Labour-Market Outsiders, Italian Justices and the Right to Social Assistance

Luca Martino Levi*

Constitutional right to social assistance in Italy – Lack of a universally-accessible, albeit conditional and means-tested, scheme against absolute poverty – Separation of powers – Textualism – Framers' original understanding – Living constitutionalism and courts' relationship with public opinion – Italian, EU and international constraints on citizenship and duration-of-residence requirements – Fiscal sustainability

Foreword

From Carneades' shipwrecked sailor, who saves himself by shoving someone else from a plank,[1] to H.L.A. Hart's park where no vehicles are allowed,[2] fictional cases have allowed generations of legal scholars to show the particulars and the practical implications of their theories. Looking back at this tradition, this paper discusses an imaginary case brought by a destitute person against the Italian Republic, alleging that her constitutional right to social assistance has been violated.

The recourse to fiction is in part inevitable, for only rarely have indigents had sufficient resources to bring a case to the attention of the Italian Constitutional Court.

*S.J.D. candidate, Harvard Law School. For comments on previous drafts and illuminating conversations on the topic, I am grateful to Jennifer Allison, Giuliano Amato, Marta Cartabia, Netta Barak-Corren, Sabino Cassese, Maurizio Ferrera, Il-Young Jung, Duncan Kennedy, Maria Francesca Lanzio, Samuel Moyn, Mark Tushnet, Marleen Wessel, the participants in the 2016 Annual Conference of the Law and Society Association (2-5 June, New Orleans), the participants in the 2016 Annual Conference of the International Society of Public Law (17-19 June, Berlin), the anonymous reviewers and the editors of *EuConst*. All opinions and mistakes are exclusively mine. Except where otherwise indicated in footnotes, all names, characters and circumstances described in this paper are fictitious. All foreign-languages sources have been translated into English.

[1] Lactantius, *Divine Institutes* (Liverpool University Press 2003) Vol. 16-18, p. 313-319.

[2] H. L. A. Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* (1958) p. 593 at p. 607.

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When they have, their pleas have usually been narrowly framed.[3] In addition, the fictional scenario which I imagine here pressures the law along lines which are more closely related to the main question which I intend to answer: is the lack of a universal means-tested scheme against absolute poverty unconstitutional? If this is the case, which branch of government should amend the flaw?

Instead of discussing the case from my own viewpoint, I adopt the perspective of one of the Justices on the bench – a choice reinforced by the use of the first person throughout the piece. While unorthodox in legal academia, this has also been the choice of Lon Fuller[4] and Duncan Kennedy[5] when they dealt with adjudication. The advantage of this narrative expedient is to bring the reader closer to the stage, and to let her look at judicial decision-making through the protagonists' eyes.

Unlike Fuller and Kennedy, however, I combine the use of the judge's point of view with a 'bad-man' characterisation.[6] My judge, in other words, is an anti-hero. To be sure, judges like to think of themselves as 'good judge[s]'.[7] But, however implausible or subliminal, the bad-man characterisation allows me to achieve two results: first, it creates a narrative distance between my character and me – a distance which I use to denounce the judge's manipulating approach to the law as both professionally censurable and ultimately detrimental to labour-market outsiders;[8] second – and here I am looking at Oliver Wendell Holmes – a bad-man perspective allows for a test of the degree of resilience and manipulability of legal institutions.

The bricks of this paper are Italian, but the building may be of interest to the foreign observer. Some of the dynamics of constitutional adjudication discussed in the article are common to other jurisdictions. In addition, occasional reference is made throughout the piece to foreign sources. Finally, the study of Italian exceptionalism in matters of social assistance, as compared with other European countries,[9] can help scholars better understand the role of constitutionalised social rights, if any, in the historical evolution of welfare regimes.

[3] *See* n. 96 *infra*. *See also* L.M. Levi, 'Judicial Enforcement of the Right to Social Assistance. Constitutional Courts as Champions of People in Need?' (unpublished paper written in satisfaction of the LL.M. writing requirement, Harvard Law School, academic year 2014-15) p. 37.

[4] L. Fuller, 'The Case of the Speluncean Explorers', 62 *Harvard Law Review* (1949) p. 616.

[5] D. Kennedy, 'Freedom and Constraint in Adjudication', 36 *Journal of Legal Education* (1986) p. 518. *Cf. also* D. Kennedy, 'A Phenomenology of "Deference" in Contemporary Legal Thought' (forthcoming 2017), where the author discusses a fictional social-rights constitutional case to address issues of separation of powers.

[6] O. W. Holmes, 'The Path of the Law', 10 *Harvard Law Review* (1897) p. 457 at p. 459.

[7] R. A. Posner, *How Judges Think* (Harvard University Press 2008) p. 60.

[8] *Cf.* R. Delgado, 'The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?', 22 *Harvard Civil Rights and Civil Liberties Law Review* (1987) p. 301 at p. 315 (questioning the helpfulness of informal decision-making from the perspective of minorities).

[9] *See* E. Barberis *et al.*, 'Social Assistance Policy Models in Europe: A Comparative Perspective', in Y. Kazepov (ed.), *Rescaling Social Policies: Towards Multilevel Governance in Europe*

This article is organised into an Introduction, which briefly illustrates the case to be discussed, and three main parts. The first part discusses the choice of rejecting the challenge as procedurally flawed, while the second part assesses the grounds for rejecting the challenge on the merits. The final part discusses the possibility that the Court endorses the challenge and issues a mandate to the Government.

Introduction

Sometimes, on evenings like this, when most of the employees have left, and the *Palazzo della Consulta* remains dark and silent, I like to have a solitary walk across the empty corridors. In pensive and slow steps I wander in the dormant rooms,[10] hands folded behind my back. Occasionally, I indulge in the view through one of the tall windows, and I let my gaze fly above the roofs of Rome.

Today, however, I force myself to remain in my office. I strive to concentrate on the briefs, but the alluring embrace of my large leather armchair conspires against my efforts and stimulates my reveries. Tomorrow's case will not be an easy one.

My name is B.J., and I am one of the 15 Justices sitting on the Italian Constitutional Court. We will meet tomorrow for a public hearing, and the President chose me as rapporteur in one of the cases to be discussed.[11] These are the facts. A certain Federica Carmini, an unemployed young woman with a two-year-old daughter, recently applied for the only maternity benefit available to her, the so-called *Assegno di Maternità del Comune*.[12] Given the limited length (five months) and amount of the benefit (€338 per month) – inadequate, if

(Ashgate Publishing 2010) p. 177 at p. 180-187; C. de Neubourg *et al.*, 'Social Safety Nets and Targeted Social Assistance: Lessons from the European Experience' (Social Protection and Labor Discussion Paper No. 0718, The World Bank 2007) at p. 15-16, 24; C. Saraceno, 'Concepts and Practices of Social Citizenship in Europe: the Case of Poverty and Income Support for the Poor', in *United in Diversity? Comparing Social Models in Europe and America* (Oxford University Press 2010) p. 163.

[10] F. Petrarca, 'Solo et Pensoso', in *Canzoniere. Rerum Vulgarium Fragmenta* (Einaudi 2005) p. 189.

[11] The role of rapporteur is a powerful one, for it allows the Justice to orient the debate and influence the final outcome of the case. For a critical reflection upon the risk that the rapporteur overshadows the other Justices, *see* E. Rossi, 'Relatore, Redattore e Collegio nel Processo Costituzionale', in P. Costanzo (ed.), *L'Organizzazione e il Funzionamento della Corte Costituzionale* (Giappichelli 1996) p. 338 at p. 347, 355.

[12] Art. 74, D.Lgs. 26 marzo 2001, n. 151. The benefit was originally introduced by Art. 66, L. 23 dicembre 1998, n. 448. The other nationwide maternity benefit, the *Assegno di Maternità dello Stato*, is available only to mothers who have worked and paid payroll taxes for at least three months during the nine months preceding pregnancy (Art. 75, D.Lgs. 26 marzo 2001, n. 151). The two forms of maternity benefit, one granted by the State, the other by the municipalities, have different eligibility requirements and cannot be cumulated.

compared with the cost of basic necessities in the city where she dwells[13] – Ms Carmini soon ran out of money. She fortuitously found shelter in a facility managed by a charitable organisation. There, Ms Carmini was able to secure pro bono legal assistance from Ms Leire Pancrazio, and sued the State.

Ms Pancrazio argued that the State had failed fully to implement the 'right to maintenance and social assistance', which Article 38 of the Italian Constitution grants to 'every citizen unable to work and devoid of the means which are necessary to live'. According to Ms Pancrazio, this provision mandates the Republic to enact a universally accessible (albeit need-based and conditional) scheme against absolute poverty, that is, a scheme to the use of which any permanent resident should be entitled, provided that she finds herself in a condition of extreme need which she cannot overcome on her own.

The promises of the Constitution, however, remained on paper. In place of a universal measure against absolute poverty, an incoherent mass of sectorial social assistance benefits has been introduced since the late 1960s.[14] In a welfare system already marked by a high level of fragmentation and inequality – legacy of workers' friendly societies,[15] fascist corporatism[16] and

[13] For example, for the year 2015 the poverty line for a single adult living with a child in a large northern Italian city was set at €984,64 per month: <www.istat.it/it/prodotti/contenuti-interattivi/calcolatori/soglia-di-poverta>, visited 23 December 2016.

[14] The first nationwide social assistance scheme – the *Pensione Sociale* – was introduced in the late 1960s, and benefited people over the age of 65 (Art. 26, L. 30 aprile 1969, n. 153) (now replaced by the *Assegno Sociale*, introduced by Art. 3(6), L. 8 agosto 1995, n. 335). Two other schemes, the *Pensione di Inabilità* and the *Assegno Mensile per l'Invalidità Civile*, soon followed, in favour of people with disabilities (Arts. 12 and 13, L. 30 marzo 1971, n. 118). While these innovations represented a significant step forward, poverty as such – i.e., devoid of additional qualifications – remained for the most part extraneous to public protection. In the late 1990s, however, the first Prodi Government tried to change such a state of affairs. Two specific benefits were introduced to tackle the most pressing instances of indigence: a maternity benefit (*see* n. 13 *supra*) and a benefit for families with three or more children (Art. 65, L. 23 dicembre 1998, n. 448). In addition, and more importantly, a general scheme against absolute poverty (*Reddito Minimo di Inserimento*) was introduced on an experimental basis in 39 municipalities (Art. 59.47-8, L. 27 dicembre 1997, n. 449). The second Berlusconi Government, however, discontinued the RMI project altogether: *see* S. Sacchi and F. Bastagli, 'Italy—Striving Uphill but Stopping Halfway. The Troubled Journey of the Experimental Minimum Insertion Income', in M. Ferrera (ed.), *Welfare State Reform in Southern Europe. Fighting Poverty and Social Exclusion in Italy, Spain, Portugal and Greece* (Routledge 2005) p. 84 at p. 109-111. For an overview of existing social assistance benefits, *see* M. Ferrera, *Le Politiche Sociali: l'Italia in Prospettiva Comparata* (Il Mulino 2006) p. 238-243; M. Persiani, *Diritto della Previdenza Sociale* (Cedam 2014) p. 380-398.

[15] Persiani, *supra* n. 14, p. 8 (claiming that the fragmentation of 'friendly societies [...] left, so to speak, an indelible mark' on Italian welfare).

[16] M. Ferrera *et al.*, *Alle Radici del Welfare all'Italiana. Origini e Futuro di un Modello Sociale Squilibrato* (Marsilio 2012) p. 52 (describing fascist corporatism as 'characterised by a systematic inequality of treatment' between 'occupational groups, and even [between] particular [sub]groups').

post-war clientelism[17] – these selective social assistance programs had the effect of perpetuating the disparities between categories of needy people.

More specifically, Ms Pancrazio, and the trial judge who endorsed her claims and raised the question before the Constitutional Court, put forward four distinct challenges, with the hope that at least one would make its way through the strict standing requirements.[18] The following norms were challenged: (i) the statutory rule that limits the *duration* of the maternity benefit to a maximum of five months, thus failing to guarantee a continuous flow of income for the entire duration of involuntary indigence;[19] (ii) the statutory rules that set the *amount* of the maternity benefit at a nationwide flat-rate level, failing to take account of the specific family situation, actual needs, and place of residence of the beneficiary;[20] (iii) the statutory rule which links unemployment insurance (*Nuova prestazione di Assicurazione Sociale per l'Impiego*, *NASpI*) to a certain status-related condition, namely previous employment, thus unreasonably discriminating within the group of indigent people;[21] and, finally, (iv) the entire corpus of Italian social assistance legislation,[22] for failing to establish a general, means-tested scheme against absolute poverty.

