

Chapter 5

Reconstructive, Systematic, and Evolutionary Profiles of the Right to Health: Italian Constitutional Jurisprudence Analysis

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ABSTRACT

The paper aims to analyze the right to health, as enshrined in Article 32 of the Italian Constitution, by examining the rulings of the Constitutional Court; in particular, the jurisprudential data, investigated in parallel with the doctrinal one, will allow to reconstruct historically (starting from the discussion that took place in the Constituent Assembly) and systematically the evolution of the social law in question. Specific analysis will be reserved for the exegesis of Article 32 of the Constitution, the problem relating to the costs of the social right to health, the primacy of medical science with respect to the intervention of the legislator in the therapeutic field, and the relationship between the right to health and the Covid-19 pandemic.

INTRODUCTION

Article 32 of the Italian Constitution states, in the first paragraph: The Republic protects health as a fundamental right of the individual and in the interest of the community and guarantees free medical care to the indigent; in the second paragraph, on the other hand, it states: Nobody can be obliged to a specific medical treatment except by law. The law cannot in any case violate the limits imposed by respect for the human person.

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This formulation was arrived at starting from the draft Constitution of the Italian Republic, presented to the Presidency of the Constituent Assembly on January 31, 1947, in which, in article 26, so much was stated: The Republic protects health, promotes hygiene and guarantees free care to the indigent. No medical treatment can be made mandatory except by law. Health practices harmful to human dignity are prohibited; it was, indeed, the subsequent debate in the Constituent Assembly that led to the enunciation of the right to health in the text in force today.

In the afternoon session of April 22, 1947, in particular, the constituent Alberto Mario Cavallotti concluded his speech on article 26 of the draft Constitution with a wish: I hope that in a few days the Italian people will have the news that, beyond any ideology and any strategy, the Constituent Assembly, unanimously, sanctioned the right to health for the Italian people, on the basis solidarity, against any speculation, against any oppression and selfishness, for the intimate union of so-called rich humanity with so-called poor humanity, suffering humanity with healthy humanity, suffering humanity with joyful humanity.

The debate on the right to health continued in the session of April 24, 1947, when, after a detailed discussion, specifically on a series of amendments to the text brought to the attention of the Assembly, Article 26 of the proposed Constitution was approved in its formulation definitive, to then be declared, following coordination, in Article 32 of the Constitution of December 27, 1947.

ARTICLE 32 OF THE CONSTITUTION

The right to health enunciated by article 32 of the Constitution must be interpreted not only as an interest of the community, but also and above all as a fundamental right of the individual, so that it is configured as a primary and absolute right, fully operative also in the relations between private (Constitutional Court, Judgment, July 26, 1979, n. 88; among others: Constitutional Court, Judgment, July 14, 1986, n. 184; Constitutional Court, Judgment, December 18, 1987, n. 559), which “imposes full and exhaustive protection” (Constitutional Court, Judgment, October 27, 1988, n. 992).

In this sense, therefore, the right to health certainly concerns and concerns both the psycho - physical integrity of the person, as a subjective right immediately and directly applicable both to private individuals and to public authorities (Siclari, 2012, p. 14), and the positive profile relating to freedom of treatment (Cartabia, 2012, p. 21), and, finally, the negative profile (freedom from) concerning, instead, the ability to resist therapeutic impositions, impositions that, in any case, would find their limit in the reservation of the law (Ridola, 2008, pp. 143-145) and in respect for the human person, guarantee safeguards placed to protect the sacrifice of the right to health of those subjected to it (Cartabia, 2012, pp. 22-24).

Considered from the point of view of defending the physical and mental integrity of the human person in the face of aggression or conduct which is in any case harmful to third parties, the right to health is an “erga omnes” right immediately guaranteed by the Constitution and, as such, directly protectable and enforceable by legitimate subjects against the perpetrators of the unlawful conduct (Constitutional Court, Judgment, October 16, 1990, n. 455); this, because the infringement of the right in question must in any case find suitable and adequate relief, regardless of the (negative) economic effects consequent to the aforementioned infringement, that is to say “the indemnity cannot be limited to the consequences of the violation affecting the aptitude to produce income but it must also include the effects of the infringement of the law, considered as an autonomous subjective position” (Constitutional Court, Judgment, July 26, 1979, n. 88; and also Constitutional Court, Judgment, July 14, 1986, n. 184).

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