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Commentary

European Social Charter in the Constitutional Review of National Laws: the Decisive Application of Art. 24 by the Italian Constitutional Court

By Giulia Frosecchi, Research Fellow, University of Florence, Italy

European Social Charter as a Restraint of the Italian Labor Market Flexibilization

In Italy—as in other European Union countries—implementation of labor market flexibilization policies involves not only the immediate aftermath of the 2008 crisis but also a later reforming phase, marked by the 2015 Jobs Act.[1] Although the amendments introduced by the act are extensive and significant, only three provisions have been challenged before the Italian Constitutional Court. All pertain to dismissal: Articles 2, 3, and 4 of legislative decree (D.Lgs.) 23/2015. Eventually, in Judgment no. 194/2018, the Italian Constitutional Court ruled solely on Article 3.1 of D.Lgs. 23/2015 by declaring its unconstitutionality, for the part that establishes the method of calculating the indemnity for unjustified dismissal.

What is of appreciable interest for the international debate is the fine integration of international labor rights' sources, which the Court develops in declaring the illegitimacy of Article 3.1. The application of Article 24 of the revised European Social Charter (ESC) as interposed parameter occurs primarily through Article 117.1 of the Italian Constitution, which binds the legislator to fulfilling international obligations. This remarkable incorporation of the

1 For an introduction, see M. T. Carinci, "In the spirit of flexibility,": An overview of Renzi's Reforms (the so-called Jobs Act) to 'improve' the Italian Labour Market. *WP CSDLE "Massimo D'Antona".IT* –working paper no. 285/2015, University of Catania, http://adapt.it/adapt-indice-a-z/wp-content/uploads/2016/01/M.T.-Carinci_In-the-spirit-of-flexibility.pdf.

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supranational norm is compounded by the value recognised, on the one hand, in the arguments and interpretation of the European Committee of Social Rights and, on the other, in ILO Convention no. 158/1982 (which Italy has not yet signed).

Remedies for Unjustified Dismissal and the European Social Charter

The ruling under discussion declares Article 3.1 of D.Lgs. 23/2015 unconstitutional on the grounds of several constitutional norms. First, Article 3 of the Constitution, because of the homogeneous treatment to which workers with the same seniority are treated by the contested provision, which excludes any consideration over the peculiarities of each circumstance.[2] Second, Articles 4.1 and 35.1 Constitution, since the economic indemnity at issue does not constitute neither an effective damage compensation, nor an appropriate dissuasive measure, hence, it fails to guarantee the worker's interest to employment stability.[3]

Several aspects of Judgment no. 194 have triggered academic debates that deserve to be addressed closely.[4] The focus here, however, is the application of international labor law sources. Certainly, the most innovative aspect of Judgment no. 194 is the decisive role of Article 24 ESC as interposed parameter, directly applicable in the Italian constitutional review.

The first significant step towards the application of Article 24 ESC is found in a recent precedent, Judgment no. 120/2018.[5] According to Article 117.1 of Italy's Constitution, the legislative power must be exercised in compliance "with the Constitution and with the constraints deriving from EU legislation and international obligations."[6] The Court begins by assessing whether the ESC could qualify as international source under this norm. The pertinent elements are the "pronounced elements of peculiarity compared to regular international agreements." According to the Court, these features link the ESC with the

2 Constitutional Court of Italy, Judgment no. 194/2018, 26 September 2018, para. 11.

3 Ibid., para. 13.

4 See L. Fassina and A. Andreoni, eds., *La sentenza della Corte costituzionale sul contratto a tutele crescenti: quali orizzonti?* (Roma: Ediesse, 2019).

5 A related precedent is Judgment no. 178/2015, in which the Italian Constitutional Court argues for the integration of international and national labor sources, including the ESC. See G. Guiglia, "Il Contributo della Giurisprudenza e degli Studi Giuridici all'Effettività della Carta Sociale Europea nell'Ordinamento Italiano: Cenni Ricostruttivi," *Lex Social* (2018): 8.

6 Article 117.1, Italian Constitution.

European Convention on Human Rights (ECHR) because the ESC constitutes "natural social completion" of the ECHR, in line with the "indivisible character of all human rights."[7] It follows that, in the Italian legal system, the ESC is in all respects an interposed parameter of constitutional legitimacy. As it has been correctly highlighted: the Charter breaks free from the "minority status" in which it had been heretofore relegated.[8]

Nevertheless, this revised standing is not enough to provide constitutional status to the supranational source, but does imply that the ordinary norm incompatible with the interposed parameter—an international obligation as the ECHR or the revised ESC—infringes on Article 117.1 of the Constitution and is therefore illegitimate.[9]

Consistently, the Court denies direct effect to the ESC and points out that ordinary courts cannot apply it immediately but should raise question of constitutionality for violation of Art. 117.1 Constitution, on the grounds of the obligations stemming from the ESC.[10] Moreover, the Court emphasizes that the decisions of the European Committee of Social Rights (ECSR), "although authoritative, do not bind national judges in the interpretation of the Charter", mainly due to the absence of a norm that provides in this sense.[11]

With this ruling in mind, filed on 13 June 2018, the Court decided on the constitutionality of Article 3.1, D.Lgs. 23/2015 on 26 September 2018. The focus is Article 24 ESC, which recognises "the right of workers whose employment is terminated without a valid reason to *adequate* compensation or other *appropriate* relief."[12] The Court does not merely recall the ESC's norm, but also makes explicit reference to *Finnish Society of Social Rights v. Finland* (Complaint no. 108/2014), which elaborates on the provision, specifying that the compensatory mechanism shall be "dissuasive" and represent a "reasonable relief" for

7 Constitutional Court of Italy, Judgment no. 120/2018, 11 April 2018, para. 10.1.

8 C. Lazzari, "Sulla Carta Sociale Europea quale parametro interposto ai fini dell'art. 117, comma 1, Cost.: note a margine delle sentenze della Corte Costituzionale n. 120/2018 e n. 194/2018," *federalismi.it*, (2018): 4.

9 Judgment no. 120/2018. On the legal status of the ECHR, see Judgment no. 349/2007.

10 Judgment no. 120/2018, para. 10.1.

11 Ibid., para. 13.4. This argument has been widely criticized by the legal scholars. See Lazzari 2018; Orlandini, "Le fonti di diritto internazionale nella sentenza n. 194/2018," in *La sentenza della Corte costituzionale*, 109.

12 Article 24.1.b ESC (emphasis added). The revised ESC has been drafted in 1994 and subsequently adopted in 1996. For an assessment of Article 24, see M. Schmitt, "Article 24: The Right to Protection in Cases of Termination of Employment," in *The European Social Charter and Employment Relation*, edited by N. Bruun, K. Lörcher, I. Schömann, and S. Clauwaert (Chicago: Hart Publishing, 2017).

the damage suffered.[13] To justify reference to this interpretation, Judgment no. 120/2018 is interpreted in the sense that the Court has "recognized the authoritativeness of the Committee's decisions, although not binding for national judges."[14] Indeed, the Court could have hardly concluded differently, thus recognizing the binding effect of the Committee's decisions, given the precedent in Judgment no. 120/2018.[15] Nevertheless, in Judgment no. 194/2018, the Court overturns the structure of the sentence (relative to Judgment no. 120/2018), emphasizing the value of the Committee's decisions rather than their legal status, even without subverting judicial precedent.[16]

Before concluding its legal argument and declaring the violation by the contested provision of Arts. 76[17] and 117.1 Constitution because of Art. 24 ESC, the Court emphasizes the existing "integration among sources" and corresponding safeguards in respect to protection against unfair dismissal and the duty to guarantee appropriate compensation.[18] The Court points out that Article 24 ESC is inspired by ILO Convention no. 158 on unjustified dismissal and the duty to guaranteed compensation.[19] The convention is in turn "in harmony" with Article 35.3 of the Constitution, which "promotes and encourages international agreements and organizations, which have the aim of establishing and regulating labor rights."[20] Including ILO Convention no. 158 was anything but obvious because Italy has not signed it, and therefore it could not be a parameter for assessing the legitimacy of the contested provision.

13 Judgment no. 194/2018, para. 14.

14 Ibid.

15 See especially Orlandini, "Le fonti di diritto internazionale", 110.

16 Judgment no. 194/2018, para. 14. One argument is that, although in Judgment 120 the value of the Committee's interpretation has been "de-powered," in Judgment no. 194 the Court "freed itself from the formalistic approach of its precedent" (see See G. Fontana, "La Corte costituzionale e il decreto n. 23/2015: One step forward two step back," CSDLE working paper no. 382/2018; see also Orlandini, "Le fonti di diritto internazionale"; Lazzari, Sulla Carta Sociale Europea").

17 Article 76 of the Constitution stipulates that legislative function may be delegated to the government only by parliamentary decree and only on a restricted basis. Law 183/2014 provides for a decree to require government compliance with international conventions. The decree at issue in this proceeding (23/2015) violates international obligations. It therefore also violates Article 76 because it does not comply with Law 183/2014 (Constitutional Court of Italy, Judgment no. 194/2018, para. 14).

18 Ibid.

19 On supranational sources, see G. H. Van Voss and B. ter Haar, "Common Ground In European Dismissal Law," *European Labour Law Journal* (2012): 3.

20 Article 35, Italian Constitution.

Exiting Legal Provincialism

Judgment no. 194/2018 represents the latest stage of the internationalization process that fundamental rights' protection is undergoing before the Italian Constitutional Court. The path is not devoid of obstacles and the ruling under assessment, in its dialogue with the relevant case law, demonstrates that is not. Nevertheless, certain innovative elements merit emphasis. Indeed, even if the Court does not recognize any binding value in the Committee's decisions, not only does it reiterate the "special character" of the ESC in regard to the review of ordinary norms, but also fosters the authoritativeness of the Committee's decisions, enhancing their value somewhat relative to the previous ruling.

In particular, the Court boosts such authoritativeness by referring explicitly to a Committee decision (*Finnish Society of Social Rights v. Finland*, Complaint no. 108/2014) to interpret Article 24 ESC. The increasing use by national courts of last instance of ESC norms as interpreted by the Committee may indirectly trigger the pervasive result of imposing the binding effect of such decisions as customary law via the practical and—if that will be the case—constant application by the higher judicial bodies of the member states.

Last, by mentioning ILO Convention no. 158—which is otherwise inapplicable to the case at issue—as inspiration for Article 24 ESC, and by emphasising on the integration of sources, this jurisprudence accentuates the synergy of national, regional, and international sources that protect workers' rights, which unavoidably interlink and, even independently from a complete formal accession, succeed in expressing a far-reaching recognition of certain fundamental rights.[21]

21 This integrative approach is in line with an established doctrine (see B. Hepple, "European Rules on Dismissal Law," *Comparative Labour Law Journal* 18 (1997): 222).