In all cases, the constitutional rules allegedly violated are either Article 38 (right to social assistance[23]), Article 3 (equal dignity, factual and formal equality, actual freedom, full development of the human person[24]) or both. In addition,

[17] G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press 1990) p. 39 at p. 60 (arguing that the 'welfare clientelism' pursued by Christian-Democratic administrations was conducive to a 'myriad of status-differentiated social insurance schemes').

[18] *See* text between n. 27 and n. 50 *infra*.

[19] Art. 74, D.Lgs. 26 marzo 2001, n. 151, for granting 'a cheque amounting to 2.5ml lire' instead of 'a monthly cheque, to be issued until the involuntary condition of absolute poverty no longer persists'.

[20] *Idem*, Art. 74(7).

[21] Art. 3(1), letters (b) and (c), D.Lgs. 4 marzo 2015, n. 22. The 2015 reform relaxed the eligibility requirements: to get unemployment insurance, it is now sufficient to have paid contributions for at least 13 weeks over the previous four years, and to have worked for at least 30 days over the year preceding unemployment. While unemployment insurance is usually not regarded as a form of 'social assistance', it often functions as an instrument that allows the recipient to escape absolute poverty. Indeed, the 2015 relaxation of the contributory and working requirements signals that the 'solidarity dimension' of the benefit is prevailing over its 'insurance dimension'.

[22] *See* n. 14 *supra*.

[23] Art. 3 of the Italian Constitution reads as follows: 'All citizens have equal social dignity and are equal before the law, with no distinction on the basis of gender, race, language, religion, political opinions, personal and social conditions. It is the task of the Republic to remove the obstacles of an economic or social nature that, limiting in practice citizens' freedom and equality, hamper the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the Country'.

[24] Art. 38, para. 1 of the Italian Constitution reads as follows: 'Every citizen unable to work and devoid of the means that are necessary to live has a right to maintenance and social assistance'. Para. 2

Ms Pancrazio infers from these and other clauses of the Constitution, as well as from the works of the Constitutional Assembly, a general commitment to the principle of universality in the provision of social services.

I am concerned about Ms Pancrazio's performance at tomorrow's hearing.[25] I've always known her as the type of person who does things in unconventional ways. Her eloquence is inspiring; her line of thought clear and logical. I know I will have to work hard to refute her points. It is true that the decisive forum will not be the hearing per se, but the discussion which my colleagues and I will have behind closed doors soon afterwards. But the more persuasive Ms Pancrazio is tomorrow, the harder it will be for me to repair the damage.

This evening I want to prepare a few strategies to deal with the case.[26] And since I know I can count on your silence, my friend, I will reflect out loud.

Rejecting the challenge as procedurally flawed

The Court can decide the case in several ways, which can be clustered into three broad groups. Specifically, the Court can: (i) declare the case inadmissible on procedural grounds; (ii) hear the case, but reject the constitutional challenge; or, finally, (iii) hear the case and accept part or all of the challenges raised by Ms Pancrazio.

The first option is to declare the case inadmissible on procedural grounds. This is my primary preference: by denying the appeal altogether, we leave the legal framework (almost) unaltered, while simultaneously sparing the Court the critique of public opinion.[27] Unlike our American peers, however, Italian Justices have no discretion over the acceptance of cases. As a general rule, the Italian Constitutional Court must accept and hear *all* cases, except in cases of procedural violations. But what exactly counts as a procedural flaw? The law says that the plaintiff's failure to specify '*the* rule of law [...] flawed by unconstitutionality' is a legitimate ground to declare a case inadmissible [my emphasis].[28]

reads: 'In case of accident, illness, disability and old age, involuntary unemployment, workers have a right that adequate means for their needs are devised and guaranteed').

[25] I am presupposing that the plaintiff opted to participate in the hearings in front of the Constitutional Court. *Cf.* U. Spagnoli, 'Appunti di un Giudice Costituzionale', in Costanzo (ed.), *supra* n. 11, p. 26 at p. 27 (claiming that the active participation of the parties to the constitutional proceedings enriched the Justices' discussion).

[26] A 'bad' judge is not concerned about how to advance justice, but about how to 'deal with' the case: *cf.* S. Cassese, *Dentro la Corte. Dario di un Giudice Costituzionale* (Il Mulino 2015) p. 88; G. Zagrebelsky, *Principî e Voti. La Corte Costituzionale e la Politica* (Einaudi 2005) p. 78.

[27] In the taxonomy put forward by Cass Sunstein, our imaginary judge would probably fall within the category of the 'Mutes', surrounded by judges who prefer – like him – 'to say nothing at all': C. Sunstein, *Constitutional Personae* (Oxford University Press 2015) p. 18-24.

[28] Art. 23, L. 11 marzo 1953, n. 87.

Perhaps induced by the definite article ('the'), the Court has interpreted this rule as requiring that the challenge is addressed against a specific flaw in a specific rule of law.[29]

The fourth of Ms Pancrazio's challenges seems particularly vulnerable to this procedural requirement.[30] That challenge is not addressed to a specific rule of law but, rather, to the Italian social assistance legislation as a whole. To be sure, Ms Pancrazio was in part compelled to formulate this last claim of hers in generic terms, because the failure to introduce a universal means-tested scheme against poverty can be hardly attributed to any particular statute or article. In addition, if it is legitimate to challenge a single rule of law in front of the Court, *a fortiori* there must be a procedurally-permissible way to scrutinise a wider and more severe constitutional violation. But, however logical this argument, the Court is bound by its rules of procedure. If the fourth of Ms Pancrazio's claims is to stand, then, one of these two options must be followed: either the Court overturns its restrictive reading of the rules of procedure, thus making general challenges admissible by way of interpretation; or, alternatively, the Court could call into question the reasonableness of its procedural rules by raising a constitutional challenge to itself.[31] Both solutions, however, would involve the Court recanting its previous approach to standing requirements. Some of the Justices could perceive such a shift as a potential source of embarrassment, and would therefore be hesitant to take either of these two paths.

The traditional restrictive approach to standing requirements, however, is surrounded by controversies. Support for the admissibility thesis, for example, can be found in the post-war writings of the Italian jurist (and soon-to-be Justice) Vezio Crisafulli. In his seminal 1952 book on constitutional rules and principles, in particular, Crisafulli argued that, *as a rule*, only government actions could be challenged in courts. But, just after making this general claim, Crisafulli conceded that, in 'very rare'[32] cases, legislative inertia could be challenged, too. In order to bring omissions to the attention of the Court, Crisafulli continued, it would be sufficient to address the challenge to existing statutes, as long as they impinge on

[29] *See* M. Bellocci and T. Giovannetti, 'Il Quadro delle Tipologie Decisorie nelle Pronunce della Corte Costituzionale' (conference paper, June 11, 2010, Rome) para. 1(2), <www.cortecostituzionale.it/documenti/convegni_seminari/STU%20219_Tipologia_decisioni.pdf>, visited 23 December 2016.

[30] Point (iv) above: *see* text to n. 22 *supra.*

[31] The challenge would be addressed against Art. 23, L. 11 marzo 1953, n. 87. *Cf.* Corte cost., ord. 5 aprile 1960, n. 22 (arguing that it would be paradoxical if 'this very Court [...] were bound to enforce unconstitutional laws', and that the only way to avoid this paradox is to allow the Court to raise constitutional challenges in front of itself); M. Belletti, 'Il Giudizio di Legittimità Costituzionale sulle Leggi e gli Atti con Forza di Legge', in L. Mezzetti *et al.*, *La Giustizia Costituzionale* (Cedam 2007) p. 320 at p. 421.

[32] V. Crisafulli, *La Costituzione e le Sue Disposizioni di Principio* (Giuffré 1952) p. 82.

the same policy area as the alleged omission.[33] Clearly, Crisafulli considered this strategy to be procedurally permissible, or he would not have suggested it. Crisafulli's remarks, however, remained unheeded, as the Court gradually embraced a restrictive stance that excludes the admissibility of challenges raised against omissions or bundles of statutes.[34] By exploiting this tradition, then, I can try to defeat on procedural grounds the fourth and most ambitious of Ms Pancrazio's claims.

There remain three other challenges, which attack the duration, amount, and eligibility requirements of existing benefits. The precedents of the Court on standing requirements seem to offer some material to neutralise these challenges without even examining the merits. Arguing in terms of separation of powers, the Court has frequently felt legitimised to declare a case inadmissible whenever some suggestion of legislative discretion is at stake.[35] Yet, the power of drawing the line between legislative discretion and constitutional boundaries is a delicate one: as such, the Court should not engage in this sort of enquiry hastily, during the preliminary check of admissibility, but scrupulously, during the discussion of the merits. Despite this powerful objection, however, the Court has shown over time a certain propensity to remain silent[36]: this consolidated practice will help me achieve my conservative ends.

I can see from your 'frowning brows'[37] that you are sceptical of my ability to convince my colleagues to refuse to hear the case. You argue that more than 60 per cent of Italian residents now favour the introduction of a general social assistance scheme against poverty.[38] My colleagues and I, you say, will eventually bend to social expectations and will declare the case procedurally admissible, because – and here you quote US Justice Harry Blackmun – 'a Court's consciousness is necessarily the product of prevailing public opinion'.[39] These observations of

[33] *Idem*, p. 49 ('[T]he specific sanction of invalidation can sometimes be achieved, indirectly, even in the hypothesis of omissive violations, by challenging statutes enacted in different but connected areas') and p. 81-83 (in some cases of legislative inertia, the parties 'will be able to challenge the constitutionality of *the old laws*, [...] thus indirectly obliging the legislative organs to break their inertia').

[34] *See* Bellocci and Giovannetti, *supra* n. 29, para. 1(2).

[35] *Ibid.*

[36] Sometimes the Court was motivated by the desire to avoid political backlash. On other occasions, it resisted politicians' attempts to use the Court to resolve controversial questions. *See generally* Cassese, *supra* n. 26, p. 31, 42, 95; Zagrebelsky, *supra* n. 26, p. 77; L. Carlassare, 'Le Decisioni d'Inammissibilità e di Manifesta Infondatezza della Corte Costituzionale', 109 *For. It.* (1986) p. 293 at p. 303.

[37] L. N. Tolstoy, 'Childhood', in *Childhood, Boyhood, Youth* (Penguin Books 1964) p. 23.

[38] N. Ferrigni, 'Il Reddito di Cittadinanza: Una Scelta Consapevole' (2005), <nicolaferrigni.it/wp/wp-content/uploads/2015/06/Studio-Reddito-di-cittadinanza-def1.pdf>, visited 23 December 2016.

[39] L. Greenhouse, *Becoming Justice Blackmun* (Times Books 2005) p. 31. *See also*, *e.g.*, M. Fiorillo, 'Corte Costituzionale e Opinione Pubblica', in V. Tondi della Mura *et al.* (eds.), *Corte Costituzionale*

yours are generally correct, and I have no reason to see this case as an exception. Your prediction, however, is based on imprecise assumptions. First, while most Italians do care about the Government's social policies, cash benefits for the poor form a subset of policies that receives far less attention than, say, those impinging on old-age pensions. Second, among major Italian institutions, the Court is the one that attracts less media coverage, hence less attention on the part of the general public.[40] Lastly, opinion polls show that one out of two Italians is sceptical about the *feasibility* of introducing a general social assistance scheme[41]: we like to dream of an utopian society without poverty, but our daily attitude towards political institutions resembles a sort of fatalist indolence.[42] For these reasons, I do not expect any particular reaction from the public if the right to subsistence remains unenforced.

Another solid ground for a declaration of inadmissibility would be a federalist argument. I can pretend to believe, in particular, that the plaintiff mistakenly sued the national, rather than the regional, Government. To be sure, the text of the Constitution, as amended in 2001,[43] is not clear about the allocation of legislative power on matters of social assistance.[44] On the one hand, social assistance is not mentioned in the enumerated prerogatives of the State,[45] suggesting that these policies fall within the residual jurisdiction of the *Regioni*.[46] On the other hand, a general clause entitles the State to 'determine the essential levels' of social security across the country.[47] If I want to make my point persuasive, then, I'll have to argue

e Processi di Decisione Politica (Giappichelli 2005) p. 90 at pp. 125-49. *Cf. also* Cassese, *supra* n. 26, p. 110; E. Cheli, *Il Giudice delle Leggi: la Corte Costituzionale nella Dinamica dei Poteri* (Il Mulino 1996) p. 34-35 (contending that the need of self-legitimation in front of the general public was particularly strong during the first 15 years of the Court's activity, i.e. from the late 1950s to the early 1970s).

