

**SOCIAL ASSISTANCE BENEFITS IN FAVOUR OF IMMIGRANTS IN THE  
ITALIAN AND EUROPEAN LEGAL FRAMEWORK**

**Prof. Cecilia CORSI<sup>1</sup>**

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<sup>1</sup> Professor of Public Law, Department of Legal Sciences, University of Florence, (Italy) [cecilia.corsi@unifi.it](mailto:cecilia.corsi@unifi.it)

## **ABSTRACT**

The essay focuses on the issue of the recognition of immigrants' entitlement to social assistance benefits. After some brief background on the treatment of aliens under the Italian Constitution and the application of the principle of equality also to non-citizens, specific attention is given to the subject of the recognition of social rights. In particular, an overview is provided of the evolution in State and regional legislation with respect to the recognition of the rights of foreign nationals to receive social assistance benefits and the numerous interventions of the Italian Constitutional Court. The problems inherent in Italian legislation, also in terms of its compatibility with EU law, have also given rise to a significant number of disputes before the ordinary courts. Despite the persistence of legislation that is discriminatory, even if motivated by the need to contain public expenditure, the courts at all levels have confirmed the inviolability of several fundamental principles.

## 1. THE STATUS OF ALIENS UNDER THE ITALIAN CONSTITUTION

Before analysing the question of immigrants' rights to social assistance, I would like to mention the status of aliens under the Italian Constitution.

Article 2 of the Constitution establishes that “the Republic recognises and guarantees the inviolable rights of man...”. If we place the principles of the Italian Constitution in their proper historical/political context,<sup>2</sup> we also perceive the dimension of art. 2 and understand that it is addressed to every person regardless of the fact that he or she is a citizen or alien. Moreover, the reference made in art. 2 to the rights of man holds true not only for civil rights and liberties, but also for social rights.

The relationship between arts 2 and 10(2) of the Constitution (“the legal status of aliens shall be regulated by the law in compliance with international standards and treaties”) makes clear the primacy of the former over the latter, which is why the rights of aliens are already recognised and guaranteed in the Constitution. Consequently, art. 10(2) embraces all aspects concerning the status of aliens that are not already provided for in the Constitution. In addition, it establishes two important guarantees: first of all, the matter is reserved to law; second, in regulating the status of aliens, the law must conform to the provisions contained in the general international conventions and treaties that Italy is

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<sup>2</sup> There can be no doubt that the Italian constituent assembly fits into the current of constitutionalism having its roots in the grand declarations of the late 18th century, which marked a break with the conception of the exclusiveness of law, understood, that is, as a set of rules designed to protect those who belong to the same community. It emerges clearly from the texts of both the U.S. and French constitutions that the majority of rights enshrined therein are intended to apply not only to citizens, but to all human beings. C. Corsi, *Lo stato e lo straniero* (Padua: Cedam, 2001).

signatory to<sup>3</sup>.

If we go and read the individual rights sanctioned by the Constitution, we can observe that the vast majority of them are addressed to every individual and intended to provide guarantees to every person. However, there are certain provisions which contain a literal reference to citizens and summarise the three principal categories of citizens' rights, including the right to work, the right to enter and stay in the territory of the Republic and political rights.

As regards the right of entry for work reasons and, in general, the right to enter and stay in the territory of the Republic, it is up to the ordinary legislator to regulate the enjoyment thereof on the part of aliens. Only those who have a right to asylum enjoy a constitutional guarantee of entry and stay in the Italian territory<sup>4</sup>.

The matter of political rights is more complex, with legal scholars being divided

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<sup>3</sup> On the relation between arts 2 and 10(2), see A. Barbera, "Principi fondamentali: art. 2", in (G. Branca ed.) *Commentario della Costituzione*, (Bologna-Roma: 1975); P. Barile, *Il soggetto privato nella Costituzione italiana*, (Padua: Cedam, 1953), p. 51; P. Barile, *Diritti dell'uomo e libertà fondamentali*, (Bologna: il Mulino 1984), p. 32; G. D'Orazio, "Effettività dei diritti e condizione dello straniero", (1973) *Diritto e società*, p. 955; G. D'Orazio, *Straniero (condizione giuridica dello)*, in *Enc. giur.* 1993, Roma, p.1 ff.; P. Grossi, *Introduzione ad uno studio sui diritti inviolabili nella Costituzione*, (Padova: Cedam 1972), p. 30 ff. note n. 49; E. Cannizzaro, "L'assunzione di lavoratori stranieri: aspetti costituzionali", in (G. Gaja ed.) *I lavoratori stranieri*, (Bologna: il Mulino 1984), p. 58-59; G. Biscottini, "I diritti fondamentali dello straniero", in *Studi in onore di Biondo Biondi*, II, (Milan: Giuffrè 1965), p. 335 ff.; A. Piraino, "Appunto sulla condizione giuridica degli 'stranieri' nell'ordinamento italiano", (1984), *Riv. trim. dir. pubbl.*, p. 993-994; V. Onida "Relazione", in *I diritti fondamentali oggi*, (Padua: Cedam 1995), p. 75; A. Pace, *Problematiche delle libertà costituzionali, Lezioni, I Parte generale* (Padua: Cedam 1990), p. 146; E. Grosso, "Straniero (status costituzionale dello)", in *Digesto discipline pubblicistiche*, XV, (Turin: Utet 1999), p. 164.

<sup>4</sup> See art. 10 (3) of the Constitution: "Aliens who are in their own country denied the real exercise of the democratic freedoms guaranteed by the Italian constitution shall have the right to asylum under the conditions provided for by law".

between those who believe that only citizens are entitled to such rights and those who maintain that legislators can reasonably regulate their exercise also by non-citizens.

Coming to the question of social rights, it is necessary first of all to consider some essential, currently widely accepted points.

Social rights as well as civil rights and liberties are included among the fundamental rights and as such are inherent in the state form of the Italian Republic.

Secondly, there is a close link between social rights and civil rights and liberties, for which there is a reciprocal implication and only the guarantee of minimum economic and social conditions can allow an effective enjoyment of civil and political rights.

Finally, the principle of the protection of social rights has been ratified at an international level, first through the Universal Declaration of Human Rights (see arts. 22 et seq.) and later and above all with the International Labour Organization Conventions and through the International Covenant on Economic, Social and Cultural rights of 1966. On a European level, the protection of social rights is a principle enshrined in the EU Charter of Fundamental Rights, in particular in the provisions contained in Chapter IV, dedicated to solidarity, and in art. 6 TEU; it is also recognised in the European Social Charter and the European Convention on Human Rights, thanks above all to the case law developed by the Strasbourg Court.

Now it is necessary to understand the relevance of nationality when it comes to provisions on social rights.<sup>5</sup>

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<sup>5</sup> *Diritti uguali per tutti?*, edited by A. Giorgis, E. Grosso, M. Losana (Milan: FrancoAngeli, 2017); G. Corso, “La disciplina dell’immigrazione tra diritti fondamentali e discrezionalità del legislatore nella giurisprudenza costituzionale”, in *La condizione giuridica dello straniero nella giurisprudenza della Corte costituzionale*, (Milan: Giuffrè 2013) p. 14 ff.; W. Chiaromonte, *Lavoro e diritti sociali degli stranieri* (Turin: Giappichelli 2013); F. Biondi dal Monte, *Dai diritti sociali alla cittadinanza* (Turin: Giappichelli 2013); G. Bascherini and A. Ciervo, “I diritti sociali degli immigrati”, in C. Pinelli (ed.), *Esclusione sociale. Politiche pubbliche e garanzie dei diritti*,

As to international law, there is no doubt that it applies to all men; the third paragraph of art. 2 of the Covenant on Economic, Social and Cultural Rights confirms this, mentioning that “Developing countries, with regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals”. As it sets forth this exception for developing countries, it is clear that any other State must undertake to guarantee the rights under the Covenant to anyone working within its territory, not just its own nationals. In addition, the ILO conventions are intended to regulate the conditions of all workers regardless of their nationality.<sup>6</sup>

As for the rules enshrined in the Italian Constitution, the first thing worth noting is that in the second title of the first part<sup>7</sup> dedicated to “ethical and social relations” there is no reference to nationality (for example art. 32 speaks about the right of the individual to health, while art. 34 states that public education is open to all and arts 29-32 address the family).

If we read the third title of the Italian Constitution dedicated to “economic relations”, it emerges that the treatment of foreign workers falls under the guarantees of arts 35, 36, 37, 38(2), 39 and 40 (right to pay, to paid vacations, to weekly rest and to a pension, freedom of trade union organisation and the right to strike): the subject to which such constitutional provisions refer is workers, without any reference to nationality. Even under ordinary legislation, if an alien who intends to enter Italy for employment purposes is

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(Florence: Passigli 2012); B. Pezzini, “Una questione che interroga l’uguaglianza: i diritti sociali del non cittadino”, in *Lo statuto costituzionale del non cittadino*, (Naples: Jovene 2010), p. 224 ff.

<sup>6</sup> C 143 *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* and C 97 *Migration for Employment Convention*.

<sup>7</sup> The first part of Italian Constitution is dedicated to Rights and Duties of Citizens and it is divided into four titles (Civil Rights, Ethical and Social Relations, Economic Relations and Political Rights).

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subject to a complex authorisation procedure due to not having a right to entry, once he or she is accepted in the Italian territory and has obtained a permit to stay for work reasons, he or she will enjoy the same rights and be required to fulfil the same obligations as Italian workers. Both international and European law, as well as the provisions of our Constitution and those of the Consolidation Act on Immigration No. 286/1998 are clear in granting to all individuals (whether they are nationals or not) the rights linked to the status of a worker, as well as equal treatment.

Finally, as regards the right to social assistance, although the first paragraph of art. 38<sup>8</sup> of the Italian Constitution includes the only reference to citizens to be found in the entire third title, it should not be construed as intending to limit the subjective sphere of the recipients, because from the point of view of the constituent assembly, the term citizen implied a wider concept than worker and the aim was solely extend some guarantees to all persons rather than limiting them only to workers;<sup>9</sup> the Constitutional Court itself has always asserted the right of aliens to social assistance benefits. Similarly, the provisions of the third paragraph of art. 38, dealing with disabled and handicapped persons, must be understood as referring also to those who do not have Italian nationality.<sup>10</sup>

This is the constitutional framework within which the provision contained in art. 2(5) of the Consolidation Act on Immigration no. 286/1998 must be read. It states in fact that “aliens shall be granted treatment equal to that of citizens...in relations with the public

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<sup>8</sup> Art. 38 (1): “All citizens unable to work and lacking the resources necessary for their livelihood are entitled to maintenance and social assistance”.

<sup>9</sup> W. Chiaromonte, “La tutela dei diritti previdenziali”, in G. Caggiano (ed.), *I percorsi giuridici per l'integrazione*, (Turin: Giappichelli, 2014), p. 493.

<sup>10</sup> Art. 38 (3): “Disabled and handicapped persons are entitled to education and vocational training”. See Constitutional Court Decision no. 454 of 30.12.1998, confirming that alien workers living in Italy have the right to compulsory employment, which relates to one aspect of the implementation of art. 38, third paragraph, and more particularly to vocational training courses.

administration and access to public services, within the limits and in manner provided by law”. This reference to law is not meant to establish entitlement, but to indicate the lawmaker’s task in identifying situations that allow access to public services.

### ***1.1. Aliens and the principle of equality***

Notwithstanding the literal reference to citizens contained in art. 3 of the Constitution (“all citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions and personal or social conditions”), from its very first judgments the Constitutional Court has always confirmed that the principle of equality also applies for foreign nationals<sup>11</sup>, when it comes to complying with inviolable rights<sup>12</sup>.

Although the Court has never explicitly set forth the grounds for going beyond the literal wording of art. 3, if, once again, we interpret the provision within the

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<sup>11</sup> Legal scholars have expressed different opinions on this point; for an overview see M. Cuniberti, [La cittadinanza. Libert  dell'uomo e libert  del cittadino nella Costituzione italiana](#) (Padova: Cedam 1997). See also C. Lavagna, *Basi per uno studio delle figure giuridiche soggettive contenute nella costituzione italiana*, in *Studi economico-giuridici*, (Padua: Cedam, 1953), p. 14; L. Paladin, *Il principio costituzionale di uguaglianza*, (Milan: Giuffr , 1965), p. 205; A. Pizzorusso, *Che cos'  l'eguaglianza?*, (Rome: Editori riuniti, 1983), p. 69; C. Esposito, *Eguaglianza e giustizia nell'art. 3 della costituzione*, in *La Costituzione italiana. Saggi*, (Padua: Cedam 1954), p. 24 note 19; C. ROSSANO, *L'eguaglianza giuridica nell'ordinamento costituzionale*, (Naples: Jovene, 1966), p. 395 ff.; G. Zagrebelsky, “Questione di legittimit  costituzionale della l. 3 febbraio 1963, n. 69, istitutiva dell'ordine dei giornalisti”, *Giur. cost.*, 1968, pp. 350-351; P. Stancati, “Le libert  civili del non cittadino: attitudine conformativa della legge, assetti irriducibili di garanzia, peculiarit  degli apporti del parametro internazionale”, in *Lo statuto costituzionale del non cittadino*, (Napoli: Jovene 2010), p. 61; A. Pace, *Dai diritti del cittadino ai diritti fondamentali dell'uomo*, (2010), Rivista dell'Associazione Italiana dei Costituzionalisti, [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it); F. Sorrentino, “Uguaglianza e immigrazione”, in (L. Ronchetti ed.) *La Repubblica e le migrazioni*, (Milan: Giuffr  2014), p. 118.

<sup>12</sup> C. Corsi, “Stranieri, diritti sociali e principio di eguaglianza nella giurisprudenza della Corte costituzionale”, (2014) *Federalismi*, 3.



historical/political context in which it originated, it is clear that the principle of equality was meant to apply to non-citizens as well.

The principle of equality was born as a principle that concerns human beings as such, not as citizens; we need only consider art. 1 of the Declaration of the Rights of Man and of the Citizen (*les homes naissent et demeurent libres et ègaux en droits*), similar American declarations (*we hold these truths to be self evident that all men are created equal*<sup>13</sup>; *all men are by nature equally free and independent*<sup>14</sup>), and the 14th amendment to the United States Constitution, which extends *the equal protection of the laws* to all people.<sup>15</sup>

The preparatory drafts of the Constitution show no evidence of any intention to limit protection of the principle of equality to citizens alone and the text adopted by the 1st sub-committee began with the term “men”; the editing committee replaced it with “citizens” and the impression is that the members of the committee, when amending this article, were convinced of “carrying out a simple ‘coordination’ action, aimed solely at eliminating an inconsistency, a break in the continuity of the constitutional fabric”.<sup>16</sup>

Moreover, recognising the entitlement to rights as per art. 2 of the Constitution without any further guarantee of observance of the principle of equality would imply stripping the recognition of the rights themselves of all meaning. Finally, international

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<sup>13</sup> United States Declaration of Independence of 1776.

<sup>14</sup> Virginia *Bill of Rights*.

<sup>15</sup> The provision was interpreted for the first time in 1886 by the Supreme Court, which ruled that “the Fourteenth Amendment to the Constitution is not confined to the protection of citizens... these provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of colour, or nationality”, *Wo Lee v. Hopkins Sheriff*, 118 U.S. 369.

<sup>16</sup> M. Cuniberti, [La cittadinanza. Libertà dell'uomo e libertà del cittadino nella Costituzione italiana](#) (Padova: Cedam 1997), p. 132.

legislation and the Charter of Fundamental Rights of the European Union apply the principle of equality to every human being.

Therefore, the subjective extension of the provision of art. 3 becomes clear in the sense that any rules regarding aliens must undergo an assessment of reasonableness: it would not be possible for lawmakers to discriminate their treatment arbitrarily on the grounds that no guarantee is provided to them under the constitution.

## **2. THE ATTEMPTS OF LAWMAKERS TO GUARANTEE SOME SOCIAL ASSISTANCE BENEFITS ONLY TO NATIONALS**

In recent years, national or regional regulations have been approved which limit certain social assistance benefits only to Italian or European nationals; a regional law of Lombardy, which limited the right to free travel on public transportation to totally disabled persons who were Italian or EU nationals, is well known, as the Constitutional Court was able to express an opinion on its legitimacy (Judgment No. 432/2005). The Court, after emphasising that a provision on free transportation was based on social solidarity, reasonably assuming the conditions of difficulty of residents who, being fully disabled, had lost most or all of their earning capacity, concluded that the provision under discussion conflicted with the principle of equality laid down in art. 3 of the Fundamental Charter. In terms of implementation of the provision at stake, making a distinction on the basis of nationality introduces fully arbitrary elements into the regulatory framework, since there is no reasonable correlation between eligibility for a benefit (Italian or EU nationality) and other specific requirements (100% disability and residency).

A few years later, based on a similar interpretation, in its Decision no. 40 of 2011, the Constitutional Court declared the illegitimacy of the Friuli Venezia Giulia Regional

Law no. 6 of March 31, 2006, which excluded immigrants from the integrated system of social interventions and services.<sup>17</sup>

It is worth mentioning, moreover, the judgment of the Strasbourg Court<sup>18</sup> in *Dhahbi v Italy*,<sup>19</sup> issued upon the application of a Tunisian national legally residing in Italy for work, who had been refused the large family allowance, as he was not of Italian nationality<sup>20</sup>. In this decision the combined provisions of arts 14 and 8 of the ECHR, among other provisions, were considered as having been violated, since there were no objective and reasonable grounds to justify such an unequal treatment. The applicant had been in possession of a lawful residence and work permit in Italy and had been insured with the INPS. He paid contributions to that insurance agency in the same capacity and on the same basis as workers who were European Union nationals. He was not an alien residing in the country for a short period or in breach of the immigration legislation. Hence, he did not belong to the category of persons who, as a rule, do not contribute to the funding of public services and in relation to whom a State may have legitimate reasons for curtailing the use of resource-hungry public services such as social insurance schemes, public benefits and health care. The Court, after finding that the lack of Italian nationality was the one and only reason for denial, deemed as not convincing the arguments in favour of containing public expenditure invoked by the government or however not such as to reasonably justify the different treatment.

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<sup>17</sup> F. Scuto, “Le Regioni e l’accesso ai servizi sociali degli stranieri regolarmente soggiornanti e dei cittadini dell’Unione”, (2013) 1, Diritto, Immigrazione e Cittadinanza, 56 ff,

<sup>18</sup> See also *Gaygusuz v Austria*, 16 September 1996; *Koua Poirrez v France*, no. 40892/98, § 46, ECHR 2003; *Andrejeva v Latvia*, no. 55707/00 §87, ECHR 2009; *Ponomaryovi v Bulgaria*, no. 5335(05) §54, ECHR 2011.

<sup>19</sup> Decision no. 17120/09, § 52-53, ECHR 2014.

<sup>20</sup> When the application was submitted, the benefit was granted to nationals. Only in 2013 it was extended to some categories of aliens (see par. 4).

“As to the ‘budgetary reasons’ advanced by the Government ..., the Court recognises that protection of the State’s budgetary interests constitutes a legitimate aim of the distinction at issue. Nevertheless, that aim cannot by itself justify the difference in treatment complained of. It remains to be determined whether there was a reasonable relationship of proportionality between the above-mentioned legitimate aim and the means employed in the present case. The Court points out in that connection that the national authorities’ refusal to grant the family allowance to the applicant was based solely on the fact that he was not a national of a European Union Member State. It is not disputed that a citizen of such a State in the same position as the applicant would receive the allowance in question. Nationality was therefore the sole criterion for the distinction complained of. However, the Court reiterates that very weighty reasons would have to be put forward before it could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention .... In these circumstances, and notwithstanding the wide margin of appreciation left to the national authorities in the field of social security, the arguments submitted by the Government are not sufficient to satisfy the Court that there was a reasonable relationship of proportionality in the instant case that would render the impugned distinction compatible with the requirements of art. 14 of the Convention”.

I shall note, finally, that lawmakers have intervened only recently to modify national regulations limiting access to certain social assistance benefits strictly to Italian or European Union citizens (the large family allowance for families with at least three children,<sup>21</sup> the social card; see par. 4).

However, taking for granted the abstract eligibility of aliens for social benefits, the legislation governing social benefits for non-nationals and the concrete identification of

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<sup>21</sup> However, on the basis of Directive 2004/83/EC and the Legislative Decree transposing it into Italian law, the INPS (Italian Social Security Institute) recognised that aliens having refugee status or subsidiary protection had the right to *de quo* benefits and services; see Circular no. 9 of January 22, 2010.

beneficiaries are very sensitive matters. Though an alien who is at the border of or within the State territory always enjoys basic civil rights and freedoms, social rights presume a “bond” with the community, which it is up to the lawmaker to indicate and which varies according to the social benefit at stake. As also pointed out by the Constitutional Court, lawmakers can not unreasonably, make the provision of certain services subject to the fact that the alien’s residence permit shows that his or her stay is not sporadic.

