states with weak governments and lack of independent judiciary, as is a common narrative in the business and human rights (BHR) field. It can also happen at the heart of the European Union (EU), despite protective legal frameworks and the implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) through the adoption of national action plans (NAPs). Furthermore,

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[1] For an analysis in English of the history and impact of ILVA, see: European Parliament, 'Fact Finding Mission to Taranto Report' (July 2017), http://www.europarl.europa.eu/cmsdata/123280/Background%20Document%20PE571.403EN.pdf (accessed 20 August 2018). FIDH, Unione Forense per i Diritti Umani, Peacelink and HRIC, 'The environmental disaster and human rights violations of the ILVA steel plant in Italy' (April 2018), https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/the-environmental-disaster-of-the-ilva-steel-plant-has-also-violated (accessed 25 July 2018).

Business and Human Rights Journal, 5 (2020), pp. 143–149
doi:10.1017/bhj.2019.3

the ILVA case and its complex judicial history show that, when substantive economic interests are at stake, access to justice is not always available even in sophisticated legal and judicial systems like the Italian one.

A thought-provoking analysis of this issue is contained in the decision of the Italian Constitutional Court of March 2018. The reasoning of the Court shows that constitutional jurisprudence can offer useful clarifications in the difficult task of balancing different constitutional rights, such as the right to work and the right to health. It thus represents a powerful and relatively unstudied tool in the BHR field, where it could serve as inspiration and a point of reference.[2]

To do so, the piece starts with a description of the case (II.A), including of the government's responses to the pollution caused by the plant (II.B). It further analyses the reasoning of the Constitutional Court on the balance between concurring fundamental rights (III) and concludes by enucleating the criteria that the Court suggests to achieve such balance, which could serve as a reference for the BHR debate.

II. The ILVA Case in a Nutshell

A. Events

The Taranto plant is Europe's largest complete-cycle steel production facility, with a surface area of 15 million square metres. It was built in 1960 to promote economic growth in Southern Italy, and operated until 1995 as a state-owned plant. In 1995, it was sold to a private company, the Riva Group, managed by the Riva family, but since January 2015 it has been under extraordinary administration (*amministrazione straordinaria*) and run by three government-appointed commissioners.[3] After the 2018 elections, the new Italian government[4] had to decide whether to continue with the transfer of the plant to a consortium led by Arcelor Mittal,[5] or to liquidate it.[6] It finally decided to carry on the initiated transfer to the consortium that gained full management control of ILVA in

[2] Italian Constitutional Court, Decision no. 58/2018, 23 March 2018.

[3] Ministerial Decree of 21 January 2015.

[4] In particular, the Ministry of Economic Development, run by the leader of the Five Star Movement, Luigi Di Maio.

[5] On 5 June 2017, the Italian Ministry of Economic Development officially assigned the plant to AM Investco Italy, a joint venture formed by Arcelor Mittal Italy Holding (51 per cent), Arcelor Mittal SA (31 per cent) and Maecegaglia Carbon Steel Spa (15 per cent), Ministero dello Sviluppo Economico, 'Firmato il Decreto di Aggiudicazione del Complesso Industriale del Gruppo Ilva ad Am Investco Italy' (5 June 2017), http://www.sviluppoeconomico.gov.it/index.php/it/194-comunicati-stampa/2036649-calenda-firma-il-decreto-di-aggiudicazione-del-complesso-industriale-del-gruppo-ilva-ad-am-investco-italy (accessed 27 August 2018).

