

J20 - The Judicial Conference of the Supreme Courts of the G20

Buenos Aires, Argentina

8-10 October 2018

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Presentation topic: Rights and Fairness

- Social needs and the Italian Constitution
- Constitutional Court and social rights
- Constitutional judgements and their costs

Rights and fairness

1. Social needs and the Italian Constitution

The Italian Constitution was approved in 1947, by a Constituent Assembly composed of 556 deputies, many of whom belonging to left-wing or Catholic-inspired political parties¹. It was approved by a strong majority (458 votes were cast in its favour).

I believe that these historical data shed light on the significance that the Constitution confers upon social needs: the formulation of Article 3, paragraph 2 of the Constitution, which enshrines the general principle of substantive equality², is distinctive in comparative terms, and the attention paid to each social right³ is equally remarkable. To draw a comparison with coeval or subsequently approved constitutions, it may be noted that Germany's Basic Law does not address individual social rights⁴. On the other hand, the Spanish Constitution of 1978 does reprise our Article 3, paragraph 2 (see Article 2, paragraph 2 of the Spanish Constitution) and grants social rights much attention; however, the latter are excluded from the scope of application of the *amparo*⁵.

In addition to Article 3, paragraph 2, and to the social rights (to health, to education, to social assistance, to welfare support, etc.: Articles 32, 34 and 38) that detail it, we must recall Article 2 of the Constitution (which mentions “the fundamental duties of political, economic and social solidarity”), as well as the limitations that the Constitution places on private economic enterprise⁶

¹ Two hundred and seven deputies belonged to the Christian Democratic Party; 115 to the Socialist Party; and 104 to the Communist Party.

² “It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country”. See, for example, B. CARAVITA, *Oltre l'eguaglianza formale*, Padua 1984; A. GIORGIS, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale*, Naples 1999; G.P. DOLSO, *Art. 3*, in S. Bartole – R. Bin (eds), *Commentario breve alla Costituzione*, Padua 2008, 33 et seq. In Article 3 of the Constitution, the principle of substantive equality goes hand in hand with that of formal equality; substantive equality entails the possibility to derogate from formal equality (by means of the so-called “positive actions”), and tempers and is tempered by it; the two paragraphs integrate and balance one another. The link between the two provisions is the concept of “equal social dignity”, found in the first paragraph.

³ On which see, for example, M. LUCIANI, *Diritti sociali e livelli essenziali delle prestazioni pubbliche nei sessant'anni della Corte costituzionale*, in *www.Rivistaaic.it*, n. 3/2016; E. LONGO, *I diritti sociali nella Costituzione italiana: un percorso di analisi*, in *Riv. dir. sicurezza sociale*, n. 2/2017, 201 et seq.; E. CAVASINO – G. SCALA – G. VERDE (eds), *I diritti sociali dal riconoscimento alla garanzia*, Naples 2013.

⁴ Aside from the general provisions on dignity (Article 1) and on Germany as a democratic, federal and social Republic (Article 20), the *Grundgesetz* governs welfare by means of organizational provisions.

⁵ See Article 53.

⁶ Article 41 of the Constitution: “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.”

and private property⁷ for social purposes⁸. In Italy, this set of constitutional provisions is a “foothold” for judges, and especially for the Constitutional Court, as they strive to ensure fair and sustainable development.

Also, the Constitutional Court has identified additional social rights that are not expressly provided for in the 1947 Constitution (such as the right to housing: see, for example, Judgments No. 49 of 1987 and 404 of 1988).

2. *The Constitutional Court and social rights*

The Constitutional Court’s role in safeguarding social rights could be illustrated “by subject”, recalling the Court’s most important judgments on each right. However, I find another perspective to be far more interesting: one that emphasizes the various ways in which the Court intervenes when it decides upon the constitutionality of laws suspected of encroaching upon social rights.

First, it must be recalled that the constitutional provisions on social rights have to be implemented through legislation, which must identify the addressees of the benefit, the specific modalities of its provision and its amount, balancing social rights with other constitutional rights, financial interests – also with a view to protecting the social rights of its future beneficiaries⁹ – and with all other constitutionally protected interests.

The financial interests of the State and of local authorities have gained greater prominence pursuant to Constitutional Law no. 1 of 2012, which introduced the concept of a balanced budget into the Constitution (Article 81¹⁰). However, the legislator cannot impinge upon the essential core of a social right. Unlike the German Basic Law¹¹, the Italian Constitution does not expressly define the boundaries of such core. It does refer to the “basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory” (Article 117, paragraph 2, letter m)¹²; however, this is a different concept, used as a basis for the central State’s power to reconcile

⁷ Article 42, paragraph 2 of the Constitution: “In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest.”

