Fundamental Rights in the Italian Constitution. Three Interpretive Issues

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Abstract

Article 2 of the Italian constitution reads: «The Republic recognizes and guarantees the inviolable rights of man […]». This provision raises a number of interpretive problems. The paper focuses on three of them. (1) The question whether the rights in question are "declared" or "created" *ex novo* by the constitution. (2) The problem of identifying such rights, namely the question of the existence of further rights beyond those expressly mentioned in the constitutional text. (3) The question whether the inviolability clause amounts to a prohibition of constitutional amendment. The answers to such questions are evidently conditioned by the legal-philosophical assumptions of interpreters. And this is a forceful argument against the current, naïve, theory of interpretation that circumscribes interpretive issues to problems of predicates' vagueness (such as: are bicycles "vehicles"?).

Keywords: Fundamental Rights. Inviolability. Constitutional Amendment Power. Natural Law. Legal Positivism. Theory of Interpretation.

Foreword

Article 2 of the Italian constitution reads: « The Republic recognizes and guarantees the inviolable rights of man […]». These few words raise a number of interpretive problems (Guastini 2007). In this paper, I shall focus on three of them.

1. Recognizing or Creating Rights?

The use of the verb "to recognize" («The Republic recognizes… the inviolable rights of man») raises a tricky problem. If understood literally, an act of "recogni-

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tion" – as an act of "declaration" – is a cognitive act, whose object is a pre-existing state of affairs, entity, event, or phenomenon. «The idea of recognition presupposes […] the pre-existence of the rights so recognized» (Paladin 1995: 557). Should we take seriously the word used in the constitutional text (Grossi 1991: 95 f.)?

If we take it seriously, we must conclude that the constitution refers to a list – however indeterminate – of pre-existing rights, that is, rights that the constitution does not "create" *ex novo*, but simply "recognizes" or "declare".

If, on the contrary, we do not take it seriously – if we think that it is only an emphatic expression with no definite ideological content – we must conclude that the constitution simply refers to itself, that is, to the list of rights expressly mentioned in its subsequent provisions.

The issue unavoidably involves the legal-philosophical beliefs of interpreters (Mengoni 1998: 3 ff.): Legal positivism or natural law?

(1) The advocates of natural law will hold that there are "in the very nature of things (or men)" rights, as well as obligations, antecedent and independent of any positive regulation: rights, therefore, that the constitution simply recognizes – nor could it do otherwise, in the sense that the constitution could perhaps disclaim, but certainly not "create" them, since they already are out there (Mortati 1969, I: 146; Mazziotti di Celso 1956: 88 ff.)[1].

(2) On the contrary, the advocates of legal positivism will hold that no rights at all exist before and independently of the positive legal order – therefore, the rights at stake are not (literally) recognized, but created (and conferred on citizens) by the constitution. The apparently "descriptive" formulations that one finds in many a constitutional text reveal, at most, the political philosophy of the framers (Mengoni 1998: 4), but of course do not prove that such proclaimed rights did really exist before the constitution (Caretti 2005: 136 f.; Grossi 1991: 95 ff.; see also Esposito 1954: 22 f.).

One could ask: who cares about legal philosophy? However, such different legal-philosophical views have important doctrinal consequences concerning: on the one hand, the identification of the inviolable rights; on the other hand, their legal status, with particular regard to the limits of constitutional amendment power.

[1] From this point of view, one might say, the constitutional text, paradoxically, is not a genuinely prescriptive text (conferring rights, in fact, is prescribing), but a text descriptive of pre-existing rights (Di Giovine 1995: 10).

2. What Rights?

In any case, the problem obviously arises of identifying the rights in question. What rights are declared or ascribed by this provision? Art. 2 does not answer to such a question, since it does not mention any particular right.

(1) A legal scholar or judge with a legal-positivistic mind will reply that – since there are no rights at all, pre-existing to the positive legal order – the rights to which art. 2 refers can only be those expressly enumerated and summarily regulated in other constitutional provisions, such as: personal liberty, freedom of speech, freedom of the press, and so forth. In other words, the clause of art. 2 simply refers to the list of rights mentioned in the subsequent constitutional provisions (Caretti 2005: 137 ff.)[2].

Moreover, from this viewpoint, the list in question is necessarily closed – in the absence of "natural" rights already existing before the constitution, other inviolable rights beyond those expressly enumerated by the constitutional text cannot exist (Barile 1984: 54 ff.)[3]. That list, therefore, does not admit any integration by the legislature or the judiciary. This is so, among other things, for the good reason that any "new" right, added to the list by means of "creative" interpretation, would conflict with one or the other of the textually ascribed rights, and therefore would limit them (Pace 2003: 25 ff.; Paladin 1995: 568)[4].

