

SHORT ARTICLES AND COMMENTS

DECENTRALISATION, EQUALITY AND DIFFERENTIATION IN THE PROTECTION OF SOCIAL RIGHTS. A GLANCE AT ITALY AND SPAIN.*

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Abstract

This article seeks to explore the dynamic balance between equality and differentiation in decentralised forms of State by comparing the implementation of social rights and commitments in the Italian *Stato regionale* and the Spanish *Estado autonómico*. After providing a brief overview of the different constitutional backgrounds and the most prominent scholarly and judicial contributions to their interpretation, relevant mechanisms devised in order to prevent differentiation to become inequality are analysed. In the final paragraph, some hints for a non-conflicting approach to multiple dimensions of social citizenship are offered, suggesting a “nested” methodological pathway that may help in investigating current legal problems.

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1. Same questions, different backgrounds. The search for a pathway to compare Italy and Spain

It is well known that establishing connections between different legal issues – and between the different answers provided by each legal system to similar fundamental questions – is one of the most intriguing challenges for comparative lawyers. It is not only a matter of finding out similarities and differences: seemingly identical problems may have their roots in dramatically different legal backgrounds, while analogous contexts may well lead legal actors to face the same issues with a different approach, thus retaining national specificities as a trademark of the legal tradition they belong to.

A good way of testing this statement is trying to investigate one of the eternal dilemmas in the field of constitutional law – that is, the reconciliation of equality and differentiation in decentralised forms of State – from the viewpoint of the protection and promotion of social rights.

Bearing in mind the Italian system, the right to health care could be a suitable starting point. The Italian Constitution explicitly recognises it in art. 32, stating in its first paragraph that “[t]he Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent¹”. In 1978, the creation of a National Health

¹ The English version of the Italian Constitution is available at www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf. References about the right to health care in the Italian Constitution and the evolution of its scholarly interpretation are countless. General overviews can be found in D. Morana, *La salute come diritto costituzionale. Lezioni*, (2013); R. Ferrara, *Il diritto alla salute: i principi costituzionali*, in R. Ferrara (ed.), *Salute e sanità*, (2010) 3; R. Balduzzi, *Salute (diritto alla)*, in S. Cassese (dir.), *Dizionario di diritto pubblico. Vol. VI*, (2006) 5393; A. Simoncini, E. Longo, *Art. 32*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione. Vol. I: artt. 1-54*, (2006) 655; N. Aicardi, *La sanità*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Diritto amministrativo speciale*, (2003). To track the evolution of the Constitutional Court’s case law and its influence of the interpretation of art. 32 by Italian constitutional law scholars, see – *ex multis* – M. Luciani, *Il diritto costituzionale alla salute*, in *Diritto e società*, 767 (1980); B. Pezzini, *Il diritto alla salute: profili costituzionali*, in *Diritto e società*, 21 (1983); B. Caravita, *La disciplina costituzionale della salute*, in *Diritto e società*, 21 (1984); M. Luciani, *Salute. I) diritto alla salute – dir. cost.*, in *Enciclopedia giuridica*, Vol. XXXII, (1994); M. Santilli, A. Giusti, *Salute. II) Tutela della salute – dir. civ.*, in *Enciclopedia giuridica*, Vol. XXXII, (1994); C. Panzera, *Legislatore, giudici e Corte Costituzionale*

Service based on a universal approach extended a comprehensive network of health care services to the entire population², while envisaging an active administrative role for regional and municipal authorities. The original 1948 version of art. 117 already provided a constitutional basis for this shift towards decentralisation, as it listed medical and hospital care among those subject matters to be regulated by the concurring legislations of both the State (as far as the fundamental principles were concerned) and the Regions³. In the following years, the long-delayed enactment of the Italian regional system sketched out in Part II of the Constitution and the economic crisis structurally affecting public expenditures highlighted the need for reshaping the Italian welfare state. The major adjustments in the Italian NHS between 1992 and 1999 showed once again the sensitiveness of striking a balance between the protection and implementation of a fundamental social right and the decision on how to spend public money. In this context, a deeper (and irreversible) regionalisation was seen as one the keys to both make the NHS structures

di fronte al diritto alla salute (verso un inedito "circuito" di produzione normativa?), in *Diritto e Società*, 309 (2004) A. Rovagnati, *La pretesa di ricevere prestazioni sanitarie nell'ordinamento costituzionale repubblicano*, paper presented at the yearly Congress of the Associazione "Gruppo di Pisa" "I diritti sociali: dal riconoscimento alla garanzia. Il ruolo della giurisprudenza" (Trapani, 8-9 giugno 2012), available at <http://www.gruppodipisa.it/wp-content/uploads/2012/09/RovagnatiDEF.pdf>; F. Minni, A. Morrone, *Il diritto alla salute nella giurisprudenza della Corte Costituzionale italiana*, in *Rivista AIC*, (2013) available at www.rivistaaic.it.

² An early opinion considering art. 32 as laying the constitutional foundation for the State's obligation to provide a public system of health care was expressed by C. Mortati, *La tutela della salute nella Costituzione italiana*, in *Rivista degli infortuni e delle malattie professionali*, (1961). The need for a comprehensive reform centered in solidarity, dignity and substantive equality (as expressed by arts. 2 and 3 of the Constitution) and the related option for a universal approach to health care services had been already stressed vigorously in the mid-1970s by scholars such as L. Montuschi, *Art. 32*, in G. Branca (ed.), *Commentario della Costituzione. Rapporti etico sociali* (1976).

³ On this point and the potentialities of a deeper involvement of regional authorities in the administration and actual shaping of health care services, see the pioneering work by G. Amato, *Regioni e assistenza sanitaria: aspetti costituzionale*, in *Problemi della sicurezza sociale*, 547 (1969)

“lighter” and offer a more territorially-tailored response to the population’s health care needs⁴.

The 2001 constitutional reform (const. law. 3/2001) completely reorganised the Italian regional system. The State has been entitled to exercise exclusive legislative power over a list of seventeen broadly described subject matters; the Regions have been vested with both concurring legislative power over a second list of subject matters to be exercised within the framework of the fundamental principles defined by State legislation, *and* exclusive legislative power over all those subject matters that are not expressly attributed to the State. Within this framework, a key role is played by art. 117.2.m, a cross-cutting clause (Italian Constitutional Court decision 282/2002) endowing the State with the exclusive legislative power over the determination of the essential levels of services relating to civil and social rights to be guaranteed throughout the whole national territory⁵. Thus,

⁴ R. Balduzzi, *Quanti sono i sistemi sanitari italiani? Un'introduzione*, in R. Balduzzi (ed.), *I servizi sanitari regionali tra autonomia e coerenza di sistema*, (2005).

⁵ Art. 117.2.m features the first explicit reference to “social rights” in the Italian Constitution. Immediately after the 2001 constitutional reform, prominent scholarly opinions pointed out that the State legislator’s power to determine the “essential levels” of services relating to fundamental rights does not entail the power to shape their “core content”, as this would result in downgrading social rights to mere legal rights (G. Scaccia, *Legge e diritti fondamentali nell’art. 117 della Costituzione*, in XXIII Quad. Cost., (2003) 531; a similar stance had been adopted before the constitutional reform by O. Chessa, *La misura minima essenziale dei diritti sociali: problemi e implicazioni di un difficile bilanciamento*, in Giur. Cost. 1170 (1998)). Therefore, the *core content* of fundamental rights could be only determined via an *ex post* test applied by the Constitutional Court to the balancing process between competing rights in a specific historical and social context (C. Panzera, *I livelli essenziali delle prestazioni concernenti i diritti sociali*, in G. Campanelli, M. Carducci, N. Grasso, V. Tondi della Mura (eds.), *Diritto costituzionale e diritto amministrativo: un confronto giurisprudenziale* (2010) while the legislator is only allowed to determine the conditions and means that allow their equal enjoyment and protection (on this point, see E. Pesaresi, *La «determinazione dei livelli essenziali delle prestazioni» e la materia «tutela della salute»: la proiezione indivisibile di un concetto unitario di cittadinanza nell’era del decentramento istituzionale*, in, Giur. Cost., (2006) 1733; L. Cuocolo, *La tutela della salute fra neoregionalismo e federalismo* (2005). Moreover – and much differently from a “minimum levels approach” – the determination of essential levels of services capable of an effective response to fundamental needs is a context-sensitive task to be performed against a factual historical and social background and based on proportionality, adequacy, appropriateness (A. D’Aloia, *Diritti e Stato autonomistico. Il modello dei livelli essenziali delle prestazioni*, in *Le Regioni*,

“health protection” is currently listed among those subject matters upon which the State and the Regions share their legislative power and, on grounds of an *a contrario* interpretation of art. 117.2.m, the Regions are free to establish only *higher* protection standards and further services relating to the right to health care, other than the essential ones provided by State regulations.

These very broad benchmarks concerning the Italian framework suggest that the Spanish constitutional system could be the most suitable one for comparison, as *a*) it features a highly decentralised (though not federal) form of State facing a dynamic tension between the “central” and the “regional” level of government of the State; *b*) its Constitution enshrines a set of relevant social commitments, among which the right to health care is explicitly recognised; *c*) both Spain and Italy belong to the so-called “Mediterranean welfare model”⁶ and follow the Mediterranean health care system pattern⁷. However, the surface of formal statements hides a different perspective. Apparently much like the Italian one, the Spanish Constitution of 1978⁸ embodies a set of norms characterised by a strong social content. More specifically, art. 43 recognises the right to health care and entrusts the public authorities with the task of organising and watching over public health by means of preventive measures and the necessary benefits and services⁹. Nonetheless, most of those

1091, (2003), effectiveness and efficiency (G. Guiglia, *I livelli essenziali delle prestazioni sociali alla luce della recente giurisprudenza della Corte costituzionale e dell'evoluzione interpretativa*, in P. Cavaleri (ed.), *Temi di diritto regionale nella giurisprudenza costituzionale dopo le riforme*, (2008).