[6] See Ansa: 'Might Revoke ILVA Tender Says Di Maio' (23 August 2018), http://www.ansa.it/english/news/2018/08/23/might-revoke-ilva-tender-says-di-maio_1d25642f-5cac-4dea-8e3d-8d15c9847b16.html (accessed 15 August 2018). This was despite that the closure of the plant was one of the strongest electoral promises of the Five Star Movement: Di Francesco Nevoli, 'La Proposta del MoVimento 5 Stelle Taranto è: Chiusura Degli Impianti Inquinanti, Reimpiego dei Lavoratori per la Decontaminazione del Territorio e Riconversione Economica. Perché l'Accordo di Programma (art. 34 T.U.E.L.)?' (15 July 2017), https://www.movimento5stelle.it/listeciviche/liste/taranto/2017/07/post.html (accessed 20 December 2018).

https://doi.org/10.1017/bhj.2019.3 Published online by Cambridge University Press

November 2018.[7] Today, ILVA still employs around 11,000 workers and accounts for approximately 75 per cent of the gross domestic product (GDP) of the Province of Taranto and 76 per cent of goods handled in the city's port.

As far back as 1990, the Italian government declared Taranto an area at 'high risk of environmental crisis', due to the consequences of the ILVA activities. However, only in 2012 did the situation escalate, with the Judge for the Preliminary Investigations ordering the seizure of the plant's production area on the grounds that 'ILVA's past and present managers have knowingly and willingly continued their polluting activity for the pursuit of profit, thereby infringing the most basic rules of public health and safety'.[8] In the decision, the judge also highlighted how it was based on the investigation and strong evidence collected by the criminal prosecutors, who found that company managers (Managing Director, President and Vice President of the Board of Directors, and Plant Director) developed 'a criminal conspiracy with the aim of committing several crimes against public safety',[9] deliberately overlooking the adoption of suitable risk management measures, as required by law. Furthermore, the same prosecutors found that the plant's managers consciously adopted measures violating several environmental regulations, sometimes with the collusion of people in public positions.[10]

The decision also brought to light data relating to the serious impact of ILVA's activities on human rights and the environment, through chemical and epidemiological expert reports. Consequently, the judicial order estimated the cost of the clean-up of the area at 8 billion Euros.[11]

B. The Political Response

Despite the seizure decree, which would have stopped the plant's production, and under pressure from unions and parts of the local population, the Italian government allowed production to resume, by adopting a series (10 to date) of extraordinary legislative

[7] Arcelor Mittal, 'ArcelorMittal Completes Transaction to Acquire Ilva S.p.A. and Launches ArcelorMittal Italia' (1 November 2018), https://corporate.arcelormittal.com/news-and-media/press-releases/2018/nov/01-11-2018a (accessed 28 December 2018).

[8] Court of Taranto, Examining Judge Office, Preventive Seizure Decree, 22 May 2013, following appeal R.G.N.R. 938/2010.

[9] Ibid, 3.

[10] Ibid.

[11] According to the chemical report supporting the judicial decision, ILVA emits substances that are harmful to the health of Taranto's workers and inhabitants: 'In 2010, ILVA emitted over 4,000 tons of dust, 11,000 tons of nitrogen dioxide and 11,300 tons of sulphur dioxide, 338.5 kilos of IPA, 52 grams of benzopyrene, 14.9 grams of benzo dioxins and PCDD/F. These substances are both inhaled by people in areas around ILVA and absorbed through contaminated food'. M. Sanna, R. Monegazzi, N. Santilli and R. Felici, 'Conclusioni Perizia Chimica ILVA' (2012), http://www.epiprev.it/materiali/2012/Taranto/Concl-perizia-chimica.pdf (accessed 20 August 2018). At the same time, the epidemiological study supporting the decision highlights mortality figures between 2004 and 2010: '174 deaths were caused by ILVA, 83 of which were due to the exceeding of maximum environmental dust levels (PM10). In surrounding areas, this figure reached 91'. The report also states that there is 'strong scientific evidence concerning the link between the plant's emissions and the rise of heart and respiratory diseases, cancer and leukaemia among inhabitants'. Italian National Institute of Health, *S.E.N.T.I.E.R.I.* (National Epidemiological Study of Territories and Settlements Exposed to Pollution Risks), 'Assessment of epidemiological evidence' (2010), http://www.epiprev.it/pubblicazione/epidemiol-prev-2010-34-5-6-suppl-3 (accessed 25 August 2018).