(2) A legal scholar or judge endorsing the natural law doctrine, on the contrary, will answer that art. 2 refers to all natural (of course inviolable) rights.

From this point of view, the clause of inviolable rights is an "open" clause. It does not refer only to the rights expressly mentioned in the subsequent constitutional provisions. The recognition of natural rights made by the framers is to be taken as not necessarily complete and exhaustive (some natural rights may have been omitted from the list). In particular, those natural lawyers who support the doctrine of

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[2] «Une règle qui tire son origine de l'ordre naturel des choses, ne peut être qualifiée règle de droit, tant qu'elle n'est pas entrée dans l'ordre juridique en vigueur; et inversement, one ne peut la qualifier de règle naturelle, à partir du moment où elle est devenue règle de droit» (Carré de Malberg 1920: I, 239).

[3] However, as a matter of fact, no constitutional lawyer really considers as strictly "closed" the list of constitutional rights – everyone admits the existence of rights that are "consequences" of the textually ascribed ones. In other words, even those who reject the natural law thesis of an open list cannot resist the temptation to consider art. 2 as a "matrix" of an indeterminate set of further rights. See Barile 1984: 56 ff.; Barile 1993: 13 ff.; Caretti 2005: 140; Pace 2003: 25 f.; Lavagna 1984: 739 ff.; Grossi 1972: 169 ff.

[4] Luciani 2007: 47: «If the interpreter, namely the judge, would identify some "new" rights […], he would make one of those choices that […] are reserved for the constituent power. And in such a way he would alter the overall balance of rights and constitutional values: no extension of the list of rights is without costs, not only since every new right expands the positions of disadvantage and subjection that are functional to its satisfaction, but also and above all since that new right alters the relative position of the pre-existing rights, shifting the terms of the balance in case of conflict with other rights or competing values».

"a variable natural law", claim that new natural rights, non-existent so far, can stem in the course of time from the "nature of things", the evolution of social conscience, or the like. No need to say that this view justifies the integration of written constitutional law through the construction, by interpreters (and especially constitutional judges), of further unexpressed "natural" rights[5].

3. "Inviolable": In What Sense?

Once it is established that the rights proclaimed in the constitution are "inviolable", one has to ask in what sense they are so. Is the qualification of certain rights as "inviolable" a mere declamatory formula – characteristic of the rhetorical language commonly used by the framers of constitutional texts – and as such devoid of any precise normative content or, on the contrary, is it provided with legal effects? The solution to this problem, too, is fatally conditioned by the legal-philosophical attitudes of interpreters.

(1) The advocates of the natural law doctrine will hold that the qualification of inviolability expresses a prohibition of constitutional amendment. If the constitutional rights are not created *ex novo*, but simply declared by the framers, then such rights cannot be suppressed in any way, not even by constitutional amendment. Since they are already given in nature – since no human normative authority created them – *a fortiori* no human authority can suppress them. In short: "inviolable" means absolutely "intangible", and therefore not liable to constitutional amendment[6].

(2) The advocates of legal positivism, on the contrary, hold that a distinction is in order. If the inviolability clause is contained in a flexible constitution, then it is a mere declamatory formula, devoid of any legal effects. If it is contained in a rigid constitution, like the Italian constitution in force, on the contrary, it does not add anything to the rigidity of rights-conferring constitutional norms[7].

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[5] Since the Eighties of the last century, the Italian Constitutional court considers the clause of art. 2 as "closed" against any value that cannot be traced back to the constitutional text, but "open" to the new forms that such values assume in changed social contexts. In fact, in the subsequent constitutional case-law jurisprudence the Court recognized as inviolable fundamental rights, among others: sexual freedom, the social right to housing, the right to honour and reputation, the right to education, the right to privacy and to a free and secret communication, the right to leave one's own country, the right to personal identity. None of such rights has a textual basis in the constitution.

[6] Among Italian legal scholars this opinion is almost unquestionable. However, it is rarely argued (as one would expect) with natural law assumptions. A (weak) recurrent argument is instead that the rights in question are "essential" to the democratic form of state established by the constitution. See, e.g., Paladin 1995: 565.

[7] No need to say that the rigidity of the constitution stems not from the inviolability clause, but from the norms that regulate constitutional amendment.

In other words, constitutional rights are certainly inviolable for the (ordinary) legislation, and more generally for public authorities at large, just like any other constitutional norm. But the rights-conferring constitutional norms may very well, like any other legal norm, be repealed, derogated, or replaced – by means of the appropriate procedures (in this case, with the constitutional amendment procedure) – whenever this is not expressly forbidden by any positive norm. Besides, the Italian constitution prohibits only the amendment of the republican form of the state (art. 139), in such a way that the prohibition of amendment may concern, at most, all those rights, if any, that define (or contribute to define) the republican form of the state, that is, rights in the absence of which the form of the state, by definition, would no longer be "republican" (Pace 2003: 45).

4. A Substantive Conception of the Constitution

The Italian Constitutional Court has endorsed the doctrine that equates the inviolability clause to the prohibition of constitutional amendment – without any argument[8].

According to the Court, the constitution includes not only expressed (the republican form of the state clause), but also implicit, unexpressed limits to constitutional amendment. In particular, the unexpressed limits identified by the Court are the "supreme principles" or "supreme values", on which the constitution "is grounded", as well as the "inalienable rights of the human person". The Court also considers that such limits are absolute, in the sense that they may not be removed in any legal way.

This jurisprudential opinion seems to presuppose, *grosso modo*, the following reasoning. (a) The amendment of an existing constitution is to be distinguished from the establishment of a new constitution. (b) By definition, the amendment power may not go as far as to establish a new constitution. (c) Any amendment presupposes that the existing constitution retains its identity. (d) A constitution, however, is not a simple set of norms: it is a coherent whole of principles and values; in short, its identity lies precisely in all such principles and values. (e) As a consequence, an amendment that would affect the supreme principles would not be a genuine "amendment": from a substantive point of view, it would be the disguised

[8] «The supreme principles of the constitutional order» have «a superior value with respect to the other constitutional norms»; therefore, «one cannot deny that this Court is competent to judge the compliance of constitutional amendments and other constitutional acts to the supreme principles of the constitutional order […]. If this were not the case, moreover, there would be an absurdity in considering the system of judicial guarantees of the Constitution as defective or ineffective precisely with regard to its most valuable norms» (Corte costituzionale, decision 1146/1988).

establishment of a new constitution. (f) Therefore, the amendment of the principles and values that characterize the constitution is prohibited[9].

This "substantive" conception of the constitution and constitutional amendment – that can be traced back to Carl Schmitt's constitutional theory[10] – is highly debatable. In fact, one could easily argue that: (i) a constitution is only a set of norms, which can be defined extensionally by simply enumerating its component norms; (ii) the axiological priority of some constitutional norms (the supreme principles, the inalienable rights) to the others is the result of a subjective value-judgment, devoid of any "positive" (textual) justification; (iii) constitutional amendment differs from the establishment of a new constitution only from the formal point of view: constitutional amendment takes place in legal forms, while the establishment of a new constitution takes place in illegal forms, *extra ordinem*; (iv) the existing constitution retains its identity until it is replaced in illegal forms (for example, by revolution or *coup d'état*)[11].

5. Vehicles in the Park?

The nowadays most influential theory of interpretation – propitiated by Hart's ideas on the subject (Hart 1961: ch. 7) – argues that (except perhaps for some marginal case of ambiguity of normative provisions) the main problems of legal interpretation are of the following kind: given, for example, a normative provision stating "No vehicles in the park", one has to wonder whether the norm applies to bicycles, fire engines, police cars, or a truck carrying a statue to be installed in the park itself, and the like.

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[9] This way of looking at the amendment power can be met in the constitutional theory of Mortati 1986.

[10] According to Schmitt, «the boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change» (Schmitt 1928: 150). Schmitt's definition of constitutional amendment reads as follows: a change in the constitutional text is a mere, genuine, amendment only if «the identity and continuity of the constitution as an entirety is preserved» (Schmitt 1928: 145).

[11] Two quotations from Hans Kelsen are in order. «Two cases must be fundamentally distinguished. In the first case, the constitution is modified in accordance with the conditions that the constitution itself has laid down […]; for example, an absolute monarchy is transformed, by an act of the monarch, into a constitutional monarchy. The continuity of law is guaranteed […]. The second case, different in principle from the first one, is that of a revolutionary transformation of the constitution, that is, through a break in the existing constitution. This is the decisive criterion, and not whether the constitutional modification is more or less profound (Kelsen 1920: 237). «The state remains the same even if its constitution is modified by juridico-positive means, that is, in the forms prescribed by the constitution itself. The modification can be as profound as it could be, but – if it takes place according to what is prescribed – there is absolutely no reason to suppose that a new state has arisen with the modified constitution. One could speak of a new state only if the modification constituted a real break in the constitution» (Kelsen 1925: 249).

In other words, the problems of interpretation would be essentially: (a) problems of reference or extension of predicates (predicates in a logical sense: terms that denote classes of objects); (b) problems dependent on the intrinsic vagueness, open texture, of predicates in general; (c) vagueness, that is not peculiar to legal language, but – following an intuition of Friedrich Waismann (Waissman 1968) – is shared by whatever kind of non-formalized language.

