

Migrants and Welfare between Social Rights and Status Issues in Italy

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1. MIGRANTS AND SOCIAL SECURITY BENEFITS: DEFINITORY PROBLEMS

The recognition of social rights to foreigners is a fundamental condition for the success of the migrants integration policies within the national territory (Chiaromonte, 2013, 205; Sciarra, Chiaromonte 2014, 121; Chiaromonte 2016, 117). Current scenarios, however, reveal many crisis signs relating to this initial assumption attributable to many factors, but especially to the cramped spaces in which the principle of solidarity is confined in the context of the national and European immigration policies (for a critical analysis see Calafà 2012, 64).

Faced with such numerically relevant and emotionally painful phenomena as can be observed in recent years it is necessary to reflect on the importance of solidarity instruments and related financial allocations to support them (Sciarra 2016, 2; Apostoli 2016, 14). And yet in the management of the financial crisis as in the managing of the migration emergency this perspective is ancillary at national and intergovernmental level despite the fact that in recent solemn occasions this issue has been crucial¹. Next to this (non-) perspective, the analysis of

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¹ See, in particular, the first speech on the state of the EU held by J.C. Juncker, President of the European Commission, of 9 September 2015, at www.europarl.it/it/succede__pe/news__2015/

migration phenomena and the consequent policy choices seem to be characterized by another paradox, consisting in the terminological and definitional proliferation of those in need of protection: migrants, refugees, asylum seekers, illegal immigrants, occupiers and so on are only the most common semantic variants used to identify the different status of foreigners who are in the national territory. In my opinion, the multiple identities of the migrants create a dissonant interpretation of the needs of protection, leaving each of them to a different representation of the migrant, as well as that from a legal point of view.

This definition fragmentation, on the one hand, prevents the disclosure of a simple and direct message and, on the other hand, can have a concrete impact on the application of the rights guaranteed to these subjects.

From this point of view, a first observation can be made for systematically describing the evolution of the regulatory steps in the field of social protection of these subjects.

The generic term «foreigner» often occurs in constitutional sources, such as art. 10, para. 2, of the Italian Constitution, and in the international sources, especially in the older ones (D’Orazio 1992). It must be said, however, that compared with the constitutional paradigm, in the international rules the concept of foreigner is defined mainly by different adjectives in order to reduce the range of the rights owners. The principle of equal treatment among foreigners and citizens, therefore, solemnly affirmed in the various texts is filled with meaning as the definitions of «foreigners» become progressively articulated.

The protection of foreigners consists mainly in the protection of foreign workers or aspiring workers (art. 6, Convention no. 97 of 1949, of the International Labour Organization, henceforth ILO), in some cases independently from the legal entry into the national territory (art. 10, ILO Convention no. 143 of 1975). Under these Conventions, therefore, the equal treatment of citizens and foreign workers is declined in terms of equal working conditions and equal social security benefits and in relation to a wider range of interested parties without specific distinctions².

This trend is confirmed by the subsequent evolution of the international regulatory framework and, in particular, by the rules for uniformly governing national systems (ILO Conventions no. 102 of 1952 and no. 118 of 1962; on the distinction between the international sources which explicitly enshrine equality between citizens and foreigners and those that sanction a uniform framework for social security, see in more detail Chiaromonte 2013, 210; Ferrante 2008, 122). In these Conventions, the concept of foreigner is also defined by the principle of residence, so that residents who are not citizens should have the same

settembre_2015/state_eu_juncker_pe.html; and also the last speech on the state of the EU of 15 September 2016, in https://ec.europa.eu/italy/news/20160915_discorso_juncker_it.

² It must be said that the Convention no. 97 of 1949 admits the possibility for Member States to refer the equal treatment only to pension benefits, excluding those based on the non-contributory systems.

rights as residents who are citizens (art. 68, Convention no. 102 of 1952, already cited), and by the notion of citizenship, because the principle of equal treatment in matters of social security apply for working citizens in the States that have ratified the Convention n. 118 of 1962.

In the perspective of social security protection the history of equal treatment between citizen and foreigner has been realized, therefore, also through evolution oriented, as said before, to define by adjectives the notion of foreigner. This conclusion can also be deduced from the analysis of the EU regulations (for general profiles see Gottardi 2003 and 2009, 517; Tursi 2005). In the EU rules, the definition of foreign undergoes a marked evolution towards a geographical connotation of the subjects who need protection: the foreigner is the third-country citizen legally residing in a Member State and employed in a EU Member State as well as their family members and survivors (Regulation no. 859/2003/EC then repealed by Regulation no. 1231/2010/EU)³. The geographical demarcation of the foreigner notion is probably the consequence of the progressive implementation of the coordination policies imposed by the EU on its Member States in the field of social security, but is also the effect of the increasing specification and delimitation of the general principle of equal treatment between foreigners and citizens.

