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The evolutionary constitutional interpretation and the deception of contextualism

L'interpretazione costituzionale evolutiva e l'inganno del contestualismo

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Abstract
It is an incontrovertible fact that the hierarchical relationship between principles and values must be defined on the basis of assumptions of contemporary social and economic. A process that, although it is composite, can be carried out due to indeterminacy, the generality and simplicity of the constitutional provisions, which lend themselves to an interpretation that is subject to constant change. However, this can only be done by checking the relevance of the terms used in advance, in the course of time, they may have acquired a different meaning from their original meaning. In the absence of legislation that is in step with new social and economic needs, the only possibility for the judge to reach a resolution of specific cases and at the same time avoid the insidious possibility that certain provisions, even if not strictly unconstitutional, may be anachronistic, is to preserve their operation, through an evolutionary and constitutionally oriented interpretation.

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Abstract
È un dato incontrovertibile che il rapporto gerarchico tra principi e valori debba essere delineato sulla base di presupposti di contemporaneità sociale ed economica. Un procedimento che per quanto composito può essere attuato in ragione dell'indeterminatezza, genericità e semplicità espositiva delle disposizioni costituzionali che si prestano ad un'interpretazione piegata ai continui cambiamenti. Tuttavia, ciò è possibile soltanto mediante una preventiva verifica dell'attualità del significato delle espressioni utilizzate, che nel tempo potrebbero aver acquisito una diversa accezione rispetto a quella originaria. In difetto di una legislazione al passo con le nuove esigenze sociali ed economiche, l'unica possibilità per il giudice di giungere alla risoluzione di casi concreti e al contempo eludere l'insidiosa possibilità che talune disposizioni, anche se non propriamente incostituzionali, risultino essere anacronistiche, è preservarne la loro operatività, attraverso un'interpretazione evolutiva e costituzionalmente orientata.

Keywords: interpretation; Constitution; contextualism; principles.

Summary: 1. The increase in inter-source conflict supported by the health emergency. – 2 The interpretation in social and economic current affairs. – 3. The judge's resolution of questions of doubtful constitutionality. – 4. The significance of interpretative activity in international jurisprudence. – 5. The prerogatives of judicial interpretation.

1. The increase in inter-source conflict supported by the health emergency.

The health emergency has considerably exacerbated existing problems, from economic and social to legal ones, which have raised new questions for legal interpreters.

Issues that had already been the subject of complex and frequently abstract debates in the past have suddenly and unexpectedly become central to the resolution of the concrete cases. These include the unresolved conflict between the sources and their hierarchy which, due to the partial and largely unimplemented constitutional reforms of recent decades, could not be resolved through systematic interpretative criteria. In today's more than ever evident uncertainty that the reforms have not been decisive and that the unsustainable and incessant legislative productivity has not infrequently been characterized by contradictions and illogicality, a fixed point are the principles and values expressed by the Constitutional Charter which, however, being devoid of behavioral indications aimed at preordaining obligations and prohibitions, cannot be subsumed into preordained schemes being, among other things, in a continuous dialectical relationship between them in which extemporaneous elements are inserted, determining their hierarchical priority.

Generally, it is the Constitution itself that establishes criteria for the greater relevance of principles and values; for example the restriction on movement for health reasons (Article 16 of the Constitution) implies that the protection of the health of the population or even its safety, prevails over freedom of movement insofar as it cannot be compromised by persons carrying contagious diseases. Nonetheless, freedom of movement, as it pertains to the relationship

of the person with the territory, is assisted by a reinforced reservation of the law in the event of its contraction as a result of the exercise of state sovereignty, so that restrictions can only be imposed in a general way and inescapably justified by reasons of health and security.

2. The interpretation in social and economic current affairs.

It is quite common for the hierarchical relationship between principles and values to be delineated on the basis of assumptions of social and economic contemporaneity, albeit in the wake of an interpretation in conformity with the Constitution, the capacity of which to adapt to the needs and prerogatives of society cannot be doubted. On the other hand the vagueness, generality and expositional simplicity of the constitutional provisions lend themselves to an interpretation bent to continuous changes in order to arrive at a specificity aimed at providing an exhaustive answer to the question posed, even if this is only possible through a prior verification of the actuality of the meaning of the expressions used, which over time may have acquired a different meaning from the original one.

Thus, the judge, who is obliged o respect the interpretation in conformity with the Constitution, finds himself having to choose between a substantive profile, taking into account social evolution, or a purely formal one. There is a tendency towards an evolutionary interpretation in cases where, a in the case of the environment we are dealing with matters that are still in the functional construction phase, so as to allow protection also for nascent rights.