⁶ M. Ferrera, *The 'Southern model' of welfare in social Europe*, in 6 J. of Eur. Social Policy, 17 (1996).

⁷ J. Figueras, E. Mossialos, M. McKee, F. Sassi, *Health Care Systems in Southern Europe: Is there a Mediterranean Paradigm?*, in Int'l J. of Health Sciences, 135 (1994).

⁸ The English version of the Spanish Constitution is available at www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_esp_texto_ingles_0.pdf

⁹ On the “two-headed” nature of art. 43 as a constitutional precept enshrining both a subjective and an objective dimension, see L. E. De la Villa Gil, *El derecho constitucional a la salud*, in M. E. Casas Baamonde, F. Durán López, J. Cruz Villalón (coord.), *Las transformaciones del derecho del trabajo en el marco de la Constitución española. Estudios en homenaje al profesor Miguel Rodríguez-Piñero y Bravo-Ferrer*, (2006); both dimensions are further explored – with cross references to the early evolution of the Spanish National Health System – by J.

precepts¹⁰ are located in Part I, Chapter III of the Constitution, interestingly titled “*Principles Governing Economic and Social Policy*”. According to art. 53.3, they are not individual entitlements, but binding principles guiding the action of *all* public authorities at both a national *and* a sub-national level. As a consequence, they may only be invoked before the ordinary courts in accordance with the legal provisions implementing them¹¹. Within the framework of the *Estado autonómico*, art. 149.1.16 places the task of defining the “basic conditions and general coordination of health matters” upon the State legislature, thus giving the *Comunidades Autónomas* (CCAA) considerable room for self-determination. The “long and winding road” that gradually led all the *Comunidades Autónomas* to the maximum level of self-determination envisaged by art. 149.1.16, together with the progressive transformation of the existing insurance-based health

Pemán Gavín, *Derecho a la salud y administración sanitaria*, Real Colegio de España, (1989); S. Muñoz Machado, *La formación y la crisis de los servicios sanitarios públicos*, (1995). A general “classic” overview on the scope and nature of art. 43 is also offered by E. Borrajo Dacruz, E., *Artículo 43. Protección de la salud*, in O. Alzaga Villaamil (dir.), *Comentarios a la Constitución española de 1978*, Vol. IV, Edersa, 167 (1996).

¹⁰ Part I, Chapter II, Division II of the Spanish Constitution also embodies typical social rights, such as the right to private property characterised by its social function (art. 33), the right to work and free choice of one’s own profession, the right to a sufficient remuneration for the satisfaction of their needs and those of their families (art. 35), the rights to collective bargaining (art. 37) and free enterprise (art. 38). However, the right to education (art. 27), the right to join trade unions and the right of workers to strike in defense of their interests (art. 28) are located in Division I, thus making it possible to fill an individual claim to the Constitutional Court (*recurso de amparo*) for their protection (art. 53.2).

¹¹ With specific reference to the right to health care recognised in art. 43 of the Constitution, the most widely shared opinions construe it as a non directly enforceable guiding principle of economic and social policy (see the works mentioned under footnote 9). A prominent voice in favour of its definition as a fundamental right is that of G. Escobar Roca, *El derecho a la protección de la salud*, in G. Escobar Roca (dir.), *Derechos sociales y tutela antidiscriminatoria*, Thomson Reuters Aranzadi, (2012) and more recently, G. Escobar Roca, *El derecho a la salud en la jurisprudencia del Tribunal Constitucional*, in *Blog de la Revista Catalana de Derecho Constitucional*, 13 September 2013, available at bloqs.gencat.cat/blocs/AppPHP/eapc-rcdp/2013/09/13/el-derecho-a-la-salud-en-la-jurisprudencia-del-tribunal-constitucional-espanol-guillermo-escobar/, in which the right to health is analysed in connection with the fundamental right to life enshrined in art. 15 of the Constitution.

care system into a universal National Health System, led in 2002 to the complete decentralisation of the Spanish health care system and placed a significant responsibility for the definition of the non-basic contents of the right to health care upon the *Comunidades Autónomas*.

A true Pandora's box of questions opens up from this quick comparison: what if the Italian Regions or the Spanish *Comunidades Autónomas* introduce discriminatory regulations, in particular in the implementation of social rights? What if the State crosses the borders of its legislative powers? What if the public authorities do not fulfill or contravene their constitutional obligations concerning the implementation of social rights or provisions? Why are jurisdictions - and constitutional courts in particular - always so cautious in addressing those issues? As questions multiply, the relationship between State and regional authorities and the nature of social rights becomes more and more complex. At this stage, tracing back the different premises upon which a constitutional theory of social commitments is built in both national contexts is an essential step in order to address the equality/differentiation dilemma.

A swift overview of the different interpretations provided by the Italian jurisprudence and case law highlights considerable differences between the timid constructions of the 1950s¹² to the multifaceted contributions of the 1980s-2000s¹³. Early commentators privileged the objective dimension of the constitutional norms concerning social rights, mainly considering

¹² These opinions ranged from openly hostile constructions such as those expressed by M. T. Zanzucchi, *Formazione, struttura estrinseca e caratteri della nuova Costituzione*, in M. T. Zanzucchi., *Istituzioni di diritto pubblico secondo la nuova Costituzione*, (1948) now in F. Gentile, P. G. Grasso (eds.) *La Costituzione criticata*, Edizioni Scientifiche Italiane, (1999), to more complex and favourable interpretations such as the ones provided by V. Crisafulli, *Costituzione e protezione sociale*, in *Rivista degli infortuni e delle malattie Professionali*, (1950); V. Crisafulli, *Sull'efficacia normativa delle disposizioni di principio della Costituzione*, in Id., *La Costituzione e le sue disposizioni di principio*, (1952); V. Crisafulli, *Efficacia delle norme costituzionali «programmatiche»*, in *Riv. Trim. Dir. Pubbl.*, 356 (1951).

¹³ G. Corso, *I diritti sociali nella Costituzione italiana*, in *Riv. Trim. Dir. Pubbl.*, 755 (1981); A. Baldassarre, *Diritti sociali*, in *Enc. Giur.*, XXVIII, (1989); A. Giorgis, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale* (1999); B. Pezzini, *La decisione sui diritti sociali*, (2001); D. Bifulco, *L'inviolabilità dei diritti sociali*, (2003); E. Longo, *Le relazioni giuridiche nel sistema dei diritti sociali. Profili teorici e prassi costituzionali*, (2012).

them as policy-oriented and almost non-judicially-enforceable norms exclusively addressed to the legislator and necessarily doomed to succumb to decisions concerning public expenditures. The focus progressively shifts to the subjective dimension, in which social rights do have a “*contenuto essenziale*”, a founding non-negotiable core, shielded from the legislator’s intervention and guarded by the Constitutional Court¹⁴. This latter approach acquires new relevance in the context of today’s Italian highly regionalised *welfare state*. While Part I of the Italian Constitution enshrines a wide catalogue of social rights, a closer look at the current distribution of the related subject matters between the State and the Regions indeed shows that there is no single pattern concerning the allocation of legislative powers and administrative functions between the different levels of government. A specific subject matter can be divided into multiple aspects, each one falling under the scope of the State’s or the Regions’ legislative power (or both). So, for example, according to art. 117.3, education (art. 34) is currently regulated by the concurrent legislative powers of both authorities (with the State’s primary responsibility for laying down the fundamental principles), with the exception of vocational training, which falls under the exclusive legislative powers of the Regions. Another example of fragmentation is offered by social security and pensions schemes (art. 38.2 in particular), which are in the province of the State’s exclusive

¹⁴ Such construction dates back to the 1980s: see e.g. Constitutional Court decision 103/1981, defining workers’ illness benefits as “insurance rights not susceptible of objective or subjective limitation”. Further “classic” examples are represented by decisions 134/1990 (concerning legal aid for workers) or 27/1998 (concerning the right to health). New perspectives on this issue were recently introduced by the very clause contained in art. 117.2.m (see e.g. the recent decision 322/2009 concerning environmental quality controls and certifications, that remarked the connection between the *contenuto essenziale* and the determination of the essential levels of services to be established by the State legislation). Moreover, the core content of social rights has also been shielded by the Court against the dangers of expenditure cuts: an early example is represented by the famous decision 304/1994, in which the Court stated that absolute predominance of financial reasons on the protection of the core content of fundamental rights would result in “a macroscopically unreasonable exercise of legislative discretionality”. For a more recent example, see decision 80/2010, striking down cuts to public expenditures reducing the availability of additional teachers for students with learning disabilities due to the illegitimate reduction of the core content of their right to education.