[40] *See generally* Cassese, *supra* n. 26, p. 24. *But see*, Fiorillo, *supra* n. 39, p. 126-127.

[41] Istituto Ixé, Poll for Agorà Rai3 (15 May 2015), <sondaggibidimedia.com/wp-content/uploads/2015/05/CFB8vUcWoAAIrSZ.jpg>, visited 23 December 2016.

[42] *Cf.* C. Rosselli, 'Socialismo Liberale', in *Opere Scelte di Carlo Rosselli* (Einaudi 1973) p. 457-462 (describing the attitude of the average Italian at the time of the advent of fascism as a combination of 'petit bourgeois idealism' and 'moral laziness', 'facility of enthusiasm' and 'renunciation of political fight').

[43] *Cf.* Sacchi and Bastagli, *supra* n. 14, p. 90 (criticising the 2001 reform for depriving the national government of the co-ordination powers that it had acquired shortly before, with the framework law of Nov. 8, 2000, n. 328: *see* n. 123 *infra*).

[44] *See* De Siervo, 'Assistenza e Beneficienza Pubblica', 1 *Digesto delle Discipline Pubblicistiche* (1987) p. 450 (criticising the rules in question as characterised by 'archaic and heterogeneous expressions', which leave to the reader 'an ample interpretative leeway').

[45] Art. 117(4) of the Italian Constitution.

[46] *See*, *e.g.*, L. Violini, 'Art. 38', in R. Bifulco *et al.* (eds.), 1 *Commentario alla Costituzione* (Utet Giuridica 2006) p. 775 at p. 789.

[47] Art. 117(2) letter (m) of the Italian Constitution.

against a broad reading of the essential-levels clause. In particular, I could claim that the national Government is *allowed* to legislate, but is not *compelled* to do so. In addition, the State is only empowered to 'determine' the essential levels of social security, a verb which seems to allude to a purely 'setting-of-the-levels' activity, one which must necessarily be integrated by regional legislation.

Ms Pancrazio could respond by invoking a 2010 decision, whereby the Court upheld a national statute granting a pre-paid credit card to qualified indigents.[48] In that case, not only did the Court recognise the national Government's power to grant a social assistance benefit directly, but it also claimed that the economic crisis was so serious that the direct provision of the benefit was 'unavoidable' (*sic*). Thus, the Court hinted at the possibility that the State had a constitutional *obligation* to guarantee subsistence uniformly across the country.[49] In order to defuse the force of this precedent, I will have to distinguish it from the case before us. In particular, I can emphasise that, in 2010, the Court allowed the national statute to stand by insisting that the economic juncture was 'exceptionally negative'. Nothing is said in that decision about the legitimation, not to say the obligation, of the State to act during less 'exceptional' times.

In order to build an even larger consensus around the choice of declaring the case inadmissible, I can attract other colleagues of mine with the promise of including an admonition in the decision. The Court, in other words, can dismiss the case on procedural grounds, but at the same time warn the legislature that its inaction will not be tolerated for long. Once I secure the support of a sufficient number of colleagues over this choice, I will then be able to draft the admonition in a sufficiently loose formulation, in order to leave an ample margin of discretion to the legislature over the amount, distribution and timing of the benefit. As American constitutional history teaches, even an innocent-sounding expression like 'with all deliberate speed' can be interpreted as leaving a wide leeway for legislative discretion.[50] Finally, and in addition to vagueness, I can also try to adopt a particularly cryptic style, which will come in handy in order to hide the lack of solid arguments and prevent an hostile reaction from the media and the public.[51]

[48] Corte cost., 15 gennaio 2010, n. 10. *See* Levi, *supra* n. 3, p. 42.

[49] *See* Levi, *supra* n. 3, p. 54-56.

[50] *Brown* v *Board of Education of Topeka*, 349 U.S. 294, 301 (1955) ['Brown II']. For a discussion of how the general public and political authorities reacted to the decision, *see* M. Klarman, *From Jim Crow to Civil Rights* (Oxford University Press 2004) p. 318-320.

[51] *Cf.* A. Baldassarre, 'Prove di Riforma dell'Organizzazione e del Funzionamento della Corte Costituzionale: la Mia Esperienza', in Costanzo (ed.), *supra* n. 11, p. 17 at p. 18 (arguing that decisions should be written in a style understandable to the public). *Cf. also* G. Carofiglio, *La Manomissione delle Parole* (Rizzoli 2010) p. 128 (claiming that the obscurity in legal language is a 'subtle, esoteric, authoritarian form to exercise power').

Rejecting the challenge on the merits

If a decision of inadmissibility is not popular among my colleagues, I can try to convince them to enter the merits and reject the challenge. If properly written, such a decision would put the question to rest for quite some time. The strongest argument in support of this solution is a textual one. The text of the Italian Constitution makes the right to social assistance subject to three prerequisites: (i) being a 'citizen'; (ii) being 'devoid of the means necessary to live'; and (iii) being 'unable to work' (*inabile al lavoro*).[52] It is this last condition, that of being 'unable to work', that sets the Italian Constitution apart from, say, the Spanish one, which makes the provision of social assistance subject to citizenship and need alone.[53]

The mere presence of the unable-to-work clause does not, however, automatically lead to the conclusion that the Italian Constitution is *indifferent* to the needs of able-bodied people. For this too is a matter of interpretation. Everyone agrees that the expression 'unable to work' encompasses people who are disabled, aged or otherwise *personally* impaired.[54] But how about those persons who are incapable of finding a job because of an economic slowdown, or because of diffuse prejudice against them, or by reason of any other *external* obstacle?[55] Are they too entitled to social assistance? Answering this question is crucial to our case, because Ms Carmini is physically and mentally able to work: she 'just' can't find a job, despite her efforts.

The scope of constitutionally-mandated social protection under Article 38, paragraph 1 turns around the interpretation of the words 'inabile al lavoro' (unable to work). Most Italian dictionaries qualify as 'inabile' the person who 'lacks aptitudes or requisites needed to accomplish a certain task'.[56] In modern definitions, then, the term 'inabile' does *not* cover cases of incapacity originating outside the individual, for example, the inability to work that derives from widespread unemployment. Instead, the contemporary understanding of the word 'inabile' tends to be limited to instances of physical or psychological impairment. In keeping with this interpretation, most Italian scholars read the

[52] *See* M. Massa, 'Profili Costituzionali del Diritto al Mantenimento nella Dinamica tra Normazione e Interpretazione', *Riv. Dir. Sicurezza Soc.* (2004) p. 183 at p. 188.

[53] Sec. 41, Constitution of Spain (mandating the provision of 'adequate social assistance and benefits' for citizens 'in situations of hardship, *especially in case of unemployment*' [my emphasis]).

[54] *See* Levi, *supra* n. 3, p. 29.

[55] *Cf.* C. Tripodina, 'Reddito di Cittadinanza come "Risarcimento per Mancato Procurato Lavoro." Il Dovere della Repubblica di Garantire il Diritto al Lavoro o Assicurare Altrimenti il Diritto all'Esistenza', *Costituzionalismo.it* (2015), para. 2 and n. 8 (acknowledging that the narrow reading of the clause 'is not the only possible interpretation').

[56] G. Devoto and G.C. Oli, *Vocabolario della Lingua Italiana* (Le Monnier 2007) p. 1327. Similar definitions are to be found in F. Sabatini and V. Coletti, *Dizionario della Lingua Italiana* (RCS Libri 2007) p. 1247 (defining *inabile* as 'lacking the qualities, capacities, strengths needed to carry out an activity'); N. Zingarelli, *Vocabolario della Lingua Italiana* (Zanichelli 2001) p. 869.

unable-to-work clause narrowly, circumscribing the sphere of constitutional protection to people with disabilities.[57]

The contemporary understanding of the word 'inabile', however, is the result of a centuries-old process of semantic change. The Romans employed the adjective 'inhabilis', from which the Italian 'inabile' originates,[58] to refer not only to personal, but also to external sources of incapacitation. Livy, for example, describes the strategy of the Romans towards the conquered city of Capua as aimed at making the population 'ad consensum inhabilem'.[59] Here, the quality of being 'inhabilis' does not refer to any personal condition or trait. In fact, Livy tells us that the Capuans' incapacity to gather and revolt would derive from their being deprived of autonomous political institutions,[60] i.e. from institutional or environmental, as opposed to personal, factors. To be sure, the term's susceptibility to refer to environmentally-induced forms of incapacitation was progressively lost, and by the fifteenth century the vulgar 'inabile' started to be used to refer to personal impairments only.[61] Yet, some residue of the original meaning must persist, if today most Italian dictionaries and thesauri stop short of equating 'inabile' with 'disabile', 'inability' with 'disability'.[62] Interpreters, then, should be cautious in drawing hasty conclusions about the clause's scope.

Since the analysis of the text seems to lead to no clear answer,[63] the interpreter is compelled to look elsewhere for additional guidance. The debates at the

[57] *See* M. Mazziotti, 'Assistenza', 3 *Enc. Dir.* (Giuffré 1958) p. 749 at p. 753 (claiming that 'the beneficiary, apart from being devoid of the means of subsistence, [must] also be unable to work; [a requirement] whose justification is so clear that it is not worth discussing'); O. Sepe, 'Il "Diritto" all'Assistenza nella Costituzione', 12 *Riv. It. Prev. Soc.* (1959) p. 361 at p. 377 (talking of a 'gap' in Art. 38, for it allegedly fails to protect the able-bodied). *Cf. also* E. Ales, 'Sicurezza Sociale e Assistenza Sociale (Art. 34 e 38)', *Rass. Dir. Pubbl. Eur.* (2008) p. 212-3 (arguing that 'the Italian constitutional model excludes the possibility that people able to work can benefit from social assistance', but at the same time invoking a broader interpretation of the Italian Constitution in light of the Charter of Nice).

[58] M. Cortellazzo and P. Zolli, *Dizionario Etimologico della Lingua Italiana* (Zanichelli 1999) p. 742; T. De Mauro and M. Mancini, *Dizionario Etimologico* (Garzanti 2000) p. 951.

[59] Livy, *History of Rome, Volume VII: Books 26-27* (Harvard University Press 1943) p. 62-63. I take this example on Livy's use of the word *inhabilis* from G. Campanini and G. Carboni, *Nomen. Il Nuovissimo Campanini-Carboni* (Paravia 2002) p. 813; L. Castiglioni and S. Mariotti, *IL Vocabolario della Lingua Latina* (Loescher 2007) p. 705.

[60] Livy, *supra* n. 59, p. 62 ('sine consilio publico, sine imperio multitudinem, nullius rei inter se sociam, ad consensum inhabilem fore').

[61] Cortellazzo and Zolli, *supra* n. 58, p. 742.

[62] A. Gabrielli, *Dizionario dei Sinonimi e dei Contrari* (Loescher 2001) p. 388; R. Simone, *Sinonimi e Contrari* (Istituto della Enciclopedia Italiana Treccani 2009) p. 450; M. Trifone, *Il Devoto-Oli dei Sinonimi e Contrari* (Le Monnier 2013) p. 609. *But see* G. Pittàno, *Sinonimi e Contrari* (Zanichelli 1997) p. 460-1 (including 'disabile' among the synonyms of 'inabile').

[63] *See* Sepe, *supra* n. 57, p. 374.

Constitutional Assembly constitute one of the sources where such guidance can be found. A new obstacle immediately arises, however, for the opinions of the framers cannot be treated as monolithic. Hundreds of delegates gathered in the *Palazzo di Montecitorio* in 1946–47 to draft the new Constitution, and their views sometimes changed over time. In fact, when the topic of assistance to the needy was debated within the Third Sub-Commission in September 1946, seven[64] out of nine delegates spoke in favour of a universalist approach: any kind of 'impossibility to work' was deemed sufficient to trigger social protection, irrespective of whether it was due to 'age, physical or mental condition, *or any other contingency of a general nature*' [my emphasis].[65] A few weeks later, the First Sub-Commission confirmed this stance, recognising the right to social assistance of everyone who, '*for whatever reason*, and without fault of her own, is unable to work' [my emphasis].[66]

The explicit universalist solution endorsed by the two Sub-Commissions, however, was rejected by the Commission for the Constitution, whose 'Project of Constitution' recognised a right to social assistance only to 'citizens unable to work' (*inabili al lavoro*).[67] The omission of any reference to external obstacles in the new formulation reflected a new ideological consensus: the universalist spirit that prevailed in the Sub-Commissions had given way to corporatism, consistent with the political priorities of the Communist, Socialist and Christian-Democratic Parties.[68] In the Plenary Assembly, most representatives endorsed the restrictive

[64] Amintore Fanfani (DC), Gustavo Ghidini (PSI), Francesco Marinaro (BNL), Angelina Merlin (PSI), Paolo Emilio Taviani (DC), Giuseppe Togni (DC). Acronyms in brackets indicate their respective party affiliation: *Democrazia Cristiana* (DC), *Partito Socialista Italiano* (PSI), *Blocco Nazionale della Libertà* (BNL). Assemblea Costituente, Commissione per la Costituzione, Terza Sottocommissione, *Resoconto Sommario della Seduta di Mercoledì 11 Settembre 1946*, p. 21-25.

