

-REPORT ON WELFARE IN ITALY-

TRYING TO ANSWER SOME QUESTIONS
WHICH ARISE FROM THE PRESENT CONDITION OF WELFARE IN ITALY

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Studio realizzato nell'ambito del Prin

Istituzioni democratiche e amministrazioni d'Europa: coesione e innovazione al tempo della crisi economica – The impact of the financial-economic crisis on the guarantee of social welfare rights (workshop to be held at the University of York Law School on 4th and 5th September 2015)

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INTRODUCTION

1.1 *Main goals of the report*

The main aim of this report is to give a general picture of the present condition of welfare in Italy¹, also extended to its relationship with the economic recession.

However, the analysis will be focused on several sectors, even though really important, which are health, social assistance, social housing. It will be also focused on specific cases regarding some policies in the field of education, work and social security (*i.e.* aid for students with disabilities and family benefits). This choice is due primarily to the will to leave out of the study most of the education and work sector (including social security, strictly related to the work policies), which are generally regulated and managed on the basis of their own particular needs.

The final goal of the report is to try to answer the following questions arising from the existing legal framework:

- is there a general trend to reduce social welfare entitlements? If so, is such a trend conditioned, to any extent, by *ex ante* planning (policies) or it is only driven by emergency reasons? What is the role played by fiscal federalism and the constitutional reform regarding the budget balance?
- Are public authorities reducing their participation in granting social services and rights?
- What is the relationship between the above mentioned trend and the economic recession? Did such a trend start before the financial crisis?
- What are the role and limits of the administrative discretion in distributing benefits and/or services with the aim of granting social rights? What is the relationship between this discretion and the bureaucratic rules in the implementation of the welfare policies? Are the two models opposed to each other? What is, if existing, the extent and quality of citizens participation in the administrative decision-making process about their

¹ As regards the relationship between social rights and the Italian model of Welfare State see G. RAZZANO, *Lo "statuto" costituzionale dei diritti sociali*, from www.gruppodipisa.it, 2012, 24, who does not consider this model in its traditional meaning of social policies managed by public authorities and covered by (increasing) public spending, but in a partially different and wider meaning, including also other kinds of measures (as many of the policies aimed at implement the economic development).

entitlements? Can the above mentioned models and participation affect the approach of the courts when considering the challengers of rights bearers?

- Why in Italy is there not a general Welfare Agenda such as that existing in the UK?

1.2 *Structure of the report*

In its first part the report will present the general framework in a horizontal perspective, focusing on the meaning and the main components of welfare in Italy, *i.e.* health, education, work, social security, social assistance, social housing

The horizontal perspective will be also developed in the light of the regional (or federal?) character of the Italian legal system, which also imposes to describe the distribution of legislative and administrative powers between the State, regions and local authorities in the most important subject matters affecting Welfare.

In its second part the report will present the general framework in a vertical perspective, focusing on an overview of specific welfare policies: the sectors of health, social assistance, social housing, and specific cases regarding some policies in the field of education, work and social security (*i.e.* aid for students with disabilities and family benefits).

In the third part the same vertical perspective (regarding health, social assistance, social housing, aid for students with disabilities and family benefits) will be developed examining the role of case law in judging claims for social services and rights.

In the conclusive part the report will finally try to answer the main questions arising from the existing legal framework, as listed in par. 1.1.

II

GENERAL FRAMEWORK: HORIZONTAL PERSPECTIVE

2.1 *The meaning and main components of Welfare in Italy: education, work, social security, social assistance, health, social housing*

The meaning and main components of welfare in Italy have their legal basis in the Italian Constitution, with special regard to:

a) the general part, establishing the fundamental principles of the constitutional system (arts. 1-12);

b) Title II (focusing on ethical and social rights and duties: arts. 29-34) and Title III (focusing on economic rights and duties: arts. 35-47) of the first part (which deals with the rights and duties of citizens: arts. 13-54);

c) Title V (focusing on Regions, Provinces, Municipalities: arts. 114-133) of the second part (which deals with the organization of Republic: arts. 55-133).

The fundamental principles having much to do with to welfare seem to be those mentioned by arts. 1-5.

As long as this report is mainly concerned, the first is the **democratic principle**, as declared in art. 1 p. 1, according to which «Italy is a democratic Republic **founded on labour**»: in this case it is relevant with special regard to the part considering labour as a fundamental value of the Republic.

This provision is strictly related to the one in art. 4, according to which «the Republic recognises the **right of all citizens to work** and promotes those conditions which make this right effective» (p. 1). Art. 4, in its second paragraph, also declares that «every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society». As a consequence, art. 4 represents the legal basis of the so called **labour principle** and it is addressed, in its paragraph 1, to public authorities in general, *i.e.*:

a) first of all, those having the monopoly of the law-making process required for the achievement of such constitutional goals (such as, in this case, making the **right of all citizens to work** effective);

b) secondly, those having the duty to apply and make in turn the primary sources of law (ordinary laws, delegated decrees, law decrees) effective, for instance adopting secondary sources (such as regulations) and/or other administrative acts different from the secondary sources.

However, par. 2 of art. 4 calls into question also the recipients of the right to work, the citizens, who in fact have, on their part, the duty to perform an activity or a function (in other words *work*) contributing to the progress of society, according to their personal potential and individual choice.

These are the reasons why the overall art. 4 may be considered closely linked to the more general provisions established by art. 2, representing the legal basis both of the so called *personalistic principle* and the value of *social pluralism*. Art. 2 declares in fact 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 that «the Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled». According to many scholars, as a consequence of its content, art. 2 may be used as a kind of ‘open door’ to allow the implicit entering into the Constitution of new rights (such as those of third/fourth generation), which were not explicitly established in its original version or in following amendments. Furthermore art. 2, such as art. 4 p. 1, is mainly addressed to public authorities (with the meaning we have seen above speaking about art. 4 p. 1).

It is the same for art. 3 p. 2, which represents the legal basis of the *principle of substantive equality*, establishing «the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country». This kind of duty is, as a consequence, instrumental to the duties imposed on public authorities both by art. 4 p. 1 and art. 2. However, it is also instrumental, to the effectiveness of the principle of formal equality, as declared in art. 3 p. 1 («all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions»).

All the above mentioned ‘public duties’ are generally addressed, as noticed, to public authorities (with the meaning we have seen above speaking about art. 4 p. 1), but the constitutional principles to which they refer may also be used to interpret every kind of national source of law, involving public authorities, or private persons, or both. It is the same regarding most of the provisions established in the following Title II on ethical and social rights and duties (arts. 29-34)

and Title III on economic rights and duties (arts. 35-47), both included in Part I (on the rights and duties of citizens: arts. 13-54), and that we are going to examine.

However, according to art. 5, even though «the Republic is one and indivisible», «it recognises and promotes local authorities, and implements the fullest measure of administrative decentralisation in those services which depend on the State», adapting «the principles and methods of its legislation to the requirements of autonomy and decentralisation». Art. 5 represents, in short, the legal basis of the *principles of institutional pluralism and institutional autonomy*, which should be made effective through the application of the *decentralization clause*. As a consequence, legislative and administrative competencies are not only in the hands of the State, but they are shared between different levels of government (the State, Regions, local administrations), with the criteria amended by the constitutional reform passed in 2001. We shall take into account this issue in the following section, dealing with Title V of the second part of the Constitution and the distribution of legislative and administrative powers between the State, regions and local authorities in the most important subject matters affecting Welfare.

Now it is useful to go back to the fundamental principles declared in the general part of the Constitution: they are applied, first of all, in the following sections of the Constitution, such as Title II on ethical and social rights and duties (arts. 29-34) and Title III on economic rights and duties (arts. 35-47), which are both components of Part I (on the rights and duties of citizens: arts. 13-54).

Title II starts in fact with some provisions on the *family*, which is the first social group «where human personality is expressed» (art. 2 mentioned above). In this perspective:

a) «the Republic recognises the rights of the family as a natural society founded on marriage» (art. 29 p. 1);

b) «it is the duty and right of parents to support, raise and educate their children, even if born out of wedlock» (art. 30 p. 1);

c) «in the case of incapacity of the parents, the law provides for the fulfilment of their duties» (art. 30 p. 2);

d) «the law ensures such legal and social protection measures as are compatible with the rights of the members of the legitimate family to any children born out of wedlock» (art. 30 p. 3);

e) «the Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits» (art. 31 p. 1);

f) «the Republic protects mothers, children and the young by adopting necessary provisions» (art. 31 p. 2).

A thorough analyses of arts. 29-31 Const. makes it clear that the Republic recognizes the family as a preexisting natural society which has to be supported (with different kind of aid/benefits, economic or not) especially when it has not sufficient means.

The second social group «where human personality is expressed» is, according to a sort of chronological progression, the *school*. In this perspective:

- a) «the Republic guarantees the freedom of the arts and sciences, which may be freely taught» (art. 33 p. 1);
- b) «the Republic lays down general rules for education and establishes state schools of all branches and grades» (art. 33 p. 2);
- c) «entities and private persons have the right to establish schools and institutions of education, at no cost to the State» (art. 33 p. 3);
- d) «the law, when setting out the rights and obligations for the non-state schools which request parity, shall ensure that these schools enjoy full liberty and offer their pupils an education and qualifications of the same standards as those afforded to pupils in state schools» (art. 33 p. 4);
- e) «State examinations are prescribed for admission to and graduation from the various branches and grades of schools and for qualification to exercise a profession» (art. 33 p. 5);
- f) «higher education institutions, universities and academies, have the right to establish their own regulations within the limits laid down by the law» (art. 33 p. 6);
- g) «schools are open to everyone» (art. 34 p. 1);
- h) «primary education, given for at least eight years, is compulsory and free of tuition» (art. 34 p. 2);
- i) «capable and deserving pupils, including those lacking financial resources, have the right to attain the highest levels of education» (art. 34 p. 3);
- j) «the Republic makes this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations» (art. 34 p. 4);
- k) «disabled and handicapped persons are entitled to receive education and vocational training» (art. 38 p. 3) with «responsibilities [...] entrusted to entities and institutions established by

or supported by the State» (art. 38 p. 4), even though «private-sector assistance may be freely provided» (art. 38 p. 5).

A thorough analysis of arts. 33, 34 and 38 p. 3-5 Const. makes it clear that education is mainly a duty of public authorities, mainly because: 1) primary education, provided for at least eight years, is compulsory and free of tuition; 2) schools are open to everyone.

However, the Republic has also taken on the duty to lay down general rules for education and to establish State schools of all branches and grades, not only primary. The main reason seems to reside in the value of school as one of the most important social groups where human personality is expressed, since it represents the link between the family and work (being an essential mean for qualification to exercise a profession). As a consequence, the Republic has also taken on the duty to support (with scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations) all the capable and deserving pupils, including those lacking financial resources, with the aim of making their right to attain the highest levels of education effective. It has moreover assumed, with the same aim, the duty to provide education and vocational training for disabled and handicapped persons, even though this kind of assistance (which seems also included in the more general category of *social assistance, infra*) may be freely provided by private-sector too (private-sector assistance).

In this framework – since the Republic guarantees the freedom of arts and sciences, which may be freely taught – it is also possible, for entities and private persons, to establish schools and institutions of education, under the following conditions: 1) that this establishment is at no cost for the State; 2) that these schools, when requesting parity with the public ones, offer their pupils an education and qualifications of the same standards as those given to pupils in State schools.

For the same reasons, another duty of the Republic is to ensure that both the public and private institutions of education enjoy full freedom in teaching: in this field, on the one hand, public regulation has in fact to be balanced with the value of freedom in teaching, while, on the other hand, the right of higher education institutions, universities and academies to establish their own regulations (so called *functional autonomy*) has to be exercised within the limits laid down by the law.

As mentioned above, school can be considered the link between the family and work (being an essential mean for qualification to exercise a profession), and *work* is in turn one of the fundamental rights on which the constitutional legal order is founded: the legal basis for this

assumption is represented not only by arts. 1 and 4, but also by many provisions contained in Title III (on economic rights and duties: arts. 35-47) of Part I (on the rights and duties of citizens: arts. 13-54). In this perspective, as far as employment is the main concern:

- a) «the Republic protects work in all its forms and practices» (art. 35 p. 1): for instance, it «provides for the training and professional advancement of workers» (art. 35 p. 2); «promotes and encourages international agreements and organisations which have the aim of establishing and regulating labour rights» (art. 35 p. 3); «recognises the freedom to emigrate [...] and protects Italian workers abroad» (art. 35 p. 4);
- b) the constitutional protection of work is also expressed by the provisions according to which: «workers have the right to a remuneration commensurate to the quantity and quality of their work and in any case such as to ensure them and their families a free and dignified existence» (art. 36 p. 1); «maximum daily working hours are established by law» (art. 36 p. 2); «workers have the right to a weekly rest day and paid annual holidays» (art. 36 p. 3); «they cannot waive this right» (art. 36 p. 4); «working women are entitled to equal rights and, for comparable jobs, equal pay as men» (art. 37 p. 1); «working conditions must allow women to fulfil their essential role in the family and ensure appropriate protection for the mother and child» (art. 37 p. 2); «the law establishes the minimum age for paid labour» (art. 37 p. 3); «the Republic protects the work of minors by means of special provisions and guarantees them the right to equal pay for equal work (art. 37 p. 4); «workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment» (art. 38 p. 2), with «responsibilities [...] entrusted to entities and institutions established by or supported by the State» (art. 38 p. 4), even though «private-sector assistance may be freely provided» (art. 38 p. 5);
- c) the constitutional protection of work is, moreover, expressed by the provisions protecting trade unions (art. 39), the right to strike (art. 40), private economic enterprise (art. 41), handicrafts (art. 45 p. 2), the right of workers to cooperate in the management of enterprises (art. 46 p. 2), or establishing the possibility to reserve to workers' associations, under certain conditions, an enterprise or a category thereof (art. 43).

The overall consideration of the above listed provisions makes it clear that the constitutional protection of work is really wide, aiming at the protection not only of workers (in particular when women and minors), but also of their families (as the provision requiring work conditions are to be compatible with special needs of mothers and children shows). The wide-ranging character of this

protection is made clear, furthermore, by the provision on the so called *social security*, *i.e.* on the right of workers to be assured adequate means for their needs in the case of accidents, illness, disability, old age and involuntary unemployment, with «responsibilities [...] entrusted to entities and institutions established by or supported by the State», even though «private-sector assistance may be freely provided».

A similar kind of protection, even though defined in a more general way, is, however, also granted to «every citizen unable to work and without the necessary means of subsistence», who are in fact «entitled to welfare support» (art. 38 p. 1) with «responsibilities [...] entrusted to entities and institutions established by or supported by the State» (art. 38 p. 4). However, «private-sector assistance may be freely provided» (art. 38 p. 5). This is the proper field of *social assistance*, which is meant to cover all those cases where other forms of protection are not available, enabling the private sector too to cooperate with the public with the objective to provide necessary services.

The role of *private-sector assistance*, which, as noticed above, may provide different performances dealing with education, work and social assistance in general², is also acknowledged by art. 45 p. 1, according to which: a) «the Republic recognises the social function of co-operation of a mutually supportive, non-speculative nature»; b) «the law promotes and encourages cooperation through appropriate means and ensures its character and purposes through appropriate checks».

Until now we have spoken about many components of welfare in the Italian constitutional system (education, work, social security, social assistance), but not about *health* yet, despite the fact that it seems to be the most important of them.

The reason why we started with education has to do with how Part I of the Constitution frames personal rights within the social groups where human personality is expressed, *i.e.* the family, school and work.

Social assistance, in turn, relates primarily to work incapacity and lack of necessary means of subsistence.

In this framework the right to health remains in a separate dimension, which is, however, the most important in the Italian welfare system.

² Education and vocational training for disabled and handicapped persons, adequate means for the needs of workers in the case of accidents, illness, disability, old age and involuntary unemployment.

The right to health is in fact safeguarded by the Republic first of all «as a fundamental right of the *individual*» (independently of his condition as a member of a family, student, worker, mother, children or citizen) and only secondarily «as a collective interest» (art. 32 p. 1).

In this perspective the Republic has also the duty to guarantee «free medical care to the indigent» (art. 32 p. 1).

Finally, it is worth noting the absence of any explicit reference to the right to housing as an inviolable right of the person, both as an individual and in the social groups where human personality is expressed (in the wording of art. 2).

However, the possibility that a person is properly housed is normally considered an essential need of the person, both as an individual and in the social groups where human personality is expressed: in this case the protection accorded to the family extends its scope to the place where a household normally resides.

Social housing refers both to *public housing* – *i.e.* policies aimed at providing public houses to be paid with public funds for individuals without the possibility of leasing or buying a house – ³ and to policies aimed at providing private owned houses to be paid in part with public funds, or to be supported by other kinds of public aid, for individuals without the possibility of leasing or buying a house at a market price.

The Constitution, establishing that «workers have the right to a remuneration commensurate to the quantity and quality of their work and [...] such as to ensure them and their families a free and dignified existence», seems mainly concerned with ensuring that workers and their families can have the possibility of leasing or buying a house.

It is just for those cases in which a citizen is «unable to work and without the necessary means of subsistence» that the Constitution entitles her or him «to welfare support»: at this point, the question is whether it is possible to include social housing in this kind of support. As a matter of fact primary and secondary sources of law have often dealt with social housing and their main contents will be examined in the following par. 3.3.

2.2 *The distribution of legislative and administrative powers between the State, regions and local authorities in the most important subject matters affecting Welfare*

³ See AA.VV. - Cassa Depositi e Prestiti, *Social housing – Il mercato immobiliare in Italia: focus sull'edilizia sociale*, 2014, report n. 3, 36 ss., in www.astrid-online.it.

It is now time to develop the horizontal perspective in the light of the regional character of the Italian legal system, which also requires describing the distribution of legislative and administrative powers between the State, regions and local authorities, as welfare policies are actually divided into many different subject matters where different levels of government concur to the rule-making.

The rules regarding the devolution of powers to regional and local government have been established by a constitutional reform passed in 2001, which has amended Title V of Part II of the Constitution.

Title V significantly opens up with art. 114, according to which «the Republic» is indeed composed, «of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State». Moreover «municipalities, provinces, metropolitan cities and regions» are defined as «autonomous entities having their own statutes, powers and functions in accordance with the principles laid down in the Constitution» (art. 114 p. 1).

According to art. 117 p. 2-4, the State has exclusive legislative power in a limited number of subject matters (listed in art. 117 p. 2), whilst it enjoys a so called concurring legislative power with the regions in some other subject matters (listed in art. 117 p. 3). In such a second case the state shall limit itself to determining the fundamental principles while detailed rule-making is reserved to the regions. The latter have legislative powers in all other subject matters not listed in par. 2 and 3 (art. 117 p. 4).

As far as administrative action is concerned, laws should award local councils the generalities of tasks except for those circumstances in which a vaster jurisdiction is needed (principle of vertical subsidiarity⁴).

Within this framework the State has got exclusive legislative powers in the following fields affecting directly or indirectly welfare policies:

- «harmonization of public budgets; equalisation of financial resources», «competition protection» (art. 117 p. 2 lett. e);
- «civil [...] law» (art. 117 p. 2 lett. l);

⁴ In the meaning that decisions connected to public interest must be taken as close as possible to people, *i.e.* by the lowest possible level of government (principle of decentralization), which, however, can be helped by the one directly above it if the former is unable to take these decisions (principle of vertical subsidiarity). The matter deals mostly, as a consequence, not with the distribution of legislative powers between the State and regions (which is directly provided by art. 117 p. 2-4), but with the distribution of administrative functions in general, which, on the contrary, is a competence of State and/or regional ordinary statutes, to be adopted according to the division of legislative powers established by art. 117 (arts. 117 p. 6, 118 p. 1 and 118 p. 2).

- «determination of the basic levels of benefits related to civil and social entitlements to be guaranteed throughout the national territory» (art. 117 p. 2, lett. m)⁵;
- «general provisions on education» (art. 117 p. 2, lett. n)⁶;
- «social security» (art. 117 p. 2, lett. o);
- «environmental protection» (art. 117 p. 2, lett. o).

The State and the regions concur in legislating in the following subject matters: «job protection and safety; education, subject to the autonomy of educational institutions and with the exception of vocational education and training; professions; scientific and technological research and innovation support for productive sectors; health protection; [...] land-use planning; [...] complementary and supplementary social security; coordination of public finance and taxation system» (art. 117 p. 3).

Since any subject matters not listed in art. 117 p. 2 or 3 is to be considered reserved to the regional rule-making, social services and/or social assistance are deemed to be in the exclusive remit of the regions. The problem of course is as to whether and to what extent a certain policy belongs to a subject matter. Social housing, for example, stands astride several subject matters as listed in article 117 Const. according to the case law of the Constitutional court: social assistance, land-use planning, civil law, determination of the basic levels of benefits related to civil and social entitlements to be guaranteed throughout the national territory, competition protection and environmental protection.

Another important factor to be considered is represented by the so called *fiscal federalism*, as provided for by article 119 Const.

This article set up the principles regarding how national legislature should allocate financial resources between different levels of government to carry out their tasks.

According to such principles: a) «municipalities, provinces, metropolitan cities and regions [...] have revenue and expenditure autonomy», with the duty to observe their budgets balance and to be in compliance with the economic and financial constraints deriving from EU legislation (art. 119 p. 1); b) they «have independent financial resources», «set and levy taxes and collect revenues of their own» («in compliance with the Constitution and according to the principles of co-ordination

⁵ This point is really important, as it can be noticed also from the exam of art. 120 p. 2, according to which, if the basic level of benefits related to civil and social entitlements is not ensured, the level of government concerned can be substituted by the State government, through the nomination of a special commissioner.

⁶ However, according to art. 116 p. 3, «additional special forms and conditions of autonomy», related to the area of *general provisions on education*, «may be attributed to other Regions by State Law», following the particular procedure established in the same art. 116 p. 3.

of State finances and the tax system»), «share in the tax revenues related to their respective territories» (art. 119 p. 2); c) «State legislation shall provide for an equalisation fund [...] for the territories having lower per-capita taxable capacity» (art. 119 p. 3); d) all the above mentioned resources shall enable municipalities, provinces, metropolitan cities and regions to fully finance their functions (art. 119 p. 4); e) however, «the State shall allocate supplementary resources and adopt special measures in favour of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to reduce economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions» (art. 119 p. 5).

At present these principles and rules have to be interpreted also in the light of art. 81 Const., as amendment by the constitutional Law no. 1/2012, of April 20th, which has explicitly introduced the «balanced budget» principle into the text of the Constitution. This revision, which was enacted as a response to the financial markets and to the pressures coming from the EU, has brought some changes, moreover, in art. 97 Const., now requiring that public administrations, according to the European Union directions, ensure «balanced budgets and public debt sustainability». The revision has introduced, however, an element of extreme rigidity which may represent a threat to the safeguarding of fundamental rights, especially the social ones, representing the corner stone of the Italian form of State, which, according to art. 138 Const., cannot be amended, neither by a constitutional reform⁷.