legislative powers (art. 117.2.o), while complementary social security and insurance are now a matter for concurrent regulation (art. 117.3). Once again with reference to health (art. 32), it is interesting to notice that after the 2001 constitutional reform placed the “protection” of it among the matters for concurrent legislation, the absence of “health care and hospital organisation” from that list raised a considerable debate before the Constitutional Court. In several cases, the Regions claimed that such a matter was now under their exclusive powers according to art. 117.4, as it was not explicitly mentioned by any lists of subjects in art. 117. These arguments were counterbalanced by a very broad construction of State’s powers on grounds of the cross-cutting nature of “health protection” and its “attractive force” on other organisational (but yet extremely relevant) aspects and sub-sectors¹⁵. As far as social assistance (art. 38.1) is concerned, while the comprehensive reform delivered through law 328/2000 traced the fundamental principles of the new social assistance network with the overall aim of guaranteeing “essential levels of assistance services¹⁶” nationwide, the 2001 constitutional amendment does not mention social assistance under either art. 117.2 or art. 117.3 catalogue of subject matters of exclusive State’s or concurrent State/Regions legislative powers, with the consequence that it is now a primary matter for exclusive Regional regulation. Finally, the distribution of sub-legislative regulatory powers between the Regions and the State according to art. 117.6¹⁷ and the assignment of all administrative functions to Municipalities as a general rule

¹⁵ On these aspects, see e.g. Constitutional Court decisions nos. 361/2003 and 270/2005; see also M. Luciani, *I livelli essenziali delle prestazioni in materia sanitaria tra Stato e Regioni*, in E. Catelani, G. Cerrina Feroni, M. C. Grisolia (eds.), *Diritto alla salute fra uniformità e differenziazione. Modelli di organizzazione sanitaria a confronto* (2011) 13; D. Morana, *La “tutela della salute”: punti fermi e perduranti incertezze nella giurisprudenza costituzionale*, in R. Balduzzi (ed.), *Cittadinanza, corti e salute* (2007) 197; U. De Siervo, *Corte Costituzionale e materia sanitaria*, in R. Balduzzi (ed.), *Cittadinanza, corti e salute* (2007) 97.

¹⁶ The pioneering definition can be found under arts. 2 and 22 law 328/2000.

¹⁷ According to art. 117.6 of the Italian Constitution, the Regions have general sub-legislative regulatory powers, while State authorities may only exercise them for those subject matters upon which they have exclusive legislative powers. Municipalities, Provinces and Metropolitan Cities have sub-legislative regulatory with reference to the organisation and performance of their own administrative functions.

(with the “exceptional” nature of Provincial, Regional and State intervention according to art. 118.1) contribute to the complexities of welfare regulation in Italy and pave the way for possible differentiation of some aspects of social rights on a regional (or even a local) basis. In this perspective, art. 117.2.m allows the State legislator to guarantee national unity in the actual implementation of fundamental rights through the determination of the related *basic levels of services*¹⁸.

Quite differently, the Spanish context is marked by two key features: the presence of a social welfare state clause in art. 1.1 of the Constitution (fashioned after art. 20 of the German GG) and the already mentioned debate concerning the nature of the *Principles Governing Economic and Social Policy*, among which most “social rights” are listed. At the same time, art. 149.1.1 enables the State legislator to exercise exclusive legislative powers in order to regulate the *basic conditions* guaranteeing the equality of all Spaniards in the exercise and fulfillment of their constitutional rights and duties. Inevitably, the impact of such a general clause on the *principios rectores* of Part I, Chapter III of the Constitution depends on whether they are conceived as either mere (non-legal) declarations¹⁹, or binding policy-oriented legal precepts²⁰, or again modernly construed as true fundamental rights²¹. Finally, the highly controversial notion of *basic legislation* (*bases/legislación básica/normas básicas*) marking several entries in art. 149 and governing the distribution of legislative power between the State and the regional legislators must also be recalled²². Art. 149.1 lists

¹⁸ C. Pinelli, *Sui «livelli essenziali delle prestazioni concernenti i diritti civili e sociali» (art. 117, o.2, lett. m Cost.)*, in *Dir. Pubbl.* 891 (2002).

¹⁹ F. Garrido Falla, *Artículo 53*, in F. Garrido Falla (coord.), *Comentarios a la Constitución* (1985). This approach is now completely rejected.

²⁰ Among others, see E. Cobreros Mendazona, *Reflexión general sobre la eficacia normativa de los principios constitucionales rectores de la política social y económica*, in n. 19 *Revista Vasca de Administración Pública*, pp. 27-59 (1987); J. R. Cossio Díaz, *Estado social y derechos de prestación* (1989); J. L. Prada Fernández de Sanmamed, *Revisión de los principios rectores de la política social y económica y de su actual realidad jurídico-constitucional*, in 122 *Revista de Estudios Políticos* 269 (2003).

²¹ G. Pisarello, II. *La justiciabilidad de los derechos sociales en el sistema constitucional español*, in G. Pisarello, (ed.), A. García Morales, A. Olivas Díaz, *Los derechos sociales como derechos justiciables: potencialidades y límites* (2009).

²² For further details in historical perspective, see – among many others – J. Jiménez Campo, *¿Qué es lo básico? Legislación compartida en el Estado autonómico*, in 27 *Revista Española de Derecho Constitucional* 39 (1989); E. Álvarez Conde,

a wide number of subject matters upon which both the State's and the CCAA's legislative powers *concur*, since according to the general rule, the State is responsible for basic legislation and the CCAA are entrusted with its development (*desarrollo*) and implementation (*ejecución*)²³. According to the so-called *principio dispositivo*, the CCAA are allowed to include in their own Statute of Autonomy the normative powers they are going to exercise - and the related subject matters and sub-sectors - by picking them up from among those listed in art. 149.1.

The *Tribunal Constitucional* has greatly contributed to systematising the fundamentals of legislative powers allocation. First of all, after allowing a "substantive" qualification of basic legislation in the early years of the *Estado Autnómico*, with STC 69/1988 the Constitutional Court of Spain highlighted the importance of stricter formal requirements such as the definition of the *bases* with legislative or other primary sources, even though allowing governmental sources such as the *real decreto* in exceptional circumstances. Moreover, in its recent STC 31/2010 about the Catalanian Statute of Autonomy, the Constitutional Court reaffirmed the above mentioned general rule on the distribution of normative powers and the preference for a legislative determination of the *bases* (*fundamento jurídico* 60), but admitted further combinations. When State authorities are vested with implementation-connected functions, sub-legislative and other regulation powers are also in the province of the State, while the powers of the CCAA are limited to administrative functions only (f.j. 61). In addition to that, the State's powers concerning the determination of the *bases* may also include issuing sub-legislative acts relating to the specific sector (or sub-sector) in which State authorities are allowed to intervene by either the Constitution itself or each CA's Statute of Autonomy (f.j. 60). Finally, the selection of specific powers by each CA does not prevent the State from shaping its own powers freely, so that those may well show

La legislación básica del Estado como parámetro de validez de la normativa autonómica, in n. 2 *Revista Española de la Función Consultiva* 24 (2004).

²³ F. Balaguer Callejón (coord.), G. Cámara Villar, M. L. Balaguer Callejón, J. A. Montilla Martos, *Manual de derecho constitucional* (3^a ed.). Vol. I: *Constitución y fuentes del derecho, derecho constitucional europeo, Tribunal Constitucional, Estado autonómico* (2008) 460.

they reflections on the powers of the CCAA within the limits of the Constitution (f.j. 64).

Not so differently from the Italian situation, the highly fragmented Spanish framework of legislative powers and administrative functions clearly highlights the dynamic tensions characterising the implementation of the social welfare state clause at all territorial levels in key matters such as (e.g.) labour legislation (art. 149.1.7), health care (149.1.16) and social security (art. 149.1.17).

2. Equality, differentiation and social rights: threat or opportunity?

In spite of substantive national differences, the Italian and Spanish constitutional experiences feature relevant similarities in the very close relationship between the declaration of the State's social commitments (be them rights or principles governing social policies) and the role played by regional political authorities in their realisation. The State and the Regions/*Comunidades Autónomas* share their legislative power over the pillars of modern welfare state (e.g., job protection and safety, various aspects of education, health protection) and on other relevant subject matters directly affecting the social functions and goals of public authorities (e.g., co-ordination of public finance and taxation system in Italy, regional economic development within the basic economic planning outlined by the State in Spain). Even though against the backdrop of a different constitutional understanding of "social rights", regional and autonomic authorities do not only take relevant political decisions about the structure and organisation of welfare services, but they are also enabled to shape some non-core aspects of social rights or entitlements differently than what has been established at a national level²⁴.

²⁴ As recalled by A. Ruggeri, *Neoregionalismo e tecniche di regolazione dei diritti sociali*, in *Diritto e società* 204 (2001), while the *core content* of fundamental rights shall not be subject to territorial differentiation, levels of services and benefits *other than* the essential ones may well be fine-tuned according to the needs and features of a specific regional context.

However, if the welfare state is closely - but not exclusively²⁵ - linked to the constitutionalisation of social rights or commitments, and if those rights or commitments are inextricably connected with the active role played by public authorities in the pursuit of substantive equality²⁶, how can this goal possibly get along with the different regional regimes created by sub-national authorities?

The fundamental principles upon which the two Constitutions are based may provide some useful hints for an answer. Much differently from the XIX and early XX century liberal tradition, both constitutions now explicitly recognise that the very society in which they find their origins is not made of archetypical individuals all formally equal in front of the law. Not surprisingly, soon after the fall of two totalitarian regimes, pluralism²⁷ knocks at the door of both the Italian and the Spanish Constitutional Assemblies to penetrate every part of the Fundamental Charters they are writing, so that the presence of social rights or commitments is just one of the outcomes of this “contextualisation” of individuals.

In the words of art. 2 of the Italian Constitution, *persons* - that is, individuals expressing their personality within different *social groups* and situations - are now the cornerstone of the whole

²⁵ G. Corso, *Welfare e Stato federale: uguaglianza e diversità delle prestazioni*, in *Regionalismo, federalismo, welfare state. Atti del convegno, Roma, 9-10 maggio 1996*, Giuffrè, 1997, 415.

