Social Rights

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“A Democratic Republic Founded on Labour:” Post World-War II Social Rights as Interpreted to Serve a XXI Century Society

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Gianluca Gentili∗

Introduction – Social Rights in the Italian Constitution

After the end of the Second World War, Europe was swept by a new wave of constitution-making. Within the group of constitutions enacted in this period,² the Italian one stands out not only for the broad protection and guarantees accorded to traditional negative rights and liberties, but also for the entrenchment of positive (social) rights and its reliance on labour as a foundational element of the Republic. As it appears from a textual and structural analysis, the 1948 Constitution of the Italian Republic³ embraces a notion of rights and liberties considered not just in their negative aspect (namely, protection of the citizens’ interests from the action of the State) but also in their positive one, that is, as instruments to achieve an effective participation of all citizens – regardless of their social and economic conditions – to the “political, economic and social organization of the country⁴”. It was ultimately in order to achieve

¹ Constitution of the Italian Republic, article 1, cl. 1.

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² Constitutions of Albania (1937), Bulgaria (1947), East Germany (1949), France (1946), German Länder (1946-1947), Germany (1949), Romania (1948), Yugoslavia (1946).


⁴ Closing of article 3, cl. 2 of the Italian Constitution, whose full text states that “[i]t is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and
this purpose and to implement the solidarity principle expressed in both articles 2 and 3, cl. 2 of the Italian Constitution\(^5\) – which completes the catalogue of fundamental rights listed in the first part of the document –, that the constituents expressly included in the Constitution this special category of rights.

Social rights are traditionally defined as rights of the citizens to be provided with services by the State and its administrative bodies, irrespective of the level of government at which these latter situate themselves (these are also often defined as rights to receive a service, or “diritti di prestazione”). The provisions in the Italian Constitution entrenching social rights are worded in order to describe and mandate programs to be carried out and implemented by subsequent action of the public bodies. The very existence of social rights appears, moreover, to rely on the possibility to achieve a compromise between the two principles of liberty and equality. More specifically, with regard to the principle of equality, inclusion of provisions, in a Constitution, protecting social rights is considered the direct consequence of the willingness to achieve a more substantive equality within the system, beyond and sometimes in derogation of the principle of formal equality. With regard to their effectiveness, social rights rely on judicial enforcement (provided they are previously qualified as justiciable) and development through interpretation to be effectively protected. While lack of implementation of social rights on the part of the public bodies may affect the possibility to effectively guarantee these rights, it nonetheless does not erase the existence of the rights themselves, which remain entrenched in the Constitution.

\(^5\) Article 2 of the Italian Constitution so provides: “The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled” (emphasis provided).
From this statement the Italian Constitutional Court has derived its power to scrutinize and evaluate reasonableness of choices made by the legislator to implement these rights, and review the balance struck between these rights and either other primary interests and rights guaranteed by the Constitution or available State resources. With specific regard to this latter aspect, the Constitutional Court has consistently affirmed that the existence of social rights must be balanced with a consideration of the State’s available economic resources and its financial and economic policy. Indeed, according to the Court, the State can determine the amount of services that it will provide on the basis of the available resources, provided – however – that an essential level of services is always guaranteed. In the view of the Court, it is therefore possible to compress a social right, but only providing that the very “core” of the right will always be guaranteed. Moreover, while it is clear that implementation and protection of a constitutionally entrenched social right should be balanced with the financial and economic resources of the State as underlined by article 81 Const., the Constitutional Court has also made clear that this is an “unequal balance” since protection of social rights cannot be considered on the same level as economic efficiency, and even when this latter is prevailing it cannot be achieved for its own sake, but it must be nonetheless pursued to provide a better fulfilment of citizens’ needs.

The terminology chosen by the constituent assembly to entrench social rights in the Constitution is worth noting, as the document does not employ a broad range of terms to define the protection accorded to these rights, relying mostly on the verb

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7 Article 81 of the Italian Constitution provides that “[e]very year, Parliament shall pass the budget and the financial statements introduced by the Government. Interim budget authority may not be granted save by law and for not longer than four months. Any law involving new or increased spending shall detail the means to cover them.”
8 See on topic Luciani M., Sui diritti sociali, in Studi in onore di M. Mazziotti di Celso, I, Cedam, Padova, 1995.
"protect." This choice, nonetheless, not only conveys the idea of the establishment of a positive obligation on the part of the State to implement these provisions and make these rights effective, but also underlines the duty of the State to safeguard them as chronologically pre-established and pre-existing before the action of the State is actually carried out. Horizontal effect, however, is never expressly and directly provided in the Constitution. As we have seen, the provisions of the Constitution must usually be implemented in order for the social rights to be enforceable in court and applicable to claims between private natural or legal persons. The Constitution indeed command positive obligations upon the State and, in some cases, directly and explicitly recognizes so called “affirmative actions:” see Articles 37 (rights of working women and guarantees for working minors) and 38 (rights of disabled persons to education and training).

The Constitutional Court has established, over time, a classification between the rights entrenched in the Constitution, qualifying the Fundamental Principles (Articles 1-11) as the core of the Constitution itself. While most of the social rights lie outside of this part, Art. 4 and its guarantee of a “right to work” is included within the so-called Fundamental Principles. More specifically, the Italian Constitution, in its Part I, Title II, provides for “Ethical and Social Rights and Duties,” (Arts. 29-34); however, as seen, social rights are also entrenched in other provisions of the Constitution comprised under the caption “Fundamental Principles” (Art. 4) or under Part I, Title III, “Economic Rights and Duties.” As a general reference, social rights included in the text of the Constitution established through Constitutional Court’s interpretation, can be broken down as follows:

- General provisions related to social rights:
  - Articles 1, s. 1 (“Italy is a democratic Republic founded on labour’’)
  - Article 2 (Recognition and guarantee of inviolable rights of the person; duties) (penumbra: right to housing)
  - Article 3, s. 2 (Substantive equality)
- Right to work and protection of workers’ rights:
  - Articles 4, s. 2 (Right to work)
  - Article 35 (Protection of work in all forms; training; international labour rights; protection of Italian workers abroad)
  - Article 36 (Right to remuneration assuring a dignified existence)
  - Article 37 (Rights of working women)
  - Article 38 (Welfare support for citizens unable to work; right to education for disabled)
  - Article 39 (Establishment of Trade Unions)
  - Article 40 (Right to strike)
  - Article 46 (Right of workers to collaborate in the management of enterprises)

- Rights of the family: Article 29
- Support and education for children: Article 30
- Support for formation of family and protection of mothers and children: Article 31
- Right to health (penumbra: right to a healthy environment): Article 32
- Right to education: Article 34

Before the Constitutional Court started its activity in 1956, rights’ provisions codified in the Constitution (those mentioned in the foregoing most included) were interpreted by ordinary and administrative courts exercising functions of judicial review – according to the decentralized system of judicial review then in effect in Italy – as
merely “programmatic” (*programmatiche*), that is, establishing a program for the legislature with regard to their necessary and future implementation, and not directly enforceable. The Constitutional Court, once established in 1956, took a different view. With specific regard to social rights the Court recognized that, even if some provisions could have been defined as “programmatic,” they could have nonetheless bound the action of the legislature and been enforceable in court with regard to some of their more concrete aspects.

The following part will address specifically some of the most important social rights provisions as interpreted by the Constitutional Court. As we will see, the Court has significantly employed a progressive interpretation in defining the content of these rights. In other cases, it has identified social rights not codified in the black letter text of the Constitution as a penumbra of other already entrenched rights.

A. A “Right” to Work?

Article 4, cl. 1 of the Italian Constitution provides that

«*The Republic recognizes the right of all citizens to work and promotes those conditions which render this right effective.*

*Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society*»

The Italian Constitutional Assembly debated extensively on the opportunity to define work as a “right,” since hardly it would have been possible to guarantee a job to every citizen and allow those who were not employed to find relief in court. The text of the article, therefore, was drafted in a way apt to convey the aspirational value of the provision and the idea that a positive obligation was falling on the State to provide the best possible conditions for employment. Had the State been unsuccessful in providing
this conditions, citizens could have only resorted to the ballot during national elections to make their voice heard. The Constitutional Court, in 1976, showed to be aware of this perspective when it handed down one of its most famous decisions on topic, confirming this interpretation.\footnote{Constitutional Court Decision no. 194/1976, in which the Court stated that «[t]he right to work guaranteed under Article 4 of the Constitution cannot be considered as a right enforceable in court by a citizen in order to be provided with a specific job. It provides for the generic possibility to have access, in the presence of necessary qualifications, to jobs available on the job market and for the obligation, for the legislator, to establish a system which would make this right effective, through the creation of jobs and pursuance of a level of occupation as high as possible. This is also consistent with the view that looks at the right to work established by Art. 4 as including the right to choose a working activity».}

It is worth noting that, by way of difference, with regard to workers (i.e. persons who are already employed), the Constitution in several articles provides rights which are directly enforceable in court: e.g. the right to «a remuneration commensurate to the quantity and quality of [the employee’s] work and in any case such as to ensure them and their families a free and dignified existence\footnote{Article 36, cl. 1 Const. According to the Constitutional Court this right applies also to the retired worker: see decision no. 516/2000.};» the right «to be assured adequate means for their needs and necessities in case of accidents, illness, disability, old age and involuntary unemployment\footnote{Article 38, cl. 2 Const.}.»

At the same time, according to the Constitutional Court, article 4 should not be interpreted as having only a merely programmatic value, as it represents the legal basis for all those actions carried out by the legislator aimed at achieving highest possible occupational levels\footnote{See, e.g. Constitutional Court decision no. 248/1986: “Art. 4 of the Constitution […] certainly includes the commitment on the part of the State, to promote a policy of full employment and justifies the intervention of the public powers in disciplining the conditions of employment for workers.”}. It should come as no surprise, therefore, that in the Court’s view article 4 also mandates the constitutional illegitimacy of each unjustified obstacle, hindering access to the job market. In this respect, in 1994, the Court quashed a provision, included in Law no. 53/1989, subordinating the possibility to work in the
State Police to possession of qualities of “good morals and conduct” to be assessed – without possibility to appeal the decision – by the competent Ministry\textsuperscript{13}. Consistent with this approach, in 2000, on the basis of article 4 Cost. (together with articles 29, 30 and 31 of the Constitution) the Court also declared unconstitutional several statutory provisions requiring an applicant for specific jobs in the public administration or in the military to be childless\textsuperscript{14}.

While not providing a full-fledged “right” to work – that is, to a specific job – enforceable in court, the Constitutional Court in 1965 nonetheless interpreted article 4 as mandating action on the part of the legislator to guarantee to the citizens the opportunity to choose a preferred working activity according to each one’s personal skills\textsuperscript{15}. The legislator, in the Court’s view, could establish limitations in the access to some positions requiring a higher professional and technical background only in order to guarantee the interests of the general collectivity or of specific categories of commissioners\textsuperscript{16}.

Article 4, together with the principle of equality, has also represented the textual basis used to provide protection against dismissal without just cause in some specific cases\textsuperscript{17}.

\textsuperscript{13} Constitutional Court decision no. 108/1994, reaffirmed in Constitutional Court decision no. 391/2000.

\textsuperscript{14} See Constitutional Court decision no. 332/2000 in which the Court stated that this requirement was a major interference in the private sphere of the person, which could not be considered justified even in light of the special activities that a member of the military performs and its status.

\textsuperscript{15} See Constitutional Court decision n. 45/1965, in which the Court stated that “[t]he right to work, recognized to every citizen, must be considered a fundamental right of liberty of the human being, which translates into the right to choose a preferred working activity and the ways in which this activity is carried out.” Reaffirmed in Constitutional Court decision no. 248/1996.

\textsuperscript{16} Constitutional Court decision no. 441/2000.

\textsuperscript{17} Constitutional Court decision n. 176/1986, issued on June 27, 1986 and declaring the constitutional illegitimacy of Article 11 of Law n. 604/1966 in the part in which it did not extend the protection against dismissal without just cause to workers of age 65 or older, not yet retired or entitled to retire (i.e. lacking the necessary requisites to retire).
B. Right to Strike

Article 40 of the Italian Constitution provides that «[t]he right to strike shall be exercised in compliance with the law». The right to strike, together with the right to establish trade unions entrenched in article 39 of the Italian Constitution\(^{18}\) has represented the most important instrument of protection for worker’s rights. In the 1960s, in the absence of a specific statutory law regulating the right to strike, the Constitutional Court recognized nonetheless its peremptory and *self-executing* character, striking down in several decisions provisions of the 1930 Italian Criminal Code making strike a crime\(^ {19}\). The Court also declared the applicability of the right to strike to public employees\(^ {20}\) and widened its applicability including among the conducts protected by article 39 strikes organized not only for economic reasons but also for political motives\(^ {21}\). Law no. 146/1990 implemented the right to strike codified in article 40 Const. establishing rules for strikes carried out by employees working for companies providing public services\(^ {22}\). Indeed, the purpose of the law was to balance the right to strike with necessary respect of the «constitutional rights of the person to life, health, freedom and security, freedom of movement, social welfare and security, education and

\(^{18}\) Article 39 so provides: «Trade Unions can be freely established. No obligations can be imposed on trade unions other than registration at local or central offices, according to the provisions of the law. A condition for registration is that the statutes of the trade unions establish their internal organization on a democratic basis. Registered trade unions are legal persons. They may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have a mandatory effect for all persons belonging to the categories referred to in the agreement».  

\(^{19}\) See, e.g. Constitutional Court decisions nos. 29/1960.  


\(^{21}\) With the only exception of those directed at subverting the constitutional order or at hindering the functions of the representative bodies (Constitutional Court decision no. 290/1974).  

\(^{22}\) Law no. 146/1990 has been subsequently amended by Law no. 83/2000.
freedom of communication\textsuperscript{23}. According to Law no. 146/1990, Trade Unions are called upon to identify the essential level of services to be guaranteed even in case of strike and to give adequate notice of the strike. Finally, the Law also established a Strike Regulatory Authority vested with the power to ascertain the effectiveness of the measures taken to balance the right to strike with the other constitutional values protected by the Law.

C. Right To Health

Article 32 of the Italian Constitution guarantees the right to health, qualifying it at the outset as a “fundamental right”\textsuperscript{24}. This article imposes a duty upon the State to provide essential conditions of health and welfare for the citizens, irrespective of their personal economic conditions. The article therefore grants the citizens a general right to the establishment of suitable structures where health care should be provided. This obligation on the part of the State led in 1978 to the establishment of National Health Service (Servizio Sanitario Nazionale)\textsuperscript{25}. While the extent of the health-related services provided has to be determined by the legislator also on the basis of the available economic resources, the Constitutional Court has repeatedly stated that article 32

\textsuperscript{23} Article 1, cl. 1 of Law no. 146/1990 which also determines specifically the services included in the categories mentioned in the text. With decision no. 171/1996 the Constitutional Court extended these guarantees also to the activities performed and services provided by lawyers (not previously covered by the Law).

\textsuperscript{24} «The Republic safeguards health as a \textit{fundamental right} of the individual and as a collective interest, and guarantees free medical care to the indigent.

No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person» (emphasis provided).

\textsuperscript{25} Law no. 833/1978
establishes an obligation to always provide a minimum level of services even in times of economic difficulties.²⁶

While the right to health codified in Article 32, s. 1 explicitly excludes any obligation for citizens to undergo any health treatment – and therefore also to keep oneself in good health –, the second clause of the article, qualifying some health treatments as compulsory by law and the possibility for the State to limit a person’s constitutionally protected freedoms for public health reasons, expresses the interest of the State in preventing the spreading of infectious diseases. In some instances, balancing the individual interest and right to health, with the safeguard of the health interests of the community has proved to be difficult and controversial. For example, in 1994 the Constitutional Court declared unconstitutional a statutory provision forbidding compulsory subjection to blood tests in order to ascertain presence of HIV infection, even in presence of working activities which – for the very features of the activities themselves – presented a serious risk or HIV infection transmission.²⁷ Only one year later, however, the Court declared unconstitutional some provisions recently introduced in the code of criminal procedure and providing for a total exclusion of HIV positive persons from detention even in cases when detention could have taken place without any serious risk to their own health or that of the other inmates, striking a different balance between the interests at stake.²⁸

It is also worth noting that the Constitutional Court has interpreted this provision as finding application not only to Italian citizens, but to foreign nationals as well. More specifically, the right to health has been considered by the Court as a right belonging a human being as such, without any relevance being given to the national origin.²⁹

²⁷ Constitutional Court decision no. 218/1994.
Consistent with this view, article 35 of Legislative Decree no. 286/1998 guarantees to illegal immigrant some medical treatments free of charge when lack of adequate economic conditions is proven.

The right to health codified in article 32 of the Constitution has also been interpreted by the Constitutional Court to provide a legal basis to the concept of biological damage. Different from the patrimonial one, the biological damage concerns physical or psychological injuries suffered regardless of any actual loss of income.

D. Right to a Healthy Environment

Deeply linked to the right to health are several actions carried out by the State in order to provide protection for the environment. Indeed, environmental protection is nowadays considered a primary interest of both the State and the citizens. Under the Italian Constitution, statutory provisions protecting natural resources and citizens from pollution and safeguarding environmental conditions to increase the general quality of life, are recognized as establishing a right to a healthy environment, which in itself is seen as the necessary premise for the implementation of a right to health.

Despite the difficulties that courts, legislator and doctrine have found and still find in providing a clear legal definition of the environment, the Italian Constitutional Court, since the 1980s has started to affirm the constitutional relevance of environmental protection. In a famous decision issued in 1987, the Constitutional Court affirmed that «[t]he environment has been considered a unitary immaterial interest [...] It is protected as a determinative element of the quality of life. [...] Its protection is mandated, first and foremost, by constitutional provisions (Arts. 9 and 32) and qualifies

30 See Constitutional Court decision no. 184/1986.
as a primary and absolute value within our constitutional system\textsuperscript{31}. Moreover, in the Court’s view protection of the environment requires action not just on the part of the public bodies, but also on the part of private citizens as members of the society, on the basis of articles 2 and 3 of the Constitution.