[65] Assemblea Costituente, Commissione per la Costituzione, Terza Sottocommissione, *Resoconto Sommario della Seduta di Mercoledì 11 Settembre 1946*, p. 26; Assemblea Costituente, Commissione per la Costituzione, Terza Sottocommissione, *Resoconto Sommario della Seduta di Mercoledì 26 Ottobre 1946*, p. 257.

[66] Assemblea Costituente, Commissione per la Costituzione, Prima Sottocommissione, *Resoconto Sommario della Seduta di Giovedì 10 Ottobre 1946*, p. 219.

[67] Art. 34, *Progetto di Costituzione della Repubblica Italiana* (presented by the Commission for the Constitution to the President of the Plenary Assembly on 31 January 1947).

[68] *See* J. Lynch, 'Italy: A Christian Democratic or Clientelist Welfare State?', in K. van Kersbergen and P. Manow (eds.), *Religion, Class Coalitions, and Welfare States* (Cambridge University Press 2009) p. 91 at p. 105-110 (discussing the political incentives that induced both the Christian-Democratic party and the left to repudiate universalism). *Cf. also* D. Rueda, 'Insider–Outsider Politics in Industrialized Democracies: The Challenge to Social Democratic Parties', 99 *American Political Science Review* (2005) p. 61 (arguing that social-democratic parties in the modern economy have an incentive to neglect the interests of labour-market outsiders; note, however, that dualisation and fragmentation have characterised Italian welfare since the very beginning, when socialists were still excluded from Government coalitions). *See* text between n. 15 and n. 17 *supra.*

language proposed by the Commission.[69] This shift from universalism to corporatism lends support to a narrow interpretation of the unable-to-work clause. Thus, a prudent invocation of originalism – i.e., one that passes over in silence the universalist approach of the Sub-Commissions – can advance my cause.

In addition to its original understanding, guidance on how to interpret the unable-to-work clause can come from a comparative analysis. The Preamble to the French 1946 Constitution of the Fourth Republic, incorporated in the 1958 Constitution of the Fifth Republic and so still in force, is particularly helpful in this respect. Like the Italian basic law, the French Preamble recognises the right to 'adequate means of subsistence', subject to the condition that the recipient is unable to work. But, in a sort of authentic interpretation, the French text explicitly acknowledges that such an inability can arise 'by reason of [...] the economic situation'.[70] We find here a broad interpretation of the unable-to-work requirement: somebody's inability to work, so the framers of the French Constitution tell us, can originate in objective conditions like an economic slowdown.

Even if we were to adopt a restrictive reading of the unable-to-work clause, however, the condition of a mother with a small child could still be subsumed within the Article's sphere of applicability. Empirical data are unanimous in showing that Italian mothers struggle in their ability to maintain their jobs and keep pace with their male colleagues in terms of career and salary advancements.[71] Some colleagues of mine, then, may use this evidence to argue that Italian women are constrained in their ability to work *fully and equally*: as such, they should be entitled to the protection stemming from Article 38, paragraph 1.

[69] Mario Rodinò, elected in the ranks of the *Uomo Qualunque Party*, even suggested restricting protection to people suffering from an '*absolute* physical or mental incapacity to work' [my emphasis]: Mario Rodinò, Assemblea Costituente, *Seduta Pomeridiana di Sabato 10 Maggio 1947*, p. 3832. The two notable exceptions in this debate were the dissenting voices of Enrico Medi and Francesco Colitto: Enrico Medi, Assemblea Costituente, *Seduta Pomeridiana di Martedì 6 Maggio 1947*, p. 3633 (arguing that *any* cause which made a person unable to satisfy her basic needs should be sufficient to entitle him/her to social assistance); Francesco Colitto, Assemblea Costituente, *Seduta Pomeridiana di Sabato 10 Maggio 1947*, p. 3824 (including 'general economic circumstances' among the conditions sufficient to trigger a right to social assistance).

[70] 11ème Alinéa, Préambule, Constitution Française de 1946.

[71] Approximately 22.4% of pregnant workers not only leave their jobs, but remain unemployed two years after delivery: Istat, 'Avere Figli in Italia negli Anni 2000' (2014), p. 25, <www.istat.it/it/files/2015/02/Avere_Figli.pdf>, visited 23 December 2016. These figures are particularly dramatic in the South, where the ratio of women leaving the workforce permanently after delivery rises to one in three: *idem*, p. 26. *Cf.* A. S. Orloff, 'Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States', 58 *American Social Review* (1993) p. 303 at p. 317-321 (arguing that welfare states should be assessed and compared for their different ability to include women in the labour market on equal terms).

The controversies surrounding the unable-to-work clause could be circumvented by resorting to the second paragraph of Article 38, which grants protection against various risks in workers' lives, including 'involuntary unemployment',[72] an expression which seems broad enough to include Ms Carmini's conditions.[73] A drastic demarcation, however, has historically been made between the first and the second paragraphs of Article 38.[74] The first paragraph, according to the traditional reading, protects *indigents* as such, and is meant to provide relief subject to certain specified conditions (need, inability to work, citizenship). The second paragraph, by contrast, refers to *workers* alone: as such, it functions only when certain risks (e.g., unemployment) materialise *in the course of a worker's life*.[75] Since Ms Carmini is not grounding her claim on her 'worker' status, the argument goes, she falls outside the area of protection of that second paragraph.

Ms Pancrazio, however, may raise at least two objections to this line of thought. To begin with, no unemployed person can by definition be a worker. If you are unemployed, you might be a former worker, or a prospective worker, but not, strictly speaking, a 'worker'. Hence, the word 'worker' must be taken as a matter of degree, for otherwise the entire second paragraph would protect nobody.[76] From this perspective, then, Ms Carmini can be entitled to social security, despite her present lack of 'worker' status, perhaps on the condition that she commits herself to actively looking for a job. This is a powerful objection, and my only defence to it will be the decades-old obstinacy that legal scholars and this very Court[77] have shown in limiting the efficacy of Article 38, paragraph 2 *in and around the workplace*.

There is another objection that Ms Pancrazio could raise. A too-strict demarcation of the various paragraphs and articles of the Constitution would

[72] Art. 38(2) of the Italian Constitution: 'Workers have the right to provision and assurance of the means adequate to their living needs in the event of accident, illness, disability and old age, involuntary unemployment'.

[73] As recognised by Gustavo Ghidini, socialist deputy in the Constitutional Assembly, the expression 'involuntary unemployment' is 'so broad as to include all imaginable instances'. Assemblea Cost, *Seduta Pomeridiana di Sabato 10 maggio 1947*, p. 3836.

[74] *But see* A. Baldassarre, 'Diritti Sociali', in 9 *Enc. Giur.* (1989) p. 1 at p. 20 (speaking of a 'structural identity' between these two forms of welfare); M. Persiani, 'Art. 38', in G. Branca (ed.), *Commentario alla Costituzione. Rapporti Economici, Tomo I: Art. 35-40* (Zanichelli 1979) p. 232 at p. 240 (stressing the unity of intent underlying social assistance and workers' welfare); Violini, *supra* n. 46, n. 105.

[75] *Cf.* Persiani, *supra* n. 74, p. 243 (arguing that the enumeration of risks set forth in Art. 38(2) is not intended to be an exhaustive catalogue).

[76] *Cf.* P. Perlingieri and S. Balletti, 'Art. 38', in P. Perlingieri (ed.), *Commentario alla Costituzione Italiana* (Edizioni Scientifiche Italiane 1997) p. 262 at p. 264.

[77] *See*, *e.g.*, Corte cost., 5 febbraio 1986, n. 31.

produce the effect of leaving a shadowy area, where no social protection exists. This result, Ms Pancrazio could note, conflicts with the universal altruistic design of the Constitution. 'Starting from the relatively less disadvantaged, up to those in extreme deprivation, the Constitution was conceived as a universal shelter for people in need', the counsel could say. 'Wouldn't it be paradoxical if, after ensuring paid vacations (Article 36), the framers created discrimination inside the group of persons at the apex of need, granting protection to some (workers), but not to others?'

This argument sounds persuasive. The only way for me to weaken it will be to argue that *some* of the framers cared at least as much about their voters as about needy people in general. 'Reflecting the preferences of their respective constituencies',[78] I could say, 'the delegates at the Constitutional Assembly drafted a Constitution that is as much based on reciprocity as it is on altruism'.[79] In support of my thesis, I could point to Article 1, which solemnly declares that 'Italy is a democratic Republic *founded on labour*', and to Article 3, which guarantees 'the effective participation of all *workers* in the political, economic and social organisation of the Country' [my emphasis].[80] Taken alone, these expressions seem to allude not much to universalism but, rather, to the social-insurance logic typical of workers' friendly societies.

I must admit, however, that this piecemeal approach, this picking-and-choosing among the clauses and words of the text, does violence to the Constitution as an integrated document. Those very articles that I have just mentioned commit the Republic to the 'factual equality of citizens', and bind people to the 'imperative duties of political, economic and social solidarity'. The Court looks at the Constitution as an integrated whole,[81] and rightly so: from this perspective, it is hard to ignore an overall commitment to universal solidarity,[82] nuanced though it may be.

[78] *See* n. 68 *supra*.

[79] On the 'double soul' of the Constitution, which oscillates between solidarity and insurance-like welfare, *see* L. Violini, *supra* n. 46, p. 777. Reciprocity, to be sure, is not considered by everyone a negative value: *see*, *e.g.*, W. A. Galston, 'What About Reciprocity?', in P. Van Parijs (ed.), *What's Wrong With a Free Lunch?* (Beacon Press 2001) p. 29 at p. 32.

[80] *But see* F. Pizzolato, 'L'Incompiuta Attuazione del Minimo Vitale nell'Ordinamento Italiano', 5 *Riv. Dir. Sicurezza Soc.* (2005) p. 243 at p. 246 (arguing that the doctrine of personalism and the framers' emphasis on workers are not at odds, but reciprocally complement each other).

[81] *See*, *e.g.*, V. Barsotti *et al.*, *Italian Constitutional Justice in a Global Context* (Oxford University Press 2015) p. 68, 71.

[82] *See* A. Amorth, *La Costituzione Italiana. Commento Sistematico* (Giuffrè 1948) p. 44-5 (arguing that the principle of 'social justice' is 'a fundamental characteristic of the new constitution'); Barsotti *et al.*, *supra* n. 81, p. 144-145; M. Bergo, *Il Diritto Sociale Frammentato. Principio di Sussidiarietà e Assistenza Sociale* (Cedam 2013) p. 364-365; C. Cardia, 'Assistenza e Beneficenza: I) Diritto

Apart from strictly legal arguments, I can count on other weapons to induce my colleagues to reject the challenge, including reasons of expediency. Courts do not merely apply the law. They also perform a signaling function. They are like lighthouses sending a message to the sailors of the legal community.[83] The case before us could be a valuable occasion to send the message that this Court will keep a low profile *vis-à-vis* the legislature, and will refrain from setting off a new expansionary phase in Italian constitutional law. Imagine for a moment what could happen if the Court introduced a nationwide social assistance benefit. Social-rights holders would feel emboldened to raise new constitutional challenges. Employers, in turn, would demand compensation for the higher costs deriving from the increase in workers' bargaining power.[84] Firms might then ask political institutions – and courts – to enforce the Republic's commitment to education (Articles 34 and 35) and technological development (Article 9), so that they can remain competitive with the help of better-skilled employees and new technologies. In short, the Court could be submerged by a waterfall of constitutional challenges. By portraying the consequences of the decision in these apocalyptic terms, then, I can hope to convince some of my colleagues to reject the challenge.

My strongest ally, however, is the doctrine of the separation of powers.[85] In particular, I can point to the democratic costs which we, as a community of people, would have to bear if political questions were decided by unelected judges. Judicial review, even in its mildest forms, always involves some assessment or 'alteration'[86] of the will of a parliamentary majority, but the democratic cost varies from case to case. That cost is relatively small, for example, when a court marginally extends the sphere of protection of an existing social benefit; but it would be much higher if a court were to introduce an entirely new social benefit.

Some scholars, however, have persuasively argued that not all forms of judicial review must be at odds with democracy. Gustavo Zagrebelsky, for example, claims that a reconciliation is possible, as long as we abandon a purely *electoral* conception of democracy and we extend our perspective to encompass within the notion of

Amministrativo', 3 *Enc. Giur.* (1988) p. 1 at p. 3; Persiani, *supra* n. 14, p. 2, 15, 388; Persiani, *supra* n. 74, p. 241 (reading Art. 38 in the light of the collective responsibilities mentioned in Art. 3).

[83] *Cf.* E. Lamarque, *Corte Costituzionale e Giudici nell'Italia Repubblicana* (Laterza 2012) p. 84 (qualifying the Court's activity as one of 'constitutional pedagogy').

[84] *See* G. Capuzzo and M. Di Masi, 'Le Ragioni del Reddito Minimo Garantito', 33 *Riv. Critica Dir. Priv.* (2015) p. 317 at p. 320.

[85] *See* Kennedy (forthcoming 2017), *supra* n. 5.

[86] V. Crisafulli, 'La Corte Costituzionale ha Vent'Anni', in Occhiocupo (ed.), *La Corte Costituzionale tra Norma Giuridica e Realtà Sociale: Bilancio di Vent'anni di Attività* (Cedam 1984) p. 69 at p. 73 (describing judicial review not as an 'antinomy, but as an alteration' of the democracy principle).

'democracy' the *pactum societatis* at the basis of society.[87] From this viewpoint, constitutional courts can be considered the supreme guarantors of that pact: the highest expression, rather than a hindrance, of the democratic principle.

In order to counter this argument, I can resort to the theory of the *rime obbligate*—literally, 'pre-established rhymes'. According to Crisafulli, who formulated the theory, the task of a constitutional judge can be seen as filling in the lines of an incomplete poem, whose metre has been established in advance.[88] The poem metaphor is not dissimilar to the image of the collective novel conceived by Ronald Dworkin.[89] Dworkin, however, used his image to both limit *and empower* his judge. Most Italian scholars, by contrast, use the allegory of the poet as a reminder of the Justices' *limitations* only. To an Italian audience, the introduction of a universal means-tested scheme against poverty will probably sound like writing a poem from scratch: an impermissible exercise of judicial discretion.[90] I can, therefore, exploit this popular metaphor to advance my cause.

My 'save democracy' argument, however, can be attacked on factual grounds.[91] At certain points in time and space, courts can be *more* in line with the prevailing sentiment of the public than legislators. This is especially true where the distance between the people and elected representatives is profound, as it is in contemporary Italy.[92] As already mentioned, some surveys show that most Italian residents favour the introduction of a social assistance scheme.[93] In this context, a judicial mandate to introduce a universal means-tested benefit against absolute poverty would bring the Court *closer* to the people.

To refute this point, however, I can powerfully object that the Court should not be the mere reflection of transient public moods. The relationship between the Court and *social conscience* (i.e. the *foundational* cultural principles of a given

[87] *See* Zagrebelsky, *supra* n. 26, p. 25 ff. (arguing that the Court adopts a political function in the sense that it protects the *pactum societatis* at the basis of society). *See also*, N. Bobbio, *Diritto e Stato nel Pensiero di Emanuele Kant* (Giappichelli 1969) p. 37 (discussing Johannes Althusius' theory of the 'double contract', according to which individuals first abandon the state of nature and gather into a community of people (*pactum societatis*), and then subject themselves to a sovereign power by means of a *pactum subiectionis*).

[88] Crisafulli, *supra* n. 86, p. 84.

[89] R. Dworkin, 'Law as Interpretation', 9 *Critical Inquiry* (1982) p. 179 at p. 192.

[90] *See*, *e.g.*, Corte cost., 15 maggio 1990, n. 241.

[91] *See* Kennedy (forthcoming 2017), *supra* n. 5, p. 19.

[92] This fracture was exacerbated by the electoral law enacted in 2005, which: (i) did not allow voters to express a preference for individual candidates, but only for a party; and (ii) allocated a majority bonus to the largest party, but contained no minimum threshold to access the bonus, thus potentially allowing a party with exiguous electoral support to gain the majority in Parliament. The law was deeply flawed, not only in the eyes of the public, but also in those of the Court, which eventually struck it down as unconstitutional: Corte cost., 13 gennaio 2014, n. 1.

[93] *See* text to n. 41, *supra*.

community, in Zagrebelsky's language) must be kept separate from the relationship between the Court and *public opinion.* The former is desirable,[94] but the latter should be avoided, lest the Court lose its independence.

A doubt might now arise in your mind. The Court, you might observe, values its own precedents highly.[95] 'How come you have not mentioned precedents much, so far?', you could ask. It is a legitimate question. Luckily, no precedent is directly relevant to this case. There do exist a few cases that touch upon the right to social assistance, but in most of those the plaintiffs refrained from questioning the social assistance system in its entirety, seeking instead to be included in the recipient groups of existing, selective benefits.[96] The Court, for its part, condemned discrimination between similarly-situated categories of workers,[97] but said nothing about the discrimination between labour-market insiders and outsiders. As such, these precedents bear little relevance to the present case.

The only exception seems to be a 1986 decision in which the Court hinted at a constitutional obligation to set up a universalist welfare system.[98] On that occasion, the Court asserted that the Constitution requires a certain 'un-differentiation, a uniformity, a single quantitative threshold, for all citizens'.[99] I can, however, defuse the force of these words by distinguishing the two cases on the facts.[100] The 1986 challenge was raised by a group of *self-employed* workers who claimed that the amount of their minimum pensions should be set at the same level as that of *employed* workers. The case we must decide tomorrow is different. Be it because Ms Carmini is ready to run the risks of a long and uncertain suit, or because she and her counsel highly value social justice, the

[94] *See* L. Elia, 'Relazione di Sintesi', in Occhiocupo (ed.), *supra* n. 86, p. 163, 164 (speaking, in his capacity as Justice, of 'an attempt to anchor [the Court's case law] to social conscience'); G. Zagrebelsky, 'Relazione', in Occhiocupo (ed.), *supra* n. 86, p. 103, 118 (arguing in favour of the use of the principle of rationality as a means by which the Court draws from that 'complex of largely accepted values').

[95] Cassese, *supra* n. 26, p. 20, 38; Zagrebelsky, *supra* n. 26, p. 83; Zagrebelsky and Marcenò, *Giustizia Costituzionale* (Il Mulino 2012) p. 114; T. Groppi and I. Spigno, 'Constitutional Reasoning in the Italian Constitutional Court', 4 *Riv. AIC* (2014) p. 19.

[96] *See*, *e.g.*, Corte cost., 6-13 maggio 1987, n. 158; Corte cost. 25 giugno 1985, n. 186; Corte cost., 22 giugno 1966, n. 92.

[97] *See*, *e.g.*, Corte cost., 28 maggio 1974, n. 160 ('social protection [must] be concretely guaranteed to all categories of workers […] with no discrimination between this and that category').

[98] Corte cost., 5 febbraio 1986, n. 31.

[99] *Ibid. See also* Massa, *supra* n. 52, p. 190.

[100] In the US, the judge could have dismissed these words as mere *dicta*. But the *dicta* versus *holding* distinction does not apply in Italy, where all the constituent parts of an opinion enjoy authoritative status: *see* Lamarque, *supra* n. 83, p. 98, 111 (illustrating the diffusion of the 'principle of totality' as the interpretative canon of the Court's precedents). *Cf.* Zagrebelsky and Marcenò, *supra* n. 95, p. 116-117.

challenge here is much more ambitious. Ms Pancrazio is asking the Court to mandate the Government to provide social assistance universally (albeit conditionally) to all involuntary indigents: something unheard of in the *Palazzo della Consulta.* Such novelty plays in my favour, for there is no directly relevant precedent to overrule.

Endorsing the challenge

Our third option is to argue that the lack of any universal means-tested scheme against poverty is unconstitutional. The best argument with which to oppose such an outcome is to invoke the difficulties which afflict the Italian public budget. In enforcing social rights, courts enjoy a space of manoeuvring that is, *de facto*, inversely proportionate to the amount of deficit and national debt. To my great joy, the Italian public debt is the fourth-largest in the world in GDP terms (2015).[101] As if this constraint was not enough, a 2012 amendment constitutionalised the 'principle of the balanced budget', placing an additional limitation on the Court's capacity to make costly decisions.[102] This principle, which requires the Republic to maintain, as a general rule, an equilibrium between revenues and expenses,[103] has had an impact on the working of the Court in at least one important way[104]: a new constitutional interest – the tentative preference for budgetary equilibrium – has been added to the list of interests to be balanced against one another. In practice, this means that the Court is now explicitly and legally required to take into account the soundness of the

[101] U.S. Central Intelligence Agency, The World Factbook, 'Country Comparison: Public Debt 2015', <www.cia.gov/library/publications/the-world-factbook/rankorder/2186rank.html>, visited 18 October 2016.

[102] L. cost. 20 aprile 2012, n. 1, amending Art. 81(2), Cost. *Cf.* C. Bergonzini, 'The Italian Constitutional Court and Balancing the Budget', 12 *EuConst* (2016) p. 177 at p. 178.

[103] In order to avoid the principle of a balanced budget being bypassed by resorting to public borrowing, the 2012 reform made reckless government spending more difficult: borrowing is now permitted only 'to take account of the effects of the economic cycle' or upon the occurrence of an 'exceptional event' (in which case, a pre-emptive authorisation from Parliament is also required). It remains unclear, however, whether these constraints on borrowing can effectively be enforced. *See* G. Delledonne, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences', in M. Adams *et al.* (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart 2014) p. 181 at p. 189-192; T. Groppi *et al.*, 'The Constitutional Consequences of the Financial Crisis in Italy', in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis* (Ashgate 2013) p. 89 at p. 97; M. Luciani, 'Costituzione, Bilancio, Diritti e Doveri dei Cittadini', 6 *Questione Giustizia* (2012) p. 92 at p. 125-127.

[104] *Cf.* Luciani, *supra* n. 103, p. 115 (defending the thesis that the 2012 constitutional reform was not irrelevant, and arguing instead that the reform 'introduce[d] [new] parameters that our Constitutional Court can now enforce when it assesses the constitutionality of statutes').

budget when it enforces costly constitutional rights or principles, which is almost always the case.[105]

The annual cost of a universal means-tested benefit for people in absolute poverty cannot be determined with exact precision in advance, because the number of recipients fluctuates over time in response to many uncertain variables. Despite these difficulties, however, a rough estimate has put the yearly cost of such a scheme at seven billion euros.[106] This is a relatively small sum, corresponding to just 1.53% of Italian public social expenditure (2014).[107] In part, this limited cost is attributable to the savings that would come from the simultaneous suppression of existing benefits. In addition, the yearly cost of the program could drop in the long term, as the economy recovers and recipients enter the labour force. All this being said, the Court is unlikely to burden the public finances of the Republic with a decision that, however financially sustainable, would still cost billions of euros.[108]

I know what you are thinking. You object that only a few months ago, in an old-age pension case, the majority of the Justices voted for a very costly decision.[109] The Court held that a two-year freeze on the automatic revaluation of retirement pensions (the amount of which exceeded the minimum by three times) was unconstitutional. This decision, you might argue, is indicative of the Justices' readiness to make an expensive decision, even during an economic crisis and even in the face of a disapproving political and academic community.[110] It may be helpful, however, to see this decision in the context of the social and demographic conditions of its time. The elderly, unlike indigent people, constitute a politically and demographically strong group in Italian society, and one with whom the Justices, by reason of their age and prospective retiree status, can potentially identify. Compassion for indigent people is less obvious. People living in absolute poverty are not few – more than 4.5 million people, or 7.6% of residents – and the

[105] *See* C. Bergonzini, *supra* n. 102, p. 189 (claiming that the new constitutional principle of a balanced budget binds all public institutions, including courts, 'to a management of public finances that is as responsible, effective and sustainable as possible').

[106] Alleanza Contro la Povertà in Italia, 'Reddito di Inclusione Sociale: Proposta' (2015), <www.redditoinclusione.it/wp-content/uploads/2014/10/REIS_proposta_marzo2015.pdf>, visited 23 December 2016.

[107] The Italian public expenditure for social services amounts to 28.6% of its GDP, or €458 billion (2014): OECD, Social Expenditure Database, <www.oecd.org/social/expenditure.htm>, visited 23 December 2016. Eurostat, 'GDP at Current Market Prices, 2005 and 2013–2015', <ec.europa.eu/eurostat/statistics-explained/index.php/National_accounts_and_GDP>, visited 23 December 2016.

[108] Such a tactful respect for the role of the legislator in cases involving costs for the national budget has been expressed, *e.g.*, by Elia, *supra* n. 94, p. 165.

[109] Corte cost., 30 aprile 2015, n. 70.

[110] *See*, *e.g.*, S. Cassese, 'Pensioni, le Strade Possibili della Corte Costituzionale', *Corriere della Sera*, 12 May 2015, p. 1, 4.

figure is growing.[111] But they have scarce opportunities to push through their preferences in the political arena.[112] Even when their interests have taken an organised form,[113] labour-market outsiders have often been unable to promote universal policies or to oppose welfare retrenchment, as the discontinuation of the *Reddito Minimo di Inserimento* in the early 2000s has shown.[114]

Not only does the 2015 old-age pension case fail to provide any substantial help to Ms Pancrazio, but it may even obstruct her plans. Expensive decisions are unlikely to be followed by other expensive decisions in the short term. The 2015 decision was 'expensive' in a double sense: it imposed a high cost on the public finances; but it also extinguished the Court's 'stock of respectability',[115] as severe criticism ensued from academics and commentators.[116] That stock being temporarily depleted, there is little chance that the Court will make another 'expensive' decision in the near future. Like trial judges, who draft their decisions in a way that minimises the risk of being reversed,[117] constitutional Justices are driven by a similar 'reversal aversion',[118] which encourages them to avoid an open

[111] Istat, 'La Povertà in Italia, Anno 2015' (2016), <www.istat.it/it/files/2016/07/La-povertà-in-Italia_2015.pdf?title=La+povertà+in+Italia+-+14%2Flug%2F2016+-+Testo+integrale+e+nota+metodologica.pdf>, visited 23 December 2016.

[112] *See* Rueda, *supra* n. 68, p. 61.

[113] *See*, *e.g.*, the various organisations re-united under the umbrella of the 'Alleanza Contro la Povertà in Italia', listed here: <www.redditoinclusione.it/il-patto-aperto-contro-la-poverta/promotori-e-loro-presentazione/>, visited 23 December 2016.

[114] *See* n. 14 *supra*. This does not mean that the Justices base their decisions on the political weight of this or that social group. When such a bias in favour of interest groups occurs, it occurs unconsciously. And on many occasions, this unconscious bias does not occur at all, as proved by a long list of cases where the Court advanced the interests of *weak* minorities. In 1987, for example, the Court nullified a statute that gave schools a margin of discretion over the admission of pupils with disabilities, and mandated their unconditional admission (Corte cost., 8 giugno 1987, n. 215). On the protection of minorities from the part of the Italian Constitutional Court, *see generally* M. Bellocci and P. Passaglia, 'La Tutela dei "Soggetti Deboli" come Esplicazione dell'Istanza Solidaristica nella Giurisprudenza Costituzionale' (2006), <www.cortecostituzionale.it/documenti/convegni_seminari/STU%20191_Tutela_soggetti_deboli.pdf>, visited Oct. 18, 2016; S. Scagliarini, 'Diritti Sociali Nuovi e DirittiSocialiinFierinellaGiurisprudenza Costituzionale'(2012), <www.gruppodipisa.it/wp-content/uploads/2012/08/ScagliariniDEF.pdf>, visited 23 December 2016.

[115] *Cf.* Kennedy (1986), *supra* n. 5, p. 55 (discussing the 'legitimacy cost' of a judicial decision).

[116] For a critique of the decision, *see* A. Anzon Demmig, 'Una Sentenza Sorprendente. Alterne Vicende del Principio dell'Equilibrio di Bilancio nella Giurisprudenza Costituzionale sulle Prestazioni a Carico del Pubblico Erario', 2 *Giur. Cost.* (2015) p. 551. *Cf. also* P. Sandulli, 'Dal Monito alla Caducazione delle Norme sul Blocco della Perequazione delle Pensioni', 2 *Giur. Cost.* (2015) p. 559 (defending the decision, but contending that the Court should have limited its efficacy to the future, thus avoiding any retroactive effects).

[117] Posner, *supra* n. 7, p. 70 (arguing that trial judges may unconsciously twist the facts to minimise the likelihood of being reversed).

[118] *Ibid.*

fight with the country's political élites. I can therefore exploit the memory of the recent backlash suffered by the Court in order to induce my colleagues to take a more cautious stance.

Despite the force of the budgetary argument, some of my colleagues may nonetheless solicit a decision that mandates the Government to provide social assistance to everyone in need. To support their position, as we have seen, they can resort to textual, comparative and historical considerations.[119] Alternatively, they can invoke certain non-written constitutional standards, such as rationality, reasonableness and proportionality.

Despite the semantic confusion arising out of the inconsistent use of these terms in the Court's own decisions,[120] it is possible to identify certain recurring requirements which have historically been demanded of a statute to allow it to withstand a constitutional challenge. Among these requirements, we find the following two: (i) the *consistency* between the statute and the broader legal system;[121] and (ii) an *adequate balance* between the constitutional right or principle advanced by the statute, on the one hand, and conflicting constitutional principles or rights, on the other.[122] Ms Pancrazio could argue that the failure to implement a universal means-tested scheme against poverty violates both requirements. It violates the consistency requirement, because the omission conflicts with the principle of universality, set out in Arts. 2 and 3 of the Constitution and in the framework law on social assistance.[123] It also violates the requirement of sound balancing, because the legislator gave too much precedence to budgetary equilibrium over social assistance. How can I respond to these strong claims?

[119] *See* text between n. 52 and n. 70 *supra*.

[120] *See* Barsotti *et al.*, *supra* n. 81, pp. 74-5; M. La Torre, 'Sullo Spirito Mite delle Leggi. Ragione, Razionalità, Ragionevolezza [Part 2]', 1 *Materiali per una Storia della Cultura Giur.* (2012) p. 123 at p. 139. *See also* M. Cartabia, 'I Principi di Ragionevolezza e Proporzionalità nella Giurisprudenza Costituzionale Italiana' (conference paper, 24-26 October 2013, Rome) p. 2, 6, <www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf>, visited 23 December 2016 (arguing that the Court uses the term 'reasonableness' as a synonym for 'proportionality'). The question, to be sure, is not merely linguistic: the precise definition of these standards matters from a practical point of view, because it allows us to understand what the Court concretely demands of a statute, to let it stand. If the significance of these terms is left vague, the separation of powers and the very legitimacy of the Court can be jeopardised: *idem*, p. 7.

[121] *Cf.* Zagrebelsky and Marcenò, *supra* n. 95, p. 196 (referring to this requirement as 'the principle of rationality'). *Cf. also* Zagrebelsky, *supra* n. 26, p. 85-86. Other scholars, however, qualify the consistency requirement as one of the forms of the 'reasonableness test': *see* Cheli, *supra* n. 39, p. 51; A.M. Sandulli, 'Il Principio di Ragionevolezza nella Giurisprudenza Costituzionale', 1 *Dir. e Società* (1975) p. 561 at p. 569.

[122] *See* Cartabia, *supra* n. 120, p. 6-7.

[123] Art. 2(2), L. 8 novembre 2000, n. 328. The opening sentence of this paragraph declares that 'the integrated system of social services and provisions is characterised by universality'.

At first glance, the consistency requirement should be relatively innocuous for my plans. When the term of reference used to assess 'consistency' is a set of *existing* rules, the impact of the requirement can only be conservative.[124] Major legislative innovations, by definition, are 'inconsistent' with the pre-existing legislative framework.[125] Failure to enact major reforms, in contrast, is always in keeping with the existing legal system. We can see this conservative effect at work by looking at the specific case before us: the lack of a universal means-tested scheme seems to fit perfectly with a legislative context that is rife with incoordination and imbalances.[126] Ms Pancrazio, however, is making an unconventional use of the consistency requirement.[127] Her term of comparison is not a given set of *existing* rules, but a *prospective* principle, namely, the principle of universal social protection. This innovative interpretation of the consistency requirement could disrupt my plans. If the principle of universal solidarity is the yardstick, then it becomes difficult to defend the 'consistency' between the existing policies and that objective. Luckily (from my point of view), the Court has historically opted for the conservative reading of the consistency requirement.[128] If this line of precedents is confirmed, I can rest assured that this requirement will not only fail to obstruct my argument, but might even play in my favour.

Let us now discuss the requirement of sound balancing. Ms Pancrazio could argue that the balancing (implicitly) performed by the legislature (by failing to legislate) is not as effective and expansive as it could be.[129] How can I convince my colleagues of the contrary? To begin with, I can point to the fact that the right to social assistance has not been entirely neglected. For decades, specific benefits have been granted to a variety of recipient groups, including the elderly, people with disabilities, families with three or more children, and mothers with children.[130] Ms Carmini herself benefited from one of those benefits, the *Assegno di Maternità*

[124] *Cf.* Zagrebelsky and Marcenò, *supra* n. 95, p. 201.

[125] *Ibid.*

[126] On the distinction between rules and principles, *see* R. Dworkin, 'The Model of Rules', 35 *University of Chicago Law Review* (1967) p. 14 at p. 23-9.

[127] On the progressive use of the principle of consistency, *see* G. Zagrebelsky, 'Su Tre Aspetti della Ragionevolezza', in *Il Principio di Ragionevolezza nella Giurisprudenza della Corte Costituzionale: Riferimenti Comparatistici* (Giuffré 1994) p. 179 at p. 183.

[128] For an overview of some emblematic cases where the Court declared certain statutes unconstitutional by virtue of their irrationality, *see* A. Morrone, *Il Custode della Ragionevolezza* (Giuffré 2001) p. 157, n. 32.

[129] On the principle of maximum expansion in the balancing of constitutional rights, *see* Cartabia, *supra* n. 120, p. 11; Barsotti *et al.*, *supra* n. 81, p. 77 ('the balancing of fundamental rights must tend towards the optimization of the protection of fundamental rights and principles; that is, to the 'maximum expansion of protection' of every right involved').

[130] *See* n. 12 *supra*.

del Comune. If we look at the evolution of social policies over time, we can see that the list and scope of these specific benefits is expanding.[131] And even if the next parliamentary elections are approaching, a draft law is currently being discussed in Parliament in order to authorise the Government to enact by decree what could potentially become, if properly funded, a universalist reform of the entire social assistance system.[132] All this is to say that the legislature *is acting* to implement the constitutional right to social assistance—even though it is doing so according to its own political priorities. This evidence may induce some of the Justices to dismiss a 'strong' mandate as premature and unnecessary.

The mere fact that welfare reforms are under way, however, does not excuse the Court from checking the soundness of existing legislation and from performing its own balancing test; a test to which I now turn. When Italian scholars describe the way in which two constitutional interests are to be balanced, they usually resort to the theory of the 'essential core'.[133] According to this doctrine, the Court's task is to make sure that neither of the two terms in question (in our case, the principle of a balanced budget and the right to social assistance) is completely sacrificed. The problem, however, lies in what exactly that 'essential core' consists of: a question that most scholars answer in very generic terms claiming that the answer should not be predetermined by abstract reasoning, but is instead contingent upon the existing socio-economic and cultural situation.[134]

[131] A new benefit, originally launched in 2012 in the 12 most populous Italian cities (*Social Card Sperimentale*), was recently extended to the entire country to meet the needs of families with minors, disabled persons and pregnant women (*Sostegno per l'Inclusione Attiva*): Art. 1(387), letter (a), L. 28 dicembre 2015, n. 208. This benefit, however, remains 'categorical' in nature, being addressed to specific categories of indigent people, rather than to indigents generally.

[132] Disegno di Legge Delega concerning 'the fight against poverty, the reorganization of benefits and the system of social services', approved by the Chamber of Deputies on July 14, 2016 (n. 3594), currently being discussed in the Senate (n. 2494), <www.senato.it/service/PDF/PDFServer/BGT/00982885.pdf>, visited 23 December 2016. The financial resources currently set aside for the new universalistic measure, however, have been deemed insufficient by some commentators: *see* C. Agostini, 'Il Disegno di Legge Delega per il Contrasto alla Povertà: Stato dell'Arte e Prospettive', in Caritas Italiana, *Non Fermiamo la Riforma. Rapporto 2016 sulle Politiche contro la Povertà* (2016) p. 23 at p. 27, <s2ew.caritasitaliana.it/materiali//Pubblicazioni/libri_2016/nonfermiamolariforma_ottobre2016.pdf>, visited 23 December 2016.