²⁶ Both the Italian and the Spanish Constitutions feature a substantive equality clause with an almost identical content. Italian Constitution, art. 3.2: “It is 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”; Spanish Constitution, art. 9.2: “It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life”.

²⁷ Pluralism is remarked as the key feature of XX century legal culture in general and post-WWII constitutionalism in particular; see P. Grossi, *L'identità del giurista oggi*, in *Riv. Trim. Dir. Proc. Civ.*, 1089 (2010); M. Azpitarte Sánchez, *Constitución del pluralismo y método jurídico*, in *21 Teoría y Realidad Constitucional* 447 (2008) (“The normative structure of the Constitution [...] organises pluralism in time”, p. 453, my translation).

constitutional system. In such a context of renewal and transformation, *territorial pluralism* cannot be put aside. Art. 5²⁸ of the Italian Constitution entrenches *unity* alongside *autonomy* and *decentralisation* among the *Fundamental Principles* listed in arts. 1-12, stressing the importance of self-administration at the different sub-national territorial (and social) levels²⁹. In doing so, art. 5 creates a bridge across the whole Constitution, embracing both Part I (*Rights and duties of citizens*) and Part II (*Organisation of the Republic*) within the *unicum* of the so-called *Stato Regionale*. On the other side, the Spanish Constitution explicitly places its foundations upon the sovereignty of the Spanish Nation as a whole, to whom constituent power pertains. This does not prevent the Nation from being composed of different “nationalities and regions”, who are *granted* the *right* to self-government (*autonomía*)³⁰. Consistently, as the Spanish *Tribunal Constitucional* pointed out from the very beginning, self-government is not sovereignty: while the first one is a limited and constitutionally derived power, the latter is an original power vested in the Spanish Nation as a whole³¹. The two principles do not collide, since self-government draws its full meaning within unity (STC 4/1981, f.j. 3) as dynamically conceived in Part VIII of the Constitution, devoted to the *Territorial organisation of the State*³².

²⁸ Italian Constitution, art. 5: “The Republic is one and indivisible. It recognises and promotes local autonomies, and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralization”.

²⁹ G. Lombardi, *Art. 5*, in G. Branca (ed.), *Commentario della Costituzione. Principi fondamentali, Artt. 1-12* (1975) 278.

³⁰ Art. 2 Spanish Constitution: “The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all”.

³¹ This article must be read in one with art. 1.2, which states: “National sovereignty belongs to the Spanish people, from whom all State powers emanate”. See J.J. Solozábal Echavarría, *Artículo 2*, in M. E. Casas Baamonde, M. Rodríguez-Piñero y Bravo-Ferrer (coords.), *Comentarios a la Constitución española. XXX aniversario*, Fundación Wolters-Kluwer España (2009) 54.

³² L. López Guerra, *De la organización territorial del Estado*, in M. E. Casas Baamonde, M. Rodríguez-Piñero y Bravo-Ferrer (coords.), *Comentarios a la Constitución española. XXX aniversario* (2009) 2071.

Indeed, art. 2 must be read in one with art. 1.1, stating that Spain is “established as a social and democratic State, subject to the rule of law”. The *Estado autonómico* must be then interpreted in the light of the *Estado social, democrático y de derecho*: if we connect these fundamental characters with the choices concerning the allocation of legislative power between the State and the *Comunidades Autónomas*, we will agree with a prominent scholarly opinion according to which the *Estado autonómico* can be considered the social service structure of the State³³. Therefore, the State and the CCAA must *all* take part in the development of the Spanish welfare state, each according to their constitutionally attributed legislative powers. As the *Tribunal Constitucional* repeatedly warned, in no case the *principios rectores* may be construed so as to allow the powers of State authorities to expand beyond their constitutional limits³⁴. Despite the absence of a *Sozialstaat clause* in the Italian Constitution, a similar conclusion can be drawn when reading art. 5 in the light of the substantive equality principle expressed in art. 3.2. Their combination, together with the detailed bill of rights featured in Part I of the Constitution, marks a sharp shift from the XIX century centralised *état de droit* to the post-WWII pluralistic social welfare state³⁵ in which the self-governing regional institutions cooperate in overcoming “the obstacles 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”. After the 2001 reform, with art. 114 now stating that the Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State³⁶ and new criteria governing the distribution of

³³ “*La veste prestacional del Estado es el Estado autonómico*” (Author’s emphasis); J. Solozábal Echavarría, *El Estado social como Estado autonómico*, in *Teoría y Realidad Constitucional*, 65 (1999).

³⁴ As recalled by P. Tenorio, *El Tribunal Constitucional, la cláusula del Estado social, los derechos sociales y el derecho a un mínimo vital digno*, in J. L. Cascajo Castro, M. Terol Becerra, A. Domínguez Vila, V. Navarro Marchante (coords.), *Derechos sociales y principios rectores. Acta del IX Congreso de la Asociación de Constitucionalistas de España*, (2012) 268.

³⁵ G. Lombardi, *Art. 5*, cit. at 29, 286.

³⁶ R. Bifulco states that the new text of art. 114 contributes in enhancing the meaning of the principles expressed in art. 5 under three different aspects, as it clarifies the territorial institutions composing the Republic and gives them all the same “constitutional dignity”; moreover, as those subjects are intentionally

legislative power between the Regions and the State, the principles in arts. 2 and 3.2 are yet again enhanced with a strengthened territorial dimension that may provide constitutional grounds for “socio-geographically” tailor-made welfare services³⁷.

However, given that there is no specific link between models of welfare state and patterns of territorial organisation³⁸, the search for this new dynamic balance between *interpersonal* and *interterritorial* equality³⁹ within a decentralised form of State surely entails a certain degree of differentiation. The key question is then up to which point differentiation is acceptable: are there constitutional mechanisms that can prevent *differences* in the implementation social rights and welfare services from becoming *inequality*?

In our case, this task is performed by clauses such as the already mentioned art. 117.2.m of the Italian Constitution and art. 149.1.1 of the Spanish one, both placing upon the State the responsibility for the determination of the non-negotiable level of protection concerning fundamental rights. Nonetheless, the perfect balance is difficult to achieve. The Italian Constitution Court has interpreted art. 117.2.m so broadly as to encompass technical standards as well⁴⁰, thus raising a wave of criticism from the Regions, but at the same time imposing on the State the duty

listed in ascending order, art. 114 offers a basis for the principle of subsidiarity, to be developed in art. 118. R. Bifulco, *Art. 5*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione. Vol. I, artt. 1-54*, (2006) 138.

³⁷ Among other contributions on that issue, see L. Torchia, *Sistemi di welfare e federalismo*, in Quad. Cost. 713 (2002); P. Carrozza, *Riforme istituzionali e sistemi di welfare*, in M. Campedelli, P. Carrozza, L. Pepino (eds.), *Diritto di welfare. Manuale di cittadinanza e istituzioni sociali* (2010) 207. As far as the Spanish case is concerned, a similar conclusion is offered by G. Ruiz-Rico Ruiz, *El Estado social autonómico: eficacia y alcance de las normas programático-sociales de los Estatutos de Autonomía*, in 65 *Revista Española de Derecho Constitucional* (2002) 11.

³⁸ U. De Siervo, *Riforma del regionalismo e stato sociale*, in *Regionalismo, federalismo, welfare state. Atti del convegno, Roma, 9-10 maggio 1996* (1997) 48; L. M^a. Díez-Picazo, *Federalismo, regionalismo e welfare state. Profili comparati*, in *Regionalismo, federalismo, welfare state. Atti del convegno, Roma, 9-10 maggio 1996* (1997) 220.

³⁹ G. Pola, *Alcuni spunti di riflessione sul rapporto welfare state – federalismo*, in *Regionalismo, federalismo, welfare state. Atti del convegno, Roma, 9-10 maggio 1996*, (1997) 185.

⁴⁰ Further details on this issues are provided by E. Griglio, *Le Regioni e i diritti sociali alla prova degli standard*, in S. Mangiameli (ed.), *Il regionalismo italiano dall'unità alla Costituzione e alla sua riforma* (2012) 447.

to cooperate actively with the Regions in their determination (decisions 88/2003 and 136/2006). Moreover, art. 120 of the Constitution enables the State Government to act in place of regional, provincial or municipal authorities whenever (among other cases) they fail to guarantee the non-negotiable level of protection concerning civil and social rights, or whenever it is required for the preservation of financial and economic unity⁴¹.

In Spain, the most recent judicial trend (STC 247/2007) excludes the social commitments listed in Part I, Chapter III of the Constitution from the “constitutional rights” mentioned by art. 149.1.1, thus rejecting the wider construction proposed by some scholars⁴². Consequences could be twofold: the *Comunidades Autónomas* would expand their power over the implementation of the *principios rectores*, but at the same time the State would lose a cross-cutting instrument for maintaining equality, being able to rely only on the specific legislative powers granted by other precepts listed in art. 149.1⁴³. In addition to that, as far as the scope and purposes of art. 149.1.1 are concerned, since STC 61/1997 the Constitutional Court of Spain has excluded any possible overlapping between the notions of “*condiciones básicas*” (149.1.1) and “*bases/legislación básica*” featured in other entries of art. 149.1. By departing from a previous *doctrina* according to which art.