https://doi.org/10.1017/bhj.2019.3 Published online by Cambridge University Press

measures called law-decrees (*decreti legge*).[12] The first law-decree[13] granted the plant the right to continue production for a limited period (36 months), on the grounds of its status as a 'strategic plant for national security', and imposed monitoring of their compliance by the Integrated Environmental Authorization (*Autorizzazione Integrata Ambientale*). This was considered by the Constitutional Court in 2013 to be a legitimate exercise of executive power because it was motivated 'by the purpose of installing a reasonable balance between the safeguard of health and employment and not of the total destruction of the former (health)'.[14]

The subsequent measures adopted by the government, however, further extended the initial delay and the deadline for the implementation of the environmental plan (now 2023) and granted immunity from prosecution to the managers of the plant (including to buyers and lessees or their representatives).[15]

III. The Dilemma of an Impossible Balance

The government's responses in the ILVA case are an example of the dilemma posed by many similar cases involving large industrial projects: the impossible balance between stopping economic activity proven to be harmful to the environment and health, and the consequences of losing thousands of jobs together with an important part of the country's industrial production. Ultimately, this case illustrates the tensions between economic activity and a number of fundamental rights granted and protected by national constitutions and international law: the rights to life, health, a healthy environment, work and the freedom to conduct a business.

One would reasonably not expect that such a dilemma takes place in EU member states, founded as they are on the rule of law, independent judiciary as well as strict environmental standards. Much less so in Italy, whose 2016 NAP for the implementation of the UNGPs affirms that: 'Italy is committed to the promotion and implementation of key actions aimed at giving human rights priority status so as to avoid and minimise potentially negative impacts from business activity in this area' and that 'in the field of environment protection, the promotion of high environmental standards by enterprises beyond National and EU legislation is an essential contribution to the respect, promotion and fulfilment of human rights'.[16]

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[12] In Italian law, the government can issue urgent regulations without passing through Parliament when certain conditions like necessity and urgency are met (Constitution of Italy 1950, art 77). Such regulations are called *Decreti legge* (law-decrees) and are immediately effective as a law, but need to be ratified by the Parliament within 60 days, otherwise they expire. In this case, all the decrees have been subsequently ratified by the Parliament and became law. However, as this is a form of 'emergency' legislation, it should not be used to tackle systematic problems as warned several times by the Constitutional Court (most recently in the decision no. 220/2013). It is indeed up to the Constitutional Court to declare illegitimate a law that ratifies a law decree. With the present decision the Court has declared illegitimate one of these law-decrees (but the other nine are still valid) and has pointed out the irregularities of the legislative procedure. However, nothing technically prevents the government to keep issuing further law-decrees on this issue if they contain different elements.

[13] Law decree no. 207/2012 of 3 December 2012 transformed in law with law no. 231/2012.

[14] Italian Constitutional Court, Decision no. 85/2013, of 9 May 2013, para 104.

[15] Law decrees no. 136/2013 of 10 December 2013; no. 1/2015 of 5 January 2015; no. 92/2015 of 4 July 2015; no. 98/2016 of 9 June 2016.

[16] CIDU, *Italian National Action Plan* (1 December 2016), 5 and 17, https://cidu.esteri.it/resource/2016/12/49117_f_NAPBHRENGFINALEDEC152017.pdf (accessed 20 December 2018).

https://doi.org/10.1017/bhj.2019.3 Published online by Cambridge University Press

However, the ILVA case illustrates how a short-term vision, combined with criminal behaviour and a challenging economic environment, can allow such situations to exist and remain unchecked for almost 50 years. In parallel, the inconsistencies between what is stated by the government in the NAP and the way it treated the situation somewhat corroborate the 'soft' character of the engagements taken by governments in NAPs.[17]

A. Decision No. 58/2018

In 2015, the Italian Constitutional Court was again asked to rule on the legitimacy of one of the law-decrees authorizing the continuation of ILVA's activity in spite of the previous seizure order by the judicial authority. In particular, the Court had to consider if the decision to extend the economic activity of the plant was in line with articles 2, 3, 4 and 32 of the Italian Constitution protecting the right to life, the right to non-discrimination, the right to work in safe conditions and ultimately the reasonable balance between the protection of these rights.[18] This time the Court stressed even more firmly the duty of the legislator to seek a delicate balance between all the constitutional values at stake.[19]