It is worth noting, however, that with regard to the area of environmental protection, the Constitutional Court adopted a view originally developed by the Court of Cassation and putting forward a change in the way environment was considered from a legal point of view. Indeed, in a famous decision issued in 1979 the Supreme Court put forward a change from a patrimonialistic to a more personalistic conception of the environment\textsuperscript{32}. While before 1979 environment was coming into consideration only in the determination of the amount of pecuniary damages to be awarded in case of pollution or alteration of the natural landscape, in 1979 the Court of Cassation started underlining the importance of a healthy environment in itself, as a “place” for socialization and for development of the person, qualifying for the first time the right to a healthy environment as a fundamental right protected by our Constitution\textsuperscript{33}. The Supreme Court therefore, no longer identified article 9, cl. 2 Const.\textsuperscript{34} as the constitutional foundation for protection of the environment, finding that that protection could be better achieved under article 32 Const.

\begin{itemize}
\item \textsuperscript{31} See Constitutional Court decision no. 641/1987, in which the Court also makes reference to one of its previous decision: no. 210/1987.
\item \textsuperscript{32} Court of Cassation decision n. 5172/1979.
\item \textsuperscript{33} In the words of the Supreme Court: “Considered the need to protect the indispensable conditions for human health, even and especially in those places where the personality of a human being is expressed [see Art. 2 Const., ndr], the right to heath, besides being defined as a right to life and physical integrity, must also be understood as a right to a healthy environment.” This view was also confirmed and reinforced by the Court of Cassation in two subsequent decisions: no. 378/2000 and 190/2001 (explicitly address environment as a fundamental principle).
\item \textsuperscript{34} Article 9, cl. 2 states that “[the Republic] safeguards natural landscape and the historical and artistic heritage of the Nation.”
\end{itemize}
E. Right to Housing

While finding an express recognition in article 25 of the Universal Declaration of Human Rights and in Article 11 of the International Covenant on Economic, Social and Cultural Rights, the right to housing, is not expressly codified in the text of the Italian Constitution. It has eventually gained full constitutional protection after the Constitutional Court, in its case law, has recognized it as a “fundamental right” under Articles 2, 3 and 32 of the Constitution, noting that the right to housing furthers the expression of human personality as codified in article 2 of the Italian Constitution.\(^{35}\) The right has also found recognition under articles 42, cl. 2\(^{36}\), 47, cl. 2\(^{37}\) and 14\(^{38}\) of the Italian Constitution. Finally, in some other cases, the Court has qualified the right to housing as protected under article 36 of the Constitution and its guarantee of a “dignified existence”\(^{39}\).

Indeed, in the words of the Constitutional Court, «[h]ousing represents – due to its fundamental importance in the life of an individual – a necessary and primary interest which must be adequately and concretely safeguarded by law»\(^{40}\). According to the Court, however, the right to housing should be interpreted as a right to the availability of a house, which the public powers would be called upon to guarantee.

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\(^{35}\) See Constitutional Court decision no. Constitutional Court Decision no. 119/1999: «[t]he right to a decent housing is undeniably comprised within the fundamental rights of the person».

\(^{36}\) Article 42, cl. 2 of the Constitution provides that «Private property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all» (emphasis provided).

\(^{37}\) Article 47, cl. 2: «The Republic promotes house and farm ownership and direct and indirect shareholding in the main national enterprises through the use of private savings» (emphasis provided).

\(^{38}\) Article 14 in providing that «[t]he home is inviolable” and that “[p]ersonal domicile is inviolable» presupposes the possibility to actually have access to a house.

\(^{39}\) Constitutional Court decision no. 217/1988, in which the Court states that «The right to housing represents one of the fundamental characters of the democratic State designed by the Constitution. The task to create the minimum conditions of a social State and guarantee to the highest possible number of citizens a fundamental social right, like the one to housing, contributes to the achievement of a higher level of human dignity and cannot be, in any way, renounced by the State».

\(^{40}\) Constitutional Court decision no. 252/1983.
Moreover, it would be up to the legislator to determine the level of implementation of this right, especially with regard to the economic resources to be employed, balancing this social right with the general economic resources available for the common good\textsuperscript{41}.

\textsuperscript{41} Constitutional Court decision no. 252/1989.