⁴¹ Since its decision 43/2004, the Italian Constitutional Court made clear that those envisaged in art 120 shall be considered *extraordinary* powers, as other statutory provisions could outline other cases and reasons for the Government to act in place of non-State territorial institutions in specific matters. Further details and case law can be found in G. Guiglia, *I livelli essenziali delle prestazioni sociali alla luce della recente giurisprudenza della Corte costituzionale e dell'evoluzione interpretativa*, in P. Cavaleri (ed.), *Temì di diritto regionale nella giurisprudenza costituzionale dopo le riforme* (2008) 171, footnote n. 149.

⁴² Though with different nuances, this opinion is shared by J. Pemán Gavín, *Artículo 149.1.1ª. La cláusula de igualdad en condiciones básicas*, in M. E. Casas Baamonde, M. Rodríguez-Piñero y Bravo Ferrer (dirs.), *Comentarios a la Constitución española. XXX aniversario* (2009) 2268; E. Sáenz Royo, *Estado social y descentralización política. Una perspectiva constitucional comparada de Estados Unidos, Alemania y España* (2003) 300; M. Vaquer Caballería, *La acción social. (Un estudio sobre la actualidad del Estado social de derecho)*, Institut de Dret Públic (2002) 158; J.J. Solozábal Echavarría, *El Estado social como Estado autonómico*, cit. at 33, 72; M. Barceló, *Derechos y deberes constitucionales en el Estado autonómico*, Civitas, (1991) 107.

⁴³ J. Ma. Castellá Andreu, 3. *La Constitución territorial*, in G. Escobar Roca (coord.), *Derechos sociales y tutela antidiscriminatoria* (2012) 396.

149.1.1 enabled the State legislator to regulate *all* substantive and organisational aspects concerning the enjoyment of fundamental rights (see e.g., SSTC 32/1983 and 102/1995), the *Tribunal Constitucional* adopted a narrower stance towards this issue and made clear that the State's intervention shall exclusively aim to define the "primary content" of fundamental rights as well as the *basic* organisational aspects that provide their equal enjoyment (f.j. 8 in particular)⁴⁴. The general clause in art. 139.1 of the Constitution also plays a considerable role in safeguarding the unity of the Spanish nation. By mentioning that "[a]ll Spaniards have the same rights and obligations in any part of the State territory", it enshrines the principle of non discrimination on a territorial basis without promoting a "rigid and monolithic uniformity" (STC 37/1981) nor contributing in setting a common standard of protection of rights as art. 149.1.1 does, but preventing the differentiation allowed within the *Estado autonómico* from turning into discrimination⁴⁵.

Finally, financial solidarity mechanisms are envisaged by both Constitutions, giving the State a most prominent role in correcting *financial* (and consequently, *substantive*) inequalities arising from different revenue-raising capacities.

On the Italian side, the new model of fiscal federalism designed in 2001 - and still awaiting full implementation⁴⁶ -

⁴⁴ On those issues, see in particular M. Á. Cabellos Espiérrez, *La regulación de los derechos: el papel del Estado y de las Comunidades Autónomas a partir del artículo 149.1.1 CE*, in *Estado compuesto y derechos de los ciudadanos*, Institut d'Estudis Autònoms (2007) 83; J. Barnés, *Problemas y perspectivas del artículo 149.1.1ª CE*, Institut d'Estudis Autònoms (2004); M. Á. Cabellos Espiérrez, *Distribución competencial, derechos de los ciudadanos e incidencia del derecho comunitario* (2001); J. Pemán Gavín, *Igualdad de los ciudadanos y autonomías territoriales* (1992).

⁴⁵ J. Pemán Gavín, *Acerca de la uniformidad de las condiciones de vida como principio constitucional del Estado de las Autonomías*, in 119 *Revista de Administración Pública* 173 (1989). Both art. 149.1.1 and art. 139 have been said to provide an insights on the principle of equality from the point of view of territorial integration (STC 247/2007, F.J. 4c, specifically speaking of "*igualdad integradora*").

⁴⁶ On this issue, see A. Iacoviello, *Il punto sull'attuazione del federalismo fiscale nella XVI legislatura*, in www.issirfa.cnr.it, *Studi e interventi* (2013); Corte dei Conti - Sezioni riunite in sede di controllo, *Attuazione e prospettive del federalismo fiscale*, public hearing before the Parliamentary Committee for the implementation of fiscal federalism, 6 March 2014, in *La Rivista Web della Corte dei Conti*, n. 0/aprile 2014, available at

requires the Regions and other sub-regional institutions to fund all the administrative functions they perform according to the subsidiarity principle expressed in art. 118 (including those functions connected to the non-negotiable core of services related to social rights) with their own revenues. At the same time, art. 119.3 refers to a State law the institution of a compensation fund for those areas with low revenue collection capacity, while art. 119.5 places on the State the obligation to set up special intervention and extra funds in order to promote solidarity, correct economic and social imbalances and favour the exercise of fundamental rights. The implementation of art. 119 has been referred to several delegated decrees to be adopted within the framework and according to the criteria provided by law 42/2009⁴⁷. With reference to the interaction between art. 117.2.m and redistribution mechanisms, delegated decree 68/2011 now envisages a specific fund composed of State revenues throughout which the central Government is enabled to cover the difference between the regional income and the financial requirements, thus ensuring the complete funding of the basic services connected with fundamental social rights such as health care, education and social assistance, plus public transports (art. 15.5 delegated decree 68/2011). On the other hand, delegated decree 88/2011 regulates the *Fondo per lo sviluppo e la coesione* (*Fund for development and cohesion*): its primary aim is to “confer financial coherency of action to additional national interventions for correcting economic and social imbalances between the different areas of the Country” (art. 4.1), according to the prescriptions of art. 119.5 of the Constitution and consistently with the European Structural Funds programming⁴⁸. Interestingly, financial solidarity mechanisms

http://www.rivistacorteconti.it/export/sites/rivistaweb/Ultimo_fascicolo/06_03_14_federalismo.pdf; F. Tuzi, A. Filippetti, *Prime considerazioni sul DDL del Governo approvato il 31 marzo 2014 in merito a federalismo fiscale, coordinamento statale e finanziamento integrale delle funzioni*, in www.issirfa.cnr.it, *Studi e commenti* (2014).

⁴⁷ Extensive commentary on the *legge delega* 42/2009 is provided by A. Ferrara, G. M. Salerno, *Il “federalismo fiscale”: commento alla legge n 42 del 2009* (2010).

⁴⁸ The Italian Chamber of Deputies Study Department provides updated information on the actual amount of available resources under the Fund for Development and Cohesion at <http://leg16.camera.it/465?area=24&tema=133&Il+Fondo+per+lo+sviluppo+e+la+coesione>.

have been the subject of the recent decision 176/2012, in which the Italian Constitutional Court struck down art. 5-*bis* of decree-law no. 138/2011, converted into the *legge di stabilità* for 2012 (law no. 148/2012). The challenged provision instituted a “horizontal” solidarity mechanism according to which five Regions from the South of Italy had been allowed to exceed their expenditure limits beyond those established by internal stability pact, redistributing the financial consequences between the State’s *and* the other Regions’ yearly budgets. The Constitutional Court upheld the claims filed by Tuscany, Sardinia and Veneto and ruled out the provision on grounds of its non-compliance with the prescriptions in art. 119.3 and 119.5. According to the Court, none of the mentioned constitutional provisions (nor law 42/2009 or delegated decrees 68 and 88 of 2011) provides support for the challenged mechanism, since they all establish the State’s exclusive responsibility for compensation and redistribution of economic and social imbalances with a clear favour for State-managed (“vertical”) solidarity mechanisms⁴⁹.

In the Spanish Constitution, art. 138 places upon the State the duty to watch over the implementation of the principle of solidarity expressed in art. 2 and maintain the economic balance between the different areas of the Spanish territory⁵⁰. Art. 158 enables the State to transfer funds (*asignaciones de nivelación*) from the State budget to the *Comunidades Autónomas*, so that “a minimum level of basic public services” can be ensured throughout the whole Spanish territory; it also institutes a “compensation fund” (*Fondo de Compensación Interterritorial*), aiming at redressing “interterritorial economic imbalances” and enact the solidarity principle. These provisions have been implemented by the *Ley Orgánica 8/1980, de Financiación de las Comunidades Autónomas* (LOFCA) and following amendments.

⁴⁹ For an extensive commentary to this decision, see E. Longo, *Le Regioni ricche non possono finanziare le più povere. La Corte Costituzionale esclude la “chiamata in solidarietà” prevista dallo Stato nella l. n. 148 del 2011*, in *Giur. Cost.* 3741 (2012); J. Di Gesù, *La Corte respinge la “chiamata in solidarietà” fra Regioni e la perequazione orizzontale*, in *Giur. Cost.* 2615 (2012).

⁵⁰ Connections between these themes are explored by M. Lucas Durán, 5. *La Constitución financiera*, in G. Escobar Roca (dir.), *Derechos sociales y tutela antidiscriminatoria*, Thomson Reuters Aranzadi (2012) 409, with a particular focus on the intersections with the principle of equal distribution of contributive efforts.

However, it is interesting to recall that even after the more detailed regulation provided in 2001 (*ley orgánica 7/2001*), which significantly identified health care and education as the fundamental public services to be guaranteed through their distribution, the above mentioned *asignaciones de nivelación* have never been used, since the correction of the existing imbalances has been mainly entrusted to other funds⁵¹. Among these, the highly debated *Fondo de Compensación Interterritorial (Interterritorial Compensation Fund)*⁵² and – since the 2009 LOFCA reform (*ley orgánica 3/2009*) – the *Fondo de Competitividad (Competitiveness Fund)* and the *Fondo de Cooperación (Cooperation Fund)*⁵³. Moreover, after the 2009 reform introduced a minimum State funding for basic levels of fundamental public services (education, health care and social assistance according to art. 15) and the principle of financial co-responsibility for the State and the CCAA, the *Fondo de Suficiencia Global (Global Adequacy Fund)* covers the difference between the CCAA's actual funding needs and their own available resources.