Such balance, the Court affirmed, must be made according to the principles of proportionality and reasonableness and should not end in one right prevailing over the others.[20] In this case, it considered that the government privileged the interest for the pursuit of production and 'totally disregarded the protection of fundamental rights such as the right to health and life as well as the right to work in a safe environment'.[21] This reasoning is confirmed by the recent decision of the European Court of Human Rights (ECHR) on the same case, stating that the Italian government violated article 8 of the European Convention on Human Rights because 'the right balance between the well-being and the right to private life of the claimants on one side and the right of society as a whole on the other has not been respected'.[22]

Moreover, the Italian Constitutional Court recalls its own decision on ILVA of 2013, affirming that it is part of the pluralist character of the Italian Constitution that fundamental rights are all interdependent and that 'the dignity of the individual is the result of this complex and interrelated system of rights and liberties'.[23] While then stressing the absence of any form of hierarchy between fundamental rights, the Court highlighted that the right to health and to live in a healthy environment could be

[17] ECCJ, 'A Critical Assessment of National Action Plans on Business and Human Rights' (2017 update), available at: http://corporatejustice.org/news/2245-a-critical-assessment-of-national-action-plans-on-business-and-human-rights-2017-update (accessed 7 January 2019).

[18] Constitution of Italy, 1950, Articles 2, 3, 4 and 32.

[19] Despite this decision of the Constitutional Court, the plant is still able to operate due to other existent provisions that have not been challenged.

[20] Marta Cartabia, 'I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana', Conferenza trilaterale delle Corte costituzionali italiana, portoghese e spagnola (Rome 2013), https://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf (accessed 27 December 2018). For a general reference, see Aharon Barak, *Proportionality* (Cambridge, Cambridge University Press, 2012), 175–210.

[21] Note 2, no. 5, 3.3.

[22] European Court of Human Rights, *Cordella et al v Italy* (January 2019), 174.

[23] Italian Constitutional Court, decision no. 85/2013, 9.

https://doi.org/10.1017/bhj.2019.3 Published online by Cambridge University Press

considered as 'primary' rights in the sense that their sacrifice always needs a strict justification and careful evaluation of the balance between different rights.[24]

Thus the Court also analysed the violation of the limits that the Constitution puts on economic activity in Article 41.[25] It further clarified that it cannot be read independently of the protection of fundamental rights and that economic activity therefore has its limits in the respect of the right to life, to health and to live in a healthy environment.

Article 41 (along with Articles 42, 43 and 44) of the Italian constitution form the economic constitution of Italy containing those principles and institutional arrangements that are central to the management of the national economy.[26] It has been mainly regarded as the basis of a system of moderated capitalism, allowing the state to intervene in the economic life of the country, as it sets out the freedom to undertake economic activity but subordinates this to the respect of 'social purposes'. In the intent of the constitutional legislator and in the subsequent jurisprudence, 'social purposes' was specifically meant to protect the safety and physical integrity of workers with regard to the employer.[27] In its decision of 2018, the Constitutional Court further develops the definition of the limits that Article 41 imposes on economic activity, stating that the respect of fundamental rights such as the right to life and health is the 'minimum and necessary condition of compliance of economic and commercial activities with constitutional principles'. This decision can be considered in line with what was affirmed just one year earlier by the French Constitutional Council on the occasion of its revision of the 'duty of vigilance' legislation. The Council affirmed that the constitutional principle of the *liberté d'entreprendre* can be limited in order to pursue other constitutional values and thus considered the mandatory vigilance plan required by the law compliant with that constitutional principle.[28]

IV. Conclusion

The decision of the Italian Constitutional Court is particularly important in the context of today's debate around further passing into law of business and human rights standards.[29]

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[24] Ibid.

