



**BEYOND JUSTICIABILITY:
THE RELATIONAL IDENTITY OF SOCIAL RIGHTS IN THE ITALIAN AND
EUROPEAN CONTEXT**

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MY PROPOSAL

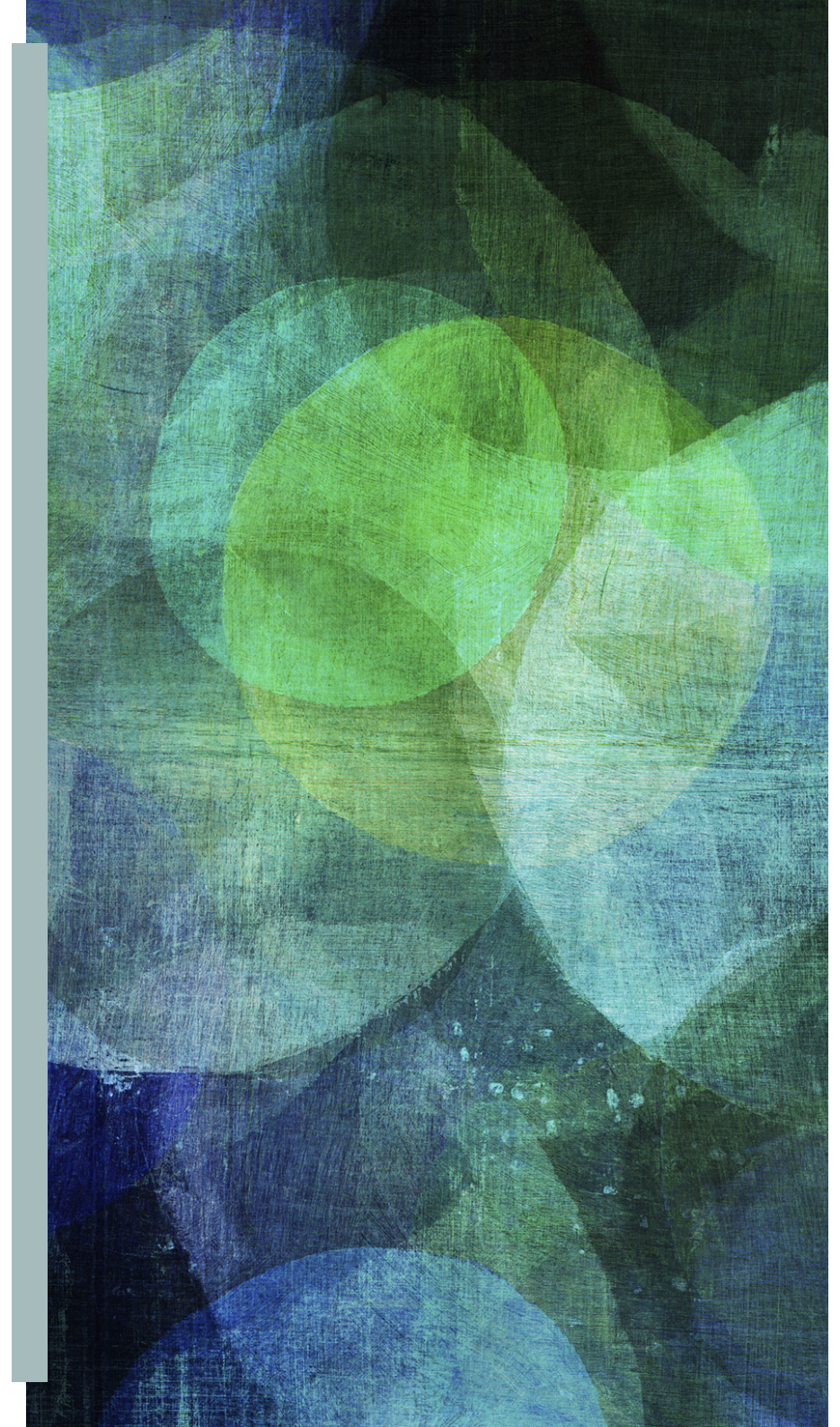
- A THEORY OF JUDICIAL ENGAGEMENT WITH SOCIAL RIGHTS (SRs) THAT PAYS CLOSER ATTENTION TO THE ‘RELATIONAL IDENTITY’ OF THESE RIGHTS.
- At the cornerstone of this perspective is the idea of ‘**constitutional relation**’.
 - The hearth of this idea is that social rights are ‘**relational rights**’ (interpersonal and *situated - homme situé*): rights emerging from the passage from ‘liberalism’ to ‘pluralism’ (equality, equity and fair distribution of resources).
 - This implies two dimensions:
 - The security of SRs needs a **durable dialogue** among Government, Legislature, Judges and Civil Society.
 - To protect SRs national and international institutions must remain congruent not only with the formal rules and limits of legislation (rule of law), but also with the **constitutional commitments** that provide the normative foundations of SRs.

