A Short Lesson on Equality under the Italian Constitution

*Riccardo Guastini**

Abstract

The paper bears upon the double constitutional provision on equality, legal and social respectively, in the Italian legal system, mainly from the standpoint of the theory of legal interpretation. As to legal equality, five main subjects are discussed: (1) the addressee of the equality clause; (2) the question whether such a clause expresses a rule or a principle; (3) the Constitutional Court's interpretation that construes equality, understood as a principle, as a requirement of reasonableness of legislation; (4) the way in which equality works as a gap creating machine and the nature of axiological gaps; (5) how the equality clause is used to justify constitutional rule-adding decisions, i.e., decisions that introduce new rules into the legal system. As to social equality, the paper argues that the corresponding constitutional clause amounts to a political directive of equalization (addressed to the legislature), which justifies affirmative actions but is in conflict with legal equality.

Keywords: Equality, Legal and Social. Reasonableness of Legislation. Axiological Gaps. Rule-adding Constitutional Decisions. Equalization. Affirmative Actions.

0. I'm supposed to be a legal philosopher. So, maybe you expect from me some kind of philosophical insight into the concept and/or the conceptions of equality. If this is the case, you will be deceived. In my view, the concept as well as the conceptions of equality do not deserve much analytical effort.

On the one hand, the concept of equality, as far as I can see, is an elementary ("primitive", "atomic") concept, i.e., a concept that does not admit of further analysis, but in turn can be used in the logical analysis of other complex ("molecular") concepts – e.g., political equality, social equality, legal equality, and the like.

* Istituto Tarello per la Filosofia del diritto, Dipartimento di Giurisprudenza, Università degli Studi di Genova, via Balbi 30/18, 16126, Genova, guastini@unige.it.

ANALISI E DIRITTO 2/2023: 187 195
doi: 10.4454/analisiediritto.v23i2.882

Apart from the obvious conceptual differences between "equality" and "obligation" (e.g., "obligation" is a property while "equality" is a relation), equality in the realm of legal or political philosophy seems to have more or less the same logical status, as the concept of obligation in deontic language: in the sense that one can use "obligation" to define "prohibition" and "permission", as one can use "equality" to define inequality as well as sex-equality, wage-equality, and so on.

On the other hand, the different conceptions of equality can be easily identified by the following simple test. Given a sentence of the form "A is equal to B", one should ask – what are the criteria (in most cases normative criteria, indeed) of equality adopted or tacitly presupposed? For example: do A and B have the same social status? do or should they have the same legal rights? and so on. The answers to such a question reveal the different conceptions of equality at play.

But the subject of this speech is not philosophical – it is a look at the constitutional provision on equality in the Italian legal system, mainly from the standpoint of the theory of legal interpretation.

1. Article 3, paragraph 1, of the Italian Constitution reads: «All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, and personal or social condition».

Now, the first question to ask is – who is the addressee of this constitutional provision? I guess that the popular answer would be: the judiciary. Judges are under the obligation to apply the laws to all citizens and, in particular, they are forbidden to discriminate between citizens because of gender, race, religion, etc.

Nonetheless, this would be a naïve answer. Article 101, paragraph 2, of the same Constitution states that judges are subject to the law, i.e., they are under the obligation to apply the laws (namely parliamentary acts). Suppose a law ascribing a certain right to all citizens: "Every citizen has the right x". And suppose a judicial decision which does not apply this law to a particular citizen or class of citizens, i.e., denies a citizen or class of citizens the right in question. It is quite clear, I think, that such a decision would not directly violate the equality clause of the Constitution but infringes the law itself and therefore the judicial obligation to apply the law: hence, it infringes article 101, not article 3.

The obvious conclusion of this argument is that the equality clause is primarily addressed not to judges, but to lawgivers. (One should not forget that we are talking about a rigid constitution that may not be infringed by the legislature.)

Equality is a constitutional right ascribed to citizens against the lawgiver – namely, a second-order right, whose content is the (equal) distribution of legal rights.

At the same time, however, the equality clause is not completely meaningless regarding judicial application of the law. This is so, since, under this clause, judges are prohibited to introduce into the law – what they often do, in fact, by means

of the rhetoric argument called "distinguishing" – any distinction, any "implicit" exception, that is not expressly provided for by the law itself.

2. I have been speaking of a constitutional "provision" or "clause" and have so far carefully avoided using such words like "rule" and "principle". Nevertheless, it is interesting to address the question of whether the provision at stake expresses a rule or a principle.

I assume – in an almost Dworkinian mood – that rules and principles are provided with different logical forms in such a way that they behave differently in legal reasoning.

In particular, rules are indefeasible conditional sentences that connect some legal consequence (e.g., a sanction, the birth of a right or an obligation, etc.) to a class of cases, and they apply to all the cases stated in the antecedent. When a rule conflicts with another rule, one of the two is tacitly repealed or definitely invalid (on the basis of either the "lex posterior" or the "lex superior" rules as the case may be).

Principles, in turn, have no antecedent, hence no definite conditions of application. Moreover, any principle, de facto, is almost always in conflict with some other principle without therefore being invalid or repealed. This is the reason why the application of any principle almost always requires weighing or balancing. This amounts to say that every principle is defeasible, i.e., subject to implicit exceptions not identifiable ex ante, which depend precisely on the coexistence of other (conflicting) principles.

At a first glance the constitutional clause I am talking about looks like a rule or, better, a set of rules – "The legislature is forbidden to distinguish between citizens because of their sex", "The legislature is forbidden to distinguish between citizens because of their language", and so on. Nonetheless, jurists and judges regard it as a principle. Why? In my view, this is so for two independent but converging reasons.

In the first place, jurists and judges ascribe to this provision a special political or ethical value – they assume equality to be a characterizing feature of the legal system, a value that defines the very axiological identity of such a system. And, as far as I can see, this is precisely the very core of the juristic concept of "principle", regardless of the logical form of the legal sentences involved.

In the second place, the equality clause was actually treated as a principle – in the sense stipulated above – by the Constitutional Court.

In fact, since the Sixties of the last century, the Constitutional Court construes article 3.1. echoing the Aristotelian conception of equality – equal cases ought to be treated equally, different cases ought to be treated differently.

This construction changes the prohibition of certain specific discriminations (sex, race, language, and so on) into a completely generic prohibition – in fact, a prohibition that is almost devoid of any normative content due to the absence of any distinguishing criteria. At most, under such a construction, the Constitution only

requires "general" laws, i.e., laws formulated with the universal quantifier ("all"), which consequently apply to classes of cases, not to individual cases.

However, it is a matter of course that, in a sense, the murderer and the murdered, the plaintiff and the defendant, the owner and the non-owner, etc., cannot be legally treated exactly in the same way – that would make no sense. The law cannot fail to distinguish somehow cases from cases. But this is precisely the problem, not the solution.

The Court's construction changes the concept of equality into the concept of "reasonableness".

Which legislative distinctions are reasonable, and which are not? Which cases are equal to which others? Are rail transports and road transports workers equal or different from the point of view, say, of the age of retirement? Are small industries and big corporations equal or different as regards income tax? Are men and women equal or different with respect to night work?

Any answer to such questions is left entirely to the evaluations of the Court – the only judge of the reasonableness of a law is but the Constitutional Court itself.

3. Two relevant consequences of this construction must be stressed.

In the first place, under this construction, the equality clause results "open" in the following sense. The constitution does not forbid a definite set of discriminations (sex, language, religion, etc.) – it just forbids discriminating equal (assumedly equal) situations or cases in general. The list of forbidden discriminations provides just a set of examples – it specifies the prohibition of discrimination but does not exhaust it.

Any discrimination that does not look reasonable – i.e., justified by the "objective" diversity of the situations concerned – is prohibited, beyond those expressly mentioned criteria. In fact, an "open" (in this sense) antecedent is logically equivalent to no antecedent at all.

In the second place, the equality clause, understood in this way, is defeasible – those expressly forbidden discriminations (sex, race, language, etc.) are not strictly binding. In the sense that such prohibitions are subject to implicit exceptions that cannot be specified in advance, depending on the cases submitted to the constitutional judge.

In other words, it is not excluded that a law distinguishing (hence discriminating) according to sex, race, language, or religion is nevertheless in accordance with the Constitution – provided that the distinction is reasonable, i.e., "justified" in the eyes of the Court.

Summing up:

(a) on the one hand – open antecedent – it may happen that a law is unconstitutional although distinguishing between citizens for reasons other than those expressly enumerated by the equality clause (age, for example);

(b) on the other hand – defeasibility – it may happen that a law is not unconstitutional although distinguishing between citizens precisely for one of the expressly enumerated reasons (sex, for example).

It is true that the "personal condition" clause (the last clause mentioned in the text of article 3.1.) is all-encompassing and so allows us to maintain that the constitutional provision has an open antecedent, but there is no textual basis to maintain that the provision is also defeasible. The implicit exceptions (such that, e.g., in certain circumstances a distinction on the basis of sex is, despite everything, constitutionally justified) depend entirely on the value judgments endorsed by the constitutional judge.

The judge of reasonableness being the Constitutional Court, the mentioned construction of the equality clause results in a shift of normative powers from the (representative) legislature to the (non-representative) Court.

The principle of reasonableness requires, of course, that it be specified according to different circumstances. To specify a principle is to derive from it a definite rule – indefeasible and provided with a closed antecedent. Let me mention some examples.

Is the ban of night work for women justified, or does it amount to an unjustified discrimination (against male workers)? Is it justified to provide for a quota of female candidates on the electoral lists of municipal councils, or does it amount to an unjustified discrimination (of potential male candidates)? Is it justified to provide financial measures in favour of female entrepreneurship, or does it amount to an unjustified discrimination (against male entrepreneurs)?

It is important to understand that the principle of equality says nothing at all about night work, the composition of electoral lists, or corporate financing.

In order to make the comparison between the principle of equality and the rule (for example) on the electoral lists possible, one must derive from the principle an implicit (i.e., unexpressed) rule – a logically closed and indefeasible rule – which governs the same class of cases (namely, the composition of the electoral lists) of the rule whose constitutionality is under discussion. The same can be said for night work, business financing, and so on.

4. The principle of equality, understood in this way, is a powerful machine for creating axiological gaps. Generally speaking, an "axiological gap" consists not in the lack of a rule regulating the case at hand, but in the lack of a rule that should regulate the case differently from how it is actually regulated. A rule that does not exist in the legal system but should exist according to the subjective ethical-political preferences (axiological preferences therefore) of the judge.

A special case of axiological gap is the lack of a rule that should exist because it is required precisely by the principle of equality.

It happens that a case (I mean, a class of cases) is, in fact, governed by a certain rule – in such a way that no "proper" gap exists – but that rule does not meet the

requirements of the principle of equality. Let me give you a couple of imaginary examples.

(a) The law has generally granted a tax relief to businesses. In doing so, the law failed to distinguish two subclasses within the class of businesses – such as "large" and "small" companies, for example – which, because (according to the judge's opinion) they differ "substantially", require different regulations. In such a circumstance, the gap consists in the absence of a "differentiating" rule – a rule which should attach a different legal consequence to one or the other of the two subclasses of cases.

(b) The law has provided a certain pension treatment for bus drivers. In doing so, the legislature did not consider another class of workers, the streetcar drivers who, being (in the judge's opinion) "substantially" equal to the class of bus drivers, would require the same pension treatment. In such a case, the gap consists in the lack of an "equalizing" rule that should also grant streetcar drivers the same pension treatment.

In a sense, the two examples examined are axiologically equivalent, since in both cases the principle of equality (construed in the way I tried to clarify) is violated – the lawgiver has the constitutional double obligation to treat like cases alike, and to treat unlike cases differently. In both cases, therefore, a rule is missing – it is an omission of the lawgiver.

In the first example there is a lack of a "differentiating" rule, since different cases ought to be treated differently – the lawgiver did not take into consideration a "substantial" or "significant" difference between two classes of cases (large and small companies, respectively) and has established the same regulation for both, failing to distinguish between them.

In the second example, there is a lack of an "equalizing" rule, since equal cases ought to be treated in the same way – the lawgiver, in regulating a given class of cases (bus drivers), has failed to regulate in the same way another class of cases (streetcar drivers), considered by the judge to be "substantially" equal to the first, failing to connect the same legal consequence to this second class as well.

5. Axiological gaps are the very source of a special class of constitutional decisions – the so-called "rule-adding" decisions.

In normal cases, when a legislative provision submitted to constitutional review is held incompatible with the constitution and hence declared unconstitutional (invalid, null and void), the Court's decision has the systemic effect of expelling such a provision from the legal system. In this sense the Court, as Kelsen maintained, acts as a "negative legislator". A pre-existing provision is subtracted from the system.

Rule-adding decisions are quite different in contents and effect. In such decisions a legislative provision is declared unconstitutional "in the part in which it does not provide for" something (e.g., a right) that it ought to provide for in order

to be in accordance with the constitution.

Suppose (an imaginary example, once again, for the sake of simplicity) that a legislative rule ascribes a right to a given class of subjects, e.g., bus drivers, and that it omits ascribing the same right on a different class of subjects, e.g., streetcar drivers. Suppose moreover that, according to the opinion of the Constitutional Court, the two classes of subjects are equal and therefore deserve an equal treatment. The rule in question is unconstitutional for violating the principle of equality, as it fails to ascribe that same right to streetcar drivers, too. Hence, such a rule should be declared unconstitutional – subtracted from the legal system.

In such cases, however, the Court does not declare unconstitutional the rule at stake, which would have as a consequence the loss of the right in question for bus drivers. The Court makes an entirely different decision – it states that the rule in question is unconstitutional as it does not extend the same right to streetcar drivers as well.

It is easy to understand that this decision is not, properly speaking, a declaration of unconstitutionality, since the right of bus drivers is by no means cancelled by the Court – bus drivers retain the right at stake (this would not be the case if that rule would be declared unconstitutional). In fact, such decisions do not in any way affect the rule that, apparently, they declare unconstitutional, since they do not bear on the existing rule but rather, paradoxically, they bear on an "absent" rule – a rule definitely unexpressed, in fact non-existent to this day.

What the Court actually does in this way is introducing into the legal system a new, apocryphal, legislative rule, which ascribes the right in question also to streetcar drivers. The law stated: (R1) "If bus drivers, then right x"; the Court adds: (R2) "If streetcar drivers, then right x".

In such cases the Court turns into a "positive legislator". And that is how the equality argument often works in the Court's reasoning.

6. Article 3, paragraph 2, of the Italian Constitution provides: «The Republic has the duty to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country».

Clearly, the Constitution speaks here of social, de facto, equality, which conceptually has nothing to do with legal equality provided for in the first paragraph of the same article. Legal and social equality are not two species of the same genus – they belong to different conceptions (normative conceptions, indeed) of equality.

The first paragraph of article 3 makes citizens equal in their rights. The second paragraph assumes that citizens are not (or states, as it were, that they are not) as far as social facts are concerned. By virtue of the first paragraph, citizens are legally equal, *de jure*. The second paragraph recommends (to the lawgiver, and more generally to the public authorities) to make them equal not legally, but socially, since they are not socially equal.

It is, in short, a directive of legal policy, according to which citizens are to be made (by legal means) socially equal: the social, extra-legal, difference between them should be not preserved, but removed by the law.

If the principle of legal equality requires the lawgiver to make abstraction from differences (namely from certain named differences: gender, race, etc.), the political directive to equalize recommends precisely to take into account the differences that run between people, by reason of their belonging to different social (or ethnic, or linguistic, etc.) groups, in order to remove them, or rather in order to remove the unfavourable consequences that result from them. In short, the equalizing directive requires the legislator to take into account the disadvantages weighing on different social groups. And equalization comes precisely by the elimination (or at least the reduction), if not of social differences, then at least of the unfavourable consequences resulting from such differences. In short, the provision at stake draws a legislative program, recommending policies of social equalization.

If the legislature fails to follow this directive, we have, once more, an omission by the legislature, but this omission is entirely different from the kind of omission that we encountered before. In a different context we encountered omissions *in legislating*, omissions of a provision within a law. Here we have lack of laws – omissions *to legislate*. In a sense, omissions of this kind, too, amount to gaps in ordinary legislation, gaps in the legal system, which violate the constitution. The difference lies in this: omissions of the first kind (lack of a provision within a law) may be somehow "sanctioned" by the Court by means of rule-adding decisions; while omissions of the second kind may not – there is no law here on which the Court can rule, and on the other hand the Court may not legislate on its own.

7. It seems obvious that the means to equalize (socially) those who are not (socially) equal or disadvantaged by legal instruments is to grant legal advantages to the socially disadvantaged, i.e., to distribute rights unequally.

In other words, a typical legal instrument to eliminate extra-legal differences is, paradoxically, the adoption of differentiated legal regulations – *differentiating* rules. The goal is social equality (broadly understood); the means is, as Karl Marx claimed, "unequal laws", i.e., legal inequality. For example, female quotas in hiring and electoral lists; reservations for the disabled in job assignment; reservations for the disabled in career advancement; quotas for ethnic minorities in schools or universities; etc. – in other words, "affirmative actions", that some people believe amount to reverse discrimination (for example, a law mandating quotas for women would amount to discrimination against males, a law favouring the disabled would amount to discrimination against the nondisabled, etc.).

Affirmative actions implement paragraph 2 of article 3 but are in conflict with paragraph 1. The principle of legal equality requires the equal distribution of rights and excludes any form of discrimination; the principle of social equalization, on the

contrary, admits of "positive" discrimination, the unequal distribution of rights, in order to remove social inequalities.

In these circumstances, the Constitutional Court can do nothing but a "balance" between the two principles – equality and equalization, respectively.

The balancing (or weighing) consists in establishing between the two conflicting principles – which have the same rank in the formal hierarchy of legal sources (both are constitutional provisions) – an axiological hierarchy, deciding that in that given case a principle prevails over (has more value than) the other. However, these hierarchies of values, constructed by the constitutional judge, are unstable. Sometimes one principle prevails, sometimes the other, depending on the case at hand.

For example, in the case of measures in favour of female entrepreneurship, the Court considered the principle of equalization prevailing. The same happened in the case of more favourable treatment for workers within the labour process. On the contrary, in the case of night work for women and – before the double constitutional amendment of 2001 and 2003 – in that of the quotas of female candidates on the electoral lists of local councils, the Court considered that the principle of equality takes precedence (arguing that no discrimination is permissible, in the case of quotas, since it would affect a "fundamental right", viz. the right to be elected to representative bodies).

In most cases, the Court uses paragraph 2 of article 3 as a criterion for assessing the reasonableness of an exception to paragraph 1 (i.e., to equality of rights). An exception – the ascription of unequal rights – is justified when, considering the actual circumstances, it is aimed at removing social inequalities. For example, a tax law provides that the taxpayer, in order to challenge a tax injunction before a judge, should first pay the required tax. The rule is egalitarian: it applies equally to everyone, haves and have-nots. But, in this way, it prevents the have-nots from exercising their right to sue. The Court deemed it unreasonable to treat the two classes of subjects in the same way in the light of paragraph 2 of article 3.

Edizioni ETS
Palazzo Roncioni - Lungarno Mediceo, 16, I-56127 Pisa
info@edizioniets.com - www.edizioniets.com
Finito di stampare nel mese di dicembre 2023