[133] Barsotti *et al.*, *supra* n. 81, p. 77 (contending that 'the result of balancing can never consist of the complete sacrifice of one right in favor of other constitutional rights or principles, because the essential core of each right must be preserved').

[134] *See*, *e.g.*, Corte cost., 9 maggio 2013, n. 85 ('The point of equilibrium [...] is dynamic and not predetermined in advance'); Barsotti *et al.*, *supra* n. 81, p. 77 ('balancing [...] cannot be limited to a pure abstract judicial syllogism'); A. Giorgis, 'Art. 3, 2º co., Cost.', in R. Bifulco *et al.* (eds.), *Commentario alla Costituzione* (Utet 2006) p. 88 at p. 99-100; Sandulli, *supra* n. 121, p. 566; Zagrebelsky, *supra* n. 26, p. 85-86.

When it comes to balancing social rights, the 'essential core' doctrine assumes a more precise shape in the form of the 'vital minimum' doctrine.[135] The 'core' of a social right is deemed to be protected as long as, at a given time and place, the right-holder can satisfy her basic vital needs. But can Italian residents, today, satisfy their basic needs? Statistics tells us that 7.6% of them cannot.[136] *By definition*, people in 'absolute poverty' are those who lack the means to satisfy their basic subsistence needs. As such, the 'essential core' of these people's right to social assistance seems to be violated.

This sort of social enquiry, however, offers me the opportunity of a rebuttal: if, as Ms Pancrazio suggests, we can legitimately look at empirical evidence, why should the Court limit itself to ascertaining the absolute needs of indigents? Should we not also consider additional data, like the foreseeable *social and economic impact* of a strong-enforcement decision?[137] If so, I could then try to convince my colleagues that the judicial creation of a universal benefit would be deleterious. To begin with, I can claim that cash benefits for mothers would be paternalistic, and reminiscent of a time when women were forced into a rigid social role, that of the non-working, breastfeeding wife.[138] The task of the State, I could say, is not to grant 'social consumption' benefits that would keep women at home, but to engage instead in 'social investment' policies, like childcare or care for the elderly: policies, in other words, that facilitate women's participation in the labour market.[139] In addition, I can pretend to believe that cash assistance for the poor generates laziness or, at best, a decline in productivity.[140]

[135] *Cf.* Giorgis, *supra* n. 134, p. 99-101 (contending that the Court must identify the 'minimal essential content' of a given right by looking at the particular personal conditions of the plaintiff, at the 'specific cultural context' against which the case is to be decided and at the amount of available wealth which can 'reasonably be redistributed' at a given point in time). *Cf.* D. Landau, 'The Reality of Social Right Enforcement', 53 *Harvard International Law Journal* (2012) p. 189 at p. 207-229 (arguing that the uncontrolled expansion of the principle of the 'vital minimum' tends to favour the middle classes, to the detriment of the poorest segments of the population).

[136] *See* n. 111 *supra*.

[137] *Cf.* Bergonzini, *supra* n. 102, p. 188-190 (arguing that the Court should ground its decisions upon a 'full understanding of the economic and accounting consequences').

[138] *See* Orloff, *supra* n. 71, p. 318 (arguing, against Esping-Andersen's call for a de-commodifying welfare, that social services should be assessed in terms of their ability to allow women to gain access to the workforce).

[139] This is, *e.g.*, the recommendation of E. Huber and J.D. Stephens, 'Development and Crisis of the Welfare State' (Chicago University Press 2001) p. 7. I take the distinction between 'social consumption' and 'social investment' policies from J. Gingrich and B. W. Ansell, 'The Dynamics of Social Investment: Human Capital, Activation, and Care', in P. Beramendi *et al.* (eds.), *The Politics of Advanced Capitalism* (Cambridge University Press 2015) p. 282 at p. 282.

[140] This is the view recently expressed, e.g., by V. Ferrante, 'A proposito del Disegno di Legge Governativo sul Contrasto alla Povertà', 16 *Riv. Dir. Sic. Soc.* (2016) p. 447 at p. 464 (lamenting that a minimum income – and, presumably, even a *conditional* minimum income, as the author does not specify otherwise – would generate 'forms of parasitism'). The efficiency critique of welfare is not

These obstacles, I must admit, can be bypassed by making access to the benefit *conditional* upon participation in training programmes and the acceptance of suitable offers of employment. With respect to productivity, the existing incentives to work, such as the prospect of career advancement and higher income, will remain in place.[141] However, given the incertitude surrounding these probabilistic scenarios, I am confident that I will be able to persuade my colleagues of the contrary. A universal means-tested benefit, I will say, would be bad for the taxpayer (burden on public finances), bad for employers (decline in productivity) and bad for indigents themselves (poverty trap and paternalism).

Now suppose that my efforts do not pay off, and that the majority of the Justices opt for a declaration of unconstitutionality. In that case, I will work to limit the damage. The margins of doing so are not narrow, because an unwritten rule prescribes that the initial rapporteur (in this case, me) drafts the majority opinion even when she belongs to the minority.[142]

As a start, I can try to re-open the discussion on the merits. This strategy is especially likely to succeed if the majority, unlikely as it may be, were to decide to enforce the right 'strongly', i.e. not only mandating the introduction of a universalist scheme, but also setting out *the details* of the new policy.[143] My first objective, in this case, would be to convince my colleagues to opt for a 'soft' decision instead. I have already shown how the invocation of legislative discretion could be useful.[144] Here, that argument will sound even stronger, because I would be able to point out *one by one* all the instances where a strong mandate risks usurping the authority of Parliament.[145] Judges, I could say, can hardly set the

just a prerogative of neoliberal thinkers. In fact, it has historically been expressed by critics of capitalism, too: *see*, *e.g.*, K. Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (Beacon 2001) p. 85 (blaming the 'Speenhamland system' of early nineteenth-century England for functioning as a poverty trap).

[141] This is the argument used by Leonard Hobhouse to refute the objection that social assistance would stymie the recipients' incentive to work: L. T. Hobhouse, *Liberalism* (Oxford University Press 1945) p. 182 ('[W]hat the State […] would be doing […] would by no means suffice to meet the needs of the normal man. He would still have to labour to earn his own living. But he would have a basis to go upon').

[142] P. Pederzoli, *La Corte Costituzionale* (Il Mulino 2008) p. 158; Rossi, *supra* n. 11, p. 349; G. Vaglio, 'Relatore e Redattore nel Processo Costituzionale', in Costanzo (ed.), *supra* n. 11, p. 385 at p. 396; Zagrebelsky, *supra* n. 26, p. 74.

[143] I am using the taxonomy put forward by M. Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008) p. 248-249. According to Tushnet, 'strong' enforcement consists in 'injunctions that spell out in detail what Government officials are to do' by 'identifying goals, the achievement of which can be measured easily' and setting 'specific deadlines for the accomplishment of these goals'.

[144] *See* text between n. 85 and n. 94 *supra.*

[145] On the need of involving the legislator in the process of enforcement of the right to social assistance, *see*, *e.g.*, Baldassarre, *supra* n. 74, p. 20; Mazziotti, *supra* n. 57, p. 752 (claiming that '[t]he

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frequency with which the benefit is to be disbursed, the conditions of access, the dispensing authority, the financing mechanisms and the nature of the means tests,[146] without transcending their powers and expertise.

In reality, some of these details *can* be judicially determined without exercising much discretion. The amount of the benefit, for example, can be tied to the poverty line, as set by the National Institute of Statistics. That threshold is updated yearly, and is differentiated according to age, residence and family size. In short, it is a good approximation of the actual subsistence needs of an Italian resident.[147] If the Court were to mandate the State to disburse the difference between the family income and that threshold, it would be hard to mourn the death of our parliamentary democracy.

And yet, this seemingly discretion-free act would not suffice. An additional condition is needed to avoid the benefit being granted to people whose *assets*, in spite of their low *income*, permits self-sufficiency. Ownership of conspicuous real estate and financial assets, for example, constitutes a strong indication of one's ability to maintain oneself. At the other extreme, ownership or use of, say, a modest vehicle should not *per se* constitute a 'conclusive presumption' of self-sufficiency, as recently recognised by the Supreme Court of Israel.[148] In Italy, the existence of an individualised measure of one's assets (ISEE), made more accurate by a recent legislative reform,[149] would save the Court the effort of making a detailed list of what count as a sign of self-sufficiency. However, the act of setting the specific ISEE threshold under which one becomes eligible for income support does require the exercise of discretion.

An even higher degree of discretion is required to choose the financing mechanism.[150] In this policy area, courts can hardly substitute themselves completely for elected representatives, both as a practical matter (lack of adequate administrative resources for implementation) and as a matter of principle (the degree of discretion involved in budgetary decisions being particularly high). These are exactly the boundaries to judicial activism acknowledged in the famous *Grootboom* decision. In that case, the South African Justices mandated the State to

enforcement of the new principles asserted in these constitutional rules *obviously* requires specific statues', emphasis added).

[146] An illustration of each of these controversial points has been provided by P. Van Parijs, 'Basic Income: A Simple and Powerful Idea for the Twenty-First Century', in B. Ackerman *et al.* (eds.), *Redesigning Distribution* (Verso 2006) p. 7.

[147] *See* n. 13 *supra.*

[148] Supreme Court of Israel, 8 November 2011, *Hassan* v *National Insurance Institute*.

[149] D.P.C.M. 5 dicembre 2013, n. 159, enacted by Government under Parliamentary authorisation (Art. 5, D.L. 6 dicembre 2011, n. 201, converted into law with amendments by L. 22 dicembre 2011, n. 214).

[150] *See* Zagrebelsky and Marcenò, *supra* n. 95, p. 407.

'devise and implement [...] a comprehensive and coordinated' housing programme, but not without acknowledging that 'the precise allocation [of financial resources] is for national Government to decide in the first instance'.[151]

Coming back to Italy: no doubt the money for a benefit of the kind demanded by Ms Pancrazio would flow from the National Fund for Social Policies. The question, however, is precisely how to supply the fund. One possibility for the Court would be to re-route some of the resources collected through general taxation. But even this choice would require some adjustment on the part of the Government after the case is decided, so that both the overall equilibrium of the budget and respect for European budgetary rules are preserved. As the unsatisfactory enforcement of *Grootboom* seems to show,[152] at least some degree of co-operation from the other two branches of government is indispensable, if the desiderata of the Court are actually to be enforced.

Ms Pancrazio could argue that yes, the Government's involvement is inevitable, but such co-operation should be secured *authoritatively*, by means of a 'strong' decision.[153] But in a country where even a 'soft' *Grootboom*-style mandate to 'devise and implement' a *new* welfare scheme is unprecedented, the possibility of taking an even stronger stance *vis-à-vis* the Government and its parliamentary majority would seem to most of the Justices a step too far.

Similarly delicate is the choice of the granting institution, i.e. the entity or entities that should receive and review the applications, perform the means tests, and issue the checks. Should it be the national agency that administers social security or the municipalities, acting as agents of the national Government? Most of the literature is inclined towards the local solution, because it allows for a greater proximity to the needs and conditions of the beneficiaries.[154] The local solution, however, could also increase the risk of geographical fragmentation and parochialism. In any event, who are we, unelected judges, to make such a political evaluation of costs and benefits?

If the majority of the Justices hold to their preference for strong enforcement, my capacity of rapporteur gives me some margin of manoeuvre to smooth such a drastic solution. Among the various things I can do, one of the most effective is to attach strict citizenship or duration-of-residence requirements to the benefit. More specifically, I can attempt to exclude from the benefit four categories of people: (a) non-Italian EU citizens; (b) documented migrants; (c) refugees, asylum seekers, and stateless persons; and (d) undocumented migrants.

[151] Constitutional Court of South Africa, October 4, 2000, *South Africa* v *Grootboom*, para. 66.
[152] Landau, *supra* n. 135, p. 197-198, nn. 33-34.
[153] *Idem* p. 192 (arguing in favour of 'stronger forms of review and judicial activism').
[154] *See*, *e.g.*, Ferrera (2006), *supra* n. 14; Alleanza Contro la Povertà in Italia, *supra* n. 101, p. 23.

European and international law may limit my ability to restrict eligibility. In reality, however, EU law seems to have only a modest impact on national social assistance policies.[155] Unlike *social security* measures like sickness or old-age benefits – with respect to which no member state is allowed to discriminate between its own citizens and other EU nationals[156] – *social assistance* policies tolerate such discrimination. Member States are allowed to deny social assistance benefits to EU citizens of another Member State during: (i) the first three months of residence; or (ii) the entire period in which she is actively seeking employment.[157] After that period (whichever is longer) has elapsed, the host state is allowed to expel EU citizens who cannot show that they have 'sufficient resources [...] not to become a burden'[158] on the national welfare system. Apart from the inappropriate use of the word 'burden' to refer to human beings, people in absolute poverty – by definition – lack 'sufficient resources'. As such, EU law gives them little help against expulsion measures.