⁷ See T. GROPPi, *The Impact of the Financial Crisis on the Italian written Constitution*, from *IJPL*, 2012, n. 1.

III

GENERAL FRAMEWORK:

AN OVERVIEW OF SPECIFIC WELFARE POLICIES IN A VERTICAL PERSPECTIVE

3.1 Focus on the healthcare system

It is now possible to present the general framework in a vertical perspective, focusing on an overview of specific welfare policies.

In this case we shall start from the right to health, to be made effective by the healthcare system. The main reason of this choice is that health policy has always been, among the welfare policies we are going to examine in a vertical perspective, the area more attentively cared by legislators.

As regards the right to health, and the healthcare system, let us recall the main constitutional principles and provisions we have pointed out in the previous section, *i.e.*:

1. the right to health is safeguarded by the Republic first of all «as a fundamental right of the *individual*» (independently of his condition of member of a family, student, worker, mother, children or citizen) and only secondly «as a collective interest» (art. 32 p. 1);

2. the Republic has assumed the duty to guarantee «free medical care to the indigent» (art. 32 p. 1);

3. the State and the regions possess concurring legislation competence in «health protection» and «coordination of public finance and taxation system» (art. 117 p. 3), even though the State enjoys exclusive legislative powers in the «determination of the basic levels of benefits relating to civil and social entitlements to be guaranteed throughout the national territory» (art. 117 p. 2, lett. m), «harmonization of public budgets» and «equalisation of financial resources» (art. 117 p. 2 lett. e);

4. the distribution of administrative duties between the State, the regions and local authorities in the field of healthcare is regulated pursuant to arts. 117 p. 6 and 118 p. 1 Const. mentioned above; that is to say that it is up to the state or regional statutory law depending on the particular subject matter to establish how to distribute administrative duties taking into account the principle of vertical subsidiarity;

5. art. 119 Const., representing the constitutional legal basis of the so called *fiscal federalism*, applies to the field at hand and has been implemented by the act of Parliament no. 42/2009 and, as regards healthcare sector only, by delegated decree no. 68/2011.

Despite the abstract rules regarding the division of labour between central state and the regions, national statutory laws have always played a major role in designing the healthcare environment, so that one can effectively speak of a national healthcare system despite remarkable regional peculiarities.

The regional healthcare models, on their part, differ from each other mainly regarding the relationships between Local health authorities and (other) providers of healthcare services. From this point of view they can be grouped in two or three models⁸.

Thus, in the light of the level of detail required by this report, it is possible to refer to the NHS as a whole, regardless of regional differences.

The Italian NHS has the nature of a universalistic system, having being modelled by the Act of Parliament no. 833 of 1978 on the English NHS, the paradigm of such kinds of systems.

They can be considered the most equitable both from a subjective and an objective point of view⁹, but they are also the ones in which the public spending is higher and more difficult to take under control.

⁸ For instance, according to the most common regional model, the Local health authorities, which are necessary regional institutions, often have a double competence, consisting both in the organization of the local healthcare system and in provision of healthcare services. This double role (of buyers and providers of healthcare services) can, however, induce them to ask for healthcare services first of all from themselves (*i.e.* from their trusts) and then from the other stakeholders. In order to avoid this possibility, in the Lombardy region a different system has been adopted: here the Local health authorities have only the role of buyers (and not of providers) of healthcare services from the accredited trusts. So they have only a competence consisting in the organization of the local healthcare system. For a comparison between different regional healthcare systems, see Q. CAMERLENGO, *Le politiche sanitarie in Emilia-Romagna, Lazio, Lombardia, Toscana*, in L. VIOLINI (edited by), *Sussidiarietà e decentramento*, Milano, 2003, 223; E. GRIGLIO, *L'esperienza della Lombardia: il ruolo della regione*, in C. DE VINCENTI - R. FINOCCHI GHERSI - A. TARDIOLA (edited by), *La sanità in Italia. Organizzazione, governo, regolazione, mercato*, Bologna, il Mulino, 2010; B. PEZZINI, *Ventuno modelli sanitari? Quanta disuguaglianza possiamo accettare (e quanta disuguaglianza riusciamo a vedere). Il cosiddetto modello lombardo*, in R. BALDUZZI, *I servizi sanitari regionali tra autonomia e coerenza di sistema*, Milano, Giuffrè, 2005.

⁹ For a comparison between different healthcare systems, see A. PIOGGIA – S. CIVITARESE MATTEUCCI – G. RACCA – M. DUGATO (edited by), *I servizi sanitari: organizzazione, riforme e sostenibilità. Una prospettiva comparata*, Rimini, Maggioli, 2011; F. TOTH, *Le politiche sanitarie – Modelli a confronto*, Bari, Laterza, 2009; ID., *Is there a Southern European Healthcare Model?*, in *West European Politics*, n. 33-2, 2010, 325; ID., *Le politiche sanitarie tra riforme e contro-riforme*, in *saluteinternazionale.info*, 2010; ID., *Le riforme sanitarie in Europa: tra continuità e cambiamento*, in *Riv. it. pol. pubb.*, n. 2, 2009, 69; E. JORIO, *Il percorso legislativo della riforma sanitaria di Barack H. Obama, prima che venga approvata dal Congresso USA*, in *www.astrid-online.it*, 2010.

Before saying something more about these two points, it is useful, to highlight the main features of the NHS as a whole.

First of all, most part of administrative competencies in the healthcare sector - mainly focused on its managing and monitoring, and on delivery of services - belongs to the regions, while the State maintains general administrative functions regarding coordination and planning and the setting of the essential levels of care (at the present provided for by the decree of the President of Council of Ministers 29.11.2001).

In this framework the management of services is largely delegated to the network of Local Health Authorities (existing in all the regional systems, even though in some cases with different role, *supra*) and to the public Hospital Trust (if existing in the regional system concerned), under the supervision technical support and control of the regions.

Care services are divided in different levels.

In general (with few exceptions represented by some regional systems, *supra*) Local Health Authorities provide for all the services: primary care, secondary care, public health, occupational health and healthcare relating to local social assistance.

Secondary care may also be provided by other public or private operators (such as public or private Scientific Institutes for Research and Care, other public or private hospitals, and so on...) insofar as they are admitted in the system by the competent region.

Such operators can deliver services either as accredited providers or as mere authorised providers. However, only in the first occurrence do they properly operate as cogs of the NHS where costs of services are covered by public funds.

Summing up, the local health authorities may provide secondary care directly through their own facilities or through services supplied by independent hospital trusts, research hospitals and other accredited providers (public or private). This kind of care may be also supplied by other providers (those who are authorized but not accredited) payed directly by patients.

Primary care is always provided free of charge, by Primary Care Physicians (*infra*), divided in general practitioners and pediatricians, which are self-employed and independent physician under a public contract.

Italy has recently taken an important step towards ensuring greater coordination and integration of care with the so called Balduzzi Law (n. 189/2012), encouraging the establishment of community care networks, mainly (but not only) as regards the primary care level, which in turn

represents the patients' first point of entry into the (public) healthcare system, through the so called *gatekeeping* function exercised by the Primary Care Physicians (*infra*).

The Balduzzi Law, the contemporary National Health Plan and the Health Pact 2014-2016 introduced, in fact, new organizational forms, mainly (but not only) in primary care, also with the aim of implementing the coordination between health and social care, the latter dealing in turn with the broader area of social assistance (*infra*).

In few words, practitioners were encouraged to establish such networks (including single profession organizations) to foster continuity and integration of health and social care, also in a multidisciplinary perspective and with the aim of encouraging the participation of patients and their families. However, the Balduzzi reform is also aimed at encouraging the development of an intermediate level of care, and at modifying the role of hospitals – in terms of implementing their specialization and integrated / multidisciplinary approach for acute and / or chronic care – while strengthening the role of primary care as an interface between the population and the healthcare system.

In order to focus on the most important features of the Italian NHS we need to bear in mind that the balancing of the duty to provide certain essential services of a certain quality – inspired to equitable principles – and the need to control and/or reduce public spending has become more and more stringent as a consequence of the economic recession.

Equity is meant to be at the root of the system and it regards the goal that everybody can freely access health services funded by public expenditure irregardless of the group or category one belongs to (opposite to this in Germany or France, healthcare services are mainly funded by social health insurance).

To be fair such a universal coverage is not fully consistent with what the Constitution establishes, as art. 32 p. 1 only provides for the guarantee of «free medical care to the indigent».

Such a very large coverage of the needs of the population entails that most of the health services are assured to the patients directly by the NHS – and in the end by general taxation – with minor exceptions, such as some dental or aesthetic healthcare services. The latter are the so called *out of pocket services*, and users must pay for them directly or through a private insurance policy, if they have one.

As regards the usually high level of public spending in a universalistic healthcare system, one of the reasons of their costliness is that users tend to overestimate their actual need for healthcare services, mainly because they usually do not pay directly for them.

The universalistic healthcare systems have, however, introduced some tools to avoid this overestimation.

In Italy the main tools used for spending control with the aim of monitoring the demand are: a) the bundling of services to be paid via public expenditure; b) the mechanism of the so called *gatekeeping* (according to which citizens asking for non-urgent hospital or specialist healthcare services which are covered by NHS have to obtain a specific prescription of their primary care physician); c) the use of the so called '*ticket*', which is a mechanism of cost-sharing, according to which each citizen asking for non-urgent hospital or specialised healthcare services (or for some kind of medicines) covered by the NHS has to partly bear the cost.

The decision regarding which services are to be covered by public funds is based on the prior *determination of the basic levels of care* by the state and is a consequence of both political and ethical stances. Regions may decide in turn to add more services if they can fund them¹⁰. In principles such decision-making is not driven by financial consideration, even though one must say that as it considerably affects public expenditure it is hardly possible to overlook the influence that the latter exerts on the actual set of such a bundle of services .

Other tools used in spending control aim at monitoring market supply. The exam of the most important of them may be useful to highlight the main features of the NHS as regards its organization.

The first is the mechanism based on institutional accreditation and contractual agreements (used to control the entry into the market of potential providers): in order to benefit from public funds healthcare trusts need in fact to receive the so called accreditation from the competent authority (the region). Such an accreditation is the premise upon which the regional authority and the healthcare trust have to sign a specific contractual agreement providing quantity and quality of healthcare services that the healthcare trust can supply. The infringement of such limits set could trigger the repeal of the accreditation by the region¹¹.

¹⁰ See, *ex multis*, Tar Lazio, Roma, sez. III *ter*, 26 may 2003, n. 4690, in www.giustizia-amministrativa.it; Tar Lazio, Roma, sez. III *ter*, July 10 2002, n. 6252, in www.giustizia-amministrativa.it.

¹¹ The consequences of exceeding the spending limits are better described by G. Corso, *Pubblico e privato nel sistema sanitario*, in G. CORSO - P. MAGISTRELLI (edited by), *Il diritto alla salute tra istituzioni e società civile*, Torino, Giappichelli, 2009, 17, with many case law references.

The second is the introduction of a spending cap for healthcare services determined by the regions in taking into account healthcare needs defined in accordance with regional health planning. This cap regards both each contractual relationship between the health authority and trusts and the regional system as a whole.¹²;

The third is to experiment new forms of organisation and delivery through public and private partnership (introduced by art. 9 *bis* of delegated decree 502/1992 (as amended by delegated decrees 517/93 and 229/99) in order to increase the quality of the services provided and at the same time raise private funds. In this case spending control is mainly due to the fact that the setting up of ‘management experimentalism’ can introduce private capital into the National Healthcare System, so reducing significantly the need for public resources¹³.

The fourth tool is constituted by the adoption of plans to eliminate the healthcare deficit (Recovery Plans), which are compulsory under certain conditions¹⁴. Their violation (such as the failure to ensure *basic levels of care*) allows the Government to intervene in substitution of the

¹² See G. FERRARI, *Determinazione dell’aggregato provinciale di spesa per l’assistenza ospedaliera prestata da strutture private accreditate*, in *Giorn. dir. amm.*, n. 4, 2011, 431.

¹³ As regards ‘management experimentations’, see, *ex multis*, R. ROTIGLIANO, *Le società di sperimentazione gestionale nel quadro della tutela della concorrenza*, in G. CORSO - P. MAGISTRELLI (a cura di), *Il diritto alla salute tra istituzioni e società civile*, quot., 12; C. DE VINCENTI - R. FINOCCHI GHERSI - A. TARDIOLA (a cura di), *La sanità in Italia. Organizzazione, governo, regolazione, mercato*, Bologna, il Mulino, 2010; S. CIVITARESE MATTEUCCI - M. DUGATO - A. PIOGGIA - G. RACCA (edited by), *Oltre l’aziendalizzazione del servizio sanitario*, cit.; M. CONTICELLI, *Privato e pubblico nel servizio sanitario*, Milano, Giuffrè, 2012; M. D’ANGELOSANTE, *Strumenti di controllo della spesa e concorrenza nell’organizzazione del servizio sanitario in Italia*, quot.; G. CORSO - P. MAGISTRELLI (edited by), *Il diritto alla salute tra istituzioni e società civile*, cit.; R. BALDUZZI (edited by), *La sanità italiana tra livelli essenziali di assistenza, tutela della salute e progetto di devolution*, Milano, Giuffrè, 2004; C. BOTTARI, *Tutela della salute ed organizzazione sanitaria*, Torino, 2009.

¹⁴ The combined application of all the tools mentioned above at points 1-3 has not been able, in fact, either to restrain or to reduce, in the necessary measure, the excessive healthcare deficit. So paragraph 180 of the only article of financial law n. 311/04 has stated that, in the cases provided in par. 174 (such as management of deficit) and 176 (non compliance with the duties disciplined in par. 173 – such as those related to planning – so that the possibility of using State additional financing is denied), the region concerned has the duty of draft and approving a plan, with a duration of no longer than three years, containing rules and programs about the reorganization, redevelopment and strengthening of regional healthcare service. In order to achieve this aim, the State and the regions signed an agreement on March 23 2005 concerning spending control, on the basis of the provisions contained in article 8, par. 6, l. 131/03. After that the discipline of the Recovery Plans was supplemented and refined, mainly to allow the management of the deficit which had not yet been paid off on the expiry of the first three years (see, *ex multis*, the agreement between the State and region signed on March 23 2005; art. 1, p. 1 *bis*, l.d. 23/07; l’art. 1, p. 2, l.d. 154/08; art. 6 *bis*, p. 1, l.d. 185/08; art. 4, l.d. 159/07; art. 5 and 6, d.d. 68/11; l.d. 23/07; art. 2, par. 46 and 49, of the financial law for the year 2008; the Health Agreement signed in 2006 between the Ministers for Health and the Economy and the regions and autonomous provinces; art. 11, l.d. 78/10; art. 2, p. 77, l. 191/09; l.d. 95/12; art. 1, p. 274 and following, l. n. 266/05; art. 1, p. 1 *bis* and 1 *ter*, l.d. 206/06; art. 1, p. 796, lett. b, l. 296/06; the Health Agreement between the State and regions, signed on December 3 2009; d.d. 149/11; see, moreover; E. JORIO, *I Piani di rientro del debito sanitario ed i rischi della legislazione dell’emergenza*, in *San. pubb. e priv.*, n. 5, 2009, 13; M. MENEGUZZO - G. FIORANI, *I Piani regionali di rientro. Analisi dinamica sistemica*, in *Mecosan*, n. 68, 2008, 27; R. ARRIGONI, *La “manovra correttiva” dei conti pubblici*, in *Giorn. dir. amm.*, n. 11, 2010, 1179). The violation of the Plans by the regions concerned can moreover determine their substitution by the State government (according to art. 120, p. 2, Const.), through the nomination of a special commissioner (the same procedure can be applied if *the basic level of benefits related to healthcare* is not ensured).

region concerned. Moreover, such Plans normally determine a clamping down of regional autonomy, both legislative and administrative, but also a limitation of regional autonomy regarding expenditure (see Const. Court, 23 April 2010, n. 141).

The sixth is the adoption of policies of *spending review* in healthcare, with the main aim of controlling transactional costs (such as costs related to public tenders): these measures are mainly related to the need to adopt new ordinary rules to discipline certain activities in order to ensure that they are well managed. In other words, the economic recession represents just an opportunity for the adoption of these measures, but their real aim goes beyond the need to cope with the crisis¹⁵.

The sixth is the implementation of fiscal federalism, with limitations and meaning which will be better explained later.

It is clear that the tools aimed at controlling supply are more numerous and complex. In fact they can be classified on the basis of different criteria. One of them is the distinction between ordinary measures (which always apply: for instance the mechanism based on institutional accreditation and contractual agreements) and extraordinary measures (which, on the contrary, apply just in some special cases: for example Recovery Plans). Another is the distinction between measures aimed at spending control (for instance Recovery Plans and the policies of the *spending review* in healthcare) and those aimed at optimizing spending (even though the spending will not be reduced in absolute terms), so preferring optimization in the use of resources (for instance the implementation of fiscal federalism, if and when implemented).

Regarding the first, it is necessary to make it clear that the distinction between ordinary and extraordinary measures seems to be even more difficult, because, as the extraordinary measures are quantitatively and qualitatively highly significant, the ordinary ones often seem to be dismissed.

¹⁵ More recently measures adopted against the economic recession and to reduce the public deficit (such as l.d. 52/12, confirmed by l. 94/12, and l.d. 95/12, confirmed by l. 135/12) have introduced an important *spending review* in healthcare, with the main aim of controlling the intermediate costs of the healthcare trusts (such as costs related to the contracts that they have signed to buy goods and *no core* services). As regards the ordinary, and not extraordinary, character of the above described *spending review*, see R. PEREZ, *Prime osservazioni sulla spending review*, in www.astrid-online.it; as regards the relationship between the economic recession and the crisis of the Welfare State in Spain see J. TORNOS MÀS, *Crisis del Estado de bienestar. El papel del derecho administrativo*, in <http://uspceu.es/pages/congresos/italo-espanol/presentacion.html>, 2012. However, it is also possible to find, among the recent policies on *spending review*, some measures applicable for a limited period to cope with urgent needs for a reduction in public spending (such as measures regarding the creation of extraordinary organs). Moreover these measures also have a functional impact (reflecting on the discipline of the actions of the parties concerned), as well as a structural one (reflecting on their organization). So all the above mentioned actions are related both to the ordinary reduction in costs and the need to eliminate the healthcare deficit, and also represent one of the most important tools of this need (regarding the relationship between *spending review*, distribution of financial resources and the gradual phasing out of the criterion of the so called 'past spending' see R. PEREZ, *La manovra d'estate, il patto interno di stabilità e la spesa sanitaria*, in www.astrid-online.it, 2008).

The emergency tends in fact to become permanent and endemic, as the ongoing economic and financial recession do. Some examples of emergency becoming permanent are the frequent exceptions to the sanctions established for the violation of the Plans to eliminate the healthcare deficit or the many agreements signed in derogation of some fiscal regulation.

Here it is necessary to clarify that the reform regarding the financing of healthcare is made up not only of the implementation of fiscal federalism (for instance through the act of Parliament 42/2009 and d.d. 68/2011), but also of l.d. 56/2000 and the subsequent measures (which, some years before 2009, began to use the concept of ‘standard cost’ in addition to the traditional notion of ‘past spending’). However, since the beginning of the new Century, the extraordinary measures have been so many and frequent that it is difficult to distinguish them from the ordinary ones. This tendency has been made worse by the economic recession. In fact, starting from the beginning of this recession as an extraordinary event, important measures have been introduced, with the aim of setting up ordinary tools for the governance of certain situations and to prevent them happening again. Some of these measures are: a) the constitutional reform regarding the budget balance (const. law 1/2012, implemented by the act of Parliament 243/2012), in accordance with the international Treaty about *Fiscal compact*; b) all the other measures regarding the recentralization of financial policies.

These reforms, however, need to be coordinated with the implementation of fiscal federalism, but trying to understand, first of all, if this implementation is still ongoing or if it has been abandoned as a consequence of the above mentioned measures.

The answer may be found going back to the distinction between measures aimed at spending control and measures aimed at optimizing spending: in this perspective the implementation of fiscal federalism as required by article 119 of the Constitution could optimize spending.

Indeed, pursuant to article 119 of the Constitution, the act of Parliament n. 42/2009 was approved. In turn, law n. 42/2009 was implemented through some delegated decrees: one of them (d.d. 68/2011) contains provisions about healthcare financing. In all these sources *the basic levels of care* are disciplined as a tool of fiscal equalization, in order to avoid the implementation of a kind of federalism which is too competitive and inequitable¹⁶.

¹⁶ For some references about fiscal federalism and *the basic level of benefits related to healthcare*, see, *ex multis*: A. MASSERA, *Uguaglianza e giustizia nel Welfare State*, in *Dir. amm.*, n. 1, 2009, 24; R. BALDUZZI, *Equità ed efficienza nei livelli essenziali in sanità*, in G. CORSO - P. MAGISTRELLI (edited by), *Il diritto alla salute tra istituzioni e società civile*, quot., 81 ss.; E. BALBONI, *Diritti sociali, sanità e prospettive del federalismo*, in G. CORSO - P. MAGISTRELLI (edited by), *Il diritto alla salute tra istituzioni e società civile*, quot., 95; E. BORGONOVÌ, *Verso il*

The financial autonomy of the regions is in fact balanced by the possibility, for those which are not able to ensure *the basic levels of care*, to draw from a State fund in order to obtain the financial resources necessary: a) to provide *the basic levels of care* according to the quality and quantity required (if the basic level is not ensured, but the budget is balanced); b) or to reach the budget balance of healthcare spending (if *the basic level of care* is ensured, but the budget is not balanced); c) or, finally, to achieve both the goals listed in the previous points (if *the basic level of care* is not ensured, and the budget is not balanced).

It is now necessary to say a little more about the concept of ‘standard need’.

The ‘standard need’, according to delegated decree 68/2011, seems to be the result of multiplying *the basic levels of benefits related to healthcare* by the standard costs of the healthcare services, as registered in the ‘virtuous’ regions: so the ‘standard need’ seems to represent, together with the ‘standard costs’, the parameter which should bring about the abandoning of the criterion of ‘past spending’ in the financing of healthcare.