Well, it is sufficient to study closely some serious problem of interpretation, actually discussed by legal scholars and judges, to realize how much this view is naïve. The reference problems of predicates regard the application of norms to particular cases: they are problems of subsumption of concrete cases under previously identified abstract classes of facts. But the primary problems of interpretation are not at all of this kind: rather, they concern not the reference (Gottlob Frege's *Bedeutung*), but the very sense (Frege's *Sinn*) of the normative sentence at hand, that is, the identification of the norm (or norms) that it expresses (and/or entails) (Guastini 2011).

Apparently, the (guilty) ingenuity of the prevailing theory depends on the assimilation – sometimes tacit, but often explicit – of legal language to ordinary language. And this in turn depends, however surprising this may be (since the theory in question is held by competent jurists), on the simple ignorance of legal practice.

Legal communication – the "dialogue" between normative authorities and interpreters – is quite different from ordinary communication, and perhaps from any other type of communication. Interpretation of legal texts is conditioned not only by practical (conflicting) interests, which should be obvious, but – often – by legal-philosophical and/or political-philosophical assumptions and – always – by elaborate dogmatic constructions, which simply do not exist in daily conversation. There is no "dogmatics" of daily conversation. Jurists are able to make ambiguous or equivocal any sentence whose interpretation would be completely unproblematic in non-legal contexts. This is precisely what has happened, for instance, in the interpretation of art. 2 of the Italian constitution by legal scholars and constitutional judges.

References

Barile, P. (1993). *Libertà, giustizia, costituzione*, Padova, Cedam.

Barile, P. (1984). *Diritti dell'uomo e libertà fondamentali*, Bologna, Il Mulino.

Caretti, P. (2005). *I diritti fondamentali. Libertà e diritti sociali*, Torino, Giappichelli, II ed.

Carré de Malberg, R. (1920). *Contribution à la théorie générale de l'État*, Paris, Centre National de la Recherche Scientifique, 1962.

Di Giovine, A. (1995). *Art. 2*, in G. Neppi Modona (ed.), *Stato della costituzione*, Milano, Il Saggiatore.

Esposito, C. (1954). *La costituzione italiana. Saggi*, Padova, Cedam.

Grossi, P.F. (1972). *Introduzione ad uno studio sui diritti inviolabili nella costituzione italiana*, Padova, Cedam.

Grossi, P.F. (1991). *I diritti di libertà ad uso di lezioni*, Torino, Giappichelli, II ed.

Guastini, R. (2007). *Esercizi d'interpretazione dell'art. 2 cost.*, «Ragion pratica», 29: 325-338.

Guastini, R. (2011). *Rule-Scepticism Restated*, in L. Green, B. Leiter (eds.), *Oxford Studies in Philosophy of Law*, vol. 1, Oxford, Oxford U.P., 138-161.

Hart, H.L.A. (1961). *The Concept of Law*, Oxford, Clarendon.

Kelsen, H. (1920). *Das Problem der Souveränität und die Theorie des Völkerrechtes. Beitrag zu einer reinen Rechtslehre*, Tübingen, J.C.B. Mohr.

Kelsen, H. (1925). *Allgemeine Staatslehre*, Berlin, J. Springer.

Lavagna, C. (1984). *Ricerche sul sistema normativo*, Milano, Giuffré.

Luciani, M. (2007). *Interpretazione costituzionale e testo della costituzione. Osservazioni liminari*, in G. Azzariti (ed.), *Interpretazione costituzionale*, Torino, Giappichelli.

Mazziotti di Celso, M. (1956). *Il diritto al lavoro*, Milano, Giuffré.

Mengoni, L. (1998). *Fondata sul lavoro: la Repubblica tra diritti inviolabili dell'uomo e doveri inderogabili di solidarietà*, in M. Napoli (ed.), *Costituzione, lavoro, pluralismo sociale*, Milano, Giuffré.

Mortati, C. (1969). *Istituzioni di diritto pubblico*, Padova, Cedam, VIII ed.

Mortati, C. (1986). *Dottrine generali e costituzione della Repubblica italiana*, Milano, Giuffré.

Pace, A. (2003). *Problematica delle libertà costituzionali. Parte generale*, Padova, Cedam, III ed.

Paladin, L. (1995). *Diritto costituzionale*, Padova, Cedam.

Schmitt, C. (1928). *Constitutional Theory*, transl. and ed. by J. Seitzer, Durham and London, Duke U.P., 2008.

Waismann, F. (1968). *Verifiability*, in Id., *How I See Philosophy*, London, MacMillan.