This trend is also evident in the many existing bilateral agreements between non-EU States and Italy through which the coordination of social security in its so-called «external» dimension is managed (about this aspect, see also the European Commission Communication COM (2012) 153 of 30 March 2012 on «The external dimension of the coordination of social security in the European Union») and it is also present in Italian national immigration law. These agreements, which in the Seventies had primarily the goal of protecting Italian emi-

³ As is known, in the EU Member States there is not a common scheme of social security, but since the early years of the EC Treaties, the EU institutions have pursued a coordination policy of national social security systems in order to facilitate the implementation of the pillars of free circulation and establishment freedom within the Member States. The first provisions relating to this subject date back to 1958 (Regulation no. 3/1958/EEC and its implementing regulation no. 4/1958/EEC). The basic text on which the subsequent secondary legislation was founded was Regulation no. 1408/1971/EEC (with its implementing Regulation no. 594/1972), modified over the years, and that today has been repealed by Regulation no. 883/2004/EEC, introducing simplifications and implementing a greater coordination in matters of social security (on the European Regulations in the field of social security and on the related judicial interpretation see Chiaromonte and Giubboni 2014, 482). Compared to the previous rules, the main novelty is that the current regulation no longer applies only to the EU workers but to all EU citizens who reside or have resided in several EU Member States independently of the reason for their residence abroad (work, study, etc.). Moreover, the new EU Regulation on social security no. 883/2004, which was initially applicable only to EU citizens, stateless persons and refugees residing in the EU, was extended to third country citizens legally resident in the territory of a Member State as a result of Regulation no. 1231/2010. The second condition laid down by the Regulation stresses the fact that the rules do not apply when the situation of foreigner has links only with one third country and with a single Member State. The Regulation was amended and extended in some aspects by EU Regulation no. 465/2012 which, for example, introduces some new features with respect to cross-border self-employed and posted workers (for details of the coordination policies in the field of social security, see especially Pessi 2016, 202).

grants citizens, are designed to ensure the equal treatment of workers and pensioners who move from one country to another through the application of general protection principles such as, for example, the territoriality of compulsory insurance, the totalization of insurance periods, the exportability of benefits accumulated in the State of residence (see, in particular, Piperno, Tognetti Bordogna 2012; Chiaromonte 2010, 248). Art. 1 of the Italian Immigration Act (Legislative Decree no. 286 of 25 July 1998, henceforth T.U.) includes under the term foreigners the citizens of third countries outside the EU and stateless persons, even if subsequently it limits the definition to the concept of foreigner legally residing under the rules of the T.U. when it is necessary to define the status of foreign worker and the subsequent social rights attributed (art. 2, para. 3). At the same time, in accordance with the EU legal framework to promote the integration of third country migrants who are long-term residents in the EU Member States as a key-element for promoting the economic and social cohesion of the Union, the notion of foreigner is also enriched with the temporal dimension (Directive 2003/109/EC of 25 November 2003 relating to the status of third country citizens who are long term residents; see also art. 9 of T.U. on immigration). For long-term resident migrants a special status is recognized which, as it will be discussed below, is the starting point for selecting the subjects who are beneficiaries of certain social protection treatments.

Apparently *sens adjetif* is the concept of refugees and more generally of the international protection subjects in the perspective of social legislation. In the European and international lexicon, the definition of the subject who is in need of international protection contains and, at same time, consumes this concept. From the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, and especially in successive EU texts and national transpositions (Directive 2004/83/EC of 29 April 2004, repealed and replaced by the subsequent Directive 2011/95/EU of 13 December 2011, on the minimum standards for the qualification of third country citizens or stateless persons as refugees or as persons who need the international protection, adopted in Italy by legislative decree no. 251 of 19 November 2007, as amended by legislative decree no. 18 of 21 February 2014), the definitions of subjects in need of international protection also become a definition of its relative status in terms of rights and social protection⁴. Since the entry into force of

⁴ For reasons of brevity, it is not possible to analyse the considerable debate on the international and European rules on asylum, international protection and humanitarian protection, as well as in relation to the Italian Constitution (art. 10, para. 3, Const.). As is known, according to the international, European and national law cited above in the texts for refugee shall mean a citizen of a third country who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country, or a stateless person who is outside the country in which he had previously habitual residence for the same reasons mentioned above is unable or, owing to such fear, is unwilling to return. At the same time, the person entitled to qualify for subsidiary protection means a third country citizen or a stateless person who does not qualify

Regulation 883/2004/EC, the conditions of equal treatment and the subsequent coordination policies on social security are based on the equality of EU citizens, stateless persons and refugees residing in a Member State who are or were subject to the legislation of one or more Member States, including their families and survivors (art. 2); indeed, for them too, the definition from a social perspective is completed by a link to the criterion of residence, which then becomes an integral part of the status of these subjects.

Instead, neither the Directive for the recognition of international protection status nor the subsequent implementing legislation seems to decline the definition of socially protected subject even at the level of residence, being limited, as discussed below, to fixing in principle a broad equal treatment in relation to employment, social and health assistance. Of course, this detachment is not only of theoretical importance, but it can have practical consequences, because, unlike other areas of social protection, in terms of social security benefits, the equality between citizens and applicants for international protection would be compatible with the setting of selective criteria based on residence. It is hardly superfluous to point out that this could weaken the position of these subjects, but it is clear that this mechanism could be a good instrument for governing social security benefits expenditure.

From this short analysis a first final observation can be drawn, susceptible of course to future and more penetrating investigations, namely that the thousand faces of foreign migrants have committed legislators at various levels to the task of circumscribing their status not only in a defining plan but, as discussed below, especially in the perspective of equal treatment and equal social protection: the qualification of the foreigner through more and more adjectives was accompanied by a simultaneous limitation of the principle of equal treatment between foreign migrants and citizens.

2. THE MIGