Legal disputes regarding social rights brought before the Italian Constitutional Court in times of economic crisis

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It is quite clear to everyone that, today, constitutional courts of all countries, and in particular those of the most economically advanced, are called upon to play a difficult role when ruling on the constitutionality of norms which have a negative impact on social rights, since these courts are held to be jointly responsible for the development of social integration, and consequently of "living together", in their respective communities.

In the current economic crisis, the Italian Constitutional Court has been faced with an ever-increasing number of questions of constitutionality, concerning measures that have affected various categories of individuals (pensioners, civil servants, judges and taxpayers in general) and which have had a significant impact on their economic and social rights. The policy decisions being challenged have not always been clear cut because of the various systems to share the burdens of the crisis which have emerged as a result, and because of their political nature, particularly when they refer to the economic crisis or to elements of economic policy designed, in most cases, to "save" norms which would otherwise have been deemed unconstitutional.

Some cases involve norms which restrict social rights but which have been "saved" by the need to maintain costs; other cases entail norms that may be deemed "state-centric", adopted by including the need to reduce spending and achieve greater efficiency; in other cases still, the Court has modified the effects of its own decisions to limit their supposed impact over the country's economy, to such an extent that its impartial role could be called into doubt.

In its defence of social rights, the commitment of the Italian Constitutional Court is founded on the keystone of its being the sole authority for verifying the constitutionality of laws, maximising its influence for the benefit of individuals thanks to an extensive catalogue of social and other rights contained in our Constitution, and thanks to the fundamental principles that are intrinsically linked to the latter, primarily principles of dignity (individual and social), supported by the principles of solidarity and equality (Articles 2 and 3 of the Constitution).

However, this does not mean that these principles must be interpreted and balanced in line exclusively with the verdict of the Italian court, without giving due consideration to the

assessments and decisions formulated by international courts and supervisory bodies, given that the principles enshrined the Italian Constitution – and, particularly, those that I have just mentioned – now correspond, for the most part, to the principles and values which have gradually obtained a general value in the international and supranational context.

Furthermore, the search for balance and effective integration of the many safeguard standards followed by the various judicial levels is in keeping with the Italian constitutional system and with the internationalist principles on which this system is based (Articles 10, 11 and 117 paragraph 1 of the Constitution), and consequently, in keeping with the international commitments freely entered into by the state over the years.

Be that as it may, even considering only the interpretations and balances conducted outside the Italian judicial order, it seems to me that we must still maximise protection of the rights in question. The interpretative input, which is taken from foreign law and from comparisons with other judicial systems, effectively allows for solutions to be reached which protect many of the rights in question, including economic and social rights.

Today, I shall refer only to some aspects of continuity and change in Italian Constitutional case law, in the context of social rights, in order to emphasise the principles and values on which that case law is based, so as to assess the similarities with and differences from other judicial systems.

The starting point for an analysis of the case law cannot but be the one right which, in the eyes of Italian citizens – but not exclusively Italian citizens – probably represents the designated symbol of the welfare state (although it is undoubtedly also the most expensive): the right to health, which has a provision devoted to it in the Italian Constitution (Article 32); this combines an individual right with the interest of the community, establishing the absolute nature of free health care for the poor.

I believe that, despite the crisis, Judgment No. 354 of 2008 provides the best illustration of the guiding principle underlying the approach taken by the Constitutional Court.

This decision confirms previous case law: (§4) "It is necessary to reiterate the course of action previously announced by this court in Decision No. 309 of 1999, according to which [A] on the one hand, the protection of the right to health, and particularly the right to benefits 'may not suffer from constraints encountered by the legislature in the allocation of the financial resources it has available; [B] on the other hand, the 'needs of public finances cannot affect the irreducible core of the right to health, protected by the Constitution as an expression of the inviolability of human dignity.' (Ref. Decisions, amongst others: Decisions No. 455/1990; No. 267/1998; No. 509/2000; No. 252/2001; No. 432/2005)".

In the midst of an economic crisis that is particularly serious for our country, Judgment No. 248 of 2011 follows a similar approach.

The aforementioned Decision confirms previous case law, based on Decision No. 455/1990: (§6.1) "[the] right to health benefits is 'financially conditioned' to the extent that 'the need to ensure the universality and comprehensiveness of our country's system has come up against and continues to come up against the inadequate level of financial resources available each year in the context of the general planning of action taken in the health sector' (amongst others, Decision No. 111/2005)."

Alongside these judgments, there are others which reveal the Court's acceptance of the limiting of health expenditure, including that of the Regions, despite the constitutional reform of 2001 which gave the regions the possibility of giving their citizens new or improved health care benefits, where their budgets are balanced and so allow.

Decision No. 104/2013 states that (§4.2): "the impugned [regional] legislation, enabling the [Abruzzo] region to bear the coast of supplementary fees, thereby guaranteeing a higher level of assistance, contrary to the objectives of the Recovery Plan, violates the principle of the limitation of public health spending, the principle of public finance co-ordination and ultimately Article 117.3 of the Constitution".

It is clear, therefore, bearing in mind the economic crisis and, implicitly, the commitments entered into by Italy at international and supranational level, that the Court is weighing up interests against the constitutional principles that are at stake, promoting the austerity policies adopted by the state through detailed "state-centric" measures, at times, going so far as to indicate how regional resources should be used. These measures are justified through an approach holding that the principle of co-ordinating public finances is superior to that of regional autonomy. Accordingly, the democratic choices made at regional level, although legitimate on the basis of the constitutional principle of autonomy (Article 5 of the Constitution) as further stated in Article 119 of the Constitution which recognises the financial autonomy of the Regions, are subject to new balanced-budget rules – the term is carefully chosen – introduced in Article 81 of the Constitution during the constitutional revision of 2012 (Constitutional Law No. 1/2012). These rules are clearly based on Italy's international commitments and relate to limitations of public spending and deficit reduction (Fiscal Compact).

Decision No. 104/2013 is the result of the new Article 81 of the Constitution, modified in 2012 to comply with the Fiscal Compact, which provides that: "The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle.

The content of the Finance Act, the basic standards and criteria to ensure a balance between revenue and expenditure budgets and the debt sustainability of all the public administrations shall be established by legislation approved by an absolute majority of the Members of each House, in compliance with the principles established by constitutional law".

During the economic crisis, following revision of Article 81 of the Constitution, the case law of the court relating to social rights, such as the right to health, was clarified by subsequent decisions.

Decision No. 193/2012 picks up on previous decisions, from which it can be deduced that measures to rebalance and moderate public spending should be transitional (§4.2).

Decisions No. 188/2015 and No. 10/2016, relating to cuts in the budgets of local authorities, assert the fundamental principle that the assignment of tasks to these authorities, particularly by the regions, should be accompanied by sufficient financial resources sufficient to carry them out. Where this is not the case, the court finds that there has been a violation of Articles 117, 119 and 97 of the Constitution.

Furthermore, these two decisions acknowledge that "the significant reduction in resources for the tasks that are carried out on an ongoing basis in sectors of particular social importance is manifestly unreasonable precisely because of the lack of proportional measures to justify the extent of those tasks in any way whatsoever". In addition to this violation of Article 3.1 of the Constitution (the principle of formal equality), there is a violation of the principle of substantive (real) equality provided for in Article 3.2 of the Constitution, as a result of the "serious prejudice to the enjoyment of social rights, caused by the failure to finance the benefits putting those rights into effect" (Decision 10/2016, §§6.1, 6.2, 6.3).

The 2015 and 2016 judgments referred to are of key importance in the field of the financial autonomy of sub-regional local authorities (municipalities and provinces), as they oblige the regions to ensure that the resources allotted to local authorities are sufficient to guarantee that citizens are provided with a social service.

Judgment No. 70 of 2015 caused something of an uproar. The Decision declared as unconstitutional the system blocking the automatic indexation of those retirement pensions which were three times more than the minimum salary recognised by the National Institute of Social Security (INPS) for the years 2012 and 2013 (Decree-Law "Salva Italia" *(Save Italy)* No. 201/2011), which would have created a considerable deficit in the state coffers (€17.6 billion in 2015 and €4.4 billion in 2016).

In so doing, the Court failed to assess the financial effects to which its decision could have given rise; it subjected the regulations at issue to a test of reasonableness and proportionality (§10).

In this way, the Court restricts the discretionary power of the legislature and links their choices to the adoption of solutions in keeping with constitutional parameters, without referring to social rights.

However, the effects of this judgment were avoided through action taken by the legislature by means of the Decree-Law termed "Renzi Decree" No. 65/2015, ratified by Law No. 109/2015, which was, in turn, referred to the Constitutional Court because of an alleged violation of the principles set out in Judgment No. 70/2015 and, therefore, of Article 136 of the Constitution, which enforces compliance, including by parliament, with whatever has been ruled as being constitutional.

In contrast, Decision No. 178 of 2015, helps to clarify the provisional nature of measures adopted in times of crisis.

Decision No. 178/2015 declared as unconstitutional the Law that led, against the background of the economic crisis, to a prolonged suspension of collective bargaining procedures (freedom of association – Article 39 of the Constitution).

The violation of this provision (Article 39 of the Constitution), made possible by the primacy recognised by the impugned law of the "collective interest of containing public spending", was declared proportionate and reasonable by the Court, insofar as the provisional and contingent nature was upheld, even in the light of the effects imposed by the new Article 81 of the Constitution, and provided that, in the interests of solidarity, it was applied to all public sectors, thereby avoiding any discriminatory effects.

In this Decision, the Court referred to the "supervening unconstitutionality" in order to reduce the financial impact. The Court, accordingly, identified a specific time, after the impugned norm came into force, when the failure to comply with the Constitution came about.

This method was introduced by the Court in the 1980s, and was particularly relevant in the case of Decision No. 178/2015, insofar as the violation of the Constitution coincided with the publication of the decision. As a result, the Court reached the same result as it had in Decision No. 10/2015, ruling out the concept of the retroactivity of the decision of unconstitutionality.

It is now possible to draw a few conclusions.

Despite the revision of Article 81 of the Constitution, the Court still considers the two main theories it had long established, often used in a complementary manner, designed to limit the legislature's discretionary power:

The theory of the “irreducible core” of fundamental rights, to protect respect of human dignity within the meaning of Article 2 of the Constitution (individual and social dignity) and Article 117.m of the Constitution (essential levels of benefits – Ref. Decision No. 10/2010);

The theory of the “weighing up of interests protected by the Constitution”, in order to preserve the irreducible core of the right concerned and comply with pre-eminent constitutional principles, such as:

• equality, pursuant to Article 3 of the Constitution (Ref. Decisions No.188/2015 and No.10/2016);

• solidarity, pursuant to Article 2 of the Constitution (Ref. Decision No.264/2012);

• proportionality (Ref. Decision No.70/2015).

The aforementioned decisions show that, faced with the legislative erosion of the welfare state, the Italian Constitutional Court carries out an “unequal balancing” (Ref. Decision No.70/2015) between the relevant economic interests, exacerbated by the crisis and shored up by the new Article 81 of the Constitution and social rights, rooted in the constitutional principles of equality (Article 3) and solidarity (Article 2). Decision No. 10/2015 has in turn determined the effects of the ‘Robin Hood Tax’, but only for the future, without retroactive effects. The Court tried to avoid violating the principles of the Constitution (Article 2, solidarity and Article 3, equality), which would probably have been the case if the declaration of unconstitutionality was applied retroactively (§8). In point of fact, in times of economic and financial crisis, “the overall consequences of the repeal of the contested provision with retroactive effect would end up requiring an unreasonable redistribution of wealth in favour of those economic operators that may by contrast have benefited from a favourable economic climate, during a period of enduring economic and financial crisis affecting the weakest in society. This would thus result in irremediable detriment to the requirements of social solidarity, and hence a serious violation of Articles 2 and 3 of the Constitution”. However, the Court showed that its decision also sought to avoid “a budgetary imbalance for the state on such a scale as to imply the need for additional financial corrective legislation, which would also be necessary in order to avoid a breach of the principles which Italy is obliged to abide by under EU and international law” (§8).

Attention must be paid to this last consideration, since a balance is not struck between the factual situation of limited financial resources and the rights to be protected, but between the principle of budgetary equilibrium (Article 81 of the Constitution) and the constitutional principles of equality and solidarity.

However, to reduce public spending, the local and regional self-governing bodies are significantly constrained and, at least temporarily, are unable to use the resources available to them, even when their budget is balanced (Ref. Decision No.104/2013).

In the case law of the Court, the need to contain public spending, although it has precedence over the financial autonomy of the regions, does not leave any discretion for the legislature to determine the relationship between economic compatibilities and social rights; the state is still required to justify any radical reduction of the amounts allocated for the implementation of social services. Consequently, even though the Court does not seek to determine public policy, it cannot be said that it has remained silent in response to the new scale of the social state, established by the Italian Constitution of 1948 (Ref. Decision No.188/2015 and No.10/2016).

It is to be hoped that the Court will not abandon this approach and that it will also follow the interpretation of international organisations which, following the example of the ECSR, assert the principle of the non-regression of social rights in times of social crisis and do not rely on the concept of the "minimum [essential] content" of recognised social rights, seeking in addition to take into consideration the cumulative effects of austerity measures on the weakest members of society. Ultimately, it is to be hoped that it will be recognised that a regressive measure, if it proves to be more painful than an alternative measure that reaches the same objective, may be declared contrary to the Constitution, even where it does not prejudice the essential content of the social right concerned. Finally, it is worth citing recent decisions of the Italian Constitutional Court which, although they do not relate to social rights, are very close to the above approach adopted by the ECSR. Decisions 23 and 272/2015, reiterating what had already been evoked by Decision No.1/2014 (§3.1 of the considerations as to the law), confirmed that "the proportionality test used by this Court and by many other European constitutional courts, which is often paired with a reasonableness test and is an essential instrument of the Court of Justice of the European Union within the judicial review of the legality of acts of the Union and of the member states, requires an assessment as to whether the provision under review, along with the arrangements stipulated for its application, is necessary and capable of achieving legitimately pursued objectives by requiring that the measure chosen out of those most appropriate is the least restrictive of the rights in play and imposes burdens that are not disproportionate having regard to the pursuit of those objectives".

In any event, the interpretative statements of international bodies are now an essential reference, even for Constitutional Courts wishing to find the most appropriate interpretations for maximising protection of the rights in question, through the (sometimes unequal) balancing of constitutional principles and, at the same time, the balance between rights and the principles involved.