It is evident that this is a very delicate task, because it is up to either State or regional lawmakers to concretely identify on what basis aliens may be entitled to enjoy certain benefits. As affirmed by the Court, choices linked to the identification of categories of beneficiaries – necessarily to be restricted to those having limited financial resources – must always in any case be made in accordance with the principle of reasonableness, so that lawmakers may introduce differentiated regimes in respect of the treatment to be given to individuals only in the presence of a regulatory “cause” which is not clearly irrational, or worse, arbitrary.<sup>22</sup>

### **3. THE IDENTIFICATION OF CATEGORIES OF BENEFICIARIES BY LAWMAKERS AND THE CASE LAW OF THE CONSTITUTIONAL COURT**

While the Consolidation Act of 1998 (art. 41) provided that legal aliens who have had a residence permit for at least one year are entitled to social assistance benefits, also of an economic nature, the 2001 Finance Act drastically reduced the scope of the provision, since it established that economic benefits would be granted only to aliens having a permanent residence permit (currently an EC residence permit for long-term residents),

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<sup>22</sup> Decision no. 308/2008.

which, as is well known, may be issued to a foreign national who has resided legally in Italy for at least five years and has disposable income that is equal to at least the amount of the yearly social allowance and suitable housing.

The economic reasons underlying this choice on the part of the lawmaker were obvious, but also immediately evident was the difference in treatment for aliens who, despite legally residing in Italy, did not have an open-ended residence permit. And it was equally evident that there would be soon a dispute before the Constitutional Court.

The Court has in fact been repeatedly asked to rule on this provision, in relation to different economic benefits. It has always ruled in favour of the applicant, and it is worth dwelling on the reasons of each decision, as they highlight different aspects of the issue.

With the first two decisions (no. 306 of 2008 and no. 11 of 2009), the Court noted an intrinsic unreasonableness of the rules making welfare benefits such as the attendance allowance and disability pension – which also presuppose an economic disadvantage – subject to a permanent residence permit that can be obtained only by a person having a sufficient income. With its subsequent decisions no. 187 of 2010 and no. 329 of 2011, respectively regarding the monthly disability allowance and attendance allowance for disabled minors, the Court pointed out an unreasonably different treatment of legal aliens who were supposed to have resided in Italy for at least five years in order to obtain the residence permit allowing them to access the benefit.<sup>23</sup> The Court, while stating that it was acceptable to subject the granting of certain benefits to a residence permit demonstrating a non-sporadic stay of the alien, was of the opinion that requiring a five-year minimum

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<sup>23</sup> In stating the reasons for these judgments, the Constitutional Court also made reference to the case law of the ECtHR concerning the principle of non-discrimination in respect of social benefits, based on which a difference in treatment is discriminatory if there is no reasonable, objective justification, i.e. if the aim pursued is not legitimate or if there is a disproportion between the means employed and the objective it is desired to achieve; consequently, only on the basis of very weighty considerations could a difference in treatment founded exclusively on nationality be judged compatible with the Convention.

period of residence was discriminatory against the alien, and thus denied the latter's right to have primary needs met.<sup>24</sup>

Some regional lawmakers have also resorted to the requirement of having a permanent residence permit in order to limit access to certain welfare benefits. Once again the Court<sup>25</sup> confirmed that the distinction was an arbitrary one, since there was no reasonable correlation between the requirements for the access of non-EU citizens to the welfare benefits at stake and situations of need or disadvantage, which refer directly to the individual as such and are the basis for granting social benefits.

In fact, it is not possible to assume a priori that non-self-sufficient aliens having an EC residence permit for long-term residents – being already previously present in Italy on the basis of their over five-year residence permit – are in a greater state of need or of disadvantage than other aliens who, although also legally present in Italy, do not have a long-term permit.

Another requirement which both national<sup>26</sup> and regional lawmakers introduced to limit aliens' access to certain social assistance benefits was that the alien had to be legally residing in Italy or in a regional territory for a certain number of years; in some cases it was established as a requirement which applied only to aliens, while in others it affected both

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<sup>24</sup> See also Decision no. 22 of 27/02/2015 concerning the pension for the visually impaired and Decision no. 230 of 7 October 2015, referring to the civil invalidity pension for the deaf and the communication allowance. Cf. A. Ciervo, "La sentenza n. 22/2015 della Corte costituzionale in materia di prestazioni assistenziali a favore degli stranieri extracomunitari. Cronaca di una dichiarazione di incostituzionalità", (2015) 2 *Federalismi*.

<sup>25</sup> Constitutional Court Decisions no. 4 of 18 January 2013 and no. 172 of 4 July 2013.

<sup>26</sup> Italian nationals and aliens alike must have legally and uninterruptedly resided in Italy for at least 10 years in order to obtain a social security allowance (an economic benefit for people over 65 who are in a state of economic hardship). See art. 20(10) of Law Decree no. 112 of 25 June 2008 converted with subsequent amendments of Law no. 133 of 6 August 2008.

nationals and non-nationals, but it is clear that it was a condition more easily met by Italian nationals, to such an extent that the regulations in question have resulted in significant constitutional litigation.

In an appeal against a Lombardy regional law requiring as a condition for the assignment of public housing that “the applicants must have resided or worked for at least five years during the period immediately preceding the date of application”, the Court adopted a debatable ruling (no. 32 of 2008) which rejected the claim of unconstitutionality.<sup>27</sup> It deemed the allegation of a violation of art. 3 of the Constitution to be groundless, as the uninterrupted residence requirement for the grant was not unreasonable and was in line with the aims that the lawmaker intended to pursue, thus ensuring a balance between the constitutional values at stake.

In more recent decisions the orientation of the Court has appeared inconsistent.

In its Decisions no. 40/2011, no. 2/2013, no. 133/2013 and no. 172/2013 (which concerned regional laws), the Court came to the conclusion that the provisions establishing a predetermined period of residence as a requirement introduced an arbitrary distinction in the regulatory framework, since there is no reasonable correlation between the duration of residence and situations of need or disadvantage that are at the basis of the entitlement to the benefits concerned: it is not possible to presume that those who have resided in an area for only a few years are less needy than someone who has resided there for an extended period.

After these four decisions, the orientation of the Court might have seemed clear, but it adopted an apparently different argumentation in the subsequent Decision no. 222 of

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<sup>27</sup> Cf. C. Corsi, “Il diritto all’abitazione è ancora un diritto costituzionalmente garantito anche agli stranieri?”, (2008) 3-4 Diritto, immigrazione e cittadinanza, 141-148.



19 July 2013 concerning a Friuli Venezia Giulia law of 2011;<sup>28</sup> although in relation to some benefits (such as the possibility of benefiting from a regional fund set up to “contrast the phenomena of poverty and social disadvantage” or the entitlement to a study allowance) it reiterated the unreasonableness of making the benefits subject to a period of twenty-four months of residence in the region, the Court came to a different conclusion for other social benefits.

With regards to the “baby bonus” (child allowance), having noted that it was a measure intended to favour births, the Court held that “it is not openly unreasonable that lawmakers addressed precisely those social groups that are not only in the area, but have already shown over time that they plan to live there on a permanent basis, so that they can be supported on a regional level”.

Concerning the provisions on rental housing, family income support, the enjoyment of goods and services, and possible tax reductions with the so-called “Family Card” or vouchers, the Court observed that “the lawmaker aimed to enhance the household’s contribution to the community with measures exceeding the basic level of benefits, so it is not openly unreasonable to target efforts in favour of households that have been active and vital community members for some time” [twenty-four months]. Also in regard to subsidised housing and subsidised leases, the Court, after recalling its Decision no. 32 of 2008 (see above), pointed out that social policies of regional governments “may well consider an additional local presence beyond residence alone, provided it is kept

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<sup>28</sup> With regional law no. 16 of 30 November 2011, introducing modifications “as to the access to social and personal benefits”, the FVG Region again made many benefits subject to the requirement of having resided for at least twenty-four months in the Region and in the case of legal aliens of having resided at least five years in Italy too. As for the requirement that regarded only aliens who had resided in Italy for at least five years, the Court reiterated its discriminatory nature due to the disproportionate importance attributed to the residency requirement, also making reference to the Decisions no. 40/2011, no. 2/2013, and no. 133/2013. However, the Court has taken a different stance in relation to the requirement (which applies to all foreign nationals and Italian citizens alike) of two years of residency in the regional territory.

within not openly arbitrary nor unreasonable limits. Access to an asset of paramount importance and of long-lasting enjoyment, such as housing, on the one hand, comes at the conclusion of the process of integration of an individual into the local community and, on the other hand, may require guarantees of stability, which, in the allocation of public rental housing, serve to prevent an excessive turnover of renters from undermining administrative action and reducing its effectiveness”.<sup>29</sup>

It is finally worth mentioning Constitutional Court Decision no. 141 of 19.5.2014 regarding the Campania regional law no. 4 of 15.3.2011, which restricted the “baby bonus” to families that had been residing in the region for at least two years; the Court rejected the claim of unconstitutionality as “the regional provision was not unreasonable, as it limited itself to encouraging the birth rate in relation to the permanent presence of the family in the area, without giving rise to additional selective criteria as to situations of need or disadvantage, which do not tolerate discriminations”.

It seems evident that the Court’s position when it comes to allowing lawmakers to introduce requirements for accessing social benefits linked to long-term residence in a given territory is not yet well defined: though in some cases the Court finds treatments to be discriminatory due to unreasonable requirements, in others it does not consider it unreasonable to give preferential treatment to those who have resided in the territory for a certain number of years. Actually, I do not think it is possible to detect any difference in the type of benefits such as to justify a different approach: for example, in its Decision no. 222 of 2013, the Court considered restricting access to the regional fund set up to “contrast poverty and social disadvantage” or the entitlement to a study allowance to aliens who had been residing in the regional territory for at least twenty-four months to be discriminatory.

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<sup>29</sup>On the problems related to the extended residency requirement for access to housing, see P. Bonetti, “Il diritto all’abitazione”, in G. Caggiano (ed.) *I percorsi giuridici per l’integrazione*, (Turin: Giappichelli 2014), 570 ff. See also F. Pallante, “Gli stranieri di fronte al diritto all’abitazione” in A. Giorgis, E. Grosso, M. Losana (eds) *Diritti uguali per tutti?* (Milan: FrancoAngeli, 2017); F. Dinelli, *Le appartenenze territoriali*, (Naples: Jovene 2011), p. 213; E. Olivito, *Il diritto costituzionale all’abitare*, (Naples: Jovene, 2017).

However, in the same decision the Court held that it falls within the legitimate discretion of lawmakers to make access to child or housing allowances subject to the same requirement.

#### **4. THE PERSISTENCE OF ILLEGITIMATE PROVISIONS IN EXISTING LEGISLATION**

Despite the aforementioned multiple decisions of the Court, the body of State laws still includes cases in which access to social assistance benefits is limited to those who have resided in Italy for a certain number of years or are holders of permanent residence permits.

The social security allowance for people over 65 who are in a state of economic hardship is paid only to Italian nationals and aliens who have legally and uninterruptedly resided in Italy for at least 10 years (see above note 24). Although the long-term residence requirement formally applies to everyone, it is obvious that it will be harder to meet for foreign nationals.

The 2000 Finance Act<sup>30</sup> provides that the maternity allowance paid by the State, as well as the maternity allowance granted by municipalities to women who do not benefit from social security benefits, may be granted only to resident women – Italian or EU citizens or women having an EC residence permit for long-term residents.

Recently, certain provisions of law which used to guarantee certain social assistance benefits only to Italian or European Union citizens were amended, thus extending access to aliens having a permanent residence permit: under the European Law of

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<sup>30</sup> Arts. 49(8) and (12), Law no. 488 of 23 Dec. 1999. See more recently Art. 74, Legislative Decree no. 151 of 26 March 2001.

2013,<sup>31</sup> the large family allowance for families with at least three children<sup>32</sup> was extended to third-country nationals having an EC residence permit for long-term residents, as well as to family members (of European nationals) who are not nationals of a member State but had permanent residence status in Italy. Based on Directive 2004/83/EC and the legislative decree transposing it into Italian law, the INPS (Italian Social Security Institute) has recognised, however, that aliens receiving refugee status or subsidiary protection also have the right to this benefit.<sup>33</sup>

Even the new “social card” regulation, which in its original version guaranteed only Italian nationals,<sup>34</sup> now provides that both Italian and European nationals and their family members, as well as aliens having an EC residence permit for long-term residents and political refugees or beneficiaries of subsidiary protection can be entitled to this benefit (art. 1(216), Law no. 147 of 27.12.2013).

A similar approach was adopted in the 2015<sup>35</sup> stability law that introduced the “baby bonus”, including as beneficiaries, in addition to Italian and EU citizens, aliens having a residence permit for long-term residents. In this case as well, however, the INPS has recognised that aliens receiving refugee status or subsidiary protection have the right to this benefit.<sup>36</sup>

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<sup>31</sup> Art. 13, Law no. 97 of 6 August 2013.

<sup>32</sup> Art. 65, Law no. 448/1998.

<sup>33</sup> See Circular no. 9 of 22 January 2010.

<sup>34</sup> The social card was introduced by Law Decree no. 112 of 25 June 2008, converted into Law no. 133 of 6 August 2008 (art. 81(32)) and in its original version it was guaranteed only to Italian nationals.

<sup>35</sup> Law no. 190 of 23 December 2014, art. 3(125): “In order to encourage births, a monthly check for a total yearly amount of € 960 shall be paid for each child born or adopted between 1 January 2015 and 31 December 2017, starting from the month of birth or adoption”.

<sup>36</sup> See Circular no. 93 of 8 May 2015.

Despite these amendments, which finally transposed Directive 2003/109/EC (concerning long-term residents) and Directive 2011/95/EU (concerning beneficiaries of international protection), Italian law continues to show points in conflict with the constitutional framework, the case law of the Court of Justice and the European directive on the single permit.

As for the latter, Directive 2011/98/EU “on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State” provides (art. 12) that third-country workers “shall enjoy equal treatment” with nationals of the Member State where they reside with regard to branches of social security, as defined in Regulation (EC) No 883/2004. But, as is well known, the question of the extension of the European notion of social security to social assistance benefits is controversial, since, on the one hand, the provisions of the Regulation (EC) No 883/2004 do not apply to social assistance,<sup>37</sup> but, on the other hand, the Regulation includes certain benefits (considered social assistance under Italian law) among the branches of social security.<sup>38</sup>

#### ***4.1. The case law of ordinary courts***

In recent years, given this legislative and jurisprudential framework, ordinary courts have been playing an important role on the issues at stake and it is worth mentioning

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<sup>37</sup> See art. 3(5), Reg. (EC) No 883/2004.

<sup>38</sup> The measures of social assistance include the benefits falling under art. 38(1) Const. (“All citizens unable to work and lacking the resources necessary for their livelihood are entitled to private and social assistance”); the social security measures include the benefits falling under art. 38(2) Const. (“Workers are entitled to adequate insurance for their needs in case of accident, illness, disability, old age, and involuntary unemployment”). See Constitutional Court Decision no. 31 of 5 February 1986.

some recent decisions which have reaffirmed the discriminatory character of the aforementioned legislative provisions.<sup>39</sup>

As regards the maternity allowance<sup>40</sup>, the Court of Bergamo<sup>41</sup> and the Court of Reggio Calabria<sup>42</sup> raised a question regarding the constitutionality of art. 74 of Law no. 151/2001, where it makes the entitlement to maternity benefits subject to possession of a long-term residence permit, in violation, according to the referring courts, of both constitutional and supranational legislation (art. 14 and first additional protocol to the ECHR; art.21 of the Charter of Fundamental Rights of the European Union and art. 6 TEU). In its Ruling no. 95 of 4 May 2017, the Constitutional Court declared the question to be inadmissible, as the referring courts had not duly evaluated whether European Union legislation was directly applicable, in particular art. 12 of Directive 2011/98/EU. Indeed, as the Court had clarified on a number of occasions, the referring court must expressly specify the reasons precluding the disapplication of domestic law in conflict with EU law, and which would thus make the Court's intervention necessary.

Unlike the courts of Bergamo and Reggio Calabria, other ordinary courts, similarly in reference to the *maternity allowance*, ruled that art. 12 Dir. 2011/98/EU must be considered a Community provision directly applicable in the national legal system, given its clear, precise and unconditional content. Therefore, from the direct applicability of art. 12 and the conflict with the domestic provision (art. 74 of Legislative Decree no. 151/2001) which limits the right to a maternity allowance to aliens with a long-term residence permit,

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<sup>39</sup> Cf. *Senza distinzioni. Quattro anni di contrasto alle discriminazioni istituzionali nel Nord Italia* edited by A. Guariso (Milano: Associazione avvocati per niente 2012).

<sup>40</sup> Art. 74, Law 26 March 2001, no. 151.

<sup>41</sup> Court of Bergamo, (ruling of 26 November 2015, available at <https://www.asgi.it/banca-dati/tribunale-di-bergamo-ordinanza-del-26-novembre-2015>).

<sup>42</sup> Court of Reggio Calabria (ruling of 30 March 2015, available at <http://www.asgi.it/banca-dati/23375/>).

it follows that the latter must necessarily be disapplied in view of the superordinate character of Community law vis-à-vis national legislation.<sup>43</sup> Consequently, the denials, on the part of municipal governments, of a *maternity* allowance to foreigners in possession of a residence permit for family reasons were declared *illegitimate*.<sup>44</sup>

As regards the so-called “baby bonus”,<sup>45</sup> several decisions of ordinary courts have affirmed the discriminatory character of the denial of the benefit to legal aliens who have a single permit or a residence permit for family reasons, as art. 125 of Law no. 190/2014 is in contradiction with Directive 2011/98/EU, which aims to guarantee equal treatment to third-country workers with regard to branches of social security, as defined in Regulation (EC) No 883/2004. The deadline for the transposition of Directive 2011/98/EU expired in December 2013 and the provision of art. 12 (which had not been transposed by Legislative Decree 40/14<sup>46</sup>), is precise, clear and unconditional, so it does not call for additional measures and it can have direct effect. Furthermore, the obligation to disapply national provisions contrasting with European directives lies not only with judges, but also with public authorities and agencies, thus also with the INPS (Italian Social Security Institute), and the benefit at stake, although it is considered a form of social assistance under Italian

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<sup>43</sup> Although the benefit at stake is a form of social assistance, it falls in the branch of social security as it concerns maternity benefits, which are mentioned by art. 3 Reg. (EC) No. 883/2004.

<sup>44</sup> Court of Bari, Ruling of 20.12.2016 ([http://www.asgi.it/wp-content/uploads/2016/12/ordinanza\\_tribunale\\_di\\_bari\\_maternit%C3%A0-74.pdf](http://www.asgi.it/wp-content/uploads/2016/12/ordinanza_tribunale_di_bari_maternit%C3%A0-74.pdf)). See also Court of Brescia, Ruling of 23.8.2016.

<sup>45</sup> Art. 1 (125), Law no. 190 of 23 December 2014: “In order to encourage births, a monthly check for a total yearly amount of € 960 shall be paid for each child born or adopted between 1 January 2015 and 31 December 2017, starting from the month of birth or adoption”.

<sup>46</sup> Legislative Decree no. 40 of 4.3.2014, which transposed Directive 2011/98/EU, says nothing about the question of the enjoyment of social security benefits. See A. Guariso, *Direttiva 2011/98 e d.lgs. 40/2014 di recepimento*, *Diritto Imm e citt.*, 23 ff. 1 (2015).

law, falls in one of the branches of social security as it concerns “family benefits”, which are explicitly mentioned in art. 3 of Regulation (EC) No. 883/2004<sup>47</sup>.

As the Court of Milan has ruled,<sup>48</sup> according to the case law of the Court of Justice, family allowances are intended as a form of help for workers with family burdens, where the burden is shared by the community (judgments of 4.7.1985, *Krombout*, C-104/84 and 19.9.2013, *Hliddale Bornard* C-216/12 and C.217/12) and, moreover, the distinction between benefits included in or excluded from the branches of social security is essentially based on the elements making up each benefit, not on whether it is defined as a social security benefit by national legislation (judgment of 24.10.2013 *Caisse nationale des prestations familiales* C-177/12); consequently, the legal mechanism a Member State relies on to implement the benefit has no relevance for the purpose of qualifying the latter as social protection.

The Court of Modena also highlighted that there is no overlap between the Community and national concepts of social security; the Community concept of social security must be evaluated in light of Community legislation and case law, so that a benefit attributed to the beneficiaries irrespective of any individual and discretionary assessment of their personal needs, based on a legally defined situation associated with one of the risks listed in art. 4(1) of Regulation No. 1408/71 must be considered as social security. Therefore, the notion of social security that has developed in the Community framework – and in light of which the aforementioned art. 12 must be interpreted – should thus be

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<sup>47</sup>See Court of Como, Ruling of 30 July 2016 (<http://www.asgi.it/banca-dati/tribunale-como-sez-ii-ordinanza-del-30-luglio-2016/>). See Brescia Court of Appeal Ruling of 30.11.2016 (<http://www.asgi.it/banca-dati/corte-dappello-brescia-sentenza-del-30-novembre-2016/>) and Court of Alessandria Ruling of 19.4.2017 (<http://www.asgi.it/banca-dati/tribunale-alessandria-ordinanza-del-19-aprile-2017/>).

