

# THE SITUATION OF THE ITALIAN WELFARE IN AN AGE OF AUSTERITY

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## *Abstract*

The aim of the study is to discuss the state of the Italian Welfare in an age of austerity. Three sets of topics in the areas of healthcare, social assistance, and social housing will be discussed to this aim: the scope of social welfare entitlements in the light of the constitutional amendments on devolution, fiscal federalism and budget balance; how decision-making process regarding the implementation of social rights has been affected by the economic recession; whether and to what extent the courts have been keen to defend social rights.

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## 1. Main goals and structure of the study

The aim of this study is to discuss the state of the Italian Welfare in an age of austerity<sup>1</sup> by highlighting the emerging tendencies. Three sets of topics in the areas of healthcare, social assistance, and social housing<sup>2</sup> have been discussed to this aim:

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<sup>1</sup> As regards the relationship between social rights and the Italian model of Welfare State see G. Ferrara, *La pari dignità sociale (Appunti per una ricostruzione)*, in *Studi Chiarelli* (1974); A. Barbera, *Commento all'art. 2 Cost.*, in *Comm. cost. Branca* (1975); A. Baldassarre, *Diritti inviolabili (ad vocem)*, in *Enc. giur. Treccani* (1989); R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale* (1992); F. Modugno, *I "nuovi" diritti nella giurisprudenza costituzionale* (1994); C. Pinelli, *Diritti costituzionali condizionati, argomento delle risorse disponibili, principio di equilibrio finanziario*, in A. Ruggeri (ed.), *La motivazione delle decisioni della Corte costituzionale* (1994); L. Carlassare, *Forme di stato e diritti fondamentali*, *Quad. cost.* 33 (1995); M. Luciani, *Sui diritti sociali*, in *Studi in onore di Manlio Mazziotti di Celso* (1995); A. Giorgis, *La costituzionalizzazione dei diritti all'uguaglianza sostanziale*, (1999); C. Salazar, *Dal riconoscimento alla garanzia dei diritti sociali. Orientamenti e tecniche decisorie della Corte costituzionale a confronto* (2009); B. Pezzini, *La decisione sui diritti sociali. Indagine sulla struttura costituzionale dei diritti sociali* (2009); D. Bifulco, *L'invioabilità dei diritti sociali* (2003); P. Ridola, *Libertà e diritti nel sistema costituzionale*, in R. Nania, P. Ridola (eds.), *I diritti costituzionali* (2006); M. Midiri, *Diritti sociali e vincoli di bilancio nella giurisprudenza costituzionale*, in *Studi in onore di Franco Modugno* (2011); A. Spadaro, *I diritti sociali di fronte alla crisi (necessità di un nuovo modello sociale europeo?: più sobrio, solidale e sostenibile)*, *www.rivistaaic.it* 4 (2011); M. Benvenuti, *Diritti sociali (ad vocem)*, in *Dig. disc. pubbl.* (2012); I. Ciolli, *I diritti sociali al tempo della crisi economica*, *Costituzionalismo.it* 3 (2012); A. Guazzarotti, *Giurisprudenza CEDU e giurisprudenza costituzionale sui diritti sociali a confronto*, *www.gruppodipisa.it* (2012); L. Trucco, *Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali*, *www.gruppodipisa.it* (2012); S. Scagliarini, *Diritti sociali nuovi e diritti sociali in fieri nella giurisprudenza costituzionale*, *www.gruppodipisa.it* (2012); G. Razzano, *Lo "statuto" costituzionale dei diritti sociali*, *www.gruppodipisa.it* (2012), who does not consider this model in its traditional meaning of social policies managed by public authorities and covered by public spending, but in a partly different and wider meaning, also including other kinds of measures (such as many of the policies aimed at implementing the economic development).

<sup>2</sup> This choice is mainly due to the fact that healthcare – on the one hand – and social assistance – on the other – are the most representative sectors mirroring two different models in the allocation of social welfare benefits, *i.e.* – respectively – the *perfect universalism* and the *selective universalism (infra)*. Furthermore, they are both interested by devolution, since they are in principle policies devolved to the legislative competence of the regions (which is exclusive for social assistance and concurrent with the State for healthcare), albeit limited by the horizontal clause regarding the determination at central

the scope of social welfare entitlements in the light of the constitutional amendments on devolution, fiscal federalism and budget balance; how decision-making process regarding the implementation of social rights has been affected by the economic recession; whether and to what extent the courts have been keen to defend social rights.

The relationship between these sets of topics can be better understood by considering that the role of public authorities in implementing social rights is changing as a consequence of the said constitutional amendments, which, in turn, can partly be seen as a consequence of economic recession. Moreover, the new constitutional landscape influences both the degree of autonomy of the regions and local levels of government and how social benefits are supplied (due to the need to reduce public spending), particularly whether in-cash or in-kind. Within this framework, the courts may try guaranteeing the effectiveness of social welfare entitlements, especially when legislative implementation of constitutional provisions or administrative implementation of legislative provisions are either absent or inadequate to grant a social minimum. To this trend, the Italian Constitutional Court's (ICC) case law regarding the recentralization of devolved powers also belongs.

Our analysis shows that, as for the scope of social welfare it has been affected by a significant degree of uncertainty for the reform of budget balance – the only one which can be traced back to the financial crisis – that has encroached upon the

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state level of a sort of welfare minimum and, for healthcare, also by the setting of general principles by statutory law. Regional and local autonomy, in turn, may work as a tool to make social welfare policies closer to the needs of the population they refer, but also as an hindrance for the adoption of a systematic reform agenda. As regards social housing, the sector has been taken into account since, over the last ten years, corresponding exactly to the eruption and evolution of the economic crisis, it has been one of the most reformed field, in a wide ranging perspective. This is common, however, to the fields of pensions and labour market. These areas have been just briefly mentioned: as regards social security, this is due to the fact that it is based on a contributory system mainly focused on pensions and having its own features. Furthermore, some policies regarding the workers who lose their job can be traced back to the social assistance. Education too has been just briefly mentioned: this is due to the fact that it mirrors the 'perfect universalism' model, already represented by healthcare.

implementation of fiscal federalism, thus hindering the completion of devolution and with this the possibility that devolved government deals with social policy. As for the decision-making process the combined effect of such constitutional amendments and economic recession has reduced both the autonomy and spending capacity of those public authorities in charge of implementing social rights. As for the courts, they have been swaying between either giving priority to financial 'rationality' or to the obligation to take heed of the *essential core of social rights*. However, judicial review has somewhat been confined to an 'external scrutiny'.

## **2. The scope of social welfare entitlements in the light of the constitutional amendments on devolution, fiscal federalism and budget balance**

Three main constitutional reforms regarding respectively devolution (1), fiscal federalism (2), and budget balance (3) have affected over the last 15 years social welfare entitlements. Of these amendments, only the latter – passed with the constitutional Act of Parliament (AoP) n. 1/2012 as a consequence of the EU constraints – can be directly traced back to the financial crisis. In fact, in 2011/2012, Italy received financial assistance from the ECB, thus had to give reassurance to the EU about limiting its debt and deficit. Moreover, the implementation of the reform of fiscal federalism, as a part of the ampler constitutional amendment regarding the devolution of powers to the Regions passed in 2001, was initiated only in 2009, in the midst of the financial crisis. Hence, the most severe legislative measures which have been introduced since 2012 as a response to the economic recession seem to have encroached upon such an implementation. Among such measures the said 2012 reform of the overall national budget with the prohibition of creating deficit did not favour the shift towards fiscal federalism.

The crux of the matter is that any welfare policy entails the balancing of the provision of services of a certain quantity and quality against the control of public spending. Such goals have become more difficult to pursue after the eruption of the financial crisis, which has determined at the same time an increase in demand for social services and a decrease in public funds aimed at

meeting the increased demand of social services<sup>3</sup>, for poor economic development determines a reduction in tax revenue<sup>4</sup>. As regards this point, one has to bear in mind that economic/fiscal policies too may be considered, at least in part, as (a tool for) social policies, at any rate in the sense that they entail to a good extent the balancing of social rights and economic rationality and also of different social rights between each other<sup>5</sup>. In turn, social policies may be considered an important tool for the achievement of a certain level of economic development<sup>6</sup>, which cannot be reached without welfare support for the workers and their families.

Within this perspective, the gist of the decision-making process in this field regards the setting of the basic level of welfare services to be guaranteed in the overall national territory, which, pursuant to art. 117 par. 2 lett. m) Const., is for the National Parliament to determine. It is clear that this determination is strongly based on political-ethical stances. One can think of the different kinds of universalisms which respectively characterise the Italian social assistance system and the healthcare system. They are indeed the consequence of different political/ethical

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<sup>3</sup> Though the percentage of public spending for welfare compared to the Gross Domestic Product increased (+ 3,2%) in the midst of the economic crisis, see Censis, *Rapporto annuale sulla situazione sociale del Paese* (2013): this is probably due to the decrease of the GDP.

<sup>4</sup> See Censis, *Rapporto annuale sulla situazione sociale del Paese* (2011).

<sup>5</sup> See M. Luciani, *Sui diritti sociali*, 1 *Democrazia e diritto* 569 (1994, 1995). See, moreover, A. Baldassarre, *Diritti inviolabili (ad vocem)*, cit. at 2; R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale*, cit. at 2; C. Pinelli, *Diritti costituzionali condizionati, argomento delle risorse disponibili, principio di equilibrio finanziario*, cit. at. 2; M. Midiri, *Diritti sociali e vincoli di bilancio nella giurisprudenza costituzionale*, cit. at 2; A. Spadaro, *I diritti sociali di fronte alla crisi (necessità di un nuovo modello sociale europeo?: più sobrio, solidale e sostenibile)*, cit. at 2; L. Trucco, *Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali*, cit. at 2.

<sup>6</sup> See, for instance, the so called *European Pillar for Social Rights*, having at present its legal basis in the following sources: COM (2016) 127, 8.3.2016, in [www.europa.eu](http://www.europa.eu); EU Parliament, Proposal for a Resolution – A8-03912016, 20.12.2016, in [www.europa.eu](http://www.europa.eu); COM (2017) 250 and 251, 26.4.2017, Commission Recommendation and Communication, in [www.europa.eu](http://www.europa.eu); EU Council Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights, 20.10.2017, followed by the Proclamation of the European Pillar of Social Rights, 16.11.2017, from [www.europa.eu](http://www.europa.eu).

choices, leading to a *selective universalism*<sup>7</sup> in the first case and to a *perfect universalism* in the second, in the face of constitutional provisions (articles 38 and 32) that do not promise a perfectly universal service. Social security, as a contributory system mainly focusing on pensions, has in turn its own features. However, both selective universalism, perfect universalism, and other rules to allocate social welfare benefits have to be balanced, especially in an age of austerity, with the availability of public funds and, thus, the perspective of the so called *sustainable universalism* should be attentively considered<sup>8</sup>. Any of these approaches seem to accept, however, that a core of fundamental rights should always prevail over the aim of controlling public spending.

If one looks at actual facts, nevertheless, as for social assistance, the combined effect of the lack of a sufficiently detailed determination of the basic levels of benefits<sup>9</sup> and the paucity of resources does not guarantee a minimum standard of services throughout Italian regions. As for healthcare, the basic levels of care had not been updated since 2001 (d.p.c.m. 29.11.2001) and, eventually, they were updated in 2017 (d.p.c.m. 12.1.2017) after a very long and complex procedure<sup>10</sup>. Moreover, before 2001 the lack in their determination has caused a constant increase in spending<sup>11</sup>, which, however, continued until 2010<sup>12</sup>.

Devolution matters here because both social assistance and healthcare are in principle policies devolved to the legislative competence of the regions (which is exclusive for social assistance

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<sup>7</sup> See A. Pioggia, *Diritto sanitario e dei servizi sociali* (2014); M. Ferrera (ed.), *Le politiche sociali* (2012).

<sup>8</sup> See E. Boscolo, *Istruzione e inclusione: un percorso giurisprudenziale attorno all'effettività dei diritti prestazionali*, 2 *Munus* 179 (2014).

<sup>9</sup> Art. 22 of AoP 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 represents a hindrance for the implementation of art. 119 Const. (and of the following AoP 42/2009, d.d. 216/2010 and 23/2011 on standard needs of municipalities and municipal federalism) in the field of social assistance.

<sup>10</sup> See Acts of Parliament 189/2012, 190/2014, 208/2015.

<sup>11</sup> See MEF - Dipartimento Ragioneria Generale dello Stato, *Garantire la corretta programmazione e la rigorosa gestione delle risorse pubbliche - Il monitoraggio della spesa sanitaria*, 2 [www.astrid-online.it](http://www.astrid-online.it) (2015).

<sup>12</sup> See MEF - DRGS, *Garantire la corretta programmazione e la rigorosa gestione delle risorse pubbliche - Le tendenze di medio-lungo periodo del sistema pensionistico e socio-sanitario*, 16 [www.astrid-online.it](http://www.astrid-online.it) (2015).

and concurrent with the State for healthcare), albeit limited by the above-mentioned horizontal clause regarding the determination at central state level of a sort of welfare minimum and, for healthcare, also by the setting of general principles by statutory law. A second limitation regards the financial framework, *i.e.* how these services are funded: at present, in fact, though they are under the prevalent legislative competence of the regions, their funding is still derived from central government decisions, since the most part of the fiscal federalism reform has still to be implemented. A third limitation regards the now constitutionalised duty to keep the budget in balance. Putting it bluntly, the chance that regional policies counteract the austerity trend is actually just abstract or extremely limited, since these policies should be covered by regional independent financial resources – at the same time pursuing budgetary equilibrium – but at present regions lack the power of leveraging taxes. In principle, they would be allowed to establish regional taxes pursuant to art. 119 Const., but since fiscal federalism is still left standing (*infra*) they do not<sup>13</sup>.

The stake regards, then, resource allocation. In this perspective, an EU Commission Report has pointed out that «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»<sup>14</sup>.

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<sup>13</sup> The ICC has established limits for the regions to finance additional levels of care by declaring them unlawful insofar as the Region was under a Recovery Plan to eliminate the healthcare deficit (we will focus on this topic in par. 4).

<sup>14</sup> See EU Commission (D. Bouget, H. Frazer, E. Marlier, S. Sabato, B. Vanhercke), *Social Investment in Europe – A study of national policies* (2015).

The point is that the objective to build a universalistic system of welfare has to come to terms with the rationing of financial resources and the presence in the system of another variable such as federalism or localism further complicates the picture even though under certain regards it could produce positive outcomes for social welfare policy. To this regard, it is fitting to explain to what extent fiscal federalism has partly already influenced (par. 2.1.) this picture and could influence it more in the future (par. 2.2.) once fully implemented.

### **2.1. The role of fiscal federalism up to now**

Fiscal federalism finds its constitutional basis in art. 119 Const., which has been implemented by the AoP 42/2009 and, as regards the specific policies involved, by different delegated decrees (for instance, d.d. 68/2011 about the healthcare system). This system, however, is still to be completed. In fact, such delegated decrees normally require other regulations to be adopted by the competent ministers, who have failed for the most part to do so, wary of the consequences of the financial crisis, especially with regard to regional financial autonomy. The only aspects which have been implemented of such complex reforms regard the criteria to be used in the distribution of national funds among the regions regarding the NHS<sup>15</sup>. They are based on the notion of '*standard need*', representing, together with '*standard costs*', the parameter which has brought about the repeal of '*historical expenditure*' to finance healthcare services. As for the distribution of national funds among local authorities (LAs), though, this system is not in place yet, as the national equalization fund for LAs is still allocated for the most according to '*historical expenditure*'. In addition, the lack of a sufficiently detailed determination of the basic levels of benefits makes it unlikely that such new criteria will be applied in the near future. This has caused that the individuation of '*standard need*' has been made by taking into account public services as previously delivered, which, in turn, strictly depend on the fiscal capacity of any territory and,

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<sup>15</sup> See Conferenza permanente per i rapporti fra lo Stato, le regioni e le Province autonome, agreement n. 62/CSR, April 14th 2016, representing one of the more recent acts regarding the distribution among the regions of the national healthcare fund according to the new criteria.

thus, it indirectly reintroduces the criterion of ‘historical expenditure’<sup>16</sup>.

The overall fiscal federalism reform hinges in fact on the role of basic levels of social services, representing a tool for fiscal equalization as opposed to a concept of federalism too competitive and inequitable. Taking healthcare as an example, the expected financial autonomy of the regions is balanced with the possibility, for those which are unable to achieve the basic levels of care according to a ‘standard need’, to rely on a State fund to obtain all the necessary financial resources to provide for the said basic levels of care, still keeping the budget under control. This is why ‘standard need’ is the ‘key-concept’ here, being calculated by multiplying the basic levels of service by standard costs of healthcare services as recorded in the ‘virtuous’ regions. The identification and choice of the ‘virtuous’ regions are, then, preconditions to calculate standard costs according to a complex procedure which takes into account a number of criteria such as demographic and aging characteristics of the population concerned.

According to the d.d. 68/2011, ‘virtuous’ regions are those (a) having a sound budget, (b) able to provide basic levels of care, *and* (c) not being subject to a Recovery Plan. Furthermore, they have to be identified yearly in different geographic areas (North, Centre and South of the national territory including at least one small region), via a procedure which involves both the central and regional level of government (in 2013, for the first application of the standard costs’ scheme, the selected regions were Veneto, Emilia Romagna and Umbria; in 2016 they were Marche, Umbria and Veneto<sup>17</sup>). This does not necessarily mean that virtuous regions spend the lowest in healthcare, but that they are capable of optimizing healthcare spending by granting their patient a better level of healthcare service without compromising the equilibrium of regional budget.

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<sup>16</sup> See E. Marchionni, C. Pollastri, A. Zanardi (Ufficio Parlamentare di Bilancio), *Fabbisogni standard e capacità fiscali nel sistema perequativo dei Comuni*, note n. 1 / January, [www.astrid-online.it](http://www.astrid-online.it) (2017).

<sup>17</sup> See Conferenza permanente per i rapporti fra lo Stato, le regioni e le Province autonome, agreement n. 62/CSR, April 14th 2016.

## **2.2. The relationship between the 'golden rule' of a «sound budget» and the general fiscal federalism scheme**

Currently, though, the principles on which fiscal federalism is based need to be reinterpreted in the light of art. 81 Const., which has explicitly introduced the 'golden rule' of a «sound budget» into the Constitution. This amendment has brought about some changes in art. 97 Const. too, which now requires that public administration, according to EU principles, is expected to ensure «balanced budgets and public debt sustainability».

As we have hinted above, by introducing such an element of rigidity this reform can be a threat to the safeguarding of social rights<sup>18</sup>, as long as it curbs progressive welfare policies decided by devolved government. One needs to bear in mind, indeed, that much of the responsibility to promote social welfare is conferred to local (regional) government by the Constitution. By assuming here a normative approach we want to suggest a way to interpret these rules as not utterly undermining regional /local choices regarding the protection of social rights.

More precisely, the sound budget reform and the recentralization of policies as a consequence of the economic recession should not necessarily and always side-line regional and/or local autonomy. In other words, autonomy could become a sort of 'prize' for the regions or local authorities which manage to achieve financial stability, a goal which does not seem that different from what fiscal federalism seeks to pursue. We can think, for instance, of the dual role of a sound budget within the allocation of resources described in the previous section, which represents both a precondition to consider a region 'virtuous' according to the principles of fiscal federalism and a constitutional principle introduced as a consequence of the constraints coming from the EU legal order. Autonomy, in other words, is channelled into budgetary cleverness but not always sacrificed in the name of economic recession. There are, moreover, two general safeguards to regional autonomy especially when it is instrumental to the guarantee of social rights, which trump even the necessity of a sound budget, despite its being the actual driving force of the system. The first is a negative condition of procedural nature and

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<sup>18</sup> See T. Groppi, *The Impact of the Financial Crisis on the Italian Written Constitution*, 1 IJPL 1 (2012).

it consists in the ICC doctrine that limitations to regional autonomy cannot be solely justified in the name of the *salus rei publicae* even in times of financial emergencies and however they should never become permanent<sup>19</sup>. The second regards the notion of rights as possessing an uncompressible core content<sup>20</sup>, which is to be found, by deploying a reasonableness review<sup>21</sup>, in the defence of human dignity and physical integrity from conditions of extreme need<sup>22</sup>. As a matter of fact, however, this latter notion operates even against the constitutional principle of regional (and local) autonomy (art. 5 Const.) itself. There are, in fact, cases in which the ICC was prepared to shield exceptional central government measures in favour of the poor to face the harshest consequences of the global financial crisis in sheer contrast with constitutionally established regional prerogatives<sup>23</sup>.

Going back to the relationship between the reforms of fiscal federalism and sound budget to find a way through to justify local policies in favour of social welfare, a thorough analysis let us make out a complex mechanism of incentives and disincentives<sup>24</sup>. The incentives are aimed to improve, up to a common standard, which is considered essential to ensure the basic levels of benefits, the quality of social services provided by the most inefficient regional/local systems as well as to optimize spending and not to reduce it in absolute terms (even though overall spending could increase). The disincentives regard the improvement of the quality of those regional systems, which either have reached the level of optimization that fiscal incentives are meant to boost or are already efficient, because any further improvement can only be funded by regional/local budgets and at present regions/local authorities as we have seen lack the power of leveraging taxes. We

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<sup>19</sup> See the following par. n. 4.

<sup>20</sup> See the following par. n. 4.

<sup>21</sup> See D. Tega, *Welfare Rights in Italy*, in C. Kilpatrick, B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014).

<sup>22</sup> More details are available in M. D'Angelosante, *Report on Welfare in Italy. Trying to Answer some Questions Which Arise from the Present Condition of Welfare in Italy*, [www.amsacta.unibo.it](http://www.amsacta.unibo.it) and <http://socialrights.co.uk/> (2015).

<sup>23</sup> See S. Civitarese Matteucci, *Austerity and Social Rights in Italy: A Long Standing Story*, <http://ukconstitutionallaw.org/2015/12/17/> (2015).

<sup>24</sup> See M. D'Angelosante, *Strumenti di controllo della spesa e concorrenza nell'organizzazione del servizio sanitario in Italia* (2012).

cannot take for granted that the failure of such a programme is a by-product of the great financial crisis and instead we suspect that it has much to do with political and institutional flaws.

A clue that the system has not been working properly can be deduced by the data regarding movement of patients across regions compared to the quality and basic levels of care, which show that healthcare regional subsystems have not been really converging towards one another. Indeed, the movement of patients increased between 2007 and 2014 in the face of a reduction in the regional divide regarding basic levels of services from 2010 to 2012<sup>25</sup>.

### **3. The role of public authorities in the decision-making process about the implementation of social rights and some consequences of the economic recession over the decisions about the supply of social benefits**

The second set of topics of this study concerns how decision-making process regarding the implementation of social rights has been affected by the economic recession. As a matter of fact, constitutional amendments on devolution, fiscal federalism and budget balance combined with an array of other austerity policies have indeed also changed how public authorities deal with social rights including the way in which public services are delivered.

We have noticed (par. 2) that at least some of these reforms, together with cuts to social welfare funds, have both made it more challenging for regional/local authorities to deliver social services and curbed the power to elevate welfare entitlements by way of autonomous regional choice. This state of affairs has favoured, in turn, two ongoing changes. An increase of co-payment schemes, which mirrors the general tendency to cover public deficit with private savings or resources. And a shift from in-kind benefits into in-cash means-tested benefits on the assumption that the cost of organisational requirements is greater than a direct payment to recipients of welfare services. This second trend presents subtler

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<sup>25</sup> See S. Gabriele (ed.), *Focus* n. 9, December 21<sup>st</sup> 2015 – *Ufficio Parlamentare di Bilancio* (2015).

problems and it is more difficult to assess also because of the historical characteristics of the welfare regime in which it occurs.

To deepen our understanding it is useful to focus on some social welfare areas, to check to what extent the above-mentioned shift has occurred. We will take into account the fields of social assistance, social housing and healthcare, for the reasons already mentioned in the footnotes of par. 1.

It is worth focusing on social assistance first, as it traditionally regards both in-cash and in-kind benefits and has a very wide-ranging scope, covering all the policies which cannot be traced back to other specific social fields (such as health, education, work, social security). The most significant of these policies regard anti-poverty aid to combat no-self-sufficiency and alleviate family burdens. Services/benefits concerned are provided in-kind (social services properly named), in-cash (economic aid), or, in 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, thus, saving a part of their salaries. Usually the main difference is that, while in the first case (in-kind benefits) services are open to everyone – although the most in need are facilitated in using them and totally or partly exempted from fees – in-cash benefits are means-tested and, generally, recipients are expected to participate in social reintegration programmes<sup>26</sup>. Measures providing for in-cash benefits have progressively been increased<sup>27</sup>. For instance, after the eruption of the economic crisis of 2008 a social card<sup>28</sup> and

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<sup>26</sup> See M. Ferrera (ed.), *Le politiche sociali* (2012).

<sup>27</sup> More details are available in M. D'Angelosante, *Report on Welfare in Italy*, cit. at 11. As regards this point, it has been already noticed that the EU Commission has recently published the following data: 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 favors 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), cit. at 8, 24.

<sup>28</sup> This measure is intended for the purchasing of essential goods, such as food, for a few categories of needy citizens, and has been established by l.d. 112/2008 (art. 81), converted to AoP 133/2008.

a family card<sup>29</sup> have been introduced. Moreover, in this welfare area, other measures have been introduced with the aim to fight poverty, support active social inclusion, and extend the number of beneficiaries<sup>30</sup>. The most recent of them, i.e. the so called 'income for active inclusion', has been established by delegated decree 147/2017, that also established the National Fund for the fight against poverty, with 1,7 billion euros for the year 2018: the benefit, that will be granted by the National Institute for Social Security, will replace the so called 'income for social inclusion' and is aimed at supporting families with low income and fostering the active social inclusion of its beneficiaries, who – in fact – have to participate in a personalized social inclusion program under the control of the Municipality where they reside.

A shift towards in-cash benefits also can be seen in the area of social housing<sup>31</sup>, mainly as regards the granting of financial aid to be used to buy or rent certain kinds of houses. For instance, AoP 9/2007 and d.m. n. 32438/2008 introduced provisions regarding the residential property market, aimed at meeting certain social goals by establishing an integrated system of property funds directed at supporting and increasing the supply of housing for rent at a subsidised rate. 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, regular migrants having low income, and residents who have been living for 10 years in Italy or 5 years in the same Italian region. In addition, several measures have been laid down since 2007 with the aim to relief tenants from eviction procedures<sup>32</sup>.

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<sup>29</sup> This measure is aimed at granting Italian or regular immigrant families with at least three children the purchasing of goods or services at social prices; it has been established by AoP 208/2015 (stability law).

<sup>30</sup> This tendency is common to the fields of social security/labour sector; for further information both on social assistance and social security/labour sector and comparison among them, see A. Albanese, *The Italian Social Model and its Implementation*, <http://socialrights.co.uk/> (2015).

<sup>31</sup> As regards social housing, since 1903 a number of primary and secondary sources of law have dealt with this policy. More details are available in M. D'Angelosante, *Report on Welfare in Italy*, cit. at 11.

<sup>32</sup> See VV.AA., Cassa Depositi e Prestiti, *Social housing – Il mercato immobiliare in Italia: focus sull'edilizia sociale*, report n. 3, [www.astrid-online.it](http://www.astrid-online.it) (2014).

Other measures can be loosely traced back to a trend to replace in-kind benefits (in the Italian tradition typically a housing lease) with financial assistance. The AoP 102/2013 (art. 6 p. 5) has established a national fund aimed at supporting tenants who encounter temporary difficulty in paying rentals. These financial aids are managed by local authorities and distributed to eligible recipients through a public competition. The Cassa Depositi e Prestiti (CDP) has agreed in 2013 to transfer to the Italian Bank system 2 billion euros to be destined for mortgages mainly to certain categories of recipients (for instance families with disabled members, young couples, big families) and to buy first house. Finally, l.d. 47/2014 (converted into AoP 80/2014) has established measures aimed at allowing the use by local authorities of the special fund provided by AoP 431/1998 (art. 11) to support letting of residential properties. Correspondently, private and public funds (mainly local) aimed at supporting social housing by publicly owned estates have progressively dwindled<sup>33</sup>.