According to d.d. 68/2011, the ‘virtuous’ regions are those which have a balanced budget and are not subject to Plans to eliminate the healthcare deficit. However, if the regions responding to both these requisites do not exist in the number required by the above mentioned delegated decree, it is possible to apply the supplementary parameter of the best economic result. The identification and choice of the ‘virtuous’ regions are the preconditions to determine the standard costs of the healthcare services: first of all these costs have to be identified in the regions chosen with the above mentioned procedure, and then they have to be multiplied by *the basic levels of care* to be ensured in each region, but adapting the result on the basis of the demographic characteristics

federalismo fiscale, in *Mecosan*, n. 67, 2008, 3.; C. TUBERTINI, *Pubblica amministrazione e garanzia dei livelli essenziali delle prestazioni. Il caso della tutela della salute*, Bologna, BUP, 2008; A. BRANCASI, *Uguaglianze e disuguaglianze nell'assetto finanziario di una repubblica federale*, in *Dir. pubbl.*, 2002, 922; C. PINELLI, *I livelli essenziali delle prestazioni e fabbisogni standard*, in www.astrid-online.it, 2011; C. PINELLI, *Sui "livelli essenziali delle prestazioni concernenti i diritti civili e sociali" (art. 117, comma 2, lett. m) Cost.*, in *Dir. pubbl.*, 2002; F. PALLANTE, *I diritti sociali tra federalismo e principio di uguaglianza sostanziale*, in *Dir. pubbl.*, n. 2, 2011, 258; G. DELLA CANANEA, *Autonomie e perequazione nell'art. 119 della Costituzione*, in *Idf*, 2005, 134; E. INNOCENTI, *Il finanziamento della spesa sanitaria nella recente giurisprudenza costituzionale: tra tutela della salute, coordinamento della finanza pubblica e (in)attuazione dell'art. 119 Cost.*, in *Le Regioni*, n. 3, 2008, 580; F. BASSANINI - G. MACCIOTTA, *I principi della delega per l'attuazione del federalismo fiscale - Commento all'art. 2 della legge n. 42 del 2009*, in www.astrid-online.it; F. SAIITTO, *La legge delega sul "federalismo fiscale": i livelli essenziali delle prestazioni come misura economia dell'eguaglianza*, in *Giur. cost.*, n. 3, 2010, 2817 ss.; R. BIFULCO, *Osservazioni sulla legge n. 42 del 2009 in materia di federalismo fiscale*, in www.astrid-online.it; E. CARUSO - N. DIRINDIN, *Costi e fabbisogni standard nel settore sanitario: le ambiguità del decreto legislativo n. 68 del 2011*, in www.astrid-online.it, 2011; M. SICLARI, *Il "federalismo sanitario" (Appunti preliminari)*, in www.astrid-online.it, 2011; F. TOSI, *Il federalismo fiscale a due anni dalla legge delega*, in www.astrid-online.it, 2011.

of the regional population concerned¹⁷. The above mentioned procedure is aimed at the identification of the ‘regional standard need’ to be covered by public financing. In December 2013, as a consequence of the first application of the above mentioned procedure, Veneto, Emilia Romagna and Umbria have been identified as virtuous regions¹⁸.

As we have already said, the introduction of these mechanisms requires understanding if and how they will be influenced by the constitutional reform regarding the budget balance (which applies as from 2014) and by the many measures related to the recentralization of financial policies due to the economic recession.

Maybe it is too soon to give a complete answer, but the interpretation of the many reforms which have recently been approved suggests that autonomy will not be abandoned, and that, on the contrary, it will become a kind of ‘prize’ for the regions which will be able to achieve certain goals. Furthermore these goals do not seem to be too different from those related to fiscal federalism reform: this conclusion can be reached, for example, by thinking of the double role of the budget balance, which represents both a precondition to consider a region ‘virtuous’ according to fiscal federalism reform and a principle now established in the Constitution above all as a consequence of constraints coming from the EU legal order. So it does not seem that autonomy is going to be sacrificed in the name of the economic recession: in other words, the recession should not lead to the waiver of autonomy¹⁹.

After these clarifications, it is now possible to affirm that the implementation of fiscal federalism: a) tends to stimulate, through the financial autonomy mentioned in the reform, the diversification of the regional healthcare systems, mainly with regard to their fiscal systems; b) thus also tends to stimulate the financial liability of the regions, at least towards the State.

However, it is possible to add the following further effects to these goals:

¹⁷ Regarding the limits related to the use, in the ‘non virtuous’ regions, of the data collected in the virtuous ones, see T.E. FROSINI, *The Gamble of Fiscal Federalism in Italy*, in *Italian Journal of Public Law*, n. 1, 2011, 138; G. LEONE, *Per un federalismo competitivo e solidale*, in *Idf*, n. 3-4, 2009, 538; G. MACCIOTTA *Semplificazione istituzionale e risorse finanziarie*, in F. BASSANINI - L. CASTELLI (edited by), *Semplificare l’Italia*, Città di Castello, Passigli, 2008, 135; G. VIESTI, *Il federalismo difficile*, in *Il Mulino*, n. 5, 2010, 734; F. PUZZO, *Prime considerazioni intorno alla legge delega di attuazione dell’art. 119 della Costituzione*, in www.astrid-online.it, 2009; F. PAMMOLLI - N.C. SALERNO, *Alla ricerca di standard per la sanità federalista. Una proposta per l’attuazione della Legge n. 42-2009*, Fondazione Cerm, note n. 1, 2010, in www.cermlab.it; ID., *Le differenze regionali nella governance della spesa sanitaria*, in www.astridonline.it, 2011; G. PITRUZZELLA, *Sanità e Regioni*, in *Le Regioni*, n. 6, 2009, 1177. Cfr. G. MACCIOTTA, *La standardizzazione dei costi, dei fabbisogni e dei prelievi*, in www.astrid-online.it, 2011. See, moreover, the Health National Plan 2011/13.

¹⁸ See L. LANZILLOTTA – C.M. MEDAGLIA (edited by), *Sanità e spending review* (Paper Glucus), 2014, in www.astrid-online.it.

¹⁹ L. VANDELLI, *Conclusive Report at the Convention of the San Martino Group, Un nuovo assetto Costituzionale per le autonomie?*, Bologna, Aula Stabat Mater - Archiginnasio, November 8 2013.

a) the incentive to improve, up to a common standard which is considered essential to ensure the *basic levels of care*, the quality of the healthcare services provided by the most inefficient regional systems;

b) the incentive to optimize spending and not to reduce it in absolute terms (as in the most efficient regional systems public spending is often higher than in the others, but resources are used in a better way);

c) the disincentive to further improve the quality of the less efficient regional systems, whether and when they have reached the level of optimization funded by fiscal incentives;

d) the disincentive to further improve the quality of the already efficient regional systems, as this further implementation can be funded only by regional budgets, whose present autonomy also depends on principles and dispositions regarding budget balance.

Furthermore the exam of the above mentioned framework suggests that its first effects could be a reduction in the moving of patients between the different regional healthcare systems and the implementation of a soft form of competition among regional welfare systems, in the meaning of competition between (regional) financial systems in healthcare.

However, the mobility of patients may regard not only the infra-national dimension (*i.e.* the mobility of patients between the regional or local healthcare systems²⁰, in addition to the possibility of choosing between direct and indirect assistance²¹), but also the international EU and non-EU one.

²⁰ In fact, although with some limits, the regional healthcare systems of the State can be considered different from each other and, albeit, with further limitations, the local healthcare systems (corresponding to the area of every Local health authority) existing in each regional healthcare system can be considered different too. The intraregional mobility (between Local health authorities within the same region) can be due to the choice between providers of the same regional healthcare system, or to the choice between the private and public system (to which also the accredited providers belong). In the first case the mobility is covered by the Local health authority in which the patient concerned resides (passive mobility), and the related costs are determined on the basis of the current tariffs. In the second case, if the choice falls on the private system without involving any request for indirect assistance (*infra*), the mobility is covered directly by the patient concerned. On the contrary, if the choice falls on the private system but according to the model of the indirect assistance (*infra*), the mobility is covered again by the Local health authority in which the patient concerned resides. Conversely interregional mobility can be due to the choice between providers belonging to different regional healthcare systems, or to the choice between the public and the private system. In the first case the mobility is covered by the region in which the patient concerned resides (passive mobility), on the basis of the current tariffs in the region concerned (and on the condition that the healthcare services required belong to those covered by the regional healthcare system concerned). In the second case, if the choice falls on the private system without involving any request for indirect assistance, the mobility is covered directly by the patient concerned. On the contrary, if the choice falls on the public system or on the private one but according to the model of indirect assistance (*infra*), the mobility is covered again by the region in which the patient concerned resides.

²¹ This choice is between the healthcare services paid directly by the patient and those covered by public financing. In this framework indirect assistance refers to that healthcare services which, even though granted by the private system (for example by the healthcare trusts which are only authorized but not accredited), can be reimbursed by the Local health authority or region in which the patient resides, on the basis of the conditions established by the regional legislation or the State one in its absence: however, a specific request from the patient is necessary. The most important legislative references are the following: l.d. 382/89; l. 595/85 and decrees of the Ministry of health November

We will not focus directly on this aspects (except than for some references in the following section of the present report as regards case law), which mainly deal with an international perspective. As far as regards this point, it seems sufficient to remember that, with the recent delegated decree n. 38/2014, Italy has implemented the EU directive 24/11, about the international mobility in the EU, choosing to make it applicable, in certain particular cases²², also to non-EU citizens: according to this scheme the healthcare services concerned may be covered by public financing if belonging to those which are covered by the same financing in the State where the patient resides; moreover the healthcare system of the patient concerned has to authorize the mobility, if he needs specialized or hospital care, and the repayment has to observe the limits of the cost of the service in the national healthcare system of the user. Finally, it is not possible to deny the authorization if in the NHS of the patient concerned the healthcare service concerned cannot be provided in a time which is compatible with the degree of the illness. Furthermore, if the choice falls on the private healthcare system without involving any request for indirect assistance, the mobility is covered directly by the patient concerned; on the contrary, if the choice falls on the public system or on the private one but according to the model of indirect assistance, the mobility is covered again by the national system in which the patient concerned resides²³. The scheme is in general not so different for the international mobility outside the EU²⁴.

3.2 *The social assistance system*

3 1989, January 24 1990 and August 30 1991; l. of the province of Bolzano 7/01, laws of Tuscany 23/93 and 5/97, l. of the Marche region 50/94; laws of the Sicily region 5/09, 30/93, 42/96; l. of the Valle d'Aosta region 25/96; EU regulation 1408/71, EU directive 24/11.

²² See arts. 2 and 3 d.d. 38/14.

²³ In the evolution of the sources of law and case law regarding this aspect, the most important in reaching the above mentioned conclusions seem to be the following: Ec regulation 1048/71; articles 6, p. 1, and 37 of law 833/78; the decision of the European Court of Justice adopted on December 17 1981, n. 279, in www.europa.eu; art. 3, p. 5, of law 595/85; art. 1, p. 9, of law decree 382/89; decree of Ministry of Health adopted on November 3 1989; decrees of Ministry of Health adopted on January 24 1990 and August 30 1991; the decision of the European Court of Justice adopted on April 1998, n. 158, in www.europa.eu; the decision of the Constitutional Court adopted on July 16 1999, n. 309, in www.giurcost.org; decision of the Major Section of the European Court of Justice adopted on June 15 2010, n. 211; EU directive n. 24/11, which has recently be implemented in Italy by delegated decree 38/14.

²⁴ In the evolution of the sources of law and case law regarding this aspect, the most important in reaching the above mentioned conclusions seem to be the following: articles 6, p. 1, and 37 of law 833/78; art. 3, p. 5, of law 595/85; art. 1, p. 9, of law decree 382/89; decree of Ministry of Health adopted on November 3 1989; decrees of Ministry of Health adopted on January 24 1990 and August 30 1991; the decision of the Constitutional Court adopted on July 16 1999, n. 309, in www.giurcost.org.

By social assistance we mean in this report a broad area of policy and management including many different performances / benefits, in kind or in cash (*infra*), and covering all the measures which cannot be traced back to other specific social fields (such as health, education, work, social security).

Social assistance is not contemplated as such in the Constitution. One can deduce, though, a commitment of the Republic to a comprehensive system of guarantees for people in need from a number of provisions. This regards the duties to support households with different kinds of aid/benefits, economic or not, i.e. in cash or in kind, especially when they lack sufficient means, and to provide education and vocational training for disabled and handicapped people.

The area of legislation specifically dealing with social assistance is normally considered the one that is derived from art. 38, according to which «every citizen unable to work and without the necessary means of subsistence», is «entitled to welfare support» (art. 38 p.1) with «responsibilities [...] entrusted to entities and institutions established by or supported by the State» (art. 38 p. 4), although «private-sector assistance may be freely provided» (art. 38 p. 5).

So, according to art. 38 Const., the right to social assistance is addressed not properly to all the individuals in a universalistic perspective, but to those categories of citizen which are unable to work and without the necessary means of subsistence. It was just through a strongly oriented interpretation of arts. 2 and 3 p. 2 Const. (establishing the personalistic principle, and the principles of social pluralism and substantive equality, *supra*) that it has been possible to extend, though, recently and inconsistently, the universalistic meaning of art. 38.

What is more, there is a substantive difference between the implementation of art. 38 p. 2 Const., focusing on the needs of workers («*workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment*»), and the implementation of the above mentioned p. 1, 4 and 5, which have, as noticed, other kinds of recipients. The implementation of art. 38 p. 1, 4 and 5 has been based, at the beginning, on benefits and services provided by charities (usually religion oriented). At present, on the contrary, it is managed by the Municipalities, in a legal framework which is, however, unclear and fragmented, and in which the financial resources are immeasurably less than those existing in healthcare (*infra*).

However, many benefits in cash (financial / economic aid) existing at present maintain both a social security and a social assistance component, thus reflecting the double aim of art. 38 (protection of workers and protection of other categories of recipients). For instance, family benefits

in cash have been though, since the beginning, such as a hybrid tool between a social security measure (for that part which was based on the contributions paid) and a social assistance measure (for that part which, on the contrary, was not based on the contribution paid but on public funds).

Two characteristics have to be stressed here as regards social assistance.

The first is the significant – both historically and according to the legal framework – role played by private sector, as charities and cooperatives, in structuring the actual operating of social assistance. A recent constitutional amendment introducing the “principle of horizontal subsidiarity” is a clear sign of such a role. According to art. 118 p. 4 Const. «the State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, related to activities of general interest».

The second regards the complex and hot issue of legislative competences shared between the Parliament and the regions. As we mentioned, social assistance, as an unlisted subject matter, should be reserved to the regional rule-making. In fact, the State through its statutory legislation concerning the «harmonization of public budgets», the «equalisation of financial resources», the «determination of the basic levels of benefits relating to civil and social entitlements to be guaranteed throughout the national territory», and the «coordination of public finance and taxation system» exerts remarkable influence on how the system actually works.

The constitutional reforms passed in 2001, regarding a shift towards a form of “fiscal federalism”, in turn, have barely been implemented. We can see, on the contrary, a trend towards a centralisation of budget control and tax levy which definitely affects local authorities leeway regarding social assistance policies and administration.

According to the original version of art. 117 Const., the general rule was that all the legislative powers were in the hand of the State, except than for a group of subject matters listed in art. 117 p. 2, which were in the hands of the State and regions (on the basis of the principle of shared competence, *supra*). However, social assistance and social services in general were not listed in p. 2, which mentioned just the field of *public charities and healthcare*.

The maconcerned affected, as a consequence, the relationship between the concepts of *public charities* – on the one hand – and *social assistance* (in addition to the other social services not listed in p. 2) – on the other hand.

At the beginning of the ‘70s, soon after the institution of the regions, the Constitutional Court (judgment 139/1972) declared that, while *social assistance* had to be considered a duty of public authorities referred to specific social rights of the recipients, *public charities* represented just

a field of competence on the basis of which regions could attribute benefits / aid to someone in application of their discretionary power. However, just few years later, the dpr 616/77, while transferring a considerable number of administrative functions from the State to regions and local authorities, has adopted a very wide ranging meaning of *public charities*, including also *social assistance*²⁵.

In this framework some regions started to exercise their legislative and administrative competencies in the field of *public charities* (mainly according to the wide ranging meaning mentioned above), while the general State law was expected to be adopted. What is more, the general State law on social assistance was adopted very late, just in 2000 (law 328), and taking into account, at least in part and as regards the fundamental features, the existing regional legislation. Soon after, at the end of 2001, const. law n. 3/2001 amended Title V of Part II of the Constitution, leaving social assistance and social services in general in the hands of the exclusive legislative power of the regions.

The main consequence was that regions have had the possibility to adopt their own laws on social assistance, giving up to apply state law n. 328/2000.

Some of them have done so, even though frequently confirming the general contents of law 328 quot.

Other of them, on the contrary, have not adopted any new regional law on social assistance, going on with the application of the previous regional legislation or of state law 328, which still exists and is applicable in that regions not having any regional law on social assistance, or having a such kind of law, but not covering all the fields covered by law 328.

Since the beginning, the Italian social assistance system set up to implement art. 38 Const. has taken inspiration from the so called ‘Southern Europe model’, in which a very important role is attributed to the family, while public authorities assume the duty to provide for social assistance in a perspective of ‘selective universalism’, *i.e.* establishing the general right of citizens (or individuals?, *infra*) to receive social assistance, but selecting the services / benefits to be provided on the basis of the existing conditions of the real need of the recipient²⁶.

²⁶ See A. PIOGGIA, *Diritto sanitario e dei servizi sociali*, quot., 37 ss., 149 ss., 158, 195 ss. For a more general perspective, dealing with the possibility to trace back to the Southern Europe model the Italian welfare system as a whole, beyond the social assistance one, see M. FERRERA (edited by), *Le politiche sociali*, Bologna, il Mulino, 2012, 47 ss., 243: in this case, however, emerges that some categories (such as certain kinds of workers and their families) are

This choice, as regards *selectivity*, is mainly due to the need to control public spending, since, especially in times of financial recession, the lack of economic development determines a diminution in tax revenue, while the need of social assistance of the population tends to increase. Social assistance, as noticed above, includes many different performances / benefits, in kind or in cash, and has a very wide ranging meaning (covering all the policies which cannot be traced back to other specific social fields, such as health, education, work, social security).

On the other hand, the above mentioned choice, as regards the *universalism*, is mainly due to the aim of reducing poverty and implementing participation in the job market, in a perspective of *inclusive development* (using the words of the so called *Europe 2020 strategy*, presented in 2010 by the EU Commission).

Before going to say something more about these points and the evolution and kinds of policies adopted in the Italian social assistance system, it is useful, however, to highlight the main general features of this system meant as a whole, even though it seems much more difficult than for the NHS, as a consequence of heterogeneous and residual character of the former.

The most important part of administrative competencies in the social assistance sector - mainly focused on its planning, managing and monitoring, and on delivery of services - belongs to the local authorities (primarily municipalities), while the regions maintain general administrative functions essentially regarding: a) the regional level of coordination; b) regional planning; c) regional supervision; d) the possible establishment of supplementary levels of benefits related to social assistance, to be covered by regional funds.

As regards the State, the most important competence seems to be the establishment of the essential levels of benefits related to social assistance: this determination, however, has never been done with the same detail used for healthcare²⁷, hindering, as a consequence, the implementation of art. 119 Const. (and of the following law 42/09 and d.d. 216/2010 and 23/2011 on standard needs of municipalities and municipal federalism) in the field of social assistance (*infra*). On the contrary, as regards the State planning competencies (which, conversely, have been exercised in the past), they seem to have been substantially replaced by the regional ones, as a consequence of the constitutional reform passed in 2001²⁸. In fact, according to the new Title V of the Constitution, the

more protected than others (such as the autonomous or atypical workers or the unemployed), not on the basis of their real condition of need, but mainly for political reasons.

²⁷ Art. 22 of law 328/2000 is in fact too general and the National Plan for Social Assistance, adopted by dpr 3.5.2001 for a two-years period on the basis of art. 18 l. 328/2000, is expired and has not been replaced.

²⁸ See A. PIOGGIA, *Diritto sanitario e dei servizi sociali*, quot., 184 ss.

distribution of administrative competencies between the State, regions and local authorities in the field of social services in general and social assistance follows the rules established by arts. 117 p. 6 and 118 p. 1 Const. mentioned above, moving from the distribution of the legislative ones (in the meaning that, according to the Constitutional Court point of view, the distribution must be done by ordinary state or regional laws on the basis of the legislative competence existing in the specific subject matter concerned, and granting, however, the application of the principle of vertical subsidiarity).

In this framework planning is shared between the regions and local authorities, in a coordinated perspective allowing also the participation of the *no profit* sector, while the executive functions are largely in the hands of the municipalities, under the supervision and support of the regions.

Furthermore the social services provided to make the right to social assistance effective may be granted, more than directly by the local autonomy concerned, also by other public or private stakeholders, including the *no profit* organizations.

These services, if not granted directly by the municipality concerned, can be provided under two different schemes: a) the authorization/accreditation model²⁹; b) the indirect management model³⁰.

By social assistance, as we have noticed before, we mean in this report a broad area of policy and management including many different performances / benefits.

The *performances / benefits* concerned can be provided *in kind* (social services properly named, organized according to the general rules mentioned above) or *in cash* (financial / economic aid). Usually the main difference is that, while in the first case (*benefits in kind*) the services concerned are open to everyone (though the most needy users are facilitated in using them and are

²⁹ According to this scheme, the services concerned may be provided under an authorization or accreditation given by the competent municipality. Each private provider may ask for an authorization, or also for an accreditation. The providers which have just asked for an authorization and obtained it, may only supply the service covered by the authorization without the possibility to exempt users from its payment: in few words, the user has to pay himself for the service received. On the contrary, the providers which have asked, in addition than for the authorization, also for an accreditation and obtained it soon after the authorization, may grant the service concerned (if planned by the accreditation and the following contractual agreement setting the quantitative and qualitative limits of the services under accreditation, when requested) with spending covered by public funds, according to the limit and tariffs set by the municipality concerned: in few words, the user has not to pay the service received, or, better, has to pay it with the same rules and limitations applied by the municipality concerned for those social services that it directly provides.

³⁰ According to this scheme, on the contrary, the services concerned may be granted by the provider which the municipality concerned has selected, after a public competition to enable it the management of the existing public structures (distinguishing between *non profit* and *for profit* stakeholders, see A. PIOGGIA, *Diritto sanitario e dei servizi sociali*, quot., 180 ss.).

exempted from paying for a part or all of such services), in the second case (benefits in cash) the potential recipient has to take the so called means-test (and, generally, also has to participate in social reintegration programs)³¹. Usually the *means test* is based on the so called *ISEE (Indicatore della Situazione Economica Equivalente)*, requiring the possible recipient to prove the amount of his income and assets, and to balance them and the number of components of his family. The present discipline of *ISEE* is established by dpcm 159/2013.