The European Court of Justice has, on the one hand, mitigated this approach by allowing parents whose children attend school to remain in the host state and to access social assistance benefits, without their needing to show 'sufficient resources'.[159] But, apart from this exception in favour of children and their parents, the Court has made it clear that even an EU citizen who has *not* been expelled can be legitimately denied access to social services, if she is found to lack 'sufficient resources'.[160] In terms of evidence, the European Court of Justice demands that the host state makes an individualised examination of 'the financial situation of each person'[161] before it can proceed to expulsion. However, no substantial proof concerning the nature or scope of the alleged 'burden' is required: the mere word of the state – i.e., the claim that providing the benefit in question would be 'burdensome' – seems to suffice. Overall, it seems, the idea of making the right to free movement within the Union conditional upon personal wealth (an idea

[155] *But see* M. Ferrera, 'The New Spatial Politics of Welfare in the E.U.', in G. Bonoli and D. Natali (eds.), *The Politics of the New Welfare State* (Oxford University Press 2012) p. 256 at p. 267-270.

[156] Arts. 3 and 4, Regulation 338/2004.

[157] Art. 24 (1), Directive 2004/38/EC.

[158] *Idem* Art. 24(2).

[159] ECJ 23 February 2010, Case C-310/08, *London Borough of Harrow* v *Ibrahim*; ECJ 23 February 2010, Case C-480/2008, *Teixeira* v *London Borough of Lambeth and Secretary of State for the Home Department.* In these twin cases, the Court held that the right to education of current or former European workers' children implies that both the child and the parent have a right to residence and to access social services on an equal footing.

[160] ECJ 11 November 2014, Case C-333/13, *Dano* v *Jobcenter Leipzig.* In para. 69, the Court held that 'so far as concerns access to social benefits [...] a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38'.

[161] ECJ *London Borough of Harrow* v *Ibrahim*, *supra* n. 151, para. 80.

that appalled the majority of US Justices in the famous *Shapiro* v *Thompson* case of 1969[162]) does not much trouble European judges and lawmakers.

Turning to refugees, international law grants them 'the same treatment with respect to public relief and assistance as is accorded to [...] nationals'.[163] This constraint, however, can be easily bypassed by *levelling down* social protection. Under standards of formal equality like this one, a state is allowed to provide relief to *both* citizens and refugees, or to *neither* of them. I could argue, 'To the Italian Republic, with its strained budget, only the second option is viable'. Some colleague of mine could reply that the cost of a national means-tested benefit could be maintained at affordable levels if effective border controls and an EU-wide system of allocation of refugees were in place. A good point, but one to which I can rejoin that strict border control by sea is difficult, if not immoral and illegal, during a humanitarian crisis. As for the existing, limited, EU agreements for the allocation of migrants, they have not been enforced so far.[164] If some of my colleagues, confused by this unusual political discussion, were to object that all this must be left to politics, I would candidly reply that that is my point, too.

The European Court of Human Rights has occasionally treated some nationality requirements attached to social benefits as impermissible under Article 14 of the European Convention on Human Rights, which prohibits discrimination.[165] The principle laid down in the Court's precedents is that restrictions on the basis of nationality must be justified by 'very weighty reasons'.[166] I can, however, exploit the 'wide margin' of discretion that the Strasbourg Court leaves to Member States in the design of their social policies.[167]

[162] *Shapiro* v *Thompson* 394 U.S. 618 (1969).

[163] Art. 23, Convention Relating to the Status of Refugees.

[164] A. Cerretelli, 'I Nodi che l'Europa non Riesce a Sciogliere', *Il Sole 24 Ore*, 28 December 2013 (illustrating how only a few hundred migrants have been reallocated to other EU Member States, out of the 160,000 which the EU countries had agreed to share).

[165] Art. 14, ECHR, does not ban all discrimination, but only that impinging on the rights falling within the scope of the ECHR. For this reason, applicants have tried to argue (successfully) that some welfare entitlements can count as 'possessions' under Art. 1, Protocol 1: *see*, *e.g.*, ECtHR 16 March 2010, Case No. 42185/05, *Carson* v *United Kingdom* ('although there [is] no obligation on a State under Article 1 of Protocol No. 1 to create a welfare or pension scheme, if a State [enacts] legislation providing for the payment as of right of a welfare benefit or pension [...] that legislation [has] to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1'); ECtHR 29 October 2009, Case No. 29137/06, *Si Amer* v *France*, paras. 26-27.

[166] ECtHR 16 September 1996, Case No. 17371/90, *Gaygusuz* v *Austria*, para. 42 ('very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'); ECtHR 27 November 2007, Case No. 77782/01, *Luczak* v *Poland*, para. 52.

[167] The scope of that discretion, the Court said, varies from case to case 'according to the circumstances, the subject matter and the background': ECtHR 12 April 2006, Case No. 65900/01, *Stec* v *United Kingdom*, para. 52.

In particular, I could try to make use of that discretion by attaching to the benefit a long *residence* requirement, which would be almost as restrictive as a *nationality* requirement, but less vulnerable to the Court's scrutiny.

The most stringent limitations upon my capacity to attach restrictive eligibility requirements to the benefit, however, come directly from the precedents of the Italian Constitutional Court. To be sure, the text of the Constitution seems to lend support to my restrictive plan. The basic protections of Article 38, paragraph 1 are textually granted to Italian 'citizens' alone.[168] And while paragraph 2 entitles all 'workers' to social security, thus encompassing *foreign workers*,[169] it says nothing with respect to people who, lacking a stable occupation, cannot be qualified as such. The Court, however, significantly expanded the textual guarantees for non-citizens and short-term residents. Limiting access to holders of an 'EU long-term residence permit' has been repeatedly declared unconstitutional.[170] Similarly suspicious to Italian Justices is discrimination on the basis of citizenship.[171] As for duration-of-residence requirements, their likelihood of withstanding the scrutiny of the Court varies, depending on the nature of the benefit in question. As a general rule, access to benefits aimed at satisfying the 'primary needs of a human being' cannot be made conditional upon prolonged residence.[172] Since social assistance benefits are meant exactly to meet those primary needs, they seem not to tolerate any requirement of this sort.[173]

The stance of the Italian Constitutional Court on duration-of-residence requirements looks particularly valiant when seen in comparison with constitutional standards elsewhere in Europe. For example, the limitation of the *Revenu de Solidarité Active* (RSA) to five-year residents, upheld by the French Constitutional Council in 2011,[174] would probably fail to meet the requirements set by the Italian Court. Yet, this strict judicial stance on duration of residence is of

[168] *See* Levi, *supra* n. 3, p. 28.

[169] *See* S. Cassese, 'I Diritti Sociali degli "Altri" ', in *Riv. Dir. Sicurezza Soc.* (2015) p. 677 at p. 679.

[170] Corte cost., 27 febbraio 2015, n. 22; Corte cost., 15 marzo 2013, n. 40; Corte cost. 16 dicembre 2011, n. 329; Corte cost., 28 maggio 2010, n. 187; Corte cost. 30 luglio 2008, n. 306. *See* Cassese, *supra* n. 169, p. 679-680; F. Biondi Dal Monte, 'Lo Stato Sociale di Fronte alle Migrazioni. Diritti Sociali, Appartenenza e Dignità della Persona' (conference paper, June 8-9, 2012, Trapani), <www.gruppodipisa.it/wp-content/uploads/2012/05/trapanibiondi.pdf>, visited 23 December 2016.

[171] Corte cost., 9 febbraio 2011, n. 40; Corte cost., 2 dicembre 2005, n. 432; Biondi Dal Monte, *supra* n. 170, p. 28.

[172] Corte cost., 19 luglio 2013, n. 222.

[173] To be sure, the line separating primary needs from other needs is inevitably blurred: *see* Biondi Dal Monte, *supra* n. 170, p. 24-25. The Court itself may have realised this difficulty when it struck down a 24-month residence requirement for some benefits, while upholding the same requirement for other benefits: Corte cost., 19 luglio 2013, n. 222.

[174] Conseil Constitutionnel, 17 June 2011, n. 137.

little use until a nationwide benefit, comparable to the French benefit, is introduced in Italy.

The last of Ms Pancrazio's assaults on my arguments could be framed as a defence of human dignity and factual freedom, both of them fundamental values of the Italian Constitution.[175] Drawing from the tradition of social democracy and progressive liberalism,[176] widely represented at the Constitutional Assembly,[177] Ms Pancrazio could argue that a conditional, means-tested, minimum income would allow workers to withhold their labour from exploitational contracts and give full, real content to their otherwise merely formal freedom.

To be sure, the centrality of liberty and dignity in our constitutional system does not make the right to social assistance any more unconditional or absolute.[178] Still, by arguing in terms of liberty and dignity, Ms Pancrazio would lift the veil which is distracting my attention away from the case's moral foundations. True, whether her endeavour would be successful is uncertain. Arguing in these terms could even be counterproductive, as principles such as dignity and liberty have no space in what some of the Justices see as a purely technical enterprise. Other Justices, however, might be stirred by this line of thought and would set to work to find a legal solution that accommodates those moral values.

Conclusion

Outside my window, the night has bathed the roofs and walls of Rome in blue. I am now assaulted by doubt. Alone in my office, I look at myself, and I see a *Doctor Azzecca-garbugli* in front of a mountain of paper.[179] But there is life outside legalism. The window is slightly open, and long, oblique moonbeams stretch out on the Persian carpet beneath my desk. In the distance, I can hear the waiters clearing the dinner tables which populate the warren of alleys below the

[175] Art. 3 of the Iralian Constitution, *supra* n. 23.

[176] J.T. Kloppenberg, *Uncertain Victory. Social Democracy and Progressivism in European and American Thought, 1870-1920* (Oxford University Press 1986) p. 82, 278-280, 395-401.

[177] *See*, *e.g.*, B. Covili, 'I Diritti Sociali nella Concezione Storico-Giuridica di Piero Calamandrei: la Speranza Riformatrice e le Inadempienze Costituzionali', 8 *Scienza e Politica* (1996) p. 91 at p. 99 (discussing the influence of Carlo Rosselli on Piero Calamandrei).

[178] The right has been described as conditional in at least a double sense: conditional on its implementation by Parliament, and conditional on the availability of financial resources: F. Gabriele, 'Diritti Sociali, Unità Nazionale e Risorse (In)disponibili', 3 *Riv. AIC* (2013) p. 2.

[179] A. Manzoni, *The Betrothed* (Knopf 2013) p. 41-45 (narrating the story of the meeting between Renzo, the main character, and Doctor Azzecca-Garbugli, a seventeenth-century Italian lawyer whose 'table [is] piled with briefs, appeals, demands and edicts', and who believes that 'if you know how to manipulate proclamations properly, no one's guilty, and no one's innocent').

Quirinale Hill. Maybe Federica and her child are there too, somewhere in the dark.[180]

So far I have played with legal arguments, but should I not devote at least as much attention to the underlying ethical question – the question that, in Dworkinian words, aims at the decision that 'best fits the background moral rights of the parties'?[181] Farewell, my friend. A long night separates me from tomorrow's hearing, and I must now prepare for an arduous and self-questioning ethical exercise.[182]

[180] Note how, for the first time, the judge is calling the plaintiff by her first name, thus treating her as a *person*.

[181] R. Dworkin, 'Political Judges and the Rule of Law', in *Proceedings of the British Academy* (1978) p. 259 at p. 268. For Dworkin, however, the judge is entitled to apply a principle which captures the plaintiff's moral rights only if that principle does 'not conflict with [...] any *considerable part* of the other rules' [my emphasis]. During the analysis of the case, our judge did encounter various rules which limit social assistance to circumscribed groups of needy people. These rules, taken together, form *the bulk* of Italian social assistance legislation (with the notable exception of the framework law of Nov. 8, 2000, n. 328: *see* n. 123 *supra*). As a consequence, it is not at all certain that Dworkin's Hercules would have resolved this case in favour of the plaintiff.

[182] Is this shift ultimate evidence of the 'normative power of the field' upon the judge? Kennedy (1986), *supra* n. 5, p. 76. On the crucial role of judges' own morality and conscience for the sound functioning of the Court, *see* Zagrebelsky, *supra* n. 26, p. 7, 16.