As for healthcare, after its foundation in 1978 the NHS came to quintessentially represent a model of in-kind welfare delivery, pursuant to art. 32 Const., which establishes the duty of the Republic to guarantee «free medical care to the indigent». However, also in this field one finds something alike in-cash benefits. Both case law and national and EU/international sources of law allow in fact patients of the Italian Healthcare System to seek, under certain conditions, the reimbursement of what they have paid for treatment received either in the EU and Switzerland or in an Italian region different from the one in which they reside<sup>34</sup>. This same rationale can be made out in that case law

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<sup>33</sup> For instance, AoP 183/2011 has reset to zero the rent Fund established by law 431/1998, see A. Misiani, *Fondi statali per le politiche sociali: nuovi tagli con la Legge di stabilità 2012*, [www.astrid-online.it](http://www.astrid-online.it) (2012).

<sup>34</sup> As regards this issue, we can find at least three schemes. According to the first, the patients can benefit from healthcare services in the EU or Switzerland or States belonging to the EEA (scheme of the indirect healthcare assistance in the EU, based on the EU directive 24/2011, implemented in Italy by the d.d. 38/2014). According to the second one, they can benefit from indirect healthcare assistance (*i.e.* the healthcare services which, though granted by the private system, can be covered by public spending, under certain conditions and a request of the patient) in the Italian Healthcare System (scheme of the indirect healthcare assistance in the national territory, based on the Italian legislation introduced before the eruption of the economic crisis). According to

coeval with the eruption of the crisis which awards patients the reimbursement of expenses for medicines and health services occurred abroad or in another region even though not included in the list of those covered by the national (or regional) healthcare system to which they belong<sup>35</sup>. The legal grounds of the said trend are both of a legislative and judicial nature, and refer to sources both preceding and following the crisis<sup>36</sup>.

One issue is to what extent the shift we have noted is permitted by the Italian Constitution. Institutional duty to provide services through either in-kind or in-cash benefits has its legal basis in arts. 29-35-41, 43, 45, and 46 of the Constitution, which charge the Italian Republic of a series of general obligations such as to support family (mainly in those cases when a household has

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the last one, they can benefit from medicines or healthcare services not included in the list of those covered by public funding in the national (or regional) healthcare system to which the patient belongs (special scheme based just on case law coeval with the eruption of the crisis).

<sup>35</sup> The detailed references to the relevant legal sources are available in M. D'Angelosante, *Report on Welfare in Italy*, cit. at 11. As regards the judicial references, see the following par. 4.

<sup>36</sup> The detailed references to these judicial/legal sources are available in M. D'Angelosante, *Report on Welfare in Italy*, cit. at 11. All in all, at least in so far as healthcare is concerned, the financial crisis does not seem to have played a paramount role in causing such developments to occur. Only indirect healthcare assistance in the EU has emerged after the eruption of the economic recession, but it has been mainly driven by the will to further implement free movement of services and persons in the EU. As far as social assistance and social housing are concerned, on the contrary, the financial crisis seems to have played a much more important role. An important question arises here, regarding the meaning of this trend: *i.e.*, whether it responds to the duty of implementing social rights. A sensible answer depends, again, on two of the above-mentioned conditions/outputs of in-cash benefits: firstly, the general trust in the spending ability of recipients and, secondly, the disengagement of public authorities from organisational requirements. Thus, it is clear that is not possible to give a straightforward answer, since the relevance and useful employ of spending ability may differ from a sector to another (let us think of housing compared to complex healthcare treatments), such as the relevance of public organisational requirements (let us think, again, of housing compared to specialised or hospital healthcare). What is indispensable, in any case, is the existence of an efficient 'command and control' system aimed at establishing, in the command-phase, detailed rules to limit how in-cash benefits can be spent as well as checking, in the control-phase, whether these rules have been observed. Furthermore, and finally, an effective sanctioning system for their violation has to be established and applied.

not sufficient means), safeguard health and guarantee free medical care to the indigent, set out State schools and provide education free of tuition for everyone for at least eight years as well as to support all skilful pupils with economic aid, and to provide social security for workers (in case of accidents, illness, disability, old age and involuntary unemployment) as well as welfare support for «every citizen unable to work and without the necessary means of subsistence». It is for the legislature, within this constitutional framework, which does not contain preferences for in-kind or in-cash benefits<sup>37</sup>, to decide how to concretely shape such obligations, with legislative measures usually followed by ministerial decrees.

As for administrative authorities, they have, as a general rule, the task of ascertaining whether the conditions laid down by the legislator to provide a certain service are met<sup>38</sup>. In other words, a good deal of welfare entitlements – for example as regards social assistance benefits – is based on bright-line rules which do not entail discretionary decisions<sup>39</sup>. However, a certain amount of administrative discretion arises as regards how to organise those social services which are provided in-kind or by mixing in-cash and in-kind benefits. This type of discretion may be quite important from a practical point of view: for example, in the field of social assistance administrative procedures aimed at allowing legal entities different from local authorities to deliver social services at least partly publicly funded (so called accreditation-scheme) can entail a good deal of discretionary decision-making. A higher degree of discretion, partly overcoming the

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<sup>37</sup> Except than for the setting out of State school (as regards the benefits in kind) and the supporting of all skilful pupils with economic aid (as regards the benefits in cash).

<sup>38</sup> See Supreme Court, Labour Section, decisions n. 1606/1990, 1082/1998, 1003/2003, 14127/2006 on disability benefit established by AoP 18/1980; *Id.*, n. 23481/2010 on disability pensions introduced by AoP 118/1971; Supreme Court, Fourth Section, decision n. 27382/2014 on family benefits established by l.d. 69/1988; Supreme Court, Labour Section, decision n. 1389/1991 on social pensions established by AoP 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.

<sup>39</sup> See Supreme Court, Labor Section, n. 23481/2010; Supreme Court, Fourth Section, n. 27382/2014.

organisational requirements, is usually involved, as regards social housing, in the public competitions managed by local authorities with the aim to distribute financial aids to the eligible recipients.

Summing up, the Constitution does not preclude a shift from in-kind into in-cash benefit. One of the effects of the observed shift might be the reduction or change of administrative discretion on the assumption (not undisputed in the literature) that in-cash benefits require less or no discretionary decision-making. Apart from this, other possible consequences of this change are the reduction in the number of beneficiaries, given the more accurate means-testing which benefits are subject to. This is disputed too, however. And a sort of depersonalisation of public welfare services which would be caused by the inevitable dismantling of part of the institutions, and personnel, in charge of delivering in-kind benefits, for public funding is given directly to benefit's recipients to allow them to obtain the service they need<sup>40</sup>. With no further empirical evidence we cannot definitely say in what direction and with what overall consequences such changes are transforming welfare administrative sub-system.

### **3.1. The relationship between the implementation choices and the general request of social protection: some data about the needs of the population**

The implementation choices can be better understood focusing on the general request of social protection, *i.e.* examining some data about the needs of the population after the eruption of the economic crisis.