CONSTITUTIONAL ISSUES (UNDERNEATH THE SURFACE)

- The role of constitutionalism for the *functioning* of social state
- The role of constitutional law in the *study* of social state
- The role of constitutional courts in the *protection* of social rights

THE DIFFICULT POSITION OF SOCIAL RIGHTS IN THE CONSTITUTIONAL STATE

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The Struggle for Justiciability



THE CONSTITUTIONALISATION OF SOCIAL RIGHTS

- ◉ The first experience: the Constitutions approved after the WW1
- ◉ The three “layers” of constitutions in the post-WW2 period.
 - ◉ National Constitutions
 - ◉ International Covenants
 - ◉ European Treaties
- ◉ SR were prominent for the creation of **egalitarian welfare states** in post-war Europe
- ◉ The constitutionalisation of SR has been influenced by **economic and social theories**
- ◉ Constitutionalising SR has allowed a reconciliation between the idea of **liberal state and social protection**
- ◉ SR depend on **culture** as well as **availability of resources**

THE “MARGINALISATION” OF SOCIO-ECONOMIC

- The limited **impact** of international socio-economic rights instruments.
 - The **marginalisation** of socio-economic rights within domestic law and politics.
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- The problem of **justiciability** and **enforcement**

GENERAL OBJECTIONS TO SOCIAL (AND ECONOMIC) RIGHTS

- A breach for the liberal idea of rights —> **positive rights**.
- A semi-complete detachment from the liberal idea of state functions —> **positive state**.
- A strong criticism over social (and economic) rights.
 - The incapacity of courts - at every level - to translate a general claim to social rights into the equivalent of an enforceable first-generation right.
 - The consideration of judicial enforcement of social rights as a major intrusion into democratically elected legislatures and the budgetary decisions of governments.

THE MODELS OF (ECONOMIC AND) SOCIAL RIGHTS ADJUDICATION

- The structural injunctions and ‘strong remedies’.
- The ‘minimum core’ doctrine.
- The ‘administrative law’ model.
- The ‘catalytic court’ approach.
- Other approaches: (‘distributive justice’; ‘The Cost of Rights’).

EXAMPLES OF THESE THEORIES

- South Africa Supreme Court.
- Latin-America adjudication: Colombia, Argentina.
- Indian Court decisions.
- Other Countries.



- Despite these developments, several concerns persist.

THE ITALIAN 'SOCIAL STATE'

*Beyond Justiciability:
The Relational Model*

THE ITALIAN EXPERIENCE: AN EARLIER EXAMPLE OF 'DEMOCRATIC EXPERIMENTALISM'

- The idea of social rights claimed not only to be the substantive content of social citizenship, but the soul of the new state —> different from North European experience.
- Articles 2, 3 and 4: solidarity, equality, occupation.
 - **Constitutional pluralism** (civil society; regions; local authorities).
- Constitutional entrenchment of social rights: a long and systematic list of SRs in the Constitution.
 - One narrative for civil, social, economic and political rights: **the idea of social relationships** —> a non-contrasting conception of human nature.
- A critique to the liberal idea of individual rights —> no indifference to **cooperation**.
- Social rights are a way to affirm the importance of understanding human self-realisation as **reciprocal**, rather than individual.

THE IMPLEMENTATION OF CONSTITUTIONAL SR IN ITALY

- The constitutionalisation of the protection —> es. the constitutionalisation of Italian National Healthcare System (1978).
 - The judicial interpretation '*praeter constitutionem*' of many articles (33, 34, 36, 38 of Const.).
- The role of the Italian **legislature**: increment the social state in time of economic expansion without a clear and consistent social policy.
 - Fragmentation and institutional heterogeneity.
- The role of the Italian **Constitutional Court** (expanding constitutional protection over the meaning of the articles).
 - Leading cases in: healthcare; social protection (pensions); education; disability.
 - Reconciling the relationship between rights and duties.

CONSEQUENCES OF THESE APPROACHES

- SRs:
 - are not limited to ‘financially conditioned’ rights.
 - are essential for the protection of **human dignity**.
 - protect the ‘**social life**’ of persons (rights and duties)
 - are based on articles 2 and 3, para. 1 & 2 of It Const.
 - are protected by Parliament, Government (administration) and Judges ‘by constitutional delegation’.

THE IMPACT OF ECONOMIC 'CRISES' ON THE SOCIAL STATE

- Welfare retrenchment and the new role of the social state
- The 'Stability and Growth Pack' (public debt) —> *flexicurity* (corporate social welfare; conditionality); reduction of public debt with reduction of benefits
- The role of Courts: the case of pensions —> Can a Court ignore the scarcity of resources?
- The impact of mass immigration: the enlargement of beneficiaries's pool —> beyond core protection
- Threats for equality and solidarity.
- The de-constitutionalisation of social protection

THE EUROPEANISATION OF SOCIAL RIGHT

*The relationship dimension as key-point
for understanding the new EU social state*



EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

- The European Social Charter (ESC): complementary and parallel protection
- Some indirect protection for socio-economic rights, by protecting individuals and groups against unequal access to health care, housing, education and social protection
- Beyond a mere positivistic approach to the protection of social rights.
- The doctrine of the margin of appreciation

EUROPEAN UNION

- Social rights at the EU level: a controversial issue.
- The “social dimension” of European Union law: a judicial construction.
- The Commission’s Communication on social rights (European Pillar of Social Rights, 2017): a strong commitment for the **institutional dialogue** on social protection of EU citizens.

FURTHER DEVELOPMENTS

- What is the impact of the societal changes on the justiciability of SRs?
- What is the relationship between society and state in the enforcement of SRs?
 - Cooperation vs individualism.
 - New 'contractualism' (conditionality).
 - The new wave: from State to Market.