

Introduction

Recently, the Italian legislature has determined that it has the power to limit the access of foreigners to certain social welfare services. In this respect, legislative measures have been adopted which have made Italian citizenship or the citizenship of a Member State of the European Union a necessary condition for receiving certain social benefits (i.e. [loans at a subsidised rate for the renovation of buildings](#), and [grants for households with three or more children](#)).

Alternatively, the receipt of the benefits in question has been made subject to the condition of long-term residence in the relevant territorial community (i.e. [citizenship income](#), [conditions for access to public housing](#) or [temporary child allowances](#)).

These legislative interventions are in conflict with the jurisprudence of the Italian Constitutional Court. In the last six months alone, the Italian Constitutional Court has issued no fewer than six rulings declaring the constitutional illegitimacy of these legislative interventions, thus guaranteeing equality between Italian and European citizens and foreigners.

In this post, I argue that these legislative interventions, ostensibly adopted to reduce welfare costs, in a sense conceal what has been called "[legislative populism](#)". The latter, in turn, obliges the Constitutional Court to strike down the same legislative interventions in order to ensure compliance with the constitutional principle of equality. In this sense, the Constitutional Court is called upon to correct regulatory choices that, in an attempt to satisfy certain social moods, do not adequately take into account principles and values that underpin the Italian Constitution.

The "reaction" of the Italian Constitutional Court

The Italian Constitution, in affirming the principle of equality, refers only to citizens: article 3 of the Constitution states that ["All citizens have equal social dignity and are equal before the](#)

law". However, the Constitutional Court has specified that this constitutional provision must be interpreted in light of two other constitutional provisions: articles 2 and 10(2). Article 2 states that "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed", and article 10(2) of the Constitution refers to international conventions and acts which, in turn, guarantee the protection of the fundamental rights of foreigners. In this sense, the Constitutional Court has interpreted the principle of equality in light of the personalist principle that inspires the Italian Constitution, and its openness to the international legal system.

The Court even went so far as to state that "if it is true that Article 3 expressly refers only to citizens, it is also certain that the principle of equality also applies to foreigners when it comes to respect for those fundamental rights", i.e. those "inviolable human rights guaranteed to foreigners". In this sense, those provisions that have the effect of excluding foreigners from access to services that include "remedies intended to allow the concrete satisfaction of primary needs inherent in the sphere of the protection of the human person, which it is the task of the Republic to promote and safeguard" have been declared constitutionally illegitimate (i.e. social housing, or essential health services).

With regard to "benefits exceeding the limits of what is essential" (i.e. loans at a subsidised rate for the renovation of buildings, or economic benefits to households for access to rented housing), the Constitutional Court has recognised that the legislature, when selecting the beneficiaries of the benefits in question, must in any event establish criteria which are linked to the function of the service and which, in this sense, are not arbitrary in view of the purpose of the benefits themselves. And it has reserved to itself the power to assess the existence and the reasonableness of such a link, carrying out a review which follows the typical structure of the review carried out pursuant to Article 3, first paragraph, of the Constitution, "which begins by identifying the purpose of the

reference provision and then verifying the consistency with that purpose of the selective filter introduced".

It is thus on the basis of the criterion of the "reasonable correlation" between the purpose of the service to be provided and the subjective characteristics required of its potential beneficiaries that the Court ultimately examines the constitutional legitimacy of regulatory provisions restricting access to social benefits when they do not satisfy a primary human need.

On the one hand, the Court has specified that a nationality requirement can never be considered as a "preliminary criterion for access to social benefits without having been conceived with reference to a specific category of persons". In this sense, the legislature cannot introduce an exclusion aimed at excluding foreigners as such from the group of beneficiaries of "non-essential" benefits.

On the other hand, on the basis of the criterion of a "reasonable correlation" between the purpose of the service to be provided and the subjective characteristics required of its potential beneficiaries the Court has scrutinized a number of provisions requiring a long stay (only in respect of foreigners) before a person could access certain social benefits.

In this respect, the Court went so far as to distinguish between measures to assist members of the community, which require a certain "territorial rootedness", in respect of which the legislature's decision to exclude foreigners who are legally resident but do not hold a "qualified" residence permit (which is essential to certify the stability of their presence on Italian territory) does not "exceed the bounds of reasonableness". On the contrary, the Court considered that the requirement of residence for a predetermined and significant minimum period of time did not respect the principles of reasonableness and equality, since it was liable to introduce "arbitrary elements of distinction into the regulatory framework", since it found that there was no

"reasonable correlation" between the duration of residence and the situations of need or hardship directly attributable to the person as such, which were a prerequisite for eligibility for the social benefits in question.

What (inadequate) reasons does the legislature have?

In light of what has been said above, one can question what may have led the legislature to introduce the controversial legislative interventions referred to. From this point of view, it cannot be denied that the legislature which intervenes in order to grant benefits or advantages has to face the '**cost of rights**'. It is true that the Constitutional Court has clarified and limited the "conditional nature" of certain so-called social rights, noting the existence of an ineradicable essential core of their fulfilment that is beyond the discretion of the legislature. Nevertheless, in the exercise of the same discretion, the legislature has attempted to limit certain welfare measures on the basis of other '**social ties**', believing that it can derive from the constitutional text an indication that there are rights for all and rights reserved only for citizens. And in this sense the legislature has attempted to limit certain public services to those who, because they do not have Italian citizenship, have the legal status of foreigners.

On the other hand, however, the observations seem to relate to what scholarship has called "**legislative populism**". It has been said that "in contemporary democracies [...] the law tends to come too close to the will of the people, i.e. to become an almost pure and naked expression of the will [...] of the representatives themselves. Not only in terms of their needs and interests, but also, and above all, in their immediate reactions, in their desires and moods, as captured with increasing precision and timing [...] by polls and social media, and as outlined and driven by populist leaders". In this sense, the legislative interventions under consideration may also have been motivated by a certain "fear of losing the electoral consensus in the short term".

Clearly, the issue is complex. What is undoubtedly important,

however, is that in this context the Constitutional Court was called upon to play a role of "substitute" for the legislature. The Court had to ensure the "continuous adaptation of infra-constitutional law to constitutional principles", correcting legislative choices that could have led to the exacerbation of already accentuated social inequalities.

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Suggested citation: Carla Di Martina, 'What social assistance for foreigners in Italy?' IACL-AIDC Blog (9 July 2024) [What Social Assistance for Foreigners in Italy? A Clash Between the Legislature and the Courts — IACL-IADC Blog \(blog-iacl-aidc.org\)](#)