Soon after the eruption of the crisis, *i.e.* in 2009, the Italian families declared that the mostly used (and needed) social service was healthcare (50,5%), followed by compulsory insurances (48,7%), childcare (15,8%), in-cash and in-kind benefits for primary school (12,3%), social assistance (7,4%), social housing (including the long-term care for the old people: 4,7%), in-cash and in-kind benefits for their essential expenditure (4,6%). Furthermore, they declared that these services were covered for the most part by private spending (78,2%: mainly for compulsory insurances, housing, in-cash and in-kind benefits for their essential

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<sup>40</sup> And another point worthy of stress is that this model entails a general trust in the spending ability of recipients.

expenditure) and, for another important part, by public spending (70,3%: mainly for healthcare, childcare, in-cash and in-kind benefits for primary school, social assistance). In this time frame the dissatisfaction of the users was mainly due to the excessive cost (31,8%) and delivery times (31,3%) of the services. The most asked services with costs covered by public spending were: benefits for no-self-sufficiency (85,7%), healthcare (82,5%), unemployment benefits (75,1%), social security and pensions (67,6%)<sup>41</sup>. As regards healthcare, however, the so called *out of pocket* spending directly covered by the users (17,8% of the overall spending for healthcare), is higher than that registered in some of the most important European Countries (UK, France, Germany), though lower than the average of the OECD Countries. This may be partly due to the fact that sometimes the amount of the co-payment overcomes the cost of the service provided with funds fully covered by private spending. Furthermore, private spending for healthcare increased constantly from 2007 to 2013 (these increase is common to other welfare sectors, such as education). As for healthcare, this is also due to the relationship between what each user could spend for a certain kind of service according to different schemes (the copayment and the *out of pocket* spending) and how much time he could wait for the availability of that service according to that different schemes. This trend continued in the following years<sup>42</sup>.

As regards the migrants, in 2009/2010, the percentage of them asking for means-tested benefits has considerably increased (22%), while for the Italians the increase has been lower (9,7%). The most part of the migrants asked for in-cash benefits regarding social assistance (65,7%), childcare and education (44,8%)<sup>43</sup>.

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<sup>41</sup> The sum is greater than 100% since it was possible to give more than one answer to each question, see M.P. Camusi, M. Melis, L. Pardini, V. Coletta, G. Addonizio, *Gli scenari del Welfare - Fra nuovi scenari e voglia di futuro - Rapporto finale Censis* (2010).

<sup>42</sup> See Censis, *Rapporto annuale sulla situazione sociale del Paese* (2012); Censis., *Rapporto annuale sulla situazione sociale del Paese* (2013); Censis, *Rapporto annuale sulla situazione sociale del Paese* (2014); Censis, *Rapporto annuale sulla situazione sociale del Paese* (2015); Censis, *Rapporto annuale sulla situazione sociale del Paese* (2017).

<sup>43</sup> The sum is greater than 100% since it was possible to give more than one answer to each question, see Censis, *Rapporto annuale sulla situazione sociale del Paese* (2011), cit. at 5.

Moreover, in the time frame 2013-2016, the level of absolute poverty of the foreign families increased while for the Italian families the same level decreased<sup>44</sup>.

In the most recent years (2015/2016) a part of the population has given up some healthcare (for instance dental care), due to the increase of their cost covered by private spending (in the form of the copayment or *out of pocket* spending) and, at the same time, the public supply of healthcare has been reduced<sup>45</sup>.

#### 4. The role played by the Courts

The actual contours of the interplay between Constitutional principles, legislative discretion and public administration in dealing with social rights is commonly affected by case law. The extent to which the courts have concurred to the developments discussed in the previous sections is very difficult to say. As we anticipated the impression is that it was not much appreciable on a macro scale, but there are niches where their role was important in defining some borders.

To this regard, the most frequent grounds of disputes concerns the application of the theory of *social rights as conditioned on finance*<sup>46</sup>, which was formulated especially regarding claims to health and social assistance and has recently been reignited as a likely consequence of economic recession<sup>47</sup>. This theory must be balanced with some *counter-limits*, such as the obligation to take

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<sup>44</sup> See Censis, *Rapporto annuale sulla situazione sociale del Paese* (2017), cit. at. 19.

<sup>45</sup> See Censis, *Rapporto annuale sulla situazione sociale del Paese* (2016).

<sup>46</sup> See, *ex multis*, Constitutional Court, decisions n. 50/1990, 406/1992, 304/1994, 267/1998, 309/1999, 52/2000, 509/2000, 226/2001, 252/2001, 432/2005, 431/2008, 251/2008, 269/2009, 10/2010, 80/2010; Administrative Court of Lazio, Rome, III, decisions n. 11574/2009, 236/2012; Court of First Instance of Genova, October 16th 2009; Labour Section of the Supreme Court, decision n. 16795/2004; Administrative Court of Veneto, decision n. 395/1989; Council of State, VI, decision n. 2231/2010; *Id.*, Section V, decision n. 3950/2013; Administrative Court of Sardegna, I, decision n. 134/2013; Administrative Court of Abruzzo, L'Aquila, decision n. 255/2014; Administrative Court of Molise, I, decision n. 232/2014; Administrative Court of Lazio, III, decision n. 224/2013; *Id.*, III bis, decision n. 6011/2013; Tribunal of Milan, I, January 4th 2011.

<sup>47</sup> See, for instance: Constitutional Court, n. 455/1990, 267/1998, 248/2011, 104/2013; Labor Section of the Supreme Court, n. 2792/1987.

heed of rights *essential core*<sup>48</sup>, even though its meaning is not well defined<sup>49</sup> and should be found, by means of a *reasonableness* scrutiny, in notions such as *human dignity* and *physical integrity*<sup>50</sup>. In this context, the most significant case law of the ICC can be grouped according to the impact of its rulings along the spectrum strong-weak form of review. The so called manipulative decisions, having the same substantive effect of an AoP<sup>51</sup>, are the strongest form of review, which can be associated with those decisions which create a new principle of law addressed to the legislator<sup>52</sup>. Another, weaker, form of review is represented by judgments which do not strike down Acts of Parliament establishing exceptional funds aimed at financing essential social needs, despite their infringing upon regional competencies<sup>53</sup>. A third group, in an intermediate position along the spectrum, concerns decisions which limit regional autonomy by striking down regional measures establishing extra social benefits. These are the rulings that can be particularly understood in the light of the

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<sup>48</sup> See, *ex multis*, Constitutional Court, decisions nn. 431/2008, 251/2008, 269/2009, 80/2010.

<sup>49</sup> See S. Civitarese Matteucci, *Austerity and Social Rights in Italy: a Long Standing Story*, cit. at 11.

<sup>50</sup> See, among others: Constitutional Court, n. 304/1994, 269/2009, 431/2008; Labour Section of the Supreme Court, n. 16795/2004; Administrative Court of Lazio, III, n. 224/2013; Council of State, V, n. 3950/2013.

<sup>51</sup> In this framework, sometimes the CC has played a quasi-legislative role. In fact, since the '90s the CC, in order to make the generic provisions about social rights effective, has embraced a doctrine that allows the Court to issue a sort of more stringent guidance for the decision-maker and even to adopt 'manipulative' decisions without any remand to the legislator, see A. Albanese, *The Italian Social Model and its Implementation*, cit. at 14. These 'manipulative' judgments can often produce budgetary consequences. Hence, art. 81 Const., which requires «that every law which brings about new expenses must give evidence of the specific means to cover them», should be applied, despite the fact that «a decision of the ICC is not a (statute) law pursuant to article 81», see S. Civitarese Matteucci, *Austerity and Social Rights in Italy: a Long Standing Story*, cit. at 11. This is one of the reasons why these kinds of decisions are phasing out and when the Court wants to intervene on an issue which the Parliament has neglected it normally limits itself to stating a legal principle for the legislator to implement.

<sup>52</sup> See A. Albanese, *The Italian Social Model and its Implementation*, cit. at 14.

<sup>53</sup> See S. Civitarese Matteucci, *Austerity and Social Rights in Italy: a Long Standing Story*, cit. at 11.

doctrine of social rights as financially conditioned<sup>54</sup>. To soften the impact of the application of such a doctrine, many of such rulings refer to a sort of qualification of the decisions which negatively affect regional and local autonomy as a consequence of the economic recession, by pointing out the said constraints should never become permanent and they cannot be justified solely in the name of the *salus rei publicae* in times of financial emergencies<sup>55</sup>. Everyone sees, though, how vague it is the condition attached to a complex phenomenon that it is permanent.

Among the above-mentioned decisions, those belonging to the first group did not emerge as a consequence of the economic crisis. The general tendency of the ICC to adopt quasi-legislative decisions has been accompanied, since the beginning of the economic recession, by the tendency to limit regional autonomy, especially concerning the funding of social services. As we have seen before, it curbs regional autonomy both by directly financing the essential core of social needs and preventing the regions financially troubled from establishing additional social benefits.

As for ordinary/administrative courts, the most significant case law can be grouped on the basis of their practical effects. The first effect is the *protection from the cuts* of part of some welfare areas, such as healthcare (mainly as regards the public funding of healthcare service not included in the essential level of care)<sup>56</sup>,

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<sup>54</sup> Dec. 104/2013, according to which the additional levels of care covered by regional funds are unlawful insofar as the region is under a Recovery Plan to eliminate the healthcare deficit.

<sup>55</sup> As regards this issue, the CC has in fact ruled that 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 n. 148 and 151/2012)». Moreover, it declared that limitations to the financial autonomy of Regions, though constitutionally allowed in time of crisis, should never become permanent (decision no. 193/2012), see D. Tega, *Welfare Rights in Italy*, in C. Kilpatrick, B. De Witte (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (2014).

<sup>56</sup> As we have already noticed above, this is a special scheme based just on case law coeval with the eruption of the crisis. See for example: Court of First instance of Bari, November 3rd 2008 (on the right of patients to benefit, 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 regional healthcare system, under conditions such as the compatibility with the general principles and rules of the NHS, the lacking of an alternative and appropriate

education (mainly as regards benefits for disabled students)<sup>57</sup>, social security (mainly as regards the purchasing power of lowest pensions)<sup>58</sup>. The second one is the *direct application of constitutional provisions* when the Acts of Parliament necessary to implement these rules/principles are either absent or inadequate to grant a social minimum and/or the implementation of their content by the public administrations (for instance, as regards the duty to finance with public funding some healthcare services not included in the essential level of care, the relevant judicial decisions have directly applied the constitutional provisions/principles, being the legislative acts either absent or inadequate to support this duty)<sup>59</sup>. The third group includes *decisions ordering administrative authorities to act in a certain way* (for instance, ordering them to compensate or repay something due to the inadequacy of certain services/benefits<sup>60</sup>).

Thus, we can register an effort by the courts to support the effectiveness of social welfare entitlements, especially when the

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care, the usefulness of the care concerned, though a scientific evidence does not exist).

<sup>57</sup> See, for instance: Administrative Court of Molise, I, decision n. 232/2014; Administrative Court of Lazio, III, decision n. 224/2013; *Id.*, III bis, decision n. 6011/2013; Tribunal of Milan, I, January 4th 2011; Council of State, VI, decision n. 2231/2010; *Id.*, V, decision n. 3950/2013 (all about the illegitimacy of the acts, such as administrative Plans, establishing binding limits to the number of specialized teachers for disabled students to be assigned to each school, sometimes in contrast with the 'scoresheet' of the competent technical commission; the common legal basis of this kind of decisions is the impossibility to compress the core of a fundamental right, such as the right to education of disabled students, with the aim of controlling public spending, as declared by Constitutional Court, decision n. 80/2010).

<sup>58</sup> See Const. Court, decision n. 70/2015.

<sup>59</sup> See footnote n. 56.

<sup>60</sup> See, for instance: Administrative Court of Sardegna, Section I, dec. n. 134/2013; Administrative Court of Abruzzo, L'Aquila, n. 255/2014 (both on the duty of the competent public authority, to admit, for disabled students, a compensation due to a delay in the availability of specialized teachers or the inappropriateness of the service concerned); Labour Section of the Supreme Court, decision n. 9969/2012; Supreme Court, III; decision n. 9319/2010 (on the duty of the competent public authority to admit the repayment of the healthcare service enjoyed abroad without any previous authorization, under the condition that the care was necessary and urgent and it was not possible to enjoy it in the NHS to which the patient belongs in a time frame compatible with this urgency).

legislative implementation of constitutional provisions or the administrative implementation of legislative provisions are either absent or inadequate to grant a social minimum, in times of economic recession. In this framework, the obligation of public authorities to protect human dignity and/or physical/personal integrity in granting the core of social rights emerges frequently. However, the limited role of legal accountability in this field may deter the judges to hold authorities to account, in practical terms, especially regarding the resource allocation decisions. Case law has in fact normally focused on using legal devices such as procedural requirements and reasonableness. Furthermore, judicial review is often confined to an 'external scrutiny' which is the expression of a more general deferential approach to the legislature. Bearing in mind that *legal accountability* of public authorities to the Courts, *political accountability* of the executive to the Parliament and *democratic accountability* of the legislature to the electorate have different meaning and consequences<sup>61</sup>, this picture could not be seen as necessarily negative.

## 5. Final remarks

In this section, we want to offer some final remarks.

Different tendencies emerge from this study as regards the influence of austerity over the state of the Italian Welfare. Each of them and the relationship between them highlight some weaknesses of the overall framework, but also some possible solutions to amend this condition.

First of all, economic recession can be deemed to limit, in a general perspective, the adaptation of social welfare entitlements and services to the increasing needs of the population. Thus, for instance, basic levels of social benefits have not been updated – or even ever established in some areas – or updated with extreme delay. This is a significant gap, since they work both as a legal basis for granting welfare services and as a tool for fiscal equalisation and the implementation of fiscal federalism. Economic recession has worsened the general attitude of the

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<sup>61</sup> As regards the relationship between the failure in protecting the core of social rights and the violation of ECHR, see C. O'Conneide, *Legal Accountability and Social Justice*, in N. Bamforth – P. Leyland (eds.), *Accountability in the Contemporary Constitution* (2013).

legislature to use its discretion to implement a certain model of welfare. This condition, in turn, influences the role of administrative authorities in managing social services, given retrogressive choices of the legislature regarding how to concretely shape constitutional obligations. A certain degree of administrative discretion does remain as regards for example organisational requirements, but it barely affects the general picture.

Secondly, the constraints on the implementation of social rights may limit the achievement of a certain level of economic development, given the mutual influence between these two economic factors.

Thirdly, emergency determines the adoption of extraordinary (and sometimes structural) measures with the aim of reducing or amending social welfare entitlements and services, and even of limiting autonomy of regional or local levels of government as regards their supply or financing. In this framework, the constitutional reforms on sound budget, adopted under the pressure of the EU, mirrors a 'cut-approach' in social policies. In 2011 a similar reform interested the Spanish Constitution for the same reason, *i.e.* the financial assistance received from the ECB and the consequent duty to give reassurance to the EU about limiting the public debt and deficit: as a consequence of these constraints, regressive reforms have been introduced in healthcare, social security and social housing<sup>62</sup>. Social welfare spending is indeed a sizeable part of the national aggregate budget, even though the cutting back of social expenditure is not the only tool to keep public spending under control<sup>63</sup>. In turn, EU financial constraints mirror the market-based approach of the EU process of integration, the prevalence of market rationality over the welfare policies and, thus, the risk of weakening the European Social model, despite the existence of a mutual relationship between economic development and welfare policies, as already pointed out. However, at present EU

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<sup>62</sup> See D. Utrilla, *Spain*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017).

<sup>63</sup> See S. Civitarese Matteucci, S. Halliday, *Constitutional Law and Social Welfare after the Economic Crisis*, in F. Merloni (ed.), *The Impact of the Crisis on Democratic Institutions and Public Administrations. How Austerity policies are Changing Public Powers* (2017).

integration is at risk not only for the financial crisis, which threatens its market-based nature, but also for an institutional crisis (epitomised by the Brexit case), which invests the EU as a whole. In the Italian Welfare system spending cuts have especially affected social assistance and, partly, the budget aimed at supporting regional expenses in healthcare. In the healthcare sector, the 'cut-approach' has mainly determined the shifting of funding from the public to the private spending covered by the users (via the increase of the number of co-payments or fees to be paid to private insurances). This is common to other European experiences<sup>64</sup>. Moreover, the 'cut-approach' is supported by that case law which holds social rights are financially dependent. However, this is counter-balanced by another strand of case law, which in particular circumstances is prepared to make the protection of social issues prevail. In such cases the courts often resort to the application of criteria of human dignity or physical integrity with the aim of avoiding the compression of the core of social rights as fundamental rights.

This leads us to the fourth point which concerns the courts and whether and to what extent they managed to limit the harshest effects of austerity, started before the financial crisis but which has become somehow permanent as a consequence of economic recession. The judiciary has often enforced the obligation of public institutions to protect the core of social rights by resorting to human dignity and/or physical/personal integrity. This has occurred especially when the legislative implementation of constitutional provisions or the administrative implementation of legislative provisions were either absent or inadequate to guarantee a social minimum. Except for these cases, courts favour a deferential approach by limiting their review to an 'external scrutiny'. This approach can also be detected in other European countries<sup>65</sup>.

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<sup>64</sup> In Germany, for instance, there was a shifting of costs from health insurers to insured individuals, see U. Lembke, *Germany*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017). The co-payment schemes have been increased in France too, see D. Roman, *France*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017).

<sup>65</sup> In Germany, for instance, the Federal CC declared that, under the German basic law, citizens enjoy a fundamental right to a subsistence minimum, to be

Fifthly, the role of public authorities in the decision-making process to implement social rights is changing as a consequence both of the financial crisis and the constitutional amendments on devolution, fiscal federalism and budget balance, in the direction of a restriction of their leeway in organising and delivering welfare services mainly conceived, in the Italian tradition, as in-kind benefits to be replaced by in-cash means-tested benefits. Once again, the increase in the use of means-testing schemes is partly common to other European countries<sup>66</sup>.

Sixthly, one more consequence of the financial crisis is the tendency to the recentralisation of competencies, mainly via their shifting from the regions to the State and, thus, the limitation of regional autonomy. This reduction has been usually determined by extraordinary legislative measures, such as those aimed at establishing and *implementing the recovery Plans in healthcare*. Limitation to regional autonomy has also been supported by the Constitutional Court case law. This is, for instance, the case for those decisions which, on the one hand, declared the impossibility of regions to establish additional levels of care covered by regional funds whether the region is under a recovery Plan (on the basis of the theory of social rights as financially conditioned), while, on the other hand, allowed the establishment of national exceptional funds aimed at financing essential social needs, though they infringed upon regional competencies (on the basis of the duty to

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calculated, however, by the legislative, according to a transparent and not arbitrary method, see U. Lembke, *Germany*, cit. at 26, and there further citations. The same deferential approach can be found in the UK, French and Spanish case law, see D. Roman, *France*, cit. at. 26; D. Utrilla, *Spain*, cit. at. 25; J. Meers, *UK*, in S. Civitarese Matteucci, S. Halliday (eds.), *Social Rights in Europe in an Age of Austerity* (2017), and there further citations.

<sup>66</sup> In Germany, for instance, the so called 'Hartz IV' reform (adopted, however, before the eruption of the economic crisis) moved towards a system placing more emphasis on means-testing, activation policies and sanctions for non complying, though many financial benefits were reduced: this is the case of many long-term unemployed people and their families, see U. Lembke, *Germany*, cit. at 26. Also in France there has been the reduction of some social benefits and an increase in activation policies and sanction programs for unemployment benefits claimants failing to comply with their commitments, see D. Roman, *France*, cit. at 26. In the UK too, since 2012, the government introduced similar measures; however, at the same time the discretionary power of the local authorities has been increased as to allow them to mitigate the impact of the harshest social reforms, see J. Meers, *UK*, cit. at. 27.

save the so called social right core). It is true that, as regards this issue, the ICC tried to introduce some counter-limits to the constraints to regional and local autonomy as a consequence of the economic recession, declaring that they should never become permanent. However, nobody knows what happens if the crisis is endemic. In this framework, the chance that regional policies counteract the austerity trend is just abstract or extremely limited. In other European countries, however, the financial crisis has determined a partly opposite tendency: for instance, in the UK, since 2012, the discretionary power of the local authorities has been increased as to allow them to mitigate the impact of the harshest social reforms<sup>67</sup>.

Seventhly, going back to the Italian case, it is however possible to argue that, when emergency reasons arise, sometimes extraordinary or even structural measures are adopted with the aim of implementing social welfare entitlements and services. Thus, for instance, as regards social assistance, social security and labour policies, some measures have been introduced with the aim of fighting poverty, increasing the number of unemployment benefits' recipients, supporting an active inclusion. Furthermore, as regards housing, several measures have been established with the aim of supporting tenants or meet other social goals. These policies reflect a tentative, albeit positive, will of fighting conditions of extreme/increasing need of the recipients.

As a way of a conclusive observation, the overall picture makes it clear that the question of the balancing between social rights and economic reasons is still open. The crisis years have lay bare old and structural deficiencies of the Italian welfare State. A piecemeal and tentative attitude of all the decision-makers involved in the managing of the system during the financial crisis has hence even worsen the condition of a chronic invalid, which would instead require a cure based on an integrated methodology, both planned and implemented on a long-term trajectory and flexible enough to be able to face the most likely upcoming shocks and changes. This goal could be also reach considering the regional/local autonomy as an opportunity for the optimization of the delivery of services/benefits more than as a threat for the public spending and budget sustainability.

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<sup>67</sup> See J. Meers, *UK*, cit. at 27.