[25] Constitution of Italy, 1950, Article 41. This article affirms that 'Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes'.

[26] Tony Prosser, *The Economic Constitution* (Oxford: Oxford University Press, 2014), 7; Sabino Cassese, *La Nuova Costituzione Economica* (Bari: Editori Laterza, 2019), 5th edn.

[27] Italian Constitutional Court, decision no. 405/1999 of 25 October 1999 and decision no. 399/1996 of 11 December 1996.

[28] Conseil Constitutionnel, decision no. 2017-750 DC of 23 March 2017, 15 and 16.

[29] See, for example, French law no. 2017-399 of 27 March 2017 instituting a duty of vigilance obligation on large French companies, the UK Modern Slavery Act 2015, 30 March 2015, and in general the wide debate on mandatory due diligence (e.g., European Coalition for Corporate Justice, www.corporatejustice.org) and the works of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9 and subsequent academic debate, e.g., Doug Cassel, 'The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty' (2018) 3:2 *Business and Human Rights Journal* and Sanyu Awori, Felogene Anumo, Denisse Cordova Montes and Layla Hughes, 'A Feminist Approach to the Binding Instrument on Transnational Corporations and Other Business Enterprises' (2018) 3:2 *Business and Human Rights Journal*.

https://doi.org/10.1017/bhj.2019.3 Published online by Cambridge University Press

It offers three clear criteria that should guide governments in the assessment of the legitimacy of industrial projects that, while creating jobs, could seriously threaten health and environment: (i) the rights to life, to health and to a healthy environment are 'primary' rights whose curtailment needs to pass a strict reasonableness and proportionality test; (ii) such a test cannot be passed when one of those 'primary' rights is totally disregarded in favour of the fulfilment of other rights, such as the right to work and the freedom to conduct a business; and (iii) respect for the right to life and health is the minimum implicit condition that frames the Constitutional freedom to conduct a business in a pluralist Constitutional system.

While not yet well studied in the BHR field, constitutional jurisprudence and public law and particularly the use of proportionality and reasonableness arguments can therefore offer a concrete reference in cases like ILVA, and operate as an additional tool for scholars, practitioners and lawyers working in this field. In particular, the proportionality and reasonableness principles typically issued from the public law sphere to limit the infringement of human rights by governments could also apply to the private law sphere and more specifically to the debate on corporate liability for human rights abuses, and provide additional clarity to the broad concepts of 'duty of care' and 'human rights due diligence', thus contributing to frame more thoroughly the scope of businesses' obligations *vis à vis* of human rights.[30]

Finally, the decision shows that existing instruments and constitutional provisions can and must be read and interpreted in a way that offers the greatest protection of individual rights. It represents, together with the Conseil Constitutionnel's decision, a significant step towards the establishment of a constitutional interpretation of the economic activity as intrinsically comprehensive of the respect of human rights and towards the recognition of social purpose as a constituent element of the notion of enterprise.[31]

If such an interpretation was confirmed and further enhanced, constitutional law and jurisprudence could also offer an additional recourse to victims of corporate abuses.

[30] On the application of the principle of proportionality to EU contract law see, for example, Caroline Cauffman, 'The Principle Of Proportionality And European Contract Law', Maastricht European Private Law Institute Working Paper, 2013/5, https://www.researchgate.net/publication/254950366_The_Principle_of_Proportionality_and_European_Contract_Law (accessed 14 February 2019).

[31] See, for example, the recent debate held in France around the report: Nicole Notat and Jean-Dominique Senard, Jean-Baptiste Barefty, 'L'entreprise, objet d'intérêt collectif [the company, object of collective interest]' (2018), http://www.ladocumentationfrancaise.fr/rapports-publics/184000133/index.shtml (accessed 23 August 2018). The report recommends that the French Civil Code be modified by inserting a specific provision stating that 'the company needs to be managed according to its own objective, that includes societal and environmental challenges', ibid, 6.

https://doi.org/10.1017/bhj.2019.3 Published online by Cambridge University Press