So as to confirm the State's essential role in the vertical correction of economic and social imbalances with the aim of ensuring the full enjoyment of (at least a core set of) social rights

⁵¹ Namely, the *Fondo de suficiencia* (aiming at compensating the difference between the Autonomous Communities revenues collection capacity and their actual expenditures) and the special *Fondo de Cohesión Sanitaria* (covering all expenditures concerning health care for foreigners and for Spaniards living in an Autonomous Community where they are not permanent residents); A. Hernández Lavado, *La solidaridad interterritorial en la Constitución española de 1978*, in *Dal diritto finanziario al diritto tributario. Studi in onore di Andrea Amatucci*, Temis-Jovene (2011) 486.

⁵² The Interterritorial Compensation Fund had been instituted by the LOFCA and was last modified in 2001, while it has not been touched by the 2009 reform. On its nature, missed opportunities for its reform, figures on actual resources devolved to the Interterritorial Compensation Fund and its close connection with the European Structural Funds, see A. Hernández Lavado, *cit.* at 51, 486-492 in particular; O. Ogando Canabal, B. Rodríguez Prado, P. Zarzosa Espina, P. B. Moyano Pesquera, *El FCI como instrumento de solidaridad interterritorial: una propuesta de reforma*, in 28 *Estudios de economía aplicada* (2010) 165; R. Fernández Llera, F. J. Delgado Rivero, *Nuevos fondos de convergencia y nada de compensación interterritorial*, in 28 *Estudios de economía aplicada* (2010) 123.

⁵³ The two funds have been recently instituted by arts. 23 and 24 of law 22/2009. While the first aims at harmonising the economic development of all CCAA, the latter is focused on achieving equality and efficiency of fundamental services through additional funding for disadvantaged CCAA.

and services, it is worth mentioning that STC 31/2010 struck down a segment of art. 206.3 of the Catalan Statute of Autonomy, that allowed adjustments to the Catalan budget for redistributive purposes only upon the condition that the other CCAA perform similar “tax efforts”. The Spanish Constitutional Court (f.j. 134) underlined that tax efforts for each Autonomous Community are to be determined exclusively by the State as the “ultimate guarantor of economic and financial interterritorial solidarity”. Therefore, the implementation of solidarity principles through the exercise of exclusive State’s powers (arts. 149.1.14, 138 and 157.3 of the Constitution) cannot be subject to any conditions whatsoever by the CCAA’s Statutes of Autonomy.

It cannot be set aside that during the last five years, the above described solidarity mechanisms and - generally speaking - the performance of social rights-related services have been deeply impacted by the current economic crisis. Once again, judicial review provides useful hints for comparison. The Italian Constitutional Court’s decision 10/2010 allowed further expansion of art. 117.2.m of the Italian Constitution and the temporary derogation to State-Regions loyal cooperation procedures in the determination of essential levels of social rights-related services on grounds of the exceptional economic distress affecting vulnerable groups, even if warning that the prescribed patterns of cooperation must be resumed once the emergency has ceased. Therefore, the Court rejected a claim presented by three Regions against a provision contained in decree-law 112/2008 (converted in law 133/2008) instituting a € 40 bonus card to help citizens most in need to buy basic products. However, the fact that the Court confirmed its reasoning in the following decision 62/2013 - again on the same issue - is a clear sign of the ongoing relevance of the crisis. As far as the Spanish context is concerned, it is worth mentioning that the controversial royal decree-law 16/2012, which deeply altered the universal foundations of the Spanish health care system with the aim of reducing public expenditures, originated a series of still pending *recursos de inconstitucionalidad* promoted by the Autonomous Communities of Asturias, Andalusia, Navarre, Canary Islands and Basque

Country⁵⁴. Moreover, since the mentioned provisions excluded wide sectors of the population from the access to the NHS (e.g., non-insured permanent residents immigrants whose income is *above* the established minimum; illegal immigrants, with the exception of minors and people in need of emergency treatment), some Autonomous Communities refused to enact the royal decree-law 16/2012 and actually extended their own regional health care access requirements to nationally excluded categories. When the Government challenged the Basque Country provisions on grounds of non-compliance with the national framework set by royal decree law 16/2012 as covered by art. 149.1.16 of the Constitution, the *Tribunal Constitucional* (*auto* 239/2012, f.j. 5) preliminarily assessed that *extending* health care coverage does not infringe any constitutional provision, while the protection of the right to health care and personal security justifies the failure in cutting public expenditures. However, the final decision on the case has not been issued yet.

Aside of national specificities⁵⁵, and pending the full implementation of the reforms that led to the constitutionalisation of the balanced budget principle in both Italy and Spain ⁵⁶, the

⁵⁴ *Recursos de inconstitucionalidad* nos. 4530-2012, 4585-2012, 4123-2012, 433-2013 and 419-2013.

⁵⁵ I discussed the issue in a previous paper, to which I refer for a comparative overview concerning constitutional courts decisions and scholarly opinion from Italy, Portugal and Spain; S. Cocchi, *Constitutional Courts in the age of crisis. A look at the European Mediterranean area*, paper presented at the IXth World Congress of Constitutional Law (Oslo, 16-20 June 2014), Workshop 12: Constitutional Changes and Financial Crisis (18 June 2014, now published in www.federalismi.it, 12 November 2014).

⁵⁶ Italy adopted the balanced budget principle through constitutional law 1/2012 (full implementation starting with the accounting period for the year 2014) and law 243/2012, while Spain proceeded to a *reforma constitucional* on 27 settembre 2011 (full implementation by 2020) which was later on specified by the *ley orgánica* 2/2012. On this issues, see – *ex multis* – F. Bilancia, *Note critiche sul cd. “pareggio di bilancio”*, in *Rivista AIC* (2012) www.rivistaaic.it; L. Ferraro, *La crisi finanziaria e lo Stato autonomico spagnolo*, in *Rivista AIC* (2012) www.rivistaaic.it; T. Groppi, I. Spigno, N. Vizioli, *The Constitutional Consequences of the Financial Crisis in Italy*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis* (2013) 91; A. Ruiz Robledo, *The Spanish Constitution in the Turmoil of the Global Financial Crisis*, in X. Contiades (ed.), *Constitutions in the Global Financial Crisis. A Comparative Analysis* (2013) 154; I. Ciolli, *The balanced budget rule in the Italian Constitution: it ain't necessarily so...useful?*, in *Rivista AIC* (2014) www.rivistaaic.it.

above mentioned examples make clear how the hardships of the crisis affected the institutional relationships between different levels of government. The extensive use of decree-laws and the impact of budgetary constraints on the current financing mechanisms for the Regions and CCAA seem to have paved the way for a “re-centralisation” in the design and implementation social policies in particular⁵⁷.

3. A “nested” approach to decentralisation. Concluding remarks.

Due to the very broad terms in which they are conceived and the ever-evolving relationships between State and regional institutions, the implementation of the above described constitutional frameworks and the actual balance between State-level decisions and autonomous regional regulations of welfare rights and services are always subject to constant (and often controversial) legislative adjustments and judicial interventions. In this light, it is relevant to notice that both the Italian and the Spanish Constitutional Courts have stressed that entrenchment of fundamental rights and social entitlements or commitments is still a task for constitutions only, thus rejecting a construction of the long and detailed lists of “rights” included in the so-called “second generation” regional and autonomic charters as truly binding precepts⁵⁸. However, we cannot deny that the sub-

⁵⁷ See e.g. for the Italian context, A. M. Russo, *El ordenamiento regional italiano en la espiral centralizadora de la crisis: ¡Todo cambia para que nada cambie!*, in Cuadernos Manuel Giménez Abad, 11 (2013); as for Spain, see M. Corretja Torrens, *El sistema competencial español a la luz de la eficiencia: indefinición, duplicidades, vulnerabilidad de las competencias autonómicas y conflictividad*, in Cuadernos Manuel Giménez Abad, 35 (2013); M. Medina Guerrero, *CCAA y crisis económica: la eficiencia económica y política del Estado autonómico en el actual contexto de crisis*, in Cuadernos Manuel Giménez Abad, 43 (2011).

⁵⁸ It is well known that several post-2001 Italian regional charters and post-2006 Spanish Statutes of Autonomy feature long and detailed lists of fundamental principles, priority goals and references to (mainly social) rights of disadvantaged groups to be protected and promoted throughout the normative powers of the regional/autonomic authorities. In both countries, the admissibility and the actual legal nature of such precepts have been the subject of heated scholarly debate and key Constitutional Court decisions. The Italian Constitutional Court faced the issue in a set of famous decisions concerning the charters of Tuscany, Umbria and Emilia-Romagna. While admitting that the

new regional charters could include declarations of priority goals and strategies for rights protection, the Court excludes their actual binding force, since they only express the political will of the incumbent majority; therefore, they may have a cultural and political value, “but not actually a normative force” (decision 372/2004). The Court thus rejects the claim of unconstitutionality raised by the Government against the Tuscan regional charter, since the challenged provisions are not real legal precepts but mere political declarations. The reasoning was later on confirmed in decisions 378 and 379 of 2004.

As far as the Spanish case is concerned, the nature and admissibility of the “bills of rights” included in the post-2006 *Estatutos de Autonomía* have been scrutinised by the Constitutional Court decisions 247/2007 (concerning the right to water included in the Valencian charter) and 31/2010 (on the Catalan Statute). In its first decision the Court attributed the nature of truly enforceable rights to those connected with the institutional organisation of the CA only (i.e., mainly voting and language rights), while excluding any binding force for those which were “merely” connected with the CA’s legislative powers ex art. 149.1 of the Constitution (e.g., health care-related rights, housing rights and other social entitlements). The related statutory precepts were then downgraded to mere directive principles or goals to be turned into legally binding norms by the autonomic legislator. In decision 31/2010, the Court seems to confirm the basics of this construction, even if some scholarly opinions inferred a timid opening from the phrase “without prejudice for the declaration of rights *strictu sensu*” (on this point, see J. M^a. Castellá Andreu, *Derechos en la STC 31/2010: ¿rectificación o depuración de la doctrina del Tribunal Constitucional en la sentencia 247/2007?*, in 16 *Revista Europea de Derechos Fundamentales*, 293 (2010)). Literature on such a controversial subject is huge in both Italy and Spain. For a glance at the Italian debate, see, e.g., R. Bifulco, *Nuovi statuti regionali e («nuovi») diritti regionali*, in *Giur. It.*, 1757 (2001); E. Rossi, *Principi e diritti nei nuovi Statuti regionali*, in *Riv. Dir. Cost.* 51 (2005); P. Caretti, *La disciplina dei diritti fondamentali è materia di riservata alla Costituzione*, in *Le Regioni*, 27 (2005); M. Rosini, *Le norme programmatiche dei nuovi statuti*, in M. Carli, G. Carpani, A. Siniscalchi (eds), *I nuovi statuti delle regioni ordinarie. Problemi e prospettive* (2006) 33; E. A. Ferioli, *Le disposizioni dei nuovi Statuti regionali sulla tutela dei diritti sociali: tanti «proclami» e scarsa efficacia*, in E. Catelani, E. Cheli (a cura di), *I principi negli statuti regionali* (2008) 45. For an overview on the Spanish case, see – among many others – the different positions expressed in the aftermath of the approval of the new charters by L. M^a. Díez-Picazo, *¿Pueden lo Estatutos de Autonomía declarar derechos, deberes y principios?*, in 78 *Revista Española de Derecho Constitucional*, 63 (2006); F. Caamaño, *Sí, pueden. (Declaraciones de derechos y Estatutos de Autonomía)*, in 79 *Revista Española de Derecho Constitucional*, 33 (2007); E. Álvarez Conde, *Reforma constitucional y reformas estatutarias* (2007); E. Expósito, *La regulación de los derechos en los nuevos Estatutos de Autonomía*, in *Revista d’Estudis Autònoms i Federals*, 147 (2007) (offering a detailed and complete classification of rights and principles envisaged by the post-2006 *Estatutos de Autonomía*); M. Á. Aparicio (ed.), J. M^a. Castellá Andreu, E. Expósito (coords.), *Derechos y principios rectores en los Estatutos de Autonomía* (2008); C. Rosado Villaverde, *Los derechos sociales en los*

national dimension of social rights protection and implementation has acquired more and more importance in shaping not only the structure of welfare services, but also crucial aspects of the very enjoyment of social rights, as this is often deeply affected by the *organisation* of the services connected to them⁵⁹. Examples from the Italian and Spanish experiences seem to confirm this trend, even if we must stress that neither systems allow regional authorities and institutions to set the protection they grant below the non-negotiable level identified by the State.

The deep involvement of regional institutions in the field of welfare services has started by the end of the so-called *golden age* of welfare state (1970s)⁶⁰, when *rescaling* policies were considered to be a way out of its crisis, and has increased considerably in the last few decades, sometimes in combination with institutional and political decentralisation supported at a constitutional level. Consequently, as we have seen when dealing with the right to health care and the decentralised NHS in Spain and Italy, in a very wide range of matters people often get their first contact with public services related to the most important social rights by addressing directly the local premises⁶¹ of regional structures.

Estatutos de Autonomía, in *Revista Europea de Derechos Fundamentales*, 131 (2009). Comparative perspectives on Italy and Spain are offered by J. Ma Castellá Andreu, M. Olivetti (coords.), *Nuevos estatutos y reforma del Estado. Las experiencias de España e Italia a debate* (2009).

⁵⁹ R. Balduzzi, *Alcune conclusioni: la difficile equivalenza dei sottosistemi sanitari regionali*, in E. Catelani, G. Cerrina Feroni, M. C. Grisolia (eds.), *Diritto alla salute fra uniformità e differenziazione. Modelli di organizzazione sanitaria a confronto* (2011) 154. This may also be explained if we think that public services often represent the most prominent and visible (even if not the only one) facet of social rights.

⁶⁰ See M. Ferrera, *The European welfare state. Golden achievements, silver prospects*, in *31 Western European Politics*, 82 (2008).

⁶¹ In both Italy and Spain the role of local authorities in the sub-regional delivery of social-rights related services is of course an invaluable one. Given the complexity of such a vast topic and the wide range of issues connected to it, it is impossible to cover all its different perspectives extensively in this article. For an overview on the Spanish case, see M. Almeida Cerredá, *Las competencias de los municipios en material de servicios sociales*, in S. Muñoz Machado (ed.), *Tratado de derecho municipal*, Tomo III, 3rd ed., (2011) 2702. The same Author also offers follow-up on the subject, after law 27/2013 “*de racionalización y sostenibilidad de la Administración Local*” amended law 7/1985 on the basic regulations of local authorities: M. Almeida Cerredá, *El incierto futuro de los servicios sociales municipales*, in *Anuario de derecho municipal 2013*, (2013) 93. As far as the Italian framework is concerned, an updated outline is provided by M.

The ever-evolving debate concerning reciprocal boundaries and intersections makes any attempt to identify the “perfect mixture” of State and regional regulation a difficult one, especially in times of heated political and institutional debate such as those currently experienced by Italy and Spain. The Italian constitutional reform bill A.S. n. 1429 introduced to the Senate on 8 April 2014 is a significant example of the continuous adjustment process concerning the so-called “neo-polycentric” models of State-Regions relationships⁶². Without going into details, the proposed constitutional reform aims at reshaping the composition, role and functioning of the Italian Senate (with the aim of abolishing the so-called “perfect bicameralism”), speeding up the legislative process by conferring a more active role to the Government, suppressing the National Council for Economics and Labour and the Provinces and modifying the current distribution of legislative powers between the State and the Regions⁶³. With

Giovanetti, C. Gori, L. Pacini, *La pratica del welfare locale. L'evoluzione degli interventi e le sfide per i Comuni*, (2014), which analyses recent developments and perspectives in the organisation of municipal welfare by taking into account demographic changes and the effects of the current economic crisis.

⁶² E. Griglio, *Principio unitario e neopolicentrismo. Le esperienze italiana e spagnola a confronto* (2008) 1.

⁶³ The updated version of the bill (with the facing-page comparison between the amended and the unamended text of the Constitution) can be found in the *Testo a fronte n. 161* of August 2014 prepared by the Italian Senate Studies Department (available at <http://www.senato.it/service/PDF/PDFServer/BGT/00800855.pdf>). For extensive commentaries on the different perspectives touched by the ongoing reform process, see the special issue no. 2/2014 of the online journal www.osservatoriosullefonti.it; the contributions by B. Pezzini, *La riforma del bicameralismo*; M. C. Grisolia, *A proposito della composizione del Senato delle Autonomie*; M. Luciani, *La riforma del bicameralism oggi*, all available in *Rivista AIC* (2014) www.rivistaaic.it; the studies collected in the latest issue of *IJPL* (2014) www.ijpl.eu, by S. Mannoni, *The “second chamber”: a historical and comparative sketch*, 8; V. Cerulli Irelli, *On the constitutional reform in the process of being approved in Italy*, 22; L. Violini, *The reform of Italian bicameralism. Current issues*, 33; R. Bifulco, *A new Senate? A first look at the draft constitutional bill*, 46; G. E. Vigevani, *The reform of Italian bicameralism: the first step*, 55; G. Canale, *Alcune preliminari considerazioni critiche sulla riforma costituzionale del Governo Renzi e sul nuovo Senato della Repubblica*, available at <http://www.gruppodipisa.it/wp-content/uploads/2014/11/canale.pdf>. Constantly updated information can be found at the *Osservatorio parlamentare sulla riforma costituzionale* (F. Fabbrizzi and G. Piccirilli, coords.), hosted by www.federalismi.it.

specific reference to this latter point, the bill envisages the abolition of concurrent legislative powers and redistributes the related subject matters now listed under art. 117.3 between the exclusive State's (art. 117.2) and Regions' (art. 117.4) domain. Significantly, legislative powers relating to the implementation of social rights are deeply affected by the proposed constitutional reform bill. Relevant examples are once again offered by art. 117.2.m, whose proposed amended version features "general common regulations concerning health protection" among the State's *exclusive* legislative powers alongside the clause on the "essential levels of services relating to civil and social rights to be guaranteed throughout the whole national territory". On the other hand, "programming and organisation of health services and social assistance" is placed among the Regions' exclusive legislative powers. Such proposed amendments seem to confirm the key role played by social rights (and the right to health care as a true experimental field) in the actual determination of State-Regions equilibriums. However, it has been pointed out that, if approved, the reform would entail a new "centripetal movement" towards the State's preeminence over the Regions. In fact, the proposed new art. 117.5 would allow the State legislator (upon proposal of the Government) to intervene in the regulation of subject matters *other than those listed under art. 117.2* whenever it may be deemed necessary for the protection of the legal or economic unity of the Republic or in the interest of the nation. Nonetheless, the "open-ended" language used in the current version of the proposed amendment could leave enough room for the development of some kind of "concurrent legislative powers"⁶⁴.

The relationship between unity and self-government is making the headlines in Spain, too. Resolution no. 5/X of 23

⁶⁴ On this specific point, see – among many others – A. Ruggeri, *Note minime a prima lettura del disegno Renzi di riforma costituzionale*, in www.federalismi.it (2014) 14.; E. Gianfrancesco, *Il regionalismo italiano: crisi ciclica o crisi strutturale? Alcune considerazioni con particolare riferimento alla potestà legislativa*, in www.issirfa.cnr.it, *Studi e interventi* (2014). The constitutional reform bill A.S. n. 1429 of 8 April 2014 has been approved in first reading by the Senate on 8 August 2014 and is currently awaiting the first-reading approval by the Chamber of the Deputies.

January 2013⁶⁵, by which the Parliament of Catalonia declared the “sovereignty and right to decide” of the Catalan people, offered several chances to resume a never-ending debate concerning the relationship between *autonomía* and *soberanía*. After the resolution had been challenged by the Government, the Constitutional Court declared the unconstitutionality of its “Point 1”, stating that the people of Catalonia is a political and legal subject. According to the *Tribunal Constitucional*, this contravenes the very foundations of “composite form of the Spanish State” (STC 32/1983, f.j. 5) grounded in arts. 1.2 and 2 of the Constitution. Since the Spanish people is the only sovereign subject within the Spanish constitutional framework, attributing such a feature to any other subject would result in denying the very cornerstone of it (STC 42/2014, f.j. 3). Nonetheless, the Constitutional Court deems the right to decide on their own political future a legitimate aspiration for the Catalanian people, so long as it is pursued by constitutionally-compatible means (f.j. 4), which of course excludes calling for a referendum⁶⁶. However, a public consultation on the issue had already been convened by the President of the *Generalitat* in December 2013 and eventually took place on 9 November 2014 as a mere “citizens’ participation process”⁶⁷.

⁶⁵ Text (in Catalan) available at http://www.parlament.cat/actualitat/R5_X_sobirania.pdf.

⁶⁶ According to art. 149.1.32 of the Spanish Constitution, “authorisation of public consultation through the holding of referendums” falls under the State’s exclusive powers. A referendum may only be convened by the King, upon proposal of the Government as authorised by the Parliament; related procedures must be regulated by means of an organic law (see arts. 92.2 and 3).

⁶⁷ After the Chamber of the Deputies rejected a bill submitted by the Catalan Parliament and asking the Spanish Parliament to delegate Catalonia the power to convene public consultations other than those already envisaged in art. 122 of the Catalan Statute of Autonomy, the Catalan Parliament approved the *Llei de consultes populars no referendàries i d’altres formes de participació ciutadana* on 26 September 2014 (for a commentary on the law, see E. Martí, *Un comentari d’urgència a la Lei de consultes populars no referendàries*, in *Blog de la Revista catalana de dret public*, 15 October 2014, available at <http://blocs.gencat.cat/blocs/AppPHP/eapc-rcdp/2014/10/15/un-comentari-durgencia-a-la-lei-de-consultes-populars-no-referendaries-esther-martin-cates/>). The Government immediately claimed a conflict of jurisdiction (art. 161.1.c of the Constitution) and challenged the law and the decree convening the consultation before the Constitutional Court (claims nos. 5829

Even in its complex and often controversial relationship with the State institutions, it is undeniable that sub-national dimension is nowadays an essential one, as it contributes in building a modern concept of *citizenship* in Europe, and – as we have seen so far – social citizenship in particular. The multi-tiered government structures around which modern State entities are currently organised involves a plurality of decision-making poles that concur in shaping the contents of citizenship, in its meaning of “fundamental political relationship between the individual and the legal and political order he/she belongs to⁶⁸”. The Nation-State approach to citizenship according to which “there is or there shall be a congruence between national identity, territoriality, statehood and citizenship⁶⁹” can still be considered the dominant

and 5830 of 2014). The claims were both admitted and, pending the final decision, the Court suspended the challenged provisions (the related resolutions are available at http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_074/P%205829-2014.pdf and http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_074/P%205830-2014.pdf). After the President of Catalonia resumed the process by turning the consultation into a participatory activity retaining the same structure, the Government challenged the decision (claim no. 6540-2014), which was again suspended by the Constitutional Court on 4 November 2014 (http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_083/P%206540-2014.pdf). The consultation was ultimately held on grounds of those parts of the *Llei de consultes populars* which had not been suspended by the Constitutional Court. Catalan residents aged 16 or more, foreign permanent residents in Catalonia, people aged 16 or more from a EU member state or a European Economic Area member state, Catalans living abroad were all entitled to express their vote on two questions: “Do you want Catalonia to become a State?” and “If you do, do you want this State to be independent?”. 2.305.290 voters took part in the consultation (almost 37% of those who were entitled to vote); double affirmative answers reached a total amount of 80.76% of votes (official data available at <http://www.participa2014.cat/resultats/dades/ca/escr-tot.html>). On 21 November 2014, the national Office of the Public Prosecutor filed a claim against the President of Catalonia for infringing the law in the development of the consultation process (http://politica.elpais.com/politica/2014/11/21/actualidad/1416568294_207719.html).

⁶⁸ This definition can be found in P. Costa, *Cittadinanza*, (2005) 3 (my translation).

⁶⁹ J. Painter, *Multi-level Citizenship, Identity and Regions in Contemporary Europe*, p. 4, <http://www.dur.ac.uk/j.m.painter/Multilevel%20citizenship.pdf>, now in

one, as proved by the fact that only citizens of EU Member States can acquire EU citizenship as designed in the EU Treaties, or by the importance of national regulations concerning the right of both nationals and non-nationals to enter and exit national boundaries or to establish on the territory of a certain State, thus accessing the rights and duties (to sum up, the *status*) granted to its citizens⁷⁰. However, if we consider *social* citizenship in particular, that is - in the traditional rights-based approach by T.H. Marshall⁷¹ - the set of social rights whose enjoyment allows full participation in the society, we will find out that institutions other than the State play a considerable role in determining its contents. While the importance of EU policies and regulations is undisputed (even if not always uncontroversial), the digression carried out in the previous paragraphs shows the importance of sub-national institutions not only in implementing constitutional social rights or commitments through the enactment of social policies designed at a national level, but also in providing levels of protection higher than the national non-negotiable ones, sometimes emerging as laboratories for social citizenship⁷². Being aware of the risks that a *regionalised citizenship* could entail for the principles of unity and equality, we could nonetheless point out the existence of a *regional dimension* of social citizenship, recalling the notion of *nested social citizenship* provided by the German scholar Thomas Faist⁷³. According to the Author, within the boundaries of the European Union, *membership* (that is, that dimension of citizenship

J. Anderson (ed.), *Transnational Democracy. Political spaces and border crossing* (2002) 93.

⁷⁰ T. Faist, *The transnational social question: social rights and citizenship in a global context*, in 24 *Int'l Sociology* 16 (2009); J. Painter, cit. at 69, 7-9.

⁷¹ T. H. Marshall, *Citizenship and social class*, (1950). For further details, see the *excursus* provided by G. Romeo, *La cittadinanza sociale nell'era del cosmopolitismo: uno studio comparato* (2011) 5-44 in particular. For a detailed overview concerning criticism to Marshall's approach and further theories of social citizenship, see D. Zolo, *La strategia della cittadinanza*, in D. Zolo, (ed.), *La cittadinanza. Appartenenza, identità, diritti* (1994) 3.

⁷² L. Moreno, *Multilevel citizenship, new social risks and regional welfare*, Instituto de Políticas y Bienes Públicos (IPP), CCHS-CSIC, Working Paper, n. 3, p. 6, http://www.ipp.csic.es/sites/default/files/IPP/documento_trabajo/pdf/CSI-C-IPP-WP-2011-03_Moreno.pdf

⁷³ T. Faist, *Social Citizenship in the European Union: Nested Membership*, in 39 *J. of Comm. Mkt. St.*, 39 (2001).

concerning *belonging* to a community⁷⁴, and completing the right-based one) “has multiple sites and there is an interactive system of politics, policies and social rights between the sub-state, state, inter-state and supra-state levels”, each one within and interwoven with each other. Then, if States still play a dominant but not exclusive role, the different levels of citizenship do not only coexist, but form a *compound* European citizenship, linking together the supra-State, the State *and* the sub-State level⁷⁵.

While helping in analysing the interactions between different levels of the policy-making process in general, a updated multi-dimensional concept of citizenship may also provide hints concerning legal methodology. The scholarly debate is currently suggesting that national legal sciences should cooperate in building a common European legal science capable of supranational efforts, visions and solutions⁷⁶. A “*nested*” approach to these issues would maybe facilitate jurists in taking into account the supra-national as well as the sub-national dimension of modern legal problems, without putting those two dimensions one against each other, but highlighting their fascinating intricacy.

⁷⁴ G. Romeo, cit. at 71, 40.

⁷⁵ T. Faist, *Social Citizenship in the European Union: Nested Membership*, cit. at 73, 46.

⁷⁶ See the seminal contribution by A. Von Bogdandy, *National legal scholarship in the European legal area – A manifesto*, in 10 Int’l J. of Const. L., 614 (2012).