As regards *benefits in cash*, we can mention the following:

- the *guarantee of integration to the minimum pensions* (established by law 218/52); this treatment was thought, at the beginning, such as a hybrid tool between a social security measure (for that part which was based on the contributions paid) and a social assistance measure (for that part which, on the contrary, was not based on the contribution paid but on public funds); at present, however, the social assistance component seems to prevail (though this guarantee is only applied to retired workers); in 1983 the law decree 463 (converted to law 638/83) introduced the so called *means test*, representing the main condition under which it is possible to benefit from the *guarantee of integration to the minimum pensions*;

- *family benefits (in cash)*, introduced 1955 (dpr 797/55) and amended in the following years (law decree 69/88, converted to law 153/88): they are conditioned to the means test and mainly addressed to families with employment income and to pensioners who have had the same kind of income; this measure was thought, at the beginning, such as a hybrid tool between a social security measure (for that part which was based on the contributions paid) and a social assistance measure (for that part which, on the contrary, was not based on the contribution paid but on public funds); at present, however, the social assistance component seems to prevail over the social security one;

- *social pensions*, introduced in 1969 by l. 153; they have to be granted to all the poor over-65 years without a pension based on the contributions paid: as a consequence this measure was thought, since the beginning, such as a social assistance measure (being completely based on public funds and aimed at contrasting extreme poverty);

- *disability pensions*, introduced by law decree 5/71 (converted to law 118/71): they are granted by the central government to all the poor disabled persons without a *disability social security benefit* based on the contributions paid; as a consequence also this measure was conceived, since the beginning, as a social assistance measure (being completely based on public funds and

³¹ See M. FERRERA (edited by), *Le politiche sociali*, quot., 240 ss.

aimed at supporting severely disabled people); on the contrary, the *disability social security benefit* is granted by the National Institute of Social Security just to those persons which have become unable to work (1984 reform) as a consequence of a disability, and just under the condition they have paid contribution at least for five years: so this measure belongs to social security;

- *disability benefit*, introduced by law 18/1980 to be granted to all the severely disabled persons independently from the means test and the amount of the income of the recipient: as a consequence this measure too was thought, since the beginning, such as a social assistance measure (being completely based on public funds and aimed at supporting the severely disabled people);

- the *fund aimed at giving people with a low income the possibility of leasing a house*, which was introduced by art. 11 l. 431/98 and disciplined in detail by dm 7.6.1999; the possibility to benefit from the economic aid granted by the fund exists under the following conditions: a) the annual availability of public funds earmarked for this purpose; b) the means test (mainly related to the amount of the annual income); e) the existence of a regular and registered housing lease signed by the recipients;

- the *benefit (in cash) for those families with at least three minor children (or third child allowance)*, introduced by law 448/98 (art. 65): it is conditioned to the means test and addressed to families with at least three minor children; moreover, it is granted by the National Institute of Social Security (with funds coming from the central government and given by the Municipality where the family concerned resides) under a specific annual request; as a consequence, it seems to have been thought, since the beginning, such as a social assistance measure (being based on public funds and aimed at supporting the most numerous families with the lowest income);

- *maternity allowance*, introduced by art. 66 l. 448/98, amended by arts. 50 and 63 l. 144/99, and finally repealed in 2001 by delegated decree 151; according to art. 74 d.d. 151/2001 the benefit concerned is addressed to those new-mothers (Italian or EU citizens, or non-EU citizens with a regular residence permit) without other subsidies / incomes based on the maternity; it is conditioned to the means test and consists in a comprehensive sum granted for each son; it is granted by the National Institute of Social Security (with funds coming from the central government and given by the Municipality where the family concerned resides); as a consequence, it seems to have been thought as a social assistance measure;

- the so called *vouchers*, established by art. 17 l. 328/2000: according to art. 17, they can be planned by the Municipalities to allow their recipients to buy social assistance services from accredited providers, or to be replaced to such kinds of benefits in cash listed in the same art. 17;

- *social card*, disciplined by art. 81 l.d. 112/2008 (converted to law 133/2008): it is addressed to few categories of needy citizens (or their families) and consists in a kind of debit card intended for the purchasing of essential goods, such as food.

As regards the so called *benefits in kind*, the most important existing measures are those established by the general state law (l. n. 328/2000) and regional law on social assistance, and provided by local authorities. They are the social services properly named, organized according to the general rules mentioned above and including performances such as aids for people with disabilities, old people, children, adolescents, but also the so called social-health services. The latter, according to dpcm 14.2.2001, can be divided into the following three categories: a) the healthcare services having a social-assistance relevance, which are organized and provided according to the same rules examined above for the healthcare services properly named; b) the social-assistance services having a healthcare relevance, which are organized and provided according to the same rules established for the social-assistance services properly named; c) the social-assistance services closely integrated to the healthcare ones, which are organized and provided such as those mentioned in the previous letter a). As a consequence, just those services listed in the previous letter b) can be considered benefits in kind regarding the field of social assistance.

This system has been designed presupposing the identification of the essential levels of benefits related to social assistance, which has never been done with sufficient detail until now.³² The actual and complete implementation of the entire system, also in the light of fiscal federalism as established and disciplined by art. 119 Const., law 42/2009 and the following delegated decrees, has therefore been considerably undermined by such an inaction of the State.

Some of the most important exceptions seems to be represented by the essential levels of benefits related to the social-health services (which were established by dpcm 29.11.2001 with the essential levels of benefits related to healthcare) and by the measures regarding the *nurseries*. As regards the nursery schools, law 1044/71 introduced the *nurseries plan* with the aim of supporting the municipal nurseries through State funds. This support, however, has had just an extraordinary nature and a five-years duration. After that, for another 20-years period, the financial support was mainly granted by regional and local funds. Finally, in 1997, l. n. 285 (art. 1) established the first

³² Art. 22 of law 328/2000 is in fact too general and the National Plan for Social Assistance, adopted by dpr 3.5.2001 for a two-years period on the basis of art. 18 l. 328/2000, is expired and has not been replaced.

general State fund aimed at financing policies in the field of childhood and adolescence (the so called *National fund for the childhood and adolescence*). In this framework the essential levels of benefits related to nurseries were explicitly mentioned by law 296/2006, which required to set them through a special agreement between the State, regions and local governments, with the aim of granting a certain quantity and quality of nurseries all over the national territory.

One has to bear in mind, though, that, when the State provides funds to cover some policies (to be granted through benefits in cash or in kind), such decisions may be probably considered as basic levels of benefits regarding the particular field to which they refer.

As a consequence, it seems possible to argue that, even though the State has not yet determined the basic levels of benefits related to social assistance with the same detail used for healthcare³³, many social interventions in kind are covered by State Funds with the aim of granting those that, in practice, should represent these levels. This is the case not only of the National Fund for childhood and adolescence, but also, for instance, of the No-self-sufficiency Fund (art. 1 c. 1264 l. 296/06)³⁴ and of the Fund for the social inclusion of the immigrants (art. 1 c. 1267 l. 296/06), in a more general perspective, of National Fund for social policies (art. 59 p. 44 l. 449/97, art. 4 l. 328/2000). In this perspective it is also useful to mention the first National Plan for the Family (adopted in 2012), which is addressed to all the existing levels of government (central, regional, local), with the main aim of encouraging the achievement of the priorities and the adoption of measures established by the same plan to support the family.

Anyhow, the main matter is that, in the absence of the determination of the basic levels of benefits related to social assistance with the same detail used for healthcare³⁵, the existence of national funds seems not sufficient to grant a certain quantity and quality standard of services common to the different regions.

It is also possible to find other measures traceable both to the scheme of benefits in kind and to that of benefits in cash.

This is, for instance, the case for the so called *parental leave*, introduced in 1971 by l. n. 1024, which was in turn amended in 2000 by law 53 and finally repealed in 2001 by delegated

³³ Art. 22 of law 328/2000 is in fact too general and the National Plan for Social Assistance, adopted by dpr 3.5.2001 for a two-years period on the basis of art. 18 l. 328/2000, is expired and has not been replaced.

³⁴ Even though it has been introduced to provide funds thought as additional to the regional and local resources, see A. PIOGGIA, *Diritto sanitario e dei servizi sociali*, quot., 227 ss.

³⁵ Art. 22 of law 328/2000 is in fact too general and the National Plan for Social Assistance, adopted by dpr 3.5.2001 for a two-years period on the basis of art. 18 l. 328/2000, is expired and has not been replaced.

decree 151. According to d.d. 151/2001 the parental leave allows (though it is in some cases compulsory and in other cases optional) parents to take direct care of their children, having a certain period of time off work and so saving a part of their salaries. This is the reason why it seems to be traceable both to the scheme of benefits in kind (allowing parents to take direct care of their children) and to that of benefits in cash (allowing parents to save s part of their salaries). These measures are, however, addressed just to workers, even though they are not usually conditioned to the quantity of contributions paid. This is the reason why they seem to be also a kind of hybrid between a social security measure (being addressed just to workers) and a social assistance measure (not being usually conditioned to the quantity of contributions paid).

What can one infer from what precedes?

First of all that, in the last 15 years, the social policies consisting in benefits in cash seem to have quantitatively overcome those consisting in benefits in kind³⁶.

Secondly that, even though the basic levels of benefits related to social assistance have not yet been determined with the same detail used for healthcare³⁷, in Italy the implementation of the principles and rules established in art. 38 Const. p. 1 and 4 seems to have gone further than the constitutional provisions, aimed just at guaranteeing «welfare support» with «responsibilities [...] entrusted to entities and institutions established by or supported by the State» to «every citizen unable to work and without the necessary means of subsistence». In some cases the welfare support mentioned in art. 38 has been in fact provided: a) not only for citizens (according to a perspective of *political citizenship*) but also to other categories of individuals (in a perspective of *social citizenship*, aiming at recognizing rights, more than to *citizens*, to the wider category of *individuals*, considered as members of a certain *community*)³⁸; b) not only for those citizens or individuals *unable to work and without the necessary means of subsistence*, but also to other categories of citizens or individuals (think of aid for mother and children, such as kindergartens, usually traced back to social assistance, and not to education). It has been probably possible through an extensive interpretation of arts. 2 and 3 p. 2 Const.³⁹.

³⁶ See M. FERRERA (edited by), *Le politiche sociali*, quot., 282 ss.

³⁷ Art. 22 of law 328/2000 is in fact too general and the National Plan for Social Assistance, adopted by dpr 3.5.2001 for a two-years period on the basis of art. 18 l. 328/2000, is expired and has not been replaced.

³⁸ See A. PIOGGIA, *Diritto sanitario e dei servizi sociali*, quot., 37 ss. See, moreover, Const. Court, 432/2005 and 306/2008, from www.giurcost.org.

³⁹ See A. PIOGGIA, *Diritto sanitario e dei servizi sociali*, quot., 212 ss.

Thirdly, that all the above mentioned social assistance policies remain, however, mainly sectorial and insufficient with respect to the real needs of the population.

However, it is finally useful to notice that, in the EU structural Funds Agenda 2014-2020, specific resources have been destined to social inclusion, and, as a consequence, also to the field of social assistance.

3.3 Focus on social housing

As we have noticed in par. 2.1, one of the lacks of the Italian Constitution is the absence of any explicit reference to the *right to house* as an inviolable right of the person, both as an individual and in the social groups where human personality is expressed (in the words of art. 2 Const.).

The matter is known with the name of *social housing*⁴⁰, which refers to those policies aimed at providing houses to be paid with public funds for citizens (or individuals?) and families without the possibility of leasing or buying a house. At this point, however, it is useful to remember that the present Report is using a wide ranging meaning of *social housing*, including both *public housing* (*i.e.* those policies aimed at providing public houses to be paid with public funds for individuals without the possibility of leasing or buying a house)⁴¹ and *social housing* properly named (*i.e.* those policies aimed at providing private owned houses to be paid at least in part with public funds, or to be supported by other kinds of public aid, for individuals without the possibility of leasing or buying a house at a market price).

In this framework the ‘right to house’ is meant, anyhow, as limited to: a) the *availability* (not necessary under property, but also on the basis of another kind of legitimization, such as lease, use) b) of *the first (and only) house* c) to be destined *for habitation*. It is, furthermore, a typical *financially conditioned right*, in the meaning that it only can be made effective if sufficient public funds exist, even though, as it will be better highlighted later, also in this case it is possible to make it effective through *benefit in kind* (for instance granting poor people the free or facilitated use of public housing) or *in cash* (for instance granting poor people financial aid to be used to buy or lease certain kinds of houses).

However, even though the Constitution does not contain any explicit reference to social housing, the possibility to benefit from a house may be considered an essential need (and, as a consequence, a fundamental and / or social right) of the person, both as an individual and in the

⁴⁰ See S. CIVITARESE MATTEUCCI, *L'evoluzione delle politiche della casa in Italia*, in *Riv. trim dir. pubb.*, 2010.

⁴¹ See AA.VV. - Cassa Depositi e Prestiti, *Social housing – Il mercato immobiliare in Italia: focus sull'edilizia sociale*, 2014, report n. 3, 36 ss., in www.astrid-online.it.

social groups where human personality is expressed⁴²: in this case the social group concerned is above all the family, which, on the contrary, is directly protected by the Constitution, especially when not having sufficient means.

In fact the Constitution, establishing that «workers have the right to a remuneration commensurate to the quantity and quality of their work and [...] such as to ensure them and their families a free and dignified existence» (art. 36 p. 1 Const.), is mainly aimed at ensuring that workers and their families can have the possibility of leasing or buying a house.

It is just for those cases in which the citizen is «unable to work and without the necessary means of subsistence» that the Constitution establishes his right «to welfare support» (art. 38 p. 1 Const.): at this point, the question should be whether is possible to include social housing in this kind of support, since the possibility to benefit from a house may be considered, as noticed, an essential need of the person, both as an individual and in the social groups where human personality is expressed.

Moreover: a) art. 47 Const. «promotes house [...] ownership [...] through the use of private savings»; b) art. 42 Const. recognizes and guarantees private property; c) many other constitutional provisions imply the existence and effectiveness of the right to house or are, however, related to such right (this is the case, for instance, of arts. 29-31 on measures to support the family, art. 14 on inviolability of home, art. 4 on the right to work, art. 3 on substantive equality).

However, even though the Constitution does not explicit refer to any right to house, primary and secondary sources of law have often dealt of social housing, which, as noticed above, could be considered a policy related, at least in part, to social assistance. In fact, as we have pointed out in the previous par. 3.2, the most important policies in the field of social assistance regard, for instance, aid against economic poverty, no-self-sufficiency, a lack of housing, family burdens. We have also listed, among the most important measures representing benefits in cash in the field of social assistance, the *fund aimed at giving people with a low income the possibility of leasing a house*, which was introduced by art. 11 l. 431/98 and disciplined in detail by dm 7.6.1999. In this framework we have finally highlighted that the possibility to benefit from the economic aid granted by the fund concerned exists under the following conditions: a) the annual availability of public funds earmarked for this purpose; b) the *means test* (mainly focused to the amount of the annual income); e) the existence of a regular and registered housing lease signed by the recipients.

⁴² See Const. Court nn. 135/1998, 221/1975, 419/91, 49/87, 217/88, 404/88 and law 254/1903. In an international and European perspective, see, moreover, art. 31 of the European Social Charter (1961, 1996), art. 34 of the EU Charter of Fundamental Rights (2000), art. 25 of the Universal Declaration of Human Rights (1948).

As regards the distribution of competencies between the State, regions and local authorities, however, social housing could be considered, in part, under art. 117 p. 4 Const. (according to which the field of social assistance belongs to the exclusive legislative power of the regions) and, partly, under art. 117 p. 3 (which refers to land-use planning as a subject matter left to the shared legislative power of the state and regions). Social housing policies have, anyhow, also other implications in the field, for instance, of *environmental protection, civil law, competition, the determination of the basic levels of benefits related to civil and social entitlements to be granted throughout the entire national territory*.

As regards this point in 2007 the Italian Constitutional Court (judgment n. 94) has established that the subject matter *public housing / social housing* deals with three kinds of legislative competences: a) exclusive of the State for the *determination of the basic levels of benefits related to civil and social entitlements to be granted throughout the entire national territory*; b) shared between the State and regions for *land use planning*; c) exclusive of the regions for the *management of residential property in the field public / social housing*.

As a consequence, according to arts. 117 and 118 Const., the administrative powers should be mainly addressed to the regions and local authorities, but also to the State as regards certain unitary needs. In fact at present, in the social housing field, the planning (and, in general, administrative) competence are shared, in practice, between the State, regions and local authorities (mainly according to dd 112/1998 and law 1150/1942), and many State primary and secondary sources of law still exist. This is due both to the survival of those sources of law adopted before the constitutional reform passed in 2001 and to the fact that, even after this reform, the State has exclusive legislative powers (and the possible consequent administrative competencies) in some subject matters which may be considered related, at least in part, to social housing, *i.e.*: a) the determination of the basic levels of benefits regarding the civil and social entitlements to be guaranteed throughout the national territory, b) civil law; c) environmental protection; d) competition.

As regards the national sources of law adopted before the constitutional reform passed in 2001, their main aim was to make the so called *right to house* effective; in this perspective the right to house has to be interpreted as the effective possibility, for those citizens without sufficient means, to buy or lease a house to live in, or, however, to benefit from it on the basis of another kind of legitimation.

In this perspective, the most important measures have been the following:

- a) art. 18 l. 254/1903, on the basis of which: *i*) the housing cooperatives have had the possibility to benefit from facilitated bank credits with the aim of buying or build public housing to be destined for free to certain categories of poor citizens; *ii*) the Municipalities have had the possibility to build public housing with the aim of leasing them to certain categories of poor citizens applying a subsidized rent, but just in those cases where the measures mentioned in the previous letter *i*) were insufficient; *iii*) the so called *IACP (Istituti Autonomi Case Popolari*, at present named *ATER – Aziende Territoriali per l’Edilizia Residenziale*), having the legal nature of public bodies, were instituted at local level with the main competence to manage public housing and their distribution (for free or under a subsidized rent / payment) to citizens without sufficient means (at present, however, these entities may have a different regulation, name, legal nature, set of competencies on the basis of the existing regional legislation); this model, introduced in the far 1903, was gradually implemented in the following years at national level;
- b) royal decrees 89/1908 and 1165/1938 (the latter replacing the former), on the basis of which new competencies in the field of social housing were given to the IACP (mainly as regards the social housing market management) and Municipalities (mainly as regards the planning activities, even though in the general framework established by the central government measures);
- c) law 43/1949, on the basis of which a specific National Plan was adopted with the aim of building public housing throughout the national territory with spending covered by public funding (provided by the National Institute for Insurance); this Plan was applied until 1963 and, in another partly different form (mainly addressed to workers and their families), until 1973;
- d) laws 167/1962 and 865/1971, on the basis of which the so called Urban Plan for Public Housing was introduced; it is a special urban plan which the municipalities have the possibility (in general) or the duty (if having more than 50.000 inhabitants or being provincial capital) to adopt with the aim of identifying those areas to be destined to the building of public housing; after few years this duty has been reinforced by art. 2 l. 10/77, which establishes a minimum level of areas to be destined to the building of public housing in the municipal urban plans (even though the regional laws, regulations and plans have in some cases violated this provision);

- e) dpr 1036/1972, on the basis of which it has been possible to distinguish different kinds of public measures in the field of social housing, *i.e.* those aimed at: *i)* granting poor families / individuals the availability of public owned houses under a ‘subsidized rent’; *ii)* granting families / individuals with low income the possibility to buy or rent a public owned house under a ‘facilitated price’; *iii)* granting private builders different kind of benefits with the aim of allowing them to rent or sell at social prices the private houses they have built;
- f) dpr 616/1977, which transferred the general administrative competencies on social housing to the regions and those on social housing allocation and management to the municipalities;
- g) laws 1444/1963 and 382/1978, which introduced some measures to limit the entity of rental fees of residential properties;
- h) law 457/1978, on the basis of which another National Plan was adopted with the aim of building public housing throughout the national territory but also of recovering and better managing the public housing already existing with spending covered by public funding; law 457/1978 also establishes that, on the basis of the national plan, the regions have the duty to adopt their own programs every four years and projects every two years;
- i) l.d. 12/1985, converted to law 118/1985, which: *i)* suspended, for a certain period, some pending eviction procedures; *ii)* prolonged the effectiveness of some categories of the existing contracts; *iii)* started a public/social housing program; *iv)* provided financial aid for municipalities to allow them the building up of houses to be rent or granted at subsidized prices;
- j) l.d. 108/1986, converted to law 899/1986, which: *i)* suspended, for a certain period, some pending eviction procedures; *ii)* limited the possibility of houses’ owners to ask for the intervention of the police force in the execution of the judicial eviction decisions; *iii)* provided financial aid for municipalities to allow them the building up or purchasing of houses to be rent or granted at subsidized prices;
- k) l.d. 551/1988, converted to law 61/1989, which suspended, for a certain period, some pending eviction procedures;

- l) law 179/1992, which implemented those measures aimed at granting families / individuals with low income the possibility to rent or buy a public owned house under a 'social price';
- m) law 560/1993, which introduced rules to sell social houses;
- n) law 431/1998 (and the following dm 7.6.1999), which amended law 382/1978, and introduced a special national fund with the aim of supporting tenants having temporary difficulty in paying their rents and, as noticed, the fund aimed at giving people with a low income the possibility of leasing a house;
- o) d.d. 112/1998, which implemented the regional administrative competencies on social housing;
- p) law 21/2001 (art. 3), which introduced a national Plan mainly aimed at granting social housing, with spending covered by central and local funds, through the implementation of houses to be rent at subsidized prices and financial aid for builders;
- q) law decree 86/2005 (converted to law 145/2009), which provides financial aid for some categories of tenants having temporary difficulty in paying their rent;
- r) law decree 23/2006 (converted to law 86/2006), which suspended, for a certain period, the pending eviction procedures regarding some categories of tenants and provided fiscal aid for the owners of the houses under the suspended eviction procedure..

More recently, after the constitutional reform passed in 2001, law 9/2007 and dm n. 32438/2008 introduced new provisions with the aim of influencing the residential property supply and demand. Furthermore law 9/07 has suspended (such as the following l.d. 158/2008, converted to law 199/08), for a certain period, all the pending eviction procedures due to delay in rent payment. These kinds of measures have been also continued and implemented by the following l.d. 112/2008 (converted to law 133/2008), as amended by l.d. 5/2009 (converted to law 33/2009), and dpcm adopted on July 16 2009.

The most important policies adopted under these laws and decree are:

- a) the establishment of an integrated system of property funds aimed at supporting and increasing the residential property supply under rent;
- b) the support to the implementation and modernization of the existing social houses through the establishment of funds both private and public, national and local, which can be used after the adoption of specific regional Plans / Programs, to be submitted to the Ministry of Infrastructure;

c) the incentive to apply the so called project financing scheme in the building of public housing and residential property to be sold or rent at social prices;

d) the establishment of the possibility, for the housing cooperatives, to benefit from financial facilitation for the building up of social houses;

e) the promotion of integrated Plans / Programs (for instance with the participation of municipalities and the so called ATER, *supra*) for the building of social houses through the application of simplified procedures.

The main recipients of these measures are families having low income, students far from home, those tenants subject to pending eviction procedure due to delay in rent payment, the regular migrants having low income and resident at least for 10 years in Italy or 5 in the same Italian region.

In this framework many other national and regional measures have been focused on the implementation of specific urban plans / programs / projects aimed at building and managing social houses and / or residential properties to be sold or leased at 'social prices'. The most recent and important, as regards the national ones, are the following:

- a) art. 6 p. 5 of law 102/2013, which has established another national fund to support tenants who, for reasons other than their negligence, have temporary difficulty in paying their rents for residential properties: these financial aid have to be managed, as regards their territorial competence, by the municipalities, and distributed to the possible recipients on the basis of a public competition;
- b) the agreement signed in 2013 between the Italian Bank Association and *Cassa Depositi e Prestiti (CDP)*, according to which the latter has assumed the duty to transfer to the Italian Bank system 2 billion euros to be destined to grant mortgages mainly to certain categories of recipients (for instance families with disabled members, young couples, big families) and mainly to buy the first house⁴³;
- c) l.d. 47/2014 (converted into law 80/14), which has established measures aimed at supporting: *i*) the implementation of houses to be rent at social prices; *ii*) the selling of public houses to their users / tenants at social prices; *iii*) the building up of new social houses and the restructuring of the existing one; *iv*) the use, by the municipalities, of the special fund provided by law 431/98 (art. 11, *supra*), such as an incentive to transfer to them other national financial resources aimed at supporting social housing.

⁴³ See AA.VV. - Cassa Depositi e Prestiti, *Social housing – Il mercato immobiliare in Italia: focus sull'edilizia sociale*, 2014, report n. 3, 28 ss., in www.astrid-online.it.

However, mainly as a consequence of the economic crisis, the private and public funds (mainly local) aimed at supporting these kinds of policies seem to have been progressively reduced⁴⁴, even though the above mentioned l.d. 47/2014 (art. 1) has increased, up to 2019, the amount of the national fund established by art. 6 l. 102/2013 to support tenants who, for reasons other than their negligence, have temporary difficulty in paying their rents for residential properties.

At the same time the financial recession has increased the public / social housing demand.

The economic crisis seems to have determined, moreover, the recentralization of certain measures, even though an important part of them is different at regional level (as far as regards, for instance: *i*) the income level allowing the access to benefits; *ii*) the social rental fee; *iii*) the detailed supply of benefits in cash or in kind provided in each regional system).

Contemporarily, as noticed above, the ongoing fiscal federalism reform has still to be completed, also in the light of the more recent constitutional reform on the budget balance. In this framework, as far as social housing is concerned, it is possible to go back to what we have noticed about social assistance (since *social housing* may be considered at least in part a component of social assistance), *i.e.* that the establishment of the essential levels of benefits to be granted throughout the entire national territory has not been done, hindering, as a consequence, the implementation of art. 119 Const. (and of the following law 42/09 and delegated decrees).

However, it is finally useful to notice that, in the EU structural Funds Agenda 2014-2020, specific resources have been destined to social inclusion, and, as a consequence, also to the field of public / social housing, which, according to the EU Parliament Report on Social Housing in the EU, adopted on April 30 – June 11 2013, is considered a *service of general economic interest* in the meaning of art. 106 p. 2 Tfeu, and in keeping with fundamental rights.

3.4 Focus on specific cases regarding some policies in the field of education, work and social security

In the two following paragraphs we will speak about specific policies in the field of education, work and social security, even though the measures concerned deal also with the sector of social assistance, to be meant in the wide ranging meaning mentioned above: they are, in fact, the case of aid for students with disabilities (on the one hand) and of family benefits (on the other).

⁴⁴ See AA.VV. - Cassa Depositi e Prestiti, *Social housing – Il mercato immobiliare in Italia: focus sull’edilizia sociale*, quot. 65 ss., in www.astrid-online.it. Moreover l. 183/2011 has reset to zero the rent Fund established by law 431/98, see A. MISIANI, *Fondi statali per le politiche sociali: nuovi tagli con la Legge di stabilità 2012*, in www.astrid-online.it.

The former is aimed, indeed, both at making the right/duty to education effective (art. 34 Const.) and at providing social assistance for students with disabilities (art. 38 Const.).

The latter, in turn, can be considered aimed both at granting social security and social assistance, depending from the fact that the measure concerned is covered by the contribution paid or by public funding in general.

3.4.1 *Aid for students with disabilities*

After the preamble above, it is also necessary to clarify that we will focus, in this section, just to those benefits (all *in kind*, such as it will soon emerge) addressed to *students* with disabilities, and not to the benefits (in cash or in kind) addressed to the disabled in general and examined in the previous par. 3.2.

It is now possible to go to aid for students with disabilities.

The double relationship of this kind of aid with the fields of education and social assistance requires to go back, at least in part, to the role played by these subject matters in the constitutional framework.

As regards education, we have already noticed that:

- a) schools are open to everyone» (art. 34 p. 1);
- b) «primary education, given for at least eight years, is compulsory and free of tuition» (art. 34 p. 2);
- c) «capable and deserving pupils, including those lacking financial resources, have the right to attain the highest levels of education» (art. 34 p. 3);
- d) «the Republic makes this right effective through scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations» (art. 34 p. 4).

As a consequence, education is first of all a duty of public authorities, mainly because: 1) primary education, given for at least eight years, is compulsory and free of tuition; 2) schools are open to everyone.

In this framework the Republic has also assumed the duty to support (with scholarships, allowances to families and other benefits, which shall be assigned through competitive examinations) all the capable and deserving pupils, including those lacking financial resources, with the aim of making their right to attain the highest levels of education effective.

As regards education in its relationship with social assistance, according to the Constitution «disabled and handicapped persons are entitled to receive education and vocational training» (art.

38 p. 3) with «responsibilities [...] entrusted to entities and institutions established by or supported by the State» (art. 38 p. 4), even though «private-sector assistance may be freely provided» (art. 38 p. 5). As a consequence, the Republic has also assumed the duty to provide education and vocational training for disabled and handicapped persons. This kind of assistance is also included in the more general category of *social assistance* (which is thought to cover all those cases where other forms of protection are not available) and may be freely provided by private-sector too (private-sector assistance).

As regards the distribution of competences between the State and regions, we have already noticed that the State has exclusive legislative powers in the field of the «determination of the basic levels of benefits related to civil and social entitlements to be guaranteed throughout the national territory» (art. 117 p. 2, lett. m)⁴⁵ and «general provisions on education» (art. 117 p. 2, lett. n)⁴⁶, while the State and regions have concurring legislation in education (with the exception of vocational education and training, which, as a consequence, has been left to the exclusive legislative competence of the regions) (art. 117 p. 3). Finally, according to art. 117 p. 4, all the subject matters not listed in art. 117 p. 2 or 3 have to be considered under the (exclusive) legislative competence of regions: this is the case, for instance, of social services and/or social assistance in general. However, the State has exclusive legislative powers concerning the «harmonization of public budgets» and the «equalisation of financial resources» (art. 117 p. 2 lett. e). It has also concurring legislation (shared with the regions) in the «coordination of public finance and taxation system» (art. 117 p. 3).

The distribution of administrative competencies between the State, regions and local authorities in the fields of education and social assistance follows the rules established by arts. 117 p. 6 and 118 p. 1 Const. mentioned above, moving from the distribution of the legislative ones.

Art. 119 Const., representing the constitutional legal base of the so called *fiscal federalism* (which is in turn the principle on the basis of which the different levels of government can obtain/find the financial resources necessary to exercise their functions), applies to the field concerned mainly as regards the so called *municipal federalism*: art. 119 Const. has been implemented, in general, by law 42/2009 and, for the standard needs of municipalities and municipal federalism, by delegated decrees 216/2010 and 23/2011.

⁴⁵ This point is really important, as it can be noticed also from the exam of art. 120 p. 2, according to which, if the basic level of benefits related to civil and social entitlements is not ensured, the level of government concerned can be substituted by the State government, through the nomination of a special commissioner.

⁴⁶ However, according to art. 116 p. 3, «additional special forms and conditions of autonomy», related to the area of *general provisions on education*, «may be attributed to other Regions by State Law», following the particular procedure established in the same art. 116 p. 3.

As regards all the other elements we have pointed out about social assistance, it is possible to defer to the previous paragraph 3.2.

At this point it is, as a consequence, finally possible to focus on the most important measures existing at present to grant aid for students with disabilities.

They are mainly established by law 104/1992 (on social assistance, social inclusion and rights of disabled people) and delegated decree 297/1994 (grouping all the primary sources of law existing at present in the field of education)⁴⁷.

Law 104/1992 *applies* not only to the Italian citizens, but also to the foreigners or stateless having a permanent residences on the national territory (art. 1 p. 4) and refers to schools of all branches and grades (from primary school to university: art. 12).

Some of the tools listed in art. 8 for the *social inclusion of the disabled* are represented by:

a) all that measures aimed at making effective their right to education, for instance through special equipments, programs, languages, exams, specialized teachers and non-teaching staff.

This list is composed, as regards just the *educational inclusion of the disabled*, also by the following tools (art. 13):

b) a coordinated planning - through special agreements between the public authorities involved - of the necessary activities in the fields of education, healthcare, social assistances, sport;

c) optional supplementary activities in the compulsory school, on the basis of law 517/1977 (arts. 2, 7), which in this case requires, however, also the institution of a socio-psycho-pedagogical service;

d) special schools (on the basis of laws 360/1976 and 517/1977) for sightless and deaf mute students (which, however, may also be enrolled in the ordinary schools).

The main *tools to make the educational inclusion of the disabled effective* are, in turn, listed in art. 14 l. 104/1992, which refers to:

- training and updating for teachers working with disabled students;
- special forms of orientation and flexible teaching for disabled students;

⁴⁷ As regards the main sources of law on aid for students with disabilities, see, moreover: a) art. 28 of Act of Parliament 118/1971 (establishing the assistance of specialized teachers in the compulsory school, free transport and special means of transport to get to compulsory school); b) art. 2 and 7 of Act of Parliament 517/1977 (establishing, as regards the compulsory school, social and educational inclusion of disabled students through specialized teachers and a socio-psycho-pedagogical support, and limiting the number of students to be enrolled in the classes including disabled students); c) the guidelines adopted in 2009 by the Ministry of Education for the social and educational inclusion of students with disabilities through personalized measures; d) Act of Parliament 70/2010, establishing, for schools of all branches and grades, special and personalized measures to make the right to education of students with specific learning disabilities (such as dyslexia, dysgraphia, dysorthography and dyscalculia) effective.

- compulsory consultation between different teachers assigned to the same disabled students;
- the possibility, for disabled students, to attend the compulsory school until the eighteenth year of age.

These tools are substantially completed by those established by art. 16, which refers to special programs of teaching and special procedures for examinations addressed to disabled students.

Moreover, according to art. 12 law 104/1992 people with disabilities have the *right to social inclusion* in nurseries and the *right to education* in nursery schools, primary schools, high schools, universities. As a consequence, since these rights cannot be limited by the disability concerned, the public authorities have the duty to avoid this kind of limitation. This duty regards also *temporary disability*, as it is shown by art. 12 p. 9 and 10, according to which minors student of the compulsory school can attend, during their hospitalization and independently from their condition of permanent disability, the special classes instituted in the hospitals to make the right to education effective, without any distinction related to permanent or temporary disability. The only condition, regarding just the cases of temporary disability, is that the hospitalization has a duration exceeding 30 days.

Many principles and rules established by law 104/1992 are also present in delegated decree 297/1994, which, however, takes into account a partially different perspective, mainly focused on the administrative organization of schools and institutions in the field of education.

In this framework d.d. 297/94 too requires special programs, exams, equipments, orientation and specialized teachers for disabled students, mainly aimed at granting them a full educational inclusion (without any limitation deriving from the disability) through a socio-psycho-pedagogical assistance, special forms of teaching, a cooperation between different subjects (teachers, parents, medical staff).

It also establishes: a) the inclusion of the above mentioned teachers in the education councils at different level; b) the right of children with disabilities to attend nursery schools; c) the right of students with disabilities to attend compulsory school until the eighteenth year of age and to repeat each class three times; d) recurring checks on the procedures of educational inclusion to be done every two years by the Ministry of education; e) experimental activities for disabled students; f) a coordinated planning - through special agreements between the public authorities involved - of the

activities addressed to the disabled students in the fields of education, healthcare, social assistance, sport; g) training and updating for teachers working with disabled students; h) compulsory consultation between different teachers assigned to the same disabled students; i) the assimilation between the special schools for sightless and deaf mute students and the other kinds of schools or school sections for disabled students.

Moreover, also in this case special forms of protection are established for *temporary disability*, as it is shown by art. 314, according to which minors student of the compulsory school can attend, during their hospitalization and independently from their condition of permanent disability, the special classes instituted in the hospitals to make the right to education effective, without any distinction related to permanent or temporary disability. The only condition, regarding just the cases of temporary disability, is that the hospitalization has a duration exceeding 30 days.

In this framework it seems also useful to mention the United Nations Convention on Rights of Persons with Disabilities, adopted in 2006 and came into force in Italy 2009: it may be considered the first comprehensive human rights treaty of the 21st century and views persons with disabilities not as "objects" of charity, medical treatment and social protection, but as "subjects", active members of society holders of right, who are capable of claiming those rights and making decisions based on their free and informed consent. Thus, the Convention can be considered a human rights instrument with an explicit social development dimension. In fact: a) it adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disability must enjoy all human rights and fundamental freedom; b) it clarifies and qualifies how to apply all categories of rights to persons with disabilities and identifies areas (such as education and the right to education: art. 24) where adaptations have to be made for persons with disabilities in order to ensure the effective exercise of their rights. Finally, the rights established and safeguarded by the Convention have to be considered uncompressible, neither for financial reasons.

3.4.2 *Family benefits*

As we have noticed above, family benefits can be considered aimed both at granting social security and social assistance, depending from the fact that the measure concerned is covered by the contribution paid (by the recipient or his family) or by public funding in general.

The double relationship of this kind of aid with the fields of social security and social assistance requires to go back, at least in part, to the role played by these subject matters in the constitutional framework.

This relationship is made clear by art. 38 Const., according to which «workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment» (art. 38 p. 2), with «responsibilities [...] entrusted to entities and institutions established by or supported by the State» (art. 38 p. 4), even though «private-sector assistance may be freely provided» (art. 38 p. 5).

The difference between the aim of social security and that of social assistance as applied to family benefits is not traceable, as a consequence, directly to the Constitution, but to ordinary legislation, which distinguishes such measures covered by the contribution paid (according to a social security's perspective) from those covered by public funding in general (according to a social assistance's perspective).

As regards the distribution of competences between the State and regions, we have already noticed that the State has exclusive legislative powers in the field of the «determination of the basic levels of benefits related to civil and social entitlements to be guaranteed throughout the national territory» (art. 117 p. 2, lett. m)⁴⁸ and social security (art. 117, p. 2. Let. o), while the State and regions have concurring legislation in job protection and safety, professions, complementary and supplementary social security (art. 117 p. 3). Finally, according to art. 117 p. 4, all the subject matters not listed in art. 117 p. 2 or 3 have to be considered under the (exclusive) legislative competence of regions: this is the case, for instance, of social services and/or social assistance in general. However, the State has exclusive legislative powers concerning the «harmonization of public budgets» and the «equalisation of financial resources» (art. 117 p. 2 lett. e). It has also concurring legislation (shared with the regions) in the «coordination of public finance and taxation system» (art. 117 p. 3).

The distribution of administrative competencies between the State, regions and local authorities in the fields of education and social assistance follows the rules established by arts. 117 p. 6 and 118 p. 1 Const. mentioned above, moving from the distribution of the legislative ones.

Art. 119 Const., representing the constitutional legal framework of the so called *fiscal federalism* (which is in turn the principle on the basis of which the different levels of government

⁴⁸ This point is really important, as it can be noticed also from the exam of art. 120 p. 2, according to which, if the basic level of benefits related to civil and social entitlements is not ensured, the level of government concerned can be substituted by the State government, through the nomination of a special commissioner.

can obtain/find the financial resources necessary to exercise their functions), applies to the field concerned mainly as regards the competencies of local authorities, such as social assistance in general. As regards this point, it is possible to defer to the previous paragraph 3.2.

In the same paragraph we have listed de main *benefits in cash* existing at present in the field of social assistance, distinguishing: a) first of all, *family benefits* from *other benefits in cash*; b) secondly, *family benefits aimed at social assistance* from *those aimed at social security* and *those aimed at pursuing both these goals*.

The most important *family benefits aimed at pursuing both these goals*, as we have seen in par. 3.2, are the *family benefits (in cash)* introduced by dpr 797/55 and amended in the following years (law decree 69/88, converted to law 153/88): they are conditioned to the means test and mainly addressed to families with employment income and to pensioners who have had the same kind of income; this measure was thought, at the beginning, such as a kind of hybrid between a social security measure (for that part which was based on the contributions paid) and a social assistance measure (for that part which, on the contrary, was not based on the contribution paid but on public funds); at present, however, the social assistance component seems to prevail.

On the other hand, the most important *family benefits aimed at social assistance* are the benefits (in cash) for those families with at least three minor children (or third child allowance), introduced by Act of Parliament no. 448/98 (art. 65): they are conditioned to the means test and addressed to families with at least three minor children; moreover, they are granted by the National Institute of Social Security (with funds coming from the central government and given by the Municipality where the family concerned resides) under a specific annual request; as a consequence, they seem to have been thought, since the beginning, such as a social assistance measure (being based on public funds and aimed at supporting the most numerous families with the lowest income).

In par. 3.2 we have also argued that it seems possible to find *other measures appearing traceable both to the scheme of benefits in kind and to that of benefits in cash*: these are the so called parental leave, introduced in 1971 by l. n. 1024, which was in turn amended in 2000 by law 53 and finally repealed in 2001 by delegated decree 151. According to d.d. 151/2001 the parental leave allows (though it is in some cases compulsory and in other cases optional) parents to take direct care of their children, having a certain period of time off work and so saving a part of their salaries. This is the reason why it seems to be traceable both to the scheme of benefits in kind (allowing parents to take direct care of their children) and to that of benefits in cash (allowing

parents to save a part of their salaries). These measures are, however, addressed just to workers, even though they are not usually conditioned to the quantity of contributions paid. This is the reason why they seem to be also a kind of hybrid between a social security measure (being addressed just to workers) and a social assistance measure (not being usually conditioned to the quantity of contributions paid).

IV

THE ROLE OF CASE LAW IN JUDGING CLAIMS FOR SOCIAL SERVICES AND RIGHTS

4.1 Focus on the healthcare system

This section of the report will exam the role played by case law in judging some claims for social services and rights in the same fields (health, social assistance, social housing, aid for students with disabilities and family benefits) on which the previous section has been focused as regards the overview of specific welfare policies.

Following the same order applied above, it is possible to start from *health* and claims for *healthcare services*.

As regards the right to health and consequent claims for healthcare services, a first group of disputes deals with the mobility of patient in the international (EU and non-EU) dimension, *i.e.* with the *right of patients to benefit from healthcare services abroad with funds covered by public spending*. This kind of disputes has arisen in Italy mainly at the end of the last century, before the recent EU directive 24/2011 and Italian delegated decree 38/2014, and under partly different sources of law in the EU⁴⁹ and non-EU⁵⁰ perspective. We have already noticed that, with the recent delegated decree n. 38/2014, Italy has implemented the EU directive 24/11, about the international mobility in the EU, choosing to make it applicable, in certain particular cases⁵¹, also to non-EU citizens: according to this scheme the healthcare services concerned may be covered by public financing if belonging to those which are covered by the same financing in the State where the patient resides; moreover the healthcare system of the patient concerned has to authorize the mobility, if he needs specialized or hospital care, and the repayment has to observe the limits of the

⁴⁹ In the evolution of the sources of law and case law regarding this aspect, the most important seem to be the following: EEC regulation 1048/71; articles 6, p. 1, and 37 of law 833/78; the decision of the European Court of Justice adopted on December 17 1981, n. 279, in www.europa.eu; art. 3, p. 5, of law 595/85; art. 1, p. 9, of law decree 382/89; decree of Ministry of Health adopted on November 3 1989; decrees of Ministry of Health adopted on January 24 1990 and August 30 1991; the decision of the European Court of Justice adopted on April 1998, n. 158, in www.europa.eu; the decision of the Constitutional Court adopted on July 16 1999, n. 309, in www.giurcost.org.

⁵⁰ In the evolution of the sources of law and case law regarding this aspect, the most important seem to be the following: articles 6, p. 1, and 37 of law 833/78; art. 3, p. 5, of law 595/85; art. 1, p. 9, of law decree 382/89; decree of Ministry of Health adopted on November 3 1989; decrees of Ministry of Health adopted on January 24 1990 and August 30 1991; the decision of the Constitutional Court adopted on July 16 1999, n. 309, in www.giurcost.org.

⁵¹ See arts. 2 and 3 d.d. 38/14.

cost of the service in the national healthcare system of the user. Furthermore, it is not possible to deny the authorization if in the NHS of the patient concerned the healthcare service concerned cannot be provided in a time which is compatible with the degree of the illness. Finally, if the choice falls on the private healthcare system without involving any request for indirect assistance, the mobility is covered directly by the patient concerned; on the contrary, if the choice falls on the public system or on the private one but according to the model of indirect assistance, the mobility is covered again by the national system in which the patient concerned resides⁵². The scheme is in general not so different for the international mobility outside the EU⁵³.

In this framework the European Court of Justice⁵⁴, few years before EU directive 24/11 and Italian d.d. 38/2014, had declared that those measures which make the free movement of services between the member States more difficult than the provision of the same services in each member State can be considered in contrast with the principle of free movement of services in the EU (as established in art. 56 Tfeu). As a consequence, the fact that the National healthcare system in which the patient concerned resides does not guarantee him a set of healthcare services covered by public financing of quantity and kind at least corresponding to those existing in other member States, may represent a hindrance to the free movement of (healthcare) services, as it seems to discourage the mobility of patients between the EU member States because of deficiencies in the quantity and kind of the healthcare services covered by public financing in the State where the patient resides: in fact, if the healthcare service that the patient wishes to use in another member State is not listed among those covered by public financing in the State where the patient resides, it is not possible for him to obtain authorization from his State to use the same service in another member State.

Conversely, as regards the *right of patients to benefit from healthcare services abroad with funds covered by public spending* and the relative disputes which has arisen in Italy mainly at the

⁵² In the evolution of the sources of law and case law regarding this aspect, the most important in reaching the above mentioned conclusions seem to be the following: Ec regulation 1048/71; articles 6, p. 1, and 37 of law 833/78; the decision of the European Court of Justice adopted on December 17 1981, n. 279, in www.europa.eu; art. 3, p. 5, of law 595/85; art. 1, p. 9, of law decree 382/89; decree of Ministry of Health adopted on November 3 1989; decrees of Ministry of Health adopted on January 24 1990 and August 30 1991; the decision of the European Court of Justice adopted on April 1998, n. 158, in www.europa.eu; the decision of the Constitutional Court adopted on July 16 1999, n. 309, in www.giurcost.org; decision of the Major Section of the European Court of Justice adopted on June 15 2010, n. 211; EU directive n. 24/11, which has recently be implemented in Italy by delegated decree 38/14.

⁵³ In the evolution of the sources of law and case law regarding this aspect, the most important in reaching the above mentioned conclusions seem to be the following: articles 6, p. 1, and 37 of law 833/78; art. 3, p. 5, of law 595/85; art. 1, p. 9, of law decree 382/89; decree of Ministry of Health adopted on November 3 1989; decrees of Ministry of Health adopted on January 24 1990 and August 30 1991; the decision of the Constitutional Court adopted on July 16 1999, n. 309, in www.giurcost.org.

⁵⁴ For the relationship between the principle of free movement of services in the EU and the National healthcare systems of the member States, see European Court of Justice, Major Section, decision adopted on June 15 2010, n. 211.

end of the last century, the case law concerned deals above all with the conditions under which it seems possible to affirm the existence of such right even though the authorization has not been requested:

- in 1998 the Joint Sections of the Italian Supreme Court declared (decision n. 10737) the right of the patient to obtain the repayment of the healthcare service benefit abroad without any previous authorization of the competent national authority; in this case the Supreme Court has based its decision on the urgency and necessity of the healthcare service concerned, excluding, as a consequence, the existence of administrative discretion in protecting this right;

- the same opinion has been expressed by the Constitutional Court in 1998 (decision n. 267), Fifth Section of the Council of State on April 10th 2000 (decision n. 2077) and the Labour Section of the Supreme Court on February 20th 2001 (decision n. 2444) and on June 6th 2012 (decision n. 9962/2012); it has been expressed, moreover, by the same Joint Sections of the Supreme Court (decision n. 194/2001), but clarifying, in this case, that urgency and necessity of the healthcare service concerned may be considered existent by the competent administration applying the so called technical discretion;

- more recently the Labour section of the Supreme Court (decision n. 9969/2012) has implemented the content of this right declaring that the duty to protect the value of human dignity imposes to admit the repayment, in the absence of a previous authorization, also for the so called palliative care, under the following conditions: a) that they are urgent; b) that it is not possible to benefit from them in the NHS to which the patient belongs in a time frame compatible with this urgency.

One of the most important implications of the existence of a legal right and the absence of a discretionary power is that the competent administration can be obliged by the Judge to give the recipient the benefit concerned and/or compensation. Conversely, if these conditions do not exist, the Judge can just oblige the public authority concerned to exercise its power legitimately; moreover, the payment of possible compensation is subject to a larger number of preconditions / proofs.

A second, and similar, group of disputes deals with the *right of patients to benefit from indirect healthcare assistance without a previous authorization of the competent administrative authority with funds covered by public spending.*

As regards this point:

- in 2000 the Italian Constitutional Court declared (decision n. 509) the right of patients to benefit from indirect healthcare assistance⁵⁵ with funds covered by public spending also in those cases when a previous authorization of the competent administrative authority does not exist; however, the Constitutional Court has based its decision on the urgency and extreme necessity of the healthcare services concerned, excluding, as a consequence, any administrative discretion in protecting this right (directly based on art. 32 Const.);

- more recently the Third Section of the Supreme Court declared that, in case of indirect assistance without a previous authorization, normally the patient cannot obtain the repayment of the cost of the care concerned, except than in those cases when it is urgent and needful (decision n. 9319/2010).

A third group of disputes deals with the *right of patients to benefit from healthcare services abroad with funds covered by public spending in those cases when the patient concerned is away from his State for temporary reason and does not belong to the categories of individuals listed in art. 2 dpr 618/1980 (for instance, people abroad for work reasons and their families, people abroad for study reasons taking advantage of a scholarship).*

As regards this point:

- in 1999 the Italian Constitutional Court declared (decision n. 309) the existence of this right basing its decision on the condition of poverty of the possible recipients;

- more recently, in 2008, the Constitutional Court (decision n. 354) confirmed the existence of this right just for poor patients.

Another group of disputes deals with the *right of patients to benefit, under certain conditions and with spending covered by public financing, of medicines which are not included in the list of those covered by the same financing in the national (or regional⁵⁶) healthcare system.*

As regards this point:

⁵⁵ As we have noticed above, indirect assistance refers to the healthcare services which, even though they are guaranteed by the private system (for instance by the healthcare trusts which are only authorized but not accredited), can be reimbursed by the Local health authority or region in which the patient resides, on the basis of the conditions established by the regional legislation or the State one in its absence: however, a specific request from the patient is necessary.

⁵⁶ We have already noticed, in fact, that, while the State has the exclusive legislative competence to determine the basic levels of care to be grant in the entire national territory, each region can provide for additional levels of care to be covered by regional funds.

- in 2000 (decision n. 2782) the Labour Section of the Italian Supreme Court declared the existence of this right under the condition that the medication concerned is essential to the patient;

- in another case, regarding some experimental oncological medicines which are not included in the essential levels of care (so-called Di Bella care) the Regional Administrative Court of Friuli V. Giulia (decision n. 355/2002) declared that the above mentioned right does not exist if there is no scientific evidence about the appropriateness⁵⁷ of the medication concerned;

- more recently, on November 3rd 2008, the Court of First instance of Bari has declared that the experimental oncological medicines included in the so-called Di Bella protocol can be covered by public funding under the following conditions: a) that an alternative and appropriate care does not exist; b) that the experimental care concerned can improve the general conditions of health of the patient (even though a scientific evidence of its appropriateness does not exist); c) that this choice is compatible with the general principles and rules on which the NHS' organization is based and the availability of public funding;

- moreover, on November 22nd 2011, the Supreme Court declared (decision n. 24569) that the experimental oncological medicines included in the so-called Di Bella protocol can be covered by public funding just for those kinds of tumors and care belonging to the experimental program authorized on the basis of d.d. 23/1998, and under the condition that the patient concerned is indigent; this decision partially differs from that taken in 1998 by the Constitutional Court, which declared (decision n. 185) that for the indigent this right exists even though the oncological medication and tumor concerned do not belong to the authorized experimental protocol, but under the condition that no alternative official care is possible;

- conversely, on February 2nd 2012, the Court of First Instance of Bari took a partially different decision, declaring that the experimental oncological medicines which are not included in the essential levels of care (so-called Di Bella care) can be covered by public funding even though there is no scientific evidence about their appropriateness; the conditions under which, according to this judge, it is possible, are the following: a) that the care concerned could in general improve the living condition of the patient (even though the possibility of healing is excluded); b) that the patient has obtained a specific prescription from his primary care physician.

⁵⁷ This concept refers both to the essentiality of the healthcare service concerned to the patient and to its security, efficacy, efficiency, inexpensiveness.

Another quite different group of disputes deals with the *right of patients to benefit, with spending covered by public financing, of healthcare services which are not included in the list of those covered by the national (or regional)⁵⁸ healthcare system.*

As regards this point:

- on March 20th 2000 the Court of First Instance of Turin declared that the above mentioned right does not exist if there is no scientific evidence about the appropriateness⁵⁹ of the healthcare service concerned;

- conversely, as regards some experimental oncological medicines which are not included in the essential levels of care (so-called Di Bella care), the case law concerned, such as we have seen above, has expressed different positions.

However, in a more general perspective, it is useful to highlight that the Italian Constitutional Court has formulated, especially regarding claims for health and social assistance, the theory of their particular legal nature of *financially conditioned rights* (decisions n. 455/1990, 267/1998). This theory has recently been reintroduced as a possible consequence of the economic recession:

- in 2011 the Constitutional Court explicitly declared (decision n. 248/2011) that the right to healthcare services is financially conditioned and the will to grant a universalistic healthcare system is in practice limited by the frequent insufficiency of financial resources;

- the theory of financially conditioned rights seems to have been lately applied by the Constitutional Court also when it declared (decisions n. 104/2013) the impossibility, for regions under a recovery plan regarding the regional healthcare deficit, to establish additional levels of care covered by regional funding.

However, this theory has to be balanced with the theory of the *impossibility to compress the core of the right to health as a fundamental right, and both have to observe, in turn, the application of the reasonableness criteria⁶⁰:*

⁵⁸ We have already noticed, in fact, that, while the State has the exclusive legislative competence to determine the basic levels of care to be granted in the entire national territory, each region can provide for additional levels of care to be covered by regional funds.

⁵⁹ This concept refers both to the essentiality of the healthcare service concerned to the patient and to its security, efficacy, efficiency, inexpensiveness.

⁶⁰ See D. TEGA, *Welfare Rights in Italy*, from C. KILPATRICK – B. DE WITTE (edited by), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, European University Institute Working Paper – Department of Law, 2014, 54 ss.

- in this perspective the Constitutional Court declared that this core is strictly related to the duty to protect the human dignity (decisions nn. 304/1994, 267/1998, 309/1999, 509/2000, 252/2001), while the Regional Administrative Court of Lazio (Rome, Section III, decision n. 11574/2009) highlighted that the limit concerned does not imply also the duty to grant any kind of healthcare; moreover it declared that that the regional legislative measures aimed at reduce expenditure by preventing local health agencies from stipulating agreements with private entities to supply home physical therapy for disabled patients are unconstitutional, as the restrictive effects of the provisions at task affect the disabled (who need home assistance) and the freedom of choosing among treatments (and treatment providers) is an element of the right to health (decision n. 236/2012)⁶¹;

- in the same perspective the Court of First Instance of Genova (decision adopted on October 16th 2009) declared that this core is strictly related to the physical integrity.

4.2 Focus on the social assistance system

It is now possible to go on with *social assistance* and claims for *social assistance services*.

As regards the right to social assistance and consequent claims for social assistance services, it is common to this field what we have already noticed about health, *i.e.* that the Italian Constitutional Court has formulated, especially regarding claims for health and social assistance, the theory of their particular legal nature of *financially conditioned rights* (decision n. 455/1990, 267/1998). The same opinion has been expressed by the Labour Section of the Supreme Court (decision n. 2792/1987). This theory has recently been reintroduced as a possible consequence of the economic recession: in 2011 the Constitutional Court explicitly declared (decision n. 248/2011), in a more general perspective, that the right to social assistance is financially conditioned and the will to grant a universalistic social assistance system is in practice limited by the insufficiency of financial resources.

However, also in this case the theory concerned should be balanced with the theory of the *impossibility to compress the core of the right to social assistance as a fundamental right*, even though its constitutional protection seems weaker than that granted for health, being limited to every citizen unable to work and without the necessary means of subsistence and potentially adaptable to the selective universalism's model:

⁶¹ See D. TEGA, *Welfare Rights in Italy*, quot.

- in this perspective the Constitutional Court declared (decision n. 432/2005) that this core is strictly related to the duty to observe the principle of reasonableness, which is violated, for instance, when a regional law establishes just for the Italian citizens fully disabled the possibility to benefit from free public transport, excluding the foreigners fully disabled residing in the region concerned; as regards welfare policies and the rights of foreigners living in Italy, also the Labour Section of the Supreme Court declared (decision n. 16795/2004), for instance, that l.d. 69/1988 has to be interpreted such as granting the right to family benefits not only to the Italian citizens, but also to the foreigners living in Italy by a certain time⁶²;
- the Constitutional Court also declared (decision n. 10/2010) that this core is strictly related to the duty of the Republic to grant all those performances which are essential to relieve conditions of extreme need of citizens / individuals;
- as regards some particular kinds of services in the field of social assistance and education (nurseries), many years before the Regional Administrative Court of Veneto had established (case n. 395/1989) that the decision to dismiss public nurseries cannot be based just on financial reasons.

In the field of social assistance, however, most of the disputes deals with claims for benefits in cash (such as the *guarantee of integration to the minimum pensions, family benefits, social pensions, disability pensions, disability benefit, third child allowance, maternity allowance, vouchers, social card, parental leave*).

They are usually considered such as a right of the recipient⁶³ and, as a consequence, it is common opinion that the competent administrative authority has not discretionary power in the procedure aimed at verifying whether they can be grant or not⁶⁴.

One of the most important implications of the existence of a legal right and the absence of a discretionary power is that the competent administration can be obliged by the Judge to give the

⁶² The same opinion has been expressed - as regards third child allowance established by l. 448/1998 - by the Court of First Instance of Verona (decision n. 564/2012), applying d.d. 3/2007. See, moreover, Court of First Instance of Padova, December 5th 2011.

⁶³ See Supreme Court, Labour Section, decision n. 1389/1991 on social pensions established by law 153/1969; Supreme Court, Labour Section, decision n. 16207/2008, Council of State, VI, decision n. 3564/2007, and Court of Accounts of Trentino, decision n. 24/2010, on parental leave established by d.d. 151/2001; Supreme Court, Fourth Section, decision n. 27382/2014 on family benefits established by l.d. 69/1988.

⁶⁴ See Supreme Court, Labour Section, decisions n. 1606/1990, 1082/1998, 1003/2003, 14127/2006 on disability benefit established by law 18/1980; *Id.*, n. 23481/2010 on disability pensions introduced by law 118/1971; Supreme Court, Fourth Section, decision n. 27382/2014 on family benefits established by l.d. 69/1988.

recipient the benefit concerned and/or compensation. Conversely, if these conditions do not exist, the Judge can just oblige the public authority concerned to exercise its power legitimately; moreover, the payment of possible compensation is subject to a larger number of preconditions / proofs.

However, case law has also pointed out that sometimes (for instance as regards parental leave to be granted to police officers) the competent administrative authority can plan the use of the benefit concerned (Administrative Court of First instance of Trentino, decision n. 79/2003), even though this opinion has been more recently disappointed by the Sixth Section of the Council of State, according to which (decision n. 3564/2007) the benefits representing an extraordinary measure (such as parental leave) cannot be limited by any administrative planning activity.

As regards the goals of some of them the Labour Section (decision n. 11295/2000) and the First Section (decision n. 8758/2005) of the Supreme Court have pointed out, for instance, that disability benefit introduced by law 18/1980 is aimed at encouraging families to take care of their disabled (confirming, as a consequence, the legal nature of the Italian social assistance system, according to which a very important role is attributed to the family, while public authorities assume the duty to provide for social assistance in a perspective of 'selective universalism').

Conversely, the EU case law mainly focuses on the criteria to be applied in determining the quantity, type, presuppositions and qualitative equivalence of these benefits when the recipients have acquired the conditions to obtain one or more of them in different member States (see, for instance, EC Court of Justice, nn. 322/1997, 301/1994, 275/1993, 186/1991, 128/1989): however, these cases concern, above all, the application of EEC Regulation 1408/71 on coordination of national social security's systems.

As far as benefits in kind are concerned, most of the disputes deals with the distribution of competencies between the State and regions: for instance, according to the Constitutional Court (decisions n. 370/2003, 320/2004), legislation on nurseries mainly belongs to the fields of education and protection of work, and just in part to the field of social assistance in general (decision n. 467/2002); conversely, before the constitutional reform passed in 2001, the subject matter concerned was considered under the field of public charities (decision n. 139/1985). On the contrary, regarding some benefits in cash (such as social card), the Constitutional Court (decision n. 10/2010) declared that they deal both with the determination of the essential levels of benefits to be grant in the entire national territory and to the field of social assistance in general.

Moreover, a very important part of case law on benefit in kind in the social assistance sector (meant in the above mentioned wide ranging meaning) regards the field of aid for students with disabilities: we will focus on this point at following par. 4.4.1.

4.3 Focus on social housing

As regards case law on *social housing*, in the previous chapter we have already noticed that, according to the Constitutional Court (decision n. 94/2007), the subject matter concerned (including *public housing* and *social housing*, in the meaning we have pointed out above) deals with three kinds of legislative competences: a) exclusive of the State for the *determination of the basic levels of benefits related to civil and social entitlements to be granted throughout the overall national territory*⁶⁵; b) shared between the State and regions for *land use planning*⁶⁶; c) exclusive of the regions for the *management of residential property in the field public / social housing*.

It deals, moreover, as regards the contractual agreement for the use of the houses concerned, with the exclusive legislative competence of the State in the field of *civil law* (Constitutional Court, n. 121/2010).

Conversely, before the constitutional reform passed in 2001, the subject matter concerned was considered at least in part under the field of public charities (Constitutional Court., n. 520/2000).

We have also pointed out, in the first part of this Report, that, even though the Constitution does not contain any explicit reference to the *right to house*, the possibility to benefit from a house may be considered an essential need of the person, both as an individual and in the social groups where human personality is expressed (in this case the social group concerned is above all the family, which, on the contrary, is directly protected by the Constitution, especially when not having sufficient means).

This opinion is also supported by a part of case law, which recognizes:

- a) the existence of the right to house, sometimes as a constitutional fundamental right (for instance based on art. 47 Const.)⁶⁷, at other times as a right based on sources of law different from the Constitution (such as primary or secondary sources)⁶⁸;

⁶⁵ See, moreover, Constitutional Court, n. 121/2010.

⁶⁶ See, moreover, Constitutional Court, n. 121/2010.

⁶⁷ See Administrative Court of Firts Instance of Lombardia, Milan, Section III, n. 2106/2008; Council of State, Section IV, n. 888/1994; Const. Court, n. 28/2003; Id., n. 520/2000. See, moreover, Const. Court, n. 121/2010.

⁶⁸ See Supreme Court, Section I, n. 6588/2003; Council of State, Section IV, n. 869/2007.

- b) the legal nature of social / public housing activities as a social service aimed at making the right to house effective⁶⁹;
- c) those regional provisions establishing that one of the conditions to benefit from public/social housing is to maintain the permanent address in the region concerned for a certain period (eight years) are in breach with arts. 3 and 117 p. 1 Const. (see ICC n. 168/2014 and, moreover, ICC n. 133 and 122/2013), since they are not reasonable.

A second group of disputes deals with the *legal nature of the administrative power involved* in assigning public / social houses and in managing their use by the recipients.

As regards this point, a part of case law believes that, while in the first phase (*adjudication*) the public power involved has a discretionary legal nature (being in practice aimed at governing a public competition), in the second phase (*management* of the contractual agreements signed with recipients of the houses concerned) the competent administration is just vested with a bond function fully similar to a private activity⁷⁰. The main consequence of this distinction is that just in the second phase the recipient is considered vested with possible legal rights (based directly on what law and the contractual agreement establish), while, according to the Italian legal system, in the competition phase he is considered vested only with a ‘legitimate interest / expectation’, which depends on the exercise of an administrative power properly named⁷¹.

However, another part of case law believes that also in the competition phase the competent administration is vested with a bond function, aimed just at verifying whether the possible recipients have the requirements established by law (and the call for tender) to allow them to benefit from a house at social price⁷² (even though the recipient is vested with a ‘legitimate interest’ as a consequence of the existence of this ‘power’⁷³) or not.

On the other hand, the United Sections of the Supreme Court have pointed out that, if the competent administrative authority annuls the adjudication on the basis of vices existing in the competition phase (decisions n. 19858/2004, 1155/2000, 952/1991, 4135/1989) or repeals it on the basis of supervening vices (decision n. 1214/1983), the public power involved has, however, a

⁶⁹ See Council of State, Section V, n. 405/2007; Supreme Court, Section II, 6172/2014; Fiscal Commission of Turin, Section XXVI, n. 15/1999.

⁷⁰ See Supreme Court, United Sections, n. 758/2007; Id., n. 1155/2000; Id., Section II, 6172/2014.

⁷¹ See Council of State, Section IV, n. 6/2014; Id., n. 1382/2007; Id., Section V, 3409/2013; Supreme Court, United Sections, n. 10710/2006; Id., n. 13459/2005; Id., n. 594/2003; Id., n. 1155/2000; Id., n. 3728/1991; Id., 5472/1985; Id., n. 67/1984; Id., n. 1214/1983; Id., Section II, n. 6172/2014; Id., n. 178/2003; Id., Section I, n. 4305/1999.

⁷² See Council of State, Section IV, n. 2269/2002.

⁷³ See Supreme Court, United Sections, n. 1214/1983.

discretionary legal nature and the recipient is vested with a legitimate interest, even though the contractual agreement has already been signed.

One of the most important implications of the existence of a legal right and the absence of a discretionary power is that the competent administration can be obliged by the Judge to give the recipient the benefit concerned and/or compensation. Conversely, if these conditions do not exist, the Judge can just oblige the public authority concerned to exercise its power legitimately; moreover, the payment of possible compensation is subject to a larger number of preconditions / proofs.

Another important group of disputes deals, finally, with the possible *violation of property's rights as a consequence of some Italian national measures on social housing*, aimed at: a) suspending, for a certain period, all the pending eviction procedures due to delay in rent payment or to other reasons (such as the expiry of the contract); b) prolonging the effectiveness of the existing contracts; c) limiting the possibility of houses' owners to ask for the intervention of the police force in the execution of the judicial eviction decisions; d) limiting the entity of rental fees of residential properties.

As regards these matters, the ECHR (throughout analyses of decisions nn. 315/1995 and 22774/1999) declared that:

1. the above listed kinds of measures do not violate art. 1 of Protocol 1 of the EConHR because: a) the State has a very wide discretion in choosing them; b) they pursue a legitimate general interest conforming to the principle of proportionality; c) they reflect the balance of the general public interest to adopt urgent measures in the field of social housing and the fundamental property's rights;
2. art. 1 of Protocol 1 and art. 6 of the ECoHR are violated in those cases when the police force does not intervene in the execution of the judicial eviction decisions even though the legal condition for the intervention exist, determining, as a consequence a not reasonable extension of the eviction procedure's duration;
3. this violation, according to art. 50 ECoHR, allows the owner to ask the State compensation for material and moral damages;
4. moreover, art. 1 of Protocol 1 and art. 6 of the ECoHR are violated in those cases when the national measures, establishing the priority of the eviction procedures based on certain

reasons (such as the need of the owner to use the house under eviction for him or his family), determine, in practice, the inability, for all the other eviction procedures, to end successfully in a reasonable time.

4.4 Focus on specific cases regarding some policies in the field of education, work and social security

In the two following paragraphs we will speak about the role of case law in judging claims for social services and rights as regards specific policies in the field of education, work and social security, even though the measures concerned deal also with the sector of social assistance, to be meant in the wide ranging meaning mentioned above: they are the case of aid for students with disabilities (on the one hand) and of family benefits (on the other).

In fact, as we have noticed in par. 3.4, the former is aimed both at making the right/duty to education effective (art. 34 Const.) and at providing social assistance for students with disabilities (art. 38 Const.). The latter, in turn, can be considered aimed both at granting social security and social assistance, depending from the fact that the measure concerned is covered by the contribution paid or by public funding in general.

4.4.1 Aid for students with disabilities

As regards aid for students with disabilities and consequent claims for public benefits in this field, it is common to the subject matter concerned what we have already noticed about health and social assistance in general, *i.e.* that the Italian Constitutional Court has formulated the theory of *financially conditioned rights* and applied it to different claims for social services (decisions nn. 455/1990, 267/1998, 248/2011).