<sup>48</sup> Court of Milan, Ruling 2 May 2017 (<http://www.asgi.it/banca-dati/tribunale-milano-ordinanza-del-2-maggio-2017/>). Cf. Court of Treviso Ruling of 29 March 2017 (<http://www.asgi.it/banca-dati/tribunale-treviso-ordinanza-del-29-marzo-2017/>).



considered to embrace the benefits defined as social assistance under Italian law.<sup>49</sup> That being said, the “baby bonus” is ascribable to the branches of social security as defined by Regulation (EC) No. 883/2004 and in particular to family benefits as per art. 3 (j) of said regulation;<sup>50</sup> consequently, Law no. 190/2014 is in conflict with art. 12 of Directive 2011/98/EU and must be disapplied.<sup>51</sup>

For the sake of completeness, mention should be made of a ruling issued by the Court of Milan,<sup>52</sup> which adopted a different interpretation: it observed first of all that the benefit is a form of assistance, since it is provided irrespective of any insurance relationship, and thus falls within the scope of art. 38(1) of the Constitution. Furthermore, art. 1(125) of Law no. 190/14 does not introduce any elements of discrimination, but rather establishes a selective criterion (namely, the requirement that the alien be in possession of a long-term residence permit) that is not unreasonable or arbitrary, also (and above all) considering that such a selection criterion is accepted at the level of European legislation: art. 11 of Directive 2003/19/EC (concerning the status of third-country nationals who are

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<sup>49</sup>Court of Modena, Ruling of 30.9.2016 (<http://www.asgi.it/banca-dati/tribunale-modena-sez-lavoro-ordinanza-del-30-settembre-2016/>).

<sup>50</sup> See Brescia Court of Appeal judgment no. 444 of 30.11.2016: from an objective standpoint, the “baby bonus”, “despite being a form of assistance according to a distinction made by Italian law, falls in the branch of social security as defined in the Community regulation referenced by the Directive, because it is aimed at economically protecting maternity and paternity, in a continuous manner until the child has reached three years of age, and is paid automatically and not discretionally where the established income requirements are met.” (<http://www.asgi.it/banca-dati/corte-dappello-brescia-sentenza-del-30-novembre-2016/>). See more recently Milan Court of Appeal, Judgment no. 1003 of 29 5 2017 (<http://www.asgi.it/banca-dati/corte-dappello-milano-sentenza-29-maggio-2017/>).

<sup>51</sup> See also Court of Milan, Ruling of 12.5.2017 (<http://www.asgi.it/banca-dati/tribunale-milano-ordinanza-del-2-maggio-2017/>).

<sup>52</sup> Court of Milan, Decision of 13.10.2016 (<http://www.cgil.lombardia.it/wp-content/uploads/2016/11/sentenza-milano-13-10-2016.pdf>).

long-term residents) envisages, under the heading of equal treatment, the possibility for Member States to limit equal treatment in respect of social assistance and social protection to essential benefits only. In the view of the Court of Milan, it is moreover evident that, based on art. 3(5) of Regulation (EC) 883/2004, social assistance benefits are excluded from the scope of application of the regulation itself. Finally, should the benefit in question be deemed to fall within the category of family benefits mentioned in art. 3(1) of Regulation (EC) 883/2004, on the basis of Recitals 19, 24 and 26 of Directive 2011/98/EU, Member States may be considered to have a margin of appreciation when it comes to equal treatment for foreign workers in respect of social benefits.

As regards the large family allowance for families having at least three children<sup>53</sup>, the Genoa Court of Appeal<sup>54</sup> presented a prejudicial question to the Court of Justice of the European Union to verify

“whether a benefit such as the one provided for under art. 65 of Law no. 448/1998, called ‘allowance for nuclear families with at least three underage children’, constitutes a family benefit within the meaning of art. 3(1)(j) of Regulation (EC) No. 883/2004. And if so, whether the principle of equal treatment enshrined in art. 12(1)(e) of Directive 2011/98/EU precludes legislation such as the Italian legislation whereby third-country workers in possession of a ‘single permit to work’ (having a period of validity exceeding six months) may not benefit from the aforesaid ‘allowance for nuclear families with at least

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<sup>53</sup> It may be worth pointing out that the Court of Ivrea, in a ruling handed down on 25 July 2014, had considered the refusal to grant the allowance for nuclear families with at least three underage children to a worker holding a residence permit for work purposes to be discriminatory. Making reference to the case law of the Constitutional Court and judging that raising the issue of constitutionality was not warranted, it ruled that the claimant was entitled to the allowance on the basis of a constitutionally oriented interpretation of art. 65 of Law no. 448/1998, which is moreover consistent with ECtHR case law (*Dahbi case*).

<sup>54</sup> Genoa Court of Appeal, Ruling of 1 August 2016 (<http://www.asgi.it/notizia/la-corte-appello-genova-rinvia-alla-corte-giustizia-merito-allassegno-nuclei-famigliari-numerosi>).

three underage children’ despite having three or more underage children living with them and earning incomes below the legal minimum”.

With the judgement C-449/16, 21 June 2017 the Court of Justice has reaffirmed that the method by which a benefit is financed, in particular the fact that its grant is not subject to any contribution requirement, is immaterial for its classification as a social security benefit. And as regards the benefit at issue, it is granted without any individual and discretionary assessment of the claimant’s personal needs, on the basis of a legally defined situation. Secondly, it consists in a sum of money paid to those recipients each year in order to meet family expenses. Therefore it is a social security benefit included among the family benefits referred to in art. 3(1)(j) of Regulation No 883/2004 and the art. 12 of Directive 2011/98/EU on a single application procedure must be interpreted as precluding national legislation under which a third-country national holding a single permit cannot receive a benefit such as the benefit for households having at least three minor children.

#### ***4.2. The illegitimacy of the latest administrative regulations***

The most recent Finance Act introduced an additional child benefit (*“birth bonus”*), providing that “As of 1 January 2017 an 800 euro bonus shall be awarded for the birth or adoption of a child. The bonus .... shall be paid by the INPS in a lump sum, at the request of the future mother, on completion of the seventh month of pregnancy or at the time of adoption”.<sup>55</sup> Although the legislative provision – finally – did not impose any restrictive requirements (in terms either of citizenship or type of residence permit) on legally residing aliens, in a circular issued on 28.4.2017, the INPS specified that non-EU citizens in possession of a residence permit valid for the purpose of obtaining the “baby bonus” as per Law 190/2014 will be eligible to receive the benefit. This means that Italian or EU nationals (and their family members), aliens receiving refugee status or subsidiary

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<sup>55</sup> Art. 1(353) of Law no. 232 of 11 December 2016.

protection, and aliens with a long-term residence permit will be entitled to the benefit. The decision of the INPS to introduce the aforesaid limitations seems truly incomprehensible given that legislation has finally been passed which does not set any requirements tied to the type of residence permit and appears to be clearly in conflict with the prevailing case law, which has on many occasions emphasised the discriminatory nature of such requirements. The circular's reference to the requirements of Law no. 190/2014, which many courts have declared to be in conflict with European law, is likewise beyond comprehension.

Similar problems are posed by the decree of the President of the Council of Ministers (issued on 17.2.2017) implementing the provision of the “stability law” for 2017,<sup>56</sup> which provided for a bonus to be paid for children born on or after 1 January 2016 and the payment of public and private day nursery costs, as well as the introduction of forms of in-home support for children under three years of age with severe chronic illnesses. Whereas the legislative provision does not set any limitations against foreigners, art. 1 of the decree establishes that the applicant must not only reside in Italy, but also be an Italian or EU citizen and if a non-EU citizen, the applicant must be in possession of a long-term residence permit.