However, it would be unjustified not to consider that at times the interpretation in conformity with the Constitution is in divergence with the living law to the point of, in some cases, undermining the relationship between constitutional legality and the prevailing jurisprudential indications. A criticality that inevitably reverberates on the economic system while exacerbating the conflict that has never been resolved between the Constitutional Court and the Court of Cassation, especially with regard to the ownership of the nomofilactic function legitimately claimed by the latter. As will be seen, this is a central issue, which, although more attenuated today than in the past, deserves to be addressed and resolved within a limited timeframe.

In addition, there is an evident increase in the demotivation to resort cross-examination due to the ever more frequent declarations of the Constitutional Court of manifest inadmissibility of questions of unconstitutionality submitted to it. Such decisions are openly taken on the assumption that the referring court instead of resolving a doubt of constitutionality is attempting to have question raised endorse a particular interpretation.

Ultimately what is criticised is that before the finding of unconstitutionality was made, no attempt was even made to the interpret the law in a way that could be constitutionally oriented.

Among the possible consequences is the certainly not minor one of the abuses of constitutionally compliant interpretations which is brought about precisely by the implemented closures of the Constitutional Court.

The concrete risk or rather more relevant risk is not the most feared one of

the reforms at the subsequent levels of judgement of decisions pronounced in clear divergence from the consolidated jurisprudential practice, since innovative interpretation based on the updated review of constitutional principles and values are aimed at overcoming a static condition that is ill-suited to the fluidity of a dynamic society. Rather there is the more insidious possibility that methodological contrapositions allow certain provisions, which if not strictly unconstitutional are evidently anachronistic, to maintain their operativeness. On the other hand, interpretation in conformity with the Constitution implies constant reference to the values and principles contained therein, but also to the fundamental rules and institutions of the state structural system without ever losing sight of the law times relationship.

Ignoring the evolution of society entails failing to recognise that constitutional provisions over time may have assumed, as frequently happens, a semantic valence different from the original one.

A circumstance that obliges the interpreter to a process of adjustment of all norms that have become of dubious constitutional legitimacy in order to recover their harmony with the historical context in which they are to be applied. It's clear that social, but also technical and linguistic changes by emptying the concepts that inspired the norms at the time of their promulgations of their meaning have given rise to new rights and legal situations deserving of protection of which the legislator could not be aware and to whose will, consequently, the interpreter cannot make exclusive reference. Today more than in the past the latter is required in addition to a more careful semantic investigation to take account of the changes that have taken place in order to be able to carry out an interpretation while also assessing the consequences that might reverberate on the related provisions.

Among the possible examples, it is worth mentioning the identifiability of damages from injury to legitimate interests, once excluded since it was recognised only for subjective interests on the basis of a literal restrictive interpretation of the phrase "just damage" as per article 2043 of the Civil Code. In the absence of a specific provision that directly contemplates the identifiability of damage due to injury to legitimate interest, there can be no doubt that the new although consolidated jurisprudential orientation has intervened in consideration of the renewed social political context in which the impunity of the public administration is no longer tolerated due to its unfairness.

3. The judge's resolution of questions of doubtful constitutionality.

The origins of the dispute between ordinary judges and the Constitutional Court which began operating in the spring of 1956, with the sole power to issue rulings either to uphold or reject questions of constitutionality submitted to it, date back to the time when the latter enucleated the innovative typology of interpretative rulings through which provisions deemed to be of dubious constitutionality are reinterpreted. This was a not insignificant leap to overcome the guaranteeist barrier that only required it to perform the interpretation of constitutional norms reserving that of all other laws to the

judge. Leaving aside here the important issue of a correct qualification and distinction between interpretative rulings of rejection and those of acceptance which have engaged scholars of the subject matter, it cannot be overlooked that the dispute in question has been characterised by various phases until the current season in which the broader operative spaces recognised to the common judge are inversely proportional to its abandonment in the face of doubts of constitutionality.

This is a very complex and delicate activity in which he is called upon to assess the concrete needs of society in view of its new values. But also to identify the correct semantic valence of words that in the past had a different one from the contemporary one. As can be seen, this is a composite function that must nevertheless be performed without incurring the abuse of the instrument by avoiding creative – interpretative excesses in the concrete implementation of the new values. There is no doubt that the current conditions of a greater relaxation of relations between the Constitutional Court and the common judges, or rather the Court of Cassation, can make the task easier for the interpreter – judge who is nonetheless burdened with the difficult task of interpreting in conformity with the Constitution without abusing the law while preserving delicate balance between the constitutional and legal order.

Adaptation of the Constitutional Charter to the needs of the community is certainly possible through an evolutionary interpretation that, however, presents alongside significant positive aspects, including first and foremost that of non proceeding to continuous revisions of the constitutional text while substantially updating it, problems that could lead to conditions of regression rather than development if the constitutional principles and values were interpreted predominantly, if not exclusively, in the light of the current context. A pitfall, that of contextualism, arguably greater than all the others, since a central role is assigned to extemporaneous phenomena, even extranormative ones, in the performance of the interpretative function. On closer inspection, this is an anti literalist position that recognises the meaning of the legal rule on the basis of criteria derived from the context. Therefore, an activity that is more than interpretative which being preordained on inductive methods of judicial reasoning could lead to an overordination of the judge's activity, legitimising the opinion of those who believe that the judge creates rather than merely interprets the law albeit in the appreciable but erroneous conviction that he is expressing the will and interests of citizens. A prerogative proper and non expropriatable to representative democracy.

4. The significance of interpretative activity in international jurisprudence.

In this cultural, even before the legal ferment, interpretative activity is increasingly playing a leading role in law also at the international level, due to the increased incidence and relevance of treaties. Among other things, globalization has brought rapid changes that the law must take into account in order to maintain the necessary connection with reality while being aware of the limitations posed by the complexity of the legislative production mechanism. The fight against regulatory obsolescence can only be

implemented through an interpretative method that leaves the legislative provision unchanged and updates it by giving it a more contemporary meaning. However, there is still no unambiguous definition or even detailed analysis of the theoretical assumptions of the concept of evolutionary interpretation. A lack of uniformity that has given rise to different modes of application of the same with which, in any event, it is possible to identify a basic model where there is always an external factor that determines the need for an evolutive interpretation and at the same time the referent object thereof, the original intention of the parties that could also be superseded if it's now deemed devoid of any factual relevance.

5. The prerogatives of judicial interpretation.

In the absence of legislation in step with the new social and economic needs, the only possibility is to access an evolutionary interpretation of the existing rules, while avoiding a legislative amendment. The latter eventuality is highly probable due to the fragile and not always perceptible distinction between the two activities is productive of *ex tunc* effects whereas amendment of the law has *ex nunc* validity as it is limited to the subsequent period of the amended provision.

The considerations made thus far should not lead one to believe that the evolutionary interpretation can be reduced to the extensive one, which unlike the former characterized by a dynamism resulting from external change is static and used to make the most accepted choice.

Not only; the breadth of the category of interpretation requires a more detailed qualification of legal interpretation in order to better understand its constitutional conformity starting from the assumption that insofar as it is directly functional to the application of the law to specific cases, it must combine the generality and abstractness of the regulatory text with the peculiar problems of the case to which the interpreter is called upon to provide an answer.

A process that must be carried out by moving from provisions that can legally qualify situations and therefore not limited to a reconnaissance function of the legislator's will but to its concrete application in compliance with the mandatory rules of conduct imposed by the legal system. Denying the possibility of a constitutional adaptation to social changes fearing that this might legitimise recourse to a creative jurisprudence harbinger of restrictions on fundamental freedoms, reserving exclusively to the legislator the task of updating the Constitution to the changing times rather than proceeding with an interpretation of the same in line with social transformation, means re-proposing outdated textualist theories characterised by the anachronistic search for the meaning of the expressions contained in the rule taking them back to the time of its promulgation.

In reality the real issue is to provide clear guidelines for the implementation of the interpretative process in order to prevent the updated provisions from being abstract and personalistic as well as lacking a balanced relationship with the purposes pursued by the legislator.

The priority assigned to literal interpretation must however be combined, especially with regard to rules of law dating back in time for which there is an inevitable disconnection with the historical – social context in which they are to be applied with an effective interpretative technique that is consistent with cultural, social and economic change, since only in this way can it be sensitive to the factual values of which society is the bearer.

Nonetheless, since the Provisions of the law in general came into force before the Constitution, it's well to give an account of the still non entirely resolved contrast as to the possibility of applying the interpretative mechanism of Art. 12 to constitutional provisions. A contrariety also endorsed by the deemed superfluousness of said interpretation given the indeterminate character of constitutional provisions with factual values, the expression of the historical social moment in which they are called upon to operate. This is all the more so if one considers that such indeterminateness is the result of their hierarchical prevalence and function of norms that are the bearers of values and principles that are the foundations of our society.

On the other hand, a different orientation is that of those, who tend to extend the applicability of Art. 12 of the "Provisions on the law in general" on the assumption that the latter has a general scope. And in any event the vagueness of the wording of the constitutional provision is not a hindrance since it is a characteristic common to all legal norms, including ordinary laws, which are characterized by the vagueness of the terms and linguistic expressions used.