However, also in this case the theory concerned (which has been also considered as the basis of a kind of '*sustainable universalism*'⁷⁴) should be balanced with the theory of the *impossibility to compress the core of right of disabled students to education as a fundamental right*:

- in this perspective the Constitutional Court declared (decision n. 80/2010, but see also decisions nn. 50/1990, 406/1992, 52/2000, 226/2001, 269/2009, 431/2008, 251/2008) that this core is strictly related to the duty to observe the principle of reasonableness (which represents a limit for the discretion of legislator), since the right to education of (and social assistance for) disabled students is a fundamental right and cannot be balanced with the aim of controlling public spending;

⁷⁴ See E. BOSCOLO, *Istruzione e inclusione: un percorso giurisprudenziale attorno all'effettività dei diritti prestazionali*, from *Munus*, 2014, 2, 179 ss.

thus, the acts of Parliament introducing binding limits to the number of specialized teachers for disabled students to be assigned to each school are in breach with the Constitution;

- the same opinion has been expressed, as regards limits to the number of specialized teachers for disabled students established by administrative Plans in contrast with the 'scoresheet' of the competent technical commission, by the Administrative Court of First Instance of Region Molise (Section I, n. 232/2014);

- many other decisions of Regional Administrative Courts of First Instance have applied in general the principles established by the Constitutional Court in decision 80/2010 as regards the acts establishing binding limits to the number of specialized teachers for disabled students to be assigned to each school (see Administrative Court of First Instance of Lazio: Section III n. 224/2013; Section III *bis* n. 6011/2013); a similar opinion has been expressed by the Tribunal of Milan (Section I, January 4th 2011);

- also the Council of State (Section VI, n. 2231/2010; Section V, n. 3950/2013) has applied the above mentioned principle, clarifying that: a) the right to education of disabled students is a fundamental right; b) the ordinary statutes have to discipline this right without compressing its core; c) in this perspective the main goal is the social and educational inclusion of each disabled student; d) thus, the measures to be adopted have to be tailored on the specific needs of each disabled student, without introducing general and unbreakable limitations;

- the violation of the above mentioned principles and rules can allow the disabled student concerned to ask for compensation, which can be based on the inappropriateness of the measures adopted or on the delay in their provision (see Administrative Court of First Instance of Sardegna, Section I, n. 134/2013; Administrative Court of First Instance of Abruzzo, L'Aquila, n. 255/2014).

Another group of disputes deals with *the extent of the right of disabled students to attend schools*. In this perspective the Constitutional Court (decision n. 215/1987) declared that the throughout analyses of arts. 2, 3, 29, 30, 31, 34 and 38 Const. represents the constitutional basis of the right of disabled students to attend secondary school and, thus, also the constitutional basis of the duty of public authorities to grant all the means which are necessary to make this right effective: therefore, Acts of Parliament or Regional Council are in breach with the Constitution when establishing just that these means 'will be provided' and not that they 'are provided'.

4.4.2 *Family benefits*

As we have already noticed, family benefits can be considered aimed both at granting social security and social assistance, depending from the fact that the measure concerned is covered by the contribution paid (by the recipient or his family) or by public funding in general.

At the previous paragraphs 3.2. and 3.4.2. we have listed de main *benefits in cash* existing at present in the field of social assistance, distinguishing: a) first of all, *family benefits* from *other benefits in cash*; b) secondly, *family benefits aimed at social assistance* from *those aimed at social security* and *those aimed at pursuing both these goals*.

Moreover, at the previous paragraph 4.2. we have focused on case law regarding *social assistance* and *claims for social assistance services*.

Thus, as regards case law on family benefits and claims for them, it is possible to defer to the previous paragraph 4.2.

TRYING TO ANSWER THE MAIN QUESTIONS
WHICH ARISE FROM THE EXISTING LEGAL FRAMEWORK

5.1 *Is it possible to find, in the Italian Welfare system, a general trend to reduce social welfare entitlements? If so, is such a trend conditioned, to any extent, by ex ante planning (policies) or it is only driven by emergency reasons? What is the role played by fiscal federalism and the constitutional reform regarding the budget balance?*

First of all one wonders whether, in Italy, there have been a general trend to reduce social welfare entitlements, and, if so, whether such a trend is conditioned, to any extent, by specific policies or it is only driven by emergency reasons.

In order to answer this question, we have to highlight that any welfare policies entails the balancing of the provision of certain services of a certain quantity/quality and the control of public spending. These goals have become both more difficult to pursue (and stringent too) with the economic recession, which has determined – on the one hand – an increase in demand for social services, and – on the other hand – a decrease in public funds aimed at covering this demand (since the lack of economic development determines a reduction in tax revenue). However, as regards this point one has to bear in mind that economic and fiscal policies too may be considered, at least in part, as (a tool for) social policies⁷⁵.

In this perspective the choice of social services to be covered by public funds mainly concerns the determination of their basic levels to be granted in the overall national territory: according to art. 117 par. 2 lett. m) Const. such policy making is within the legislative remit of the National Parliament.

Such a choice is a consequence of both political and ethical stances.

For instance, as regards social assistance services, although this determination has not been ever done with the same detail used for healthcare services⁷⁶, it is possible to affirm that the

⁷⁵ See G. RAZZANO, *Lo “statuto” costituzionale dei diritti sociali*, from www.gruppodipisa.it, 2012, 6.

⁷⁶ Art. 22 of law 328/2000 is in fact too general and the National Plan for Social Assistance, adopted by dpr 3.5.2001 for a two-years period on the basis of art. 18 l. 328/2000, is expired and has not been replaced. This situation

different kind of universalism which characterises the Italian social assistance system vis a vis the healthcare system is the consequence of different political and ethical choices, which have led to a *selective universalism*⁷⁷ in the first case and to a perfect universalism⁷⁸ in the second. However, in both these cases the implementation of the principles and rules established by arts. 38⁷⁹ and 32⁸⁰ Const. has gone beyond what the constitutional provisions establish.

Within this framework two more issues are worthy of a mention. As regards social assistance, due to the lack of a sufficiently detailed determination of the basic levels of benefits the

represents a hindrance to the implementation of art. 119 Const. (and of the following law 42/09 and d.d. 216/2010 and 23/2011 on standard needs of municipalities and municipal federalism) in the field of social assistance.

⁷⁷ According to the *selective universalism's* model, the competent public authorities establish the general right of citizens (/ individuals) to receive social assistance, but select the services / benefits to be provided on the basis of the existing conditions of the real need of the recipient. This choice, as regards *selectivity*, is mainly due to the need to control public spending. On the other hand, the choice at task, as regards the *universalism*, is mainly due to the aim of reducing poverty and implementing the participation to the job market, in a perspective of inclusive development (using the words of the so called Europe 2020 strategy, presented in 2010 by the EU Commission). See A. PIOGGIA, *Diritto sanitario e dei servizi sociali*, Torino, Giappichelli, 2014, 37 ss., 149 ss., 158, 195 ss. For a more general perspective, dealing with the possibility to trace back to the Southern Europe model the Italian welfare system as a whole, beyond the social assistance one, see M. FERRERA (edited by), *Le politiche sociali*, Bologna, il Mulino, 2012, 47 ss., 243: in this case, however, emerges that some categories (such as certain kinds of workers and their families) are more protected than others (such as the autonomous or atypical workers or the unemployed), not on the basis of their real condition of need, but mainly for political reasons.

⁷⁸ The Italian NHS has the nature of a universalistic system, having being modelled by the Act of Parliament no. 833 of 1978 on the English NHS, the paradigm of such kinds of systems. They can be considered the most equitable both from a subjective (as regards the recipients of services covered by public spending) and an objective (as regards the quantity and kinds of services covered by public spending) point of view, but they are also the ones in which the public spending is higher and more difficult to take under control. The concept of 'equity' can be considered the corner stone of the *perfect universalism's* models. Equity is meant to be, especially in its subjective meaning, at the root of the system and it regards the goal that everybody can freely access health services funded by public expenditure irregardless of the group or category one belongs to (opposite to this in Germany or France, healthcare services are mainly funded by social health insurance). Such a very large coverage of the needs of the population entails that most of the health services are assured to the patients directly by the NHS – and in the end by general taxation – with minor exceptions, such as some dental or aesthetic healthcare services. The latter are the so called out of pocket services, and users must pay for them directly or through a private insurance policy, if they have one. For a comparison between different healthcare systems, see A. PIOGGIA – S. CIVITARESE MATTEUCCI – G. RACCA – M. DUGATO (edited by), *I servizi sanitari: organizzazione, riforme e sostenibilità. Una prospettiva comparata*, Rimini, Maggioli, 2011; F. TOTH, *Le politiche sanitarie – Modelli a confronto*, Bari, Laterza, 2009; ID., *Is there a Southern European Healthcare Model?*, in *West European Politics*, n. 33-2, 2010, 325; ID., *Le politiche sanitarie tra riforme e contro-riforme*, in *saluteinternazionale.info*, 2010; ID., *Le riforme sanitarie in Europa: tra continuità e cambiamento*, in *Riv. it. pol. pubb.*, n. 2, 2009, 69; E. JORIO, *Il percorso legislativo della riforma sanitaria di Barack H. Obama, prima che venga approvata dal Congresso USA*, in *www.astrid-online.it*, 2010.

⁷⁹ In some cases the welfare support mentioned in art. 38 has been in fact provided: a) not only for citizens (according to a perspective of political citizenship) but also to other categories of individuals (in a perspective of social citizenship, aiming at recognizing rights, more than to citizens, to the wider category of individuals, considered as members of a certain community); b) not only for those citizens or individuals unable to work and without the necessary means of subsistence, but also to other categories of citizens or individuals (think of aid for mother and children, such as kindergartens, usually traced back to social assistance, and not to education).

⁸⁰ In fact, as we have already pointed out, the universal coverage granted by the Italian NHS introduced by the Act of Parliament n. 833/1978 is not fully consistent with what the Constitution establishes, as art. 32 p. 1 only provides for the guarantee of «free medical care to the indigent».

actual supply of national funds does not seem sufficient to guarantee a minimum standard of services in the different Italian regions. As regards healthcare, the basic levels of care have not been updated since 2001 (d.p.c.m. 29.11.2001).

Also in the field of public/social housing specific basic levels of service have not been issued by the State. And here as well the implementation of the constitutional principles and rules, as long as they even exist, has probably gone beyond what the constitution provides for in terms of social housing rights.

In fact, although the Constitution does not contain any explicit reference to social housing, the possibility that one can get assistance regarding his or her housing needs has sometimes been considered a fundamental/social right of a person⁸¹.

In this framework, since 1903 many primary and secondary sources of law have often dealt of social housing⁸².

In recent years the Act of Parliament no. 9/2007 and dm n. 32438/2008 – followed by many other national and regional measures until now – introduced a new regulation regarding the residential property market, aimed at meeting some social goals. An integrated system of property funds to sustain and increase the rental market was introduced. The implementation and modernisation of the existing stock of public houses was financed. New housing cooperatives were created and aided by granting them money for the building up of new houses, to be sold or leased at ‘social prices’, also thanks to specific urban plans and programmes.

At the same time several measures of tenant relief from eviction have been laid down in the law between 2007 and 2014.

However, private and public funds (mainly local) aimed at supporting social housing policies have progressively dwindled⁸³, with the exception of the national fund established to support tenants with outstanding rents which has been increased and prolonged until 2019.

⁸¹ See, for instance: Const. Court, n. 121/2010; Supreme Court, Section I, n. 6588/2003; Council of State, Section IV, n. 869/2007; EU Parliament Essay on Social Housing in the EU, adopted on April 30 – June 11 2013.

⁸² For instance: art. 18 of Act of Parliament 254/1903; royal decrees 89/1908 and 1165/1938; Act of Parliament 43/1949; Acts of Parliament 167/1962 and 865/1971; art. 2 of Act of Parliament 10/1977; dpr 1036/1972 and 616/1977; Acts of Parliament 1444/1963 and 382/1978; l.d. 12/1985, converted to Act of Parliament 118/1985; l.d. 108/1986, converted to Act of Parliament 899/1986; l.d. 551/1988, converted to Act of Parliament 61/1989; Act of Parliament 179/992; Act of Parliament 560/1993; Act of Parliament 431/1998 (and the following dm 7.6.1999); d.d. 112/1998; art. 3 of Act of Parliament 21/2001; law decree 86/2005 (converted to Act of Parliament 145/2009); law decree 23/2006 (converted to Act of Parliament 86/2006).

It is possible that Regions and local authorities, according to fiscal federalism reform (art. 119 Cost.), decide to finance their own welfare policies using their independent financial resources, but they face a number of constraints should they resort to this possibility.

As regards this last issue it is worth recalling here the ICC case law regarding the NHS. Dealing with decisions by the regions to establish additional levels of care covered by regional funds, the ICC ruled that the former were unlawful insofar as the Region is under a Recovery Plan to eliminate the healthcare deficit (dec. no. 104/2013). The obligation to get the balance sheet in order without affecting the national deficit budget as a whole trumps the desire to elevate regional welfare entitlements.

These kinds of decisions can be traced back to a long standing doctrine of the ICC which considers social rights as financially conditioned. This doctrine was formulated by the Italian Constitutional Court especially regarding claims to health and social assistance and has recently been reintroduced as a probable consequence of the economic recession⁸⁴. Putting it bluntly the will to build an universalistic system of welfare has to come to terms with the rationing of financial resources. Hence claims regarding rights, despite their constitutional entrenchment, are never absolute.

However, according to another important strand of case law (both of the constitutional court and by civil and administrative courts), this doctrine has, in turn, to be balanced with the theory of the existence of a social right core. Such a balancing is made in the light of the golden principle of reasonableness⁸⁵: in this perspective this core can be represented, say, by human dignity or physical integrity which require avoiding conditions of extreme need for the recipients⁸⁶.

⁸³ See AA.VV. - Cassa Depositi e Prestiti, *Social housing – Il mercato immobiliare in Italia: focus sull’edilizia sociale*, quot. 65 ss., in www.astrid-online.it. Moreover l. 183/2011 has reset to zero the rent Fund established by law 431/98, see A. MISIANI, *Fondi statali per le politiche sociali: nuovi tagli con la Legge di stabilità 2012*, in www.astrid-online.it.

⁸⁴ See, for instance: Constitutional Court, decisions n. 455/1990, 267/1998, 248/2011, 104/2013; but see also Labour Section of the Supreme Court, decision n. 2792/1987.

⁸⁵ See D. TEGA, *Welfare Rights in Italy*, from C. KILPATRICK – B. DE WITTE (edited by), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges*, European University Institute Working Paper – Department of Law, 2014, 54 ss.

⁸⁶ See, for instance: Constitutional Court, decisions n. 304/1994, 267/1998, 309/1999, 509/2000, 252/2001, 432/2005, 10/2010, n. 80/2010, 50/1990, 406/1992, 52/2000, 226/2001, 269/2009, 431/2008, 251/2008; Regional Administrative Court of Lazio, Rome, Section III, decisions n. 11574/2009 and 236/2012; Court of First Instance of Genova, decision adopted on October 16th 2009; Labour Section of the Supreme Court, decision n. 16795/2004; Regional Administrative Court of Veneto, decision n. 395/1989; Administrative Court of First Instance of Region Molise, Section I, decision n. 232/2014; Administrative Court of First Instance of Lazio, Section III, decision n. 224/2013, and Section III bis, decision n. 6011/2013;

What stands out, in brief, is that the chance that regional policies counteract the austerity trend is actually just abstract or extremely limited.

To sum up, regarding the austerity trend we can refer to a recent study edited by the EU Commission according to which «in Italy there has been a reduction in financial resources for public services, as well as in the general budget assigned to regional and local authorities, i.e. the main providers of services and benefits». In this perspective it has also pointed out that: a) «the resources devoted to the “National Fund for Social Policies”, which supports local welfare systems, decreased by 32% in 2014 compared to 2010, and by 58% if compared with 2008 levels»; b) «the National Fund for Childhood and Adolescence», playing an «important role in fostering integrated child well-being projects in large metropolitan areas, has been continuously cut since 2008»; c) these cuts have the effect «to jeopardise the service delivery capacity of local authorities», «as demonstrated by a 23.5% general decrease in their investments which occurred between 2008 and 2012»⁸⁷.

In addition we can also notice that a general plan or agenda of welfare reforms is hardly detectable and therefore that the sensible reduction in welfare entitlements has occurred via a number of disparate measures often hidden in legislation enacted to face situations of financial distress.

The latter is one of the crucial points for, as we shall see, this development appears to be driven not only by external factors (Eurozone fiscal rules mainly) but also by the combined effect of fiscal federalism and budget balance domestic reforms.

Fiscal federalism, having its constitutional basis in art. 119 Const., is the principle on the basis of which the different levels of government can obtain the financial resources necessary to exercise their functions⁸⁸. Art. 119 has been implemented, in general, by the Act of Parliament

Tribunal of Milan, Section I, decision adopted on January 4th 2011; Council of State, Section VI, decision n. 2231/2010, and Section V, decision n. 3950/2013; Administrative Court of First Instance of Sardegna, Section I, decision n. 134/2013; Administrative Court of First Instance of Abruzzo, L’Aquila, decision n. 255/2014.

⁸⁷ See EU Commission (D. BOUGET – H. FRAZER – E. MARLIER – S. SABATO – B. VANHERCKE), *Social Investment in Europe – A study of national policies*, 2015, from www.astridonline.it, 13, 43, 30.

⁸⁸ According to art. 119 Const.: a) «municipalities, provinces, metropolitan cities and regions [...] have revenue and expenditure autonomy», with the duty to observe their budgets balance and to be in compliance with the economic and financial constraints deriving from EU legislation (art. 119 p. 1); b) they «have independent financial resources», «set and levy taxes and collect revenues of their own» («in compliance with the Constitution and according to the principles of co-ordination of State finances and the tax system»), «share in the tax revenues related to their respective territories» (art. 119 p. 2); c) «State legislation shall

42/2009 and, as regards the specific policies involved, by different delegated decrees (for instance, d.d. 68/2011 about the healthcare system, and d.d. 216/2010 and 23/2011 about the standard needs of municipalities and municipal federalism). This system, however, is still to be completed, since the above mentioned delegated decrees usually refers to other regulations to be adopted by the competent ministries.

Anyhow, it seems possible to argue that while – on the one hand – measures such as recovery plans in healthcare are aimed at spending control – on the other hand – measures such as the implementation of fiscal federalism should mainly aim at optimising spending whereby adequate use of resources.

The overall fiscal federalism framework is based on the role of the basic levels of social services, representing a tool of fiscal equalization, in order to avoid the implementation of a too competitive and inequitable federalism.

For instance, as far as fiscal federalism in healthcare is concerned, the financial autonomy of the regions is balanced by the possibility, for those which are unable to achieve the basic levels of care according to the ‘standard need’, to draw from a State fund in order to obtain all the financial resources necessary: a) to provide the basic levels of care according to the quality and quantity standard required (if this basic level is not reached, but the budget is balanced); b) or to reach the budget balance for the healthcare spending (if the basic level of care is ensured, but the budget is not balanced); c) or, finally, to achieve both such goals (if the basic level of care is not ensured, and the budget is not balanced).

Hence, the key-concept is the “standard need”. It is calculated by multiplying the basic levels of benefits relating to healthcare by the standard costs of the healthcare services, as recorded in the ‘virtuous’ regions: the ‘standard need’ seems to represent, together with the ‘standard costs’, the parameter which should bring about the abandoning of the criterion of ‘past spending’ in the financing of healthcare.

provide for an equalisation fund [...] for the territories having lower per-capita taxable capacity» (art. 119 p. 3); d) all the above mentioned resources shall enable municipalities, provinces, metropolitan cities and regions to fully finance their functions (art. 119 p. 4); e) however, «the State shall allocate supplementary resources and adopt special measures in favour of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to reduce economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions» (art. 119 p. 5).

The identification and choice of the ‘virtuous’ regions are the preconditions to determine the standard costs of the healthcare services: first of all these costs have to be identified in the regions chosen with the above mentioned procedure, and then they have to be multiplied by the basic levels of care to be ensured in each region. The outcome is still to be corrected taking into account the demographic characteristics of the regional population concerned. Moreover, according to d.d. 68/2011, the ‘virtuous’ regions are those which have a balanced budget and are not subject to Recovery Plans (in 2013 they have been identified choosing Veneto, Emilia Romagna and Umbria): it does not necessarily mean that they have the lowest spending in healthcare, but it can mean that they are capable of optimising healthcare spending by granting their patient a better level (in quantity and quality) of healthcare services without compromising the balance of their budget, also in the light of the constitutional reform regarding the budget balance.

At present the principles and rules on which fiscal federalism is based have to be interpreted, in fact, also in the light of art. 81 Const., as amendment by the constitutional Law no. 1/2012, of April 20th, which has explicitly introduced the «balanced budget» principle into the text of the Constitution. This revision, which was enacted as a response to the financial markets and to the pressures coming from the EU, has brought some changes, moreover, in art. 97 Const., now requiring that public administrations, according to the European Union directions, ensure «balanced budgets and public debt sustainability». The revision has introduced, however, an element of extreme rigidity which may represent a threat to the safeguarding of fundamental rights, especially the social ones, representing the cornerstone of the Italian form of State, which, according to art. 138 Const., cannot be amended, not even by a constitutional reform⁸⁹.

As regards this reform, and in general the reforms dealing with the recentralization of many policies as a consequence of the economic recession, it seems possible to argue, however, that regional and/or local autonomy will not be abandoned, and that, on the contrary, it will become a kind of ‘prize’ for the regions or local authorities which will be able to achieve certain goals. Furthermore these goals do not seem to be too different from those relating to fiscal federalism: this conclusion can be reached, for instance, by thinking of the double role of the budget balance, which represents both a precondition to consider a region ‘virtuous’ according to fiscal federalism reform and a principle now established in the Constitution above all as a consequence of the constraints coming from the EU legal order. Thus, it does not seem that autonomy is going to be sacrificed in

⁸⁹ See T. GROPPI, *The Impact of the Financial Crisis on the Italian written Constitution*, from *IJPL*, 2012, n. 1.

the name of the economic recession: in other words, the recession should not lead to the waiver of local autonomy.

A throughout analyses of fiscal federalism and the budget balance reforms may allow, thus, to argue that the following effect will be determined⁹⁰: a) the incentive to improve, up to a common standard, which is considered essential to ensure the basic levels of social services, the quality of the social services provided by the most inefficient regional/local systems; b) the incentive to optimize spending and not to reduce it in absolute terms (even though spending could increase, as in the most efficient systems public spending is often higher than in the others, but the resources are used in a better way); c) the disincentive to further improve the quality of the less efficient systems, whether and when they have reached the level of optimization funded by fiscal incentives; d) the disincentive to further improve the quality of the already efficient systems, as this further implementation can be funded only by regional/local budgets, whose present autonomy also depends on principles and dispositions regarding the budget balance.

5.2 Are public authorities reducing their participation in granting social services and rights?

Another question is whether public authorities are reducing their participation in granting social services and rights or not.

The possibility for public authorities to provide services through benefits in kind or in cash is established first of all by the Constitution.

For instance, a throughout analysis of arts. 29-31 makes it clear that the Republic recognizes the family as a natural society existing before it and assumes the duty to support the family with different kinds of aid/benefits, economic or not (but mainly in those cases in which the family itself has not sufficient means).

Furthermore, the examination of arts. 33, 34 and 38 p. 3-5 makes it clear that the Republic has assumed the duty not only to establish State schools of all branches and grades and to provide education free of tuition for everyone for at least eight years, but also to support all capable pupils, including those lacking financial resources, with economic aid (such as scholarships).

⁹⁰ As regards the legal basis and effects of this theory in the Italian healthcare system, see M. D'ANGELOSANTE, *Strumenti di controllo della spesa e concorrenza nell'organizzazione del servizio sanitario in Italia*, Rimini, Maggioli, 2012, 185 ss.

Finally, as regards the constitutional protection of work, the analysis of arts. 35-41, 43, 45-46 shows its wide-ranging character. It is based also on the provisions about social security, i.e. the right of workers to be assured adequate means for their needs in the case of accidents, illness, disability, old age and involuntary unemployment, with «responsibilities [...] entrusted to entities and institutions established by or supported by the State»: it is clear that an important part of these means should consist in benefits in cash.

On the contrary, as regards social assistance, the Constitution just establishes that «every citizen unable to work and without the necessary means of subsistence» is «entitled to welfare support» (art. 38), without adding or suggesting anything else on the form of this support.

However, as far as the implementation of the Constitution is concerned, the sector of social assistance includes many different performances / benefits, in kind or in cash, and has a very wide ranging meaning (covering all the policies which cannot be traced back to other specific social fields, such as health, education, work, social security).

The most important of the social assistance policies regard, for instance, aid against economic poverty, no-self-sufficiency, a lack of housing, family burdens. The performances / benefits concerned are provided sometimes in kind (social services properly named / aid in kind for people with disabilities, old people, children, adolescents / social-assistance services having a healthcare relevance), at other times in cash (financial / economic aid), or, in a few cases, both in kind and in cash (for instance, parental leave allows parents to take direct care of their children, having a certain period of time off work and so saving a part of their salaries). Usually the main difference is that, while in the first case (benefits in kind) the services concerned are open to everyone (though the most needy users are facilitated in using them and are exempted from paying for a part or all of such services), in the second case (benefits in cash) the potential recipient has to take the so called means-test (and, generally, also has to participate in social reintegration programs)⁹¹.

As regards benefits in cash the most important seem to be:

a) the guarantee of integration to the minimum pension⁹² (representing a hybrid tool in which the social assistance component seems to prevail over the social security one⁹³, though this guarantee is only applied to retired workers);

⁹¹ See M. FERRERA (edited by), *Le politiche sociali*, quot., 240 ss.

⁹² See Act of Parliament 218/1952; law decree 463/1983, converted to Act of Parliament 638/83.

⁹³ Which deals with the right of workers to be assured adequate means for their needs in the case of accidents, illness, disability, old age and involuntary unemployment, with «responsibilities [...] entrusted to entities and

- b) family benefits⁹⁴ in cash (representing a hybrid tool in which the social assistance component seems to prevail over the social security one);
- c) social pensions⁹⁵ (representing a social assistance measure);
- d) disability pensions⁹⁶ (representing a social assistance measure, thus differing from the disability social security benefit);
- e) disability benefit⁹⁷ (representing a social assistance measure, being completely based on public funds and aimed at supporting severely disabled people);
- f) third child allowance⁹⁸ (representing a social assistance measure, being based on public funds and aimed at supporting the most numerous families with the lowest income);
- g) maternity allowance⁹⁹ (representing a social assistance measure, being based on public funds);
- h) vouchers¹⁰⁰ (which can be planned and provided by the Municipalities to allow their recipients to buy social assistance services from accredited providers);
- i) social card¹⁰¹ (intended for the purchasing of essential goods, such as food, for a few categories of needy citizens).

Thus, in the field of social assistance in general the measures consisting in benefits in cash seem to have overcome quantitatively those consisting in benefits in kind¹⁰².

It seems the same for the field of social housing, in which the benefit in kind are aimed, for instance, at granting poor people the free or facilitated use of social houses, while the benefits in cash are frequently aimed at granting poor people financial aid to be used to buy or lease certain kinds of houses, or at supporting tenants having temporary difficulty in paying their rents, or, finally, at giving people with a low income the possibility of leasing a house.

institutions established by or supported by the State», even though «private-sector assistance may be freely provided» (art. 38 Const.).

⁹⁴ See dpr 797/1955; law decree 69/1988, converted to Act of Parliament 153/1988.

⁹⁵ See Act of Parliament 153/1969.

⁹⁶ See law decree 5/1971, converted to Act of Parliament 118/1971, and the following 1984 reform.

⁹⁷ See Act of Parliament 18/1980.

⁹⁸ See Act of Parliament 448/1998 (art. 65).

⁹⁹ See Acts of Parliament 448/1998 (art. 66) and 144/1999 (arts. 50 and 63), and delegated decree 151/2001.

¹⁰⁰ See Act of Parliament 328/2000 (art. 17).

¹⁰¹ See l.d. 112/2008 (art. 81), converted to Act of Parliament 133/2008.

¹⁰² As regards this point, a specific study edited by the EU Commission has recently pointed out, for instance, that: a) in Italy «expenditure devoted to family benefits increased by 53% in 2014 compared to 2010 (6% compared to 2008»; b) however, «such increase does not represent a clear move towards social investment, since it favours cash benefits ([...] bonuses and vouchers [...]) rather than services ([...] those supported by a national fund for family policies decreased by 88% between 2008 and 2014)», see EU Commission (D. BOUGET – H. FRAZER – E. MARLIER – S. SABATO – B. VANHERCKE), *Social Investment in Europe – A study of national policies*, quot., 24.

This is not the case of the healthcare system, which – in accordance with the Constitution (declaring, in art. 32, that the right to health is both «a fundamental right of the individual» and a «collective interest», and establishing the duty of the Republic to guarantee «free medical care to the indigent») – has been mainly implemented focusing on the provision of healthcare services (in kinds) for patients.

However, also in this field it seems possible to find something similar to benefit in cash. We refer to case law and the existing national and EU/international sources of law regarding the possibility of patients to ask for the reimbursement, with funds covered by public spending, of what they have directly paid in order to:

a) benefit from healthcare services abroad when the authorization to the competent national authority has been requested;

b) benefit from healthcare services abroad when the authorization to the competent national authority has not been requested;

c) benefit from indirect healthcare assistance without a previous authorization from the competent administrative authority;

d) benefit from healthcare services abroad when the patient is away from his State for temporary reasons and does not belong to the categories of individuals listed in art. 2 dpr 618/1980 (for instance, people abroad for work reasons and their families, people abroad for study reasons taking advantage of a scholarship, etc.);

e) benefit, under certain conditions, from medicines or healthcare services which are not included in the list of those covered by public funding in the national (or regional) healthcare system to which the patient belongs.

5.3 What is the relationship between the above mentioned trend and the economic recession? Did such a trend start before the financial crisis?

A third group of questions regards: a) the relationship between the above mentioned trend and the economic recession; b) the starting of this trend before or after the financial crisis.

Thus, in order to try to answer, it is necessary to remember what trend we are talking about.

First of all, *the trend to reduce social welfare entitlements or not, and its relationship with an ex ante planning or emergency reasons.*

As regards this point, we have seen that one of the trends is to *maintain* the social welfare entitlements *when emergency reasons are not manifested*. The economic recession, however, seems to *limit the adaptation* of social welfare entitlements and services to the increasing needs of the population (which is also due to the financial crisis), since the lack of economic development determines a diminution in tax revenue. Thus, for instance, in the field of social assistance the basic levels of benefits have never been determined with the same detail used for healthcare services, while in the field of healthcare services they have not been updated since 2001. Such a trend started before the financial crisis but has been mainly maintained as a consequence of the economic recession.

On the other hand, *when emergency reasons are manifested*, sometimes extraordinary measures are adopted with the effect of *reducing social welfare entitlements and services*, and also of *limiting the autonomy* of the level of government having the competence to provide and in part to finance them. This happens *when the emergency reasons have an economic nature*. Thus, for instance, in the field of healthcare, recovery plans have been adopted and implemented with the aim of eliminating the healthcare deficit: but they can also hinder the possibility, for the region concerned, to establish additional levels of care covered by regional funds. Moreover, in the field of aid for students with disabilities, some acts of Parliament have established binding limits to the number of specialized teachers for disabled students to be assigned to each school; the same limits have been established by some administrative plans, in contrast with the ‘scoresheet’ of the competent technical commission. However, case law has established that it is not possible to compress the core of the social rights concerned as they are fundamental rights. Such a trend seems to have been mainly determined by the economic recession. Finally, as regards this point, the Constitutional Court declared that: a) the State’s measures «combining spending cuts and invasions of competences constitutionally allocated to the Regions [...] cannot be justified solely in the name of the *salus rei publicae* in times of financial emergencies (Decisions no. 148 and 151/2012)»; b) «transitional limitations to the financial autonomy of Regions, even when they are constitutionally allowed in a time of crisis, should never become permanent restrictions (Decision no. 193/2012)»¹⁰³.

Other times, *when emergency reasons are manifested*, extraordinary measures are taken with the effect of *implementing social welfare entitlements and services* through different measures, the most important of which are: a) *financial aid* covered by public, private or mixed funds (even

¹⁰³ See D. TEGA, *Welfare Rights in Italy*, quot., 56.

though the financial crisis sometimes leads to a reduction in public spending); b) *special planning activities*; c) *limitations to civil rights*. Thus, for instance, in the field of public/social housing many measures have been established with the very wide ranging aim we have already pointed out above, namely: a) to influence the residential property supply and demand; b) to suspend, for a certain period, all the pending eviction procedures due to delay in rent payment / extend the existing contracts / introduce limitations in the use of the police force for the execution of eviction procedures and in the entity of rental fees for residential properties; c) to implement specific urban plans / programs / projects for the building of social houses and / or residential properties to be sold or leased at ‘social prices’; d) to establish public funds to support the tenants who, for reasons other than their negligence, have temporary difficulty in paying their rents for residential properties; e) to grant facilitated mortgages mainly to certain categories of recipients. This happens *when the emergency reasons concerned are based on conditions of extreme/increasing need of the recipients*. Such a trend started before the financial crisis but has been maintained and implemented mainly as a consequence of the economic recession.

Secondly, we are also talking about the relationship between fiscal federalism and the constitutional reform regarding the budget balance.

As regards this point, we have already pointed out the relationship between fiscal federalism and the budget balance reforms, their main features, aim and possible consequences. The trend we have already spoken about started in part (as regards fiscal federalism) before the financial crisis and partly (as regards the ongoing implementation of fiscal federalism, the constitutional reform on budget balance and in general the other reforms on recentralization of many policies) just after the economic recession.

Finally, we are talking about the participation of public authorities in granting social services and rights mainly through benefit in kind or in cash.

As regards this point, we have already noticed that in the fields of social assistance in general and of social housing many services have been and are still provided in the form of benefits in cash, so that these measures seem to have quantitatively overcome those consisting in benefit in kind. Such a trend started before the financial crisis but has been maintained and implemented also after the beginning of the economic recession.

This is not the case of the healthcare system, which – as we have noticed – has always been implemented mainly focusing on the provision of healthcare services (in kind) for patients. However, as we have noticed too, also in this field it seems possible to find something similar to benefit in cash, which is related to the possibility of patients to ask for the reimbursement, with funds covered by public spending, of what they have directly paid for some kinds of care / medicines. Such a trend started before the financial crisis but has been maintained and implemented also after the beginning of the economic recession.

5.4 What are the role and limits of administrative discretion in distributing benefits and/or services with the aim of granting social rights? What is the relationship between this discretion and the bureaucratic rules in the implementation of the welfare policies? Are the two models opposed to each other? What is, if existing, the extent and quality of citizens participation in the administrative decision-making process about their entitlements? Can the above mentioned models and participation affect the approach of the courts when considering the challengers of rights bearers?

A fourth group of questions regards: a) the role and limits of administrative *discretion* in distributing benefits / services with the aim of granting social rights; b) the relationship between this discretion and the *bureaucratic rules* in the implementation of the welfare policies; c) the *relationship* between these two models; d) the existence of *citizens participation* in the administrative decision-making process about their entitlements, and its extent and quality; e) the *possible influence* of these models and participation *on the approach of the courts* when considering the challengers of rights bearers.

These questions are strictly related to each other: thus, we shall try to answer them together, though it seems difficult, since the differences characterizing the organization of the services concerned in the various welfare sectors (such as health, social assistance, social housing, and so on...) are usually substantial.

However, the general rule is that administrative discretion is not involved in deciding the distribution of benefits / services with the aim of granting social rights, since normally the administrative function concerned is just aimed at verifying or evaluating whether the conditions established by law or general administrative decisions for the granting of such rights exist. Another general rule is that, on the contrary, a certain administrative discretion exists as regards how they organize and provide the social services aimed at granting those rights, though the competent public

authorities have the constitutional duty to make them effective through the organization and provision of the above mentioned services.

Thus, the general scheme is the following.

A) The *Constitution* establishes the duty of the competent *public authorities to make* the social rights it foresees *effective*. As regards this point, we have already noticed that case law (mainly the constitutional one) has formulated the theory of the *financially conditioned rights*, according to which the will to grant a universalistic welfare system is in practice limited by the insufficiency of financial resources. However, the same case law has also formulated the theory of the *impossibility to compress the core* of these rights as they are fundamental rights, which always requires that, both the legislator and public administration, observe certain limits (such as the principle of reasonableness; the duty to grant those benefits which are essential to relieve conditions of extreme need of the recipients; the duty to protect human dignity and physical integrity, though this limit does not also imply the duty to grant any kind of service).

B) The *competent public authorities* have a *certain discretion* in establishing how to make these rights effective. Normally this *implementation* is carried out through primary sources of law (acts of Parliament or regional councils, delegated decrees, law decrees). Thus, this dimension refers to a kind of *legislative discretion*, which has to observe, however, the constitutional framework (and the international agreements / conventions incorporated in the Italian legal system).

C) The competent *administrative authorities* have a *certain discretion* as regards *how they organize and provide* the social services aimed at granting social rights according to the legal framework arising from the implementation of the Constitution. In general such organization and provision are carried out through administrative plans / decisions. Thus, this point refers to an administrative discretion, which has to observe, however, the constitutional framework, the international agreements / conventions incorporated in the Italian legal system and the legal framework arising from the implementation of the Constitution and of the international primary sources of law. For instance, the competent administrative authority can decide to publish a call for tender in order to give the most needy users priorities in taking advantage from some kinds of social services and exemptions in paying for them (this is frequent as regards the fields of social assistance and social housing, which conform to the 'selective universalism' model): after that, the so called *adjudication phase* is usually considered an expression of a discretionary power (being in practice aimed at governing a public competition), though another part of case law believes that also in this

phase the competent administration is vested with a bond function, aimed at verifying whether the possible recipients have the requirements established by law (and the call for tender) or not.

D) Moreover, the above mentioned framework usually gives the competent administration, as regards the *distribution of benefits /services aimed at granting social rights, just the skill to verify or evaluate whether the conditions established by law* for the granting of such rights through those services *exist*. Furthermore, it gives *the possible recipients the responsibility to ask* for such benefits *and to participate* in the subsequent administrative procedure *in order to prove the possession of the above mentioned conditions*. This happens, for instance, as regards the claims for social assistance benefits in cash (which, according to case law, represent the rights to whether the legal conditions to acquire them exist, while the competent administrative authorities do not have any discretionary power in verifying this existence). It happens, for instance, also in the management of the contractual agreements signed by the competent administration with recipients of the social houses.

As we have already noticed in the previous chapter fourth, this general scheme is frequently 'broken' by case law, when resolving disputes requiring the application of those limits listed in letter *a*) above (such as the principle of reasonableness; the duty to grant those benefits which are essential to relieve conditions of extreme need of the recipients; the duty to protect human dignity and physical integrity).

This happens , for instance, with the Italian case law on the conditions under which it seems possible to affirm the existence of the right of patients to benefit from healthcare services abroad with funds covered by public spending even though the necessary authorization established by law has not been requested. These conditions are, as we have already noticed, the urgency and necessity of the healthcare service concerned, together with the duty to protect human dignity. Furthermore, as regards this right, case law sometimes has excluded the existence of any form of administrative discretion in protecting it, while, at other times, it has affirmed the existence of a technical discretion in determining the urgency and necessity of the healthcare service at task. A similar case law concerns the right of patients to benefit from indirect healthcare assistance without a previous authorization of the competent administrative authority and with funds covered by public spending. It concerns, moreover, the right of patients to benefit, under certain conditions and with spending covered by public financing, from medicines or care which are not included in the list of those covered by the same financing in the national (or regional) healthcare system to which the patient belongs: in these situations, however, the case law requires that the choice at task is

compatible with the general principles and rules on which the NHS' organization is based and the availability of public funding. Furthermore, as regards experimental care on tumors, case law requires the legal authorization of the experimental program, a prescription from the competent primary care physician and that the patient is indigent.

The main implication of the existence of an administrative discretion is that, in this case, the possible recipient of the benefit concerned is considered vested with a legitimate expectation, which is something less than a legal right. This happens, for instance, because, if a legal right exists and has been violated, the competent administration can be obliged more easily by the Judge to give the recipient the benefit at task and/or compensation. Conversely, if a legal right does not exist, the Judge can just oblige the public authority concerned to exercise its power legitimately; moreover, the payment of possible compensation is subject to a larger number of preconditions / proofs.

5.5. Why in Italy is there not a general Welfare Agenda such as that existing in the UK?

The last question we should try to answer regards the reason why in Italy there is not a general Welfare Agenda (and policy) such as that existing in the UK.

As far as this point is concerned, we shall just express some partial opinions, since this report has mainly focused on the Italian welfare system, without taking into account the UK system in the same detailed way.

These opinions deal with the differences between the institutional and welfare models existing in Italy and the UK, and with the consequences of these differences on the choice of the measures to better manage claims for social rights and services in times of economic recession.

It is possible to start from the differences between the institutional models, which mainly deal with the decentralization regarding the regional level of government.

As we have noticed in the first part of this report, this kind of decentralization, involving both the legislative and administrative functions, is one of the most important features of the Italian legal system, while it does not exist in England.

Moreover it was been implemented by the constitutional reform passed in 2001.

Furthermore, this implementation covered not only the legislative and administrative competencies in a general perspective, but also the fiscal autonomy of the regional level of government.

It is true, however, that the State has maintained important skills in each one of the above mentioned fields (legislative, administrative and fiscal dimension), mainly aimed at granting a certain level of uniformity of the existing welfare models in the overall national territory: but this condition has not avoided in absolute terms the establishment of partially different welfare systems in each of the Italian regions. Moreover, until now the regions have shown a certain restraint in exercising their autonomy completely in this field, though their possibility to adopt more different models exists, and is based on the Constitution.

In our opinion, this existing (and potentially increasable) regional decentralization may represent (and may have represented) a hindrance to the adoption of general welfare reforms at national level.

Another reason deals with the differences between the Italian and English model of welfare as a whole (but excluding, however, the national healthcare systems, which, on the contrary, are more similar).

On the one hand, in fact, as we have already noticed, the Italian system has mainly taken as a model the so called ‘Southern Europe scheme’, according to which an important role is attributed to the family, while a comprehensive minimum income scheme with national-wide coverage does not exist¹⁰⁴ and public authorities assume the duty to provide for social services in a perspective of ‘*selective universalism*’, *i.e.* establishing the general right of the recipients to receive social services covered by public funds, but selecting the benefits to be provided on the basis of the existing conditions of need of the recipient¹⁰⁵.

This choice, as regards *selectivity*, is mainly due to the aim of controlling public spending, since: a) in the Italian legal system most of the very wide and heterogeneous welfare sector (excluding an important part of social security) is covered by public funds; b) this situation represents a real problem when, especially in times of financial recession, the lack of economic development determines a diminution in tax revenue, while the need of social services of the population tends to increase; c) the welfare sector, as noticed above, includes many different performances / benefits, in kind or in cash, and has a very wide ranging meaning.

¹⁰⁴ As regards the matter of minimum income (in its connection with the pilot projects of *new social card* and *inclusion card*) and the relationship between the current economic crisis and the strengthening of the «compulsory familialism» in the Italian welfare system, see EU Commission (D. BOUGET – H. FRAZER – E. MARLIER – S. SABATO – B. VANHERCKE), *Social Investment in Europe – A study of national policies*, quot., 39, 24.

¹⁰⁵ See M. FERRERA (edited by), *Le politiche sociali*, quot., 39 ss.

Conversely, the above mentioned choice, as regards the will to reach a certain level of *universalism*, is mainly due to the aim of reducing poverty and implementing participation in the job market, in a perspective of inclusive development (using the words of the so called Europe 2020 strategy, presented in 2010 by the EU Commission).

However, as a study edited by the EU Commission has recently pointed out, this system has «historically been characterised by a low degree of universalism (apart from healthcare), limited vertical redistributive capacity, a low degree of selectivity to reach those most in need, a low degree of service provision, meagre enabling and “activating” measures, significant regional disparities, and overall inequality in income distribution (accompanied by a fragmentary and chaotic tax system)»¹⁰⁶.

On the other hand, the UK’s welfare system (excluding the NHS), has mainly taken as a model the so called ‘liberal scheme’, according to which an important role is attributed to the market, while public authorities assume the duty to provide for social services on the basis of the existing conditions of the real need of the recipient (*i.e.* on the basis of his financial incapacity to gain access to the market), to be demonstrated through the so called ‘means test’¹⁰⁷. This choice may represent an even more important matter when, especially in times of financial recession, the lack of economic development determines a diminution of the individuals’ capacity to gain access to such a market, while the need of social services of the population tends to increase and the family has not been thought of as a kind of ‘safety-net’.

In our opinion, the partially different perspective of the UK’s model may represent (and may have represented) a higher incentive to the adoption of general welfare reforms at national level.

The third possible cause seems independent from each one of the above mentioned reasons: it deals, in fact, with the general trend, peculiar to the Italian legal system, to amend the existing legal framework mainly on the basis of emergency reasons than by an *ex ante* planning, and, thus, taking into account mostly specific welfare policies than the general welfare system as a whole.

The same trend emerges as regards investment in social policies: a clear social investment strategy is in fact still lacking in Italy, while the protection of the rights of the people experiencing poverty and social exclusion is not fully incorporated into the national policy¹⁰⁸.

¹⁰⁶ See EU Commission (D. BOUGET – H. FRAZER – E. MARLIER – S. SABATO – B. VANHERCKE), *Social Investment in Europe – A study of national policies*, 2015, quot., 10.

¹⁰⁷ See M. FERRERA (edited by), *Le politiche sociali*, quot., 39 ss.

¹⁰⁸ See EU Commission (D. BOUGET – H. FRAZER – E. MARLIER – S. SABATO – B. VANHERCKE), *Social Investment in Europe – A study of national policies*, 2015, quot., 8.