A more complex issue concerns a further measure to combat poverty (“support for active inclusion”),<sup>57</sup> which consists in a credit card (“SIA” card) enabling the holder to purchase basic necessities and is essentially an extension of the shopping card previously introduced in 2008.<sup>58</sup>

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<sup>56</sup> Art. 1(355) of Law no. 232 of 11 December 2016.

<sup>57</sup> See art. 1 (386) and (387)(a), Law no. 208 of 28 December 2015.

<sup>58</sup> See *supra* par. 4.

The ministerial decree<sup>59</sup> introducing this benefit restricted it to Italian or EU nationals (and their family members) and aliens with a long-term residence permit. On the one hand, aliens receiving refugee status or subsidiary protection are incomprehensibly and illegitimately excluded,<sup>60</sup> whilst on the other hand holders of a single residence permit continue to be excluded. As regards the latter, we again see the same problems previously illustrated in relation to compliance with principles enshrined in the Italian constitution and in the ECHR. Doubtful is instead the assumption that this benefit belongs to the categories listed in art. 3(1) of Regulation (EC) 883/2004, which does not make mention of measures to combat poverty. However, if we analyse the terms of the SIA card in greater detail, it emerges that it can be issued only on condition that the beneficiary's household includes at least one member less than 18 years old or a disabled person or a pregnant woman. This might be grounds for including the SIA card among the family benefits which, according to art. 1 (z) of Regulation (EC) No. 883/2004, regard "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances".

What is striking is how administrative authorities and agencies continue to set requirements that the courts have consistently declared to be illegitimate and their perseverance in doing so also arouses some concern, as if it were a signal that the road to equality is still a very long one.

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<sup>59</sup> Ministerial decree of 26 May 2016, as amended by the decree issued on 16.3.2017.

<sup>60</sup> The bizarre nature of this exclusion is conspicuously evident, all the more so given that that legislation on the shopping card also applies to aliens receiving refugee status or subsidiary protection. It should nonetheless be pointed out that although the INPS circular no. 133 of 19 July 2016 did not make any correction, the forms downloadable from the INPS website include aliens entitled to international protection among the eligible beneficiaries.

## 5. SOME CONCLUDING REMARKS

As has been pointed out<sup>61</sup>, we are witnessing a sort of conflict, not so much between politics and the judiciary, but rather between politics and law and what is most striking is that all levels of government (national and regional legislators, the government, administrative authorities) have implemented policies aimed at differentiating the treatment of aliens in respect of the enjoyment of social benefits.

Economic concerns are evident and have been repeatedly voiced also in arguments of defence; I shall mention, for example, the defence of the provincial authority of Bolzano in the proceedings before the Constitutional Court on the provincial law regarding the social integration of foreign nationals, which required a minimum period of five years of uninterrupted residence in the provincial territory in order to access benefits of an economic nature. The defence underscored that the long-term residence requirement introduced a progressive mechanism, imposed by the need to save on costs to comply with State measures aimed at containing public spending, but the Court<sup>62</sup> reiterated that it was not relevant whether a certain requirement had been introduced due to savings needs tied to the decrease in available funds resulting from State measures to contain public spending, because the choices connected to the identification of the beneficiaries must always be made in observance of the principle of equality.<sup>63</sup>

In proceedings before the Court on art. 80(19), in relation to an attendance allowance and disability pension, the INPS similarly observed that art. 80(19) had introduced limits connected to public finance needs: which gave the legislation a

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<sup>61</sup> A. Guariso, *Introduzione*, in *Senza distinzioni. Quattro anni di contrasto alle discriminazioni istituzionali nel Nord Italia* (Milano: Associazione avvocati per niente 2012).

<sup>62</sup> Decision no. 2 of 18 January 2013.

<sup>63</sup> See also Decision no. 222 of 19 July 2013.

constitutionally relevant dimension. Moreover, in proceedings related to pensions for the visually impaired, it stressed that art. 80(19), included in the 2001 Finance Act, was also clearly aimed at balancing the provision of benefits with needs connected to the limited availability of financial resources and to address, albeit implicitly, the need to ensure a balanced budget<sup>64</sup>, but the Court did not take the arguments of the INPS into consideration either.

Finally, in its defence before the Strasbourg Court (*Dhahbi* case), the Italian government stressed that the benefit had been denied to the applicant for financial, rather than discriminatory reasons, but the Court reiterated that although States are allowed a wide margin of appreciation in deciding economic or social measures of a general character, only very weighty considerations could induce it to regard a difference in treatment exclusively based on nationality as compatible with the Convention.

It is evident that an important political game is being played out on this issue, and it also involves the model of integration<sup>65</sup> that it is intended to adopt and the interpretation that is given to the principle of equality. Defining the individuals who may take part in a community founded on solidarity is a complex and delicate operation, but if we lose sight of the fundamental principles of a democratic social system and create forms of “institutional discrimination”, the negative impact will be felt not only by the individuals

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<sup>64</sup> As has been pointed out (A. Ciervo, “La sentenza n. 22/2015 della Corte costituzionale in materia di prestazioni assistenziali a favore degli stranieri extracomunitari. Cronaca di una dichiarazione di incostituzionalità”, (2015) 2 *Federalismi*), this argument, though not accepted by the Court, has proven to be an insidious one, also in view of the 2012 amendment to art. 81 of the Italian Constitution, which introduced the principle of a balanced budget. The references to “a constitutionally relevant dimension” of art. 80(19) and the need to ensure a balanced budget can be understood in this light.

<sup>65</sup> *Cross-Border Welfare State, Immigration, Social Security and Integration*, edited by G. Vonk (Cambridge: Intersentia 2012).

who are excluded from a network of solidarity for various reasons, but by the community as a whole.

There is no doubt that certain choices of State and regional legislators are the result of political orientations and are intended to harm and discriminate against aliens, and that although balancing the budget is a legitimate aim, it is the weakest individuals who end up being most affected by the measures to contain public expenditure.<sup>66</sup> The political exploitation of the migratory phenomenon on the part of those who are riding the wave of fear and mistrust of a segment of public opinion appears senseless, as it risks undermining a process of integration and consolidation of a community that goes beyond nationalities.

It should be noted that the judiciary as a whole, by contrast, has firmly reaffirmed the inviolability of several fundamental principles: it is in fact not only a matter of defending certain categories of individuals from arbitrary discrimination, but also of reaffirming the rule of law and the pillars of a democratic state. However, as has been pointed out, an improper role of cultural resistance cannot be permanently entrusted to the judiciary. The political class should again take on the promotional and emancipatory function that is supposed to characterise it.<sup>67</sup>

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<sup>66</sup> The perseverance of lawmakers and administrative authorities in demanding the fulfilment of requirements that courts have declared to be illegitimate can also be explained by the fact that legal action is taken against the denial of benefits in a relatively small percentage of cases. For a foreigner, perhaps in financial difficulty, applying to a court might not always be such an obvious course to take.

<sup>67</sup> E. Grosso, "Introduzione", in A. Giorgis, E. Grosso, M. Losana (eds), *Diritti uguali per tutti?*, (Milan: FrancoAngeli, 2017), p. 12 ff.