⁸ Moreover, scholarship (see, for example, M. LUCIANI, *Economia nel diritto costituzionale*, in *Dig. disc. pubbl.*, V, Torino, Utet, 1990, 377 *et seq.*) considers those social purposes that may limit liberal interests (economic enterprise and private property) to be linked to Article 3, paragraph 2 of the Constitution, that is, to the programme indicated in this provision; however, in most cases, the Constitutional Court has matched social utility with the achievement of constitutionally significant interests in general (M. GIAMPIERETTI, *Art. 41*, in S. Bartole – R. Bin (eds), *op. cit.*, 415).

⁹ I believe it is preferable to refer to future but existing beneficiaries, rather than to “future generations”, because use of the latter term gives reason for objections of a different kind: see, for example, M. LUCIANI, *Generazioni future, distribuzione temporale della spesa pubblica e vincoli costituzionali*, in *Dir. soc.*, 2008, 145 *et seq.*

¹⁰ Article 81 paragraph 1 of the Constitution: “The State shall ensure the balance between revenue and expenditure in its budget, taking into account the adverse and favorable phases of the economic cycle.”

¹¹ Article 19(2) of the *Grundgesetz*: “In no case may the essence of a basic right be affected”.

¹² It is one of the matters in which the State has exclusive legislative powers according to the list contained in Article 117, paragraph 2.

the principle of equality between private actors with the principle of the autonomy of local authorities.

The Constitutional Court is tasked with identifying this core and, where necessary, requiring that necessary benefits be provided if the legislator fails to do it. For example, the Constitutional Court has struck down regional legislation that cast uncertainty on the financing of transportation services for disabled students, noting that the legislator's discretion is subject to an "absolute limit consisting in 'respect for an essential core of guarantees for the individuals affected' (Judgment no. 80 of 2010), which includes school transportation and assistance service, as this is an essential element in ensuring the effectiveness of that very right for disabled students" (Judgment no. 275 of 2016, which moreover states that "[i]t is the guarantee of inviolable rights that must condition the budget, whilst conversely the need for budgetary equilibrium cannot condition the requirement to provide such services")¹³. To give another example, Judgment no. 309 of 1999 declared the unconstitutionality of a provision that did not establish "forms of free healthcare" for indigent Italian citizens who were temporarily abroad for reasons other than work. Here, too, the Court emphasized the "hardcore of the right to health".

As may be known, the balancing of interests by the legislator is subject to additional limits, other than the essential core of the right. The balancing must be reasonable and proportionate. For example, Judgment no. 70 of 2015 struck down a provision that, for 2012-2013, excluded larger pensions from the revaluation increase normally accorded to old-age pensions, allowing the full increase only to pensions up to three times the minimum pension. The Court held that the legislator had reached an unreasonable balance between the State's financial interest and the pensioners' interest in an adequate (Article 38, paragraph 2 of the Constitution) and proportionate (Article 36, paragraph 1 of the Constitution) pension, as the exclusion from the revaluation increase was absolute and extended to pensions that were considered not particularly large (over €1,217)¹⁴.

The Court expressly referred to the principles of solidarity and substantive equality enshrined in Articles 2 and 3 of the Constitution. As another example, to mention a case in which a social right was not balanced with the State's financial interest but with other rights, we may recall Judgment no. 58 of 2018. This judgment struck down a provision that authorized the ILVA steel factory in Taranto to continue operations notwithstanding the seizure of its industrial plants by the courts in relation to health and safety offences; according to the Court, the provision unreasonably sacrificed the right to health to that of continuity of production. It bears noting that, in a previous judgment on the same matter, the Court had rejected the argument that the safeguarding of the right to health was absolute and unconditional in nature compared to other constitutional rights – particularly, employment protection – and stated that it was nevertheless necessary to strike a balance between them.¹⁵

¹³ On the right to education of the disabled, see also Judgment no. 80 of 2010, on special education teachers.

¹⁴ The Court had previously confirmed the constitutionality of provisions that excluded revaluation for larger pensions, for the surplus amount (and not the entire pension), or for only a certain percentage of the pension.

¹⁵ Judgment no. 85 of 2013 contains a very clear reasoning based on the balancing of constitutional rights: no constitutional right has an absolute nature, but all rights must be balanced against each other; balancing requires a judgment based on reasonableness and proportionality; the result can never consist of the complete sacrifice of one right in favor of others, because the essential core of each right must be preserved.

In addition to the balancing of interests, another important sphere of application of the criterion of reasonableness is the principle of equality, also with reference to social rights: in this context, the Constitutional Court has annulled legal provisions that unreasonably excluded certain parties from enjoying a given benefit. In these cases, two scenarios may arise: the Court's judgment may extend the public benefit, thereby bringing about an increase in public expenditure; or the Court may eliminate discrimination without this leading to an expansion of the benefit.

Examples of the first scenario may be found in Judgment no. 286 of 1987 (which extended survivors' pensions to separated spouses who were at fault for the separation) or 230 of 1974 (on the integration of minimum pensions). Several judgments have nullified legislation that discriminated against foreigners in the provision of social benefits (see Judgment no. 206 of 2008 on carers' allowances; see also Judgments no. 2 of 2013 and 4 of 2013).

The second scenario involves the issue of "territorial discriminations", that is, of those provisions that make extended residence in the relevant State or regional territory a prerequisite for access, or preferential access, to a certain public benefit. The Constitutional Court has declared unconstitutional provisions of this type on several occasions, thus avoiding a situation in which the benefit would be denied to individuals in need, and not to persons who are not as indigent but who have long resided in the relevant territory. For example, Judgment no. 107 of 2018 declares unconstitutional regional legislation enacted by the Veneto region on regulating access to daycare centres for children, because it granted priority to persons who had resided or worked in the Veneto for at least fifteen years, regardless of their economic situation.

3. *The costs of the Constitutional Court's judgments*

The foregoing considerations shed light on an issue deserving attention: not infrequently, the Constitutional Court's interventions to defend social interests entail greater expenditure on the part of public authorities. These "judgments that cost" may nullify spending cuts established by law, reinstating the benefit to its original extent (as did Judgment no. 70 of 2015 on pensions revaluation), or may "punish" omissions by the legislator, introducing new benefits (as in the case of healthcare expenses incurred abroad). In the latter situation, the judgments are described as "additive" (of benefits), because they add, to the legal system, a provision that was previously missing and constitutionally required.

Scholarship has devoted much attention to the Court's "judgments that cost", and especially on the aspect of their compatibility with the principle of the financial coverage of budget laws (Article 81 of the Constitution)¹⁶.

First, it is noted that, when addressing legislation that curtails social rights, the Court possesses several "weapons" with which it may soften the impact of its judgments. It may issue a "warning" to the legislator, calling upon it to intervene, and deferring the decision on the constitutionality of the new provision. The Court may also issue a judgment that is called "additive of principle",

¹⁶ See, for example, E. GROSSO, *Sentenze costituzionali di spesa "che non costano"*, Turin 1991; AA. VV., *Le sentenze della Corte costituzionale e l'art. 81, u.c., della Costituzione*, Milan 1993; S. SCAGLIARINI, *La quantificazione degli oneri finanziari delle leggi tra Governo, Parlamento e Corte costituzionale*, Milan 2006, 35 et seq.

through which it establishes that the benefit is necessary but leaves the tasks of defining the eligible cases and beneficiaries to the legislator (as occurred in Judgment no. 309 of 1999 on healthcare expenses incurred abroad).

In addition, the Court may restrict the effects in time of a declaration of unconstitutionality: it may diachronically delimit the content of the declaration, circumscribing its effects to the time following the judgment, as first occurred with Judgment no. 10 of 2015 on the so-called Robin Tax. In such cases, in the absence of any specific regulation on the issue, the constitutional judge – faced with a fact (the declaration of unconstitutionality) that on one hand protects constitutional interests, but on the other risks impinging upon other interests excessively if it were to be given retroactive effect – itself engages in a balancing of the interests at play, temporally calibrating the effects of its decision.

Finally, it is recalled that, when deciding upon legislation that grants a social benefit only to a specific category of persons, in violation of the principle of equality, the Court – considering the costs of extending the benefit – may avoid “equalizing upwards” and choose instead to “equalize downwards” (Judgment no. 421 of 1995)¹⁷, eliminating the benefit (raising a question of constitutionality before itself in relation to the benchmark of comparison) or to divide the overall resource allocation among a larger number of beneficiaries (thus reducing the benefit received by each beneficiary).

In light of the above considerations, I now address the objections raised by some scholars regarding the Court’s “cost” judgments. It appears to me that extreme positions are to be rejected. On the one hand is the position held by those who deem this type of decision unacceptable because they give rise to a large “free zone” in constitutional justice, often depriving of protection not only from social rights but also “first-generation” civil rights, which likewise entail costs. On the other hand equally unconvincing are the arguments submitted by those who deny that the problem exists at all, given that the principle of financial security enshrined in Article 81 of the Constitution applies to budget laws and not judgments. In fact, judgments entailing costs have an impact on legislation, giving rise to a legal situation that contrasts with Article 81 of the Constitution because while the benefit is “inserted” into the law, the corresponding funding is not. Furthermore, the judgment may indirectly affect other constitutional interests, the protection for which may be weakened because of the financial imbalance brought about by the Court’s judgment.

The correct answer can only lie in moderation. Article 81 of the Constitution enshrines a principle that the Court must take into consideration; however, this principle is not absolute, in that it too must be balanced with the other constitutional principles. It is also necessary to draw a distinction: while, in some cases, the Court is called upon to decide “only” on a violation of the principle of equality (in that the legislator grants a benefit at its discretion, unreasonably excluding certain parties), in others, it must address the failure to provide benefits that are crucial for safeguarding fundamental rights. In such cases, therefore, it should be considered that the Court introduces

¹⁷ In this case, the Court noted that “the evolution of the social conscience, increasingly hostile to corporatist pressure on public powers, and the serious crisis of public finances, which makes it increasingly difficult to sustain the costs of judgments expanding eligibility for special treatment, require [...] a more diffuse and incisive examination of the constitutionality of the privilege-creating provision indicated as the standard”. Raising the question of the constitutionality of such provision before itself, the Court then declared it to be unconstitutional.

expenditure mandated by the Constitution, and that its work is to be completed by the political bodies, which have the responsibility to retrieve the necessary resources.

This issue certainly raises the need, for the Court, to estimate the financial consequences of its judgments: from this point of view, it is important to ensure optimal use of the tool of investigations, as well as to enhance the transparency of the reasoning behind judgments by including references to the relevant accounting information.¹⁸

4. *Conclusions*

While it is no longer disputed that all rights – including “first-generation” civil rights – entail costs, such that all rights are “*juridically* scarce resources (in the sense that their enjoyment is not unlimited), conditional upon the availability of *economically* scarce resources (in the sense that budgetary decisions define the opportunities to enjoy rights)”¹⁹, it is clear that this is particularly true with regard to social rights, the immediate object of which is a service provided by a public authority. For this reason, spending cuts affect them in a more evident manner, and it is for this reason that the protracted financial crisis, which intensified the need for such policies, gave rise to an often bitter conflict between the need for financial stability and the need for welfare.

In this context, the Constitutional Court has been cast into an extremely sensitive and “risky” realm, in which national policies, at times prompted by the European Union, collide with the needs of broad sections of society, and in which the legislator’s restricting decisions often conflict with the claims advanced by the Regions, which have competence in the fields of healthcare and social assistance.

Moreover, the Constitutional Court is not the only party involved in the judicial protection of rights: recently, social rights have been gaining importance in the European Union (see the Charter of Rights, which has had equal force as the Treaties since 2009 and includes social rights; see also Article 3(3) TEU), such that the Court of Justice of the European Union is also often called upon to decide issues relating to their safeguarding²⁰. Furthermore, social rights, although almost wholly unaddressed in the ECHR, have also gained significance in the ECtHR’s case law²¹.

This being said, it may be noted in conclusion that, particularly with regard to redistributive policies²², the Constitutional Court’s role is a central one: one performed to defend not only the weakest parties but also the democratic order itself, because such order presupposes the full and

¹⁸ On this, broadly, see M. D’AMICO, F. BIONDI (eds), *La Corte costituzionale e i fatti: istruttoria ed effetti delle decisioni*, Naples, ESI, 2018.

¹⁹ M. LUCIANI, *Diritti sociali*, *op. cit.*, 8.

²⁰ Cfr. P. Bilancia, *La dimensione europea dei diritti sociali*, in *Federalismi*, 2018, in specie 12 ss.

²¹ On social rights in the EU and the ECHR, see, for example, D. TEGA, *I diritti sociali nella dimensione multilivello tra tutele giuridiche e crisi economica*, in E. CAVASINO – G. SCALA – G. VERDE, *op. cit.*, 67 *et seq.*; A. GUZZAROTTI, *Giurisprudenza Cedu e giurisprudenza costituzionale sui diritti sociali a confronto*, E. CAVASINO – G. SCALA – G. VERDE, *op. cit.*, 379 *et seq.*

²² The CJEU and the ECtHR intervene especially to protect the prohibition on discrimination.

conscious participation of all, and thus the safeguarding of not only freedom but also substantive equality. As a great Italian jurist, Piero Calamandrei, wrote, at the end of the Second World War shortly before participating in the work of the Constituent Assembly: «Without the support of social rights, traditional political freedoms can actually become a means of oppression by a minority against the majority, so that it can be said in conclusion that social rights are the precondition in order to ensure that all citizens enjoy effective political liberties»²³.

²³ P. Calamandrei, *L'avvenire dei diritti di libertà*, prefazione alla ristampa di F. Ruffini, *Diritti di libertà*, Firenze, La Nuova Italia 1946, ora in *Opere giuridiche*, vol. III, Napoli, Morano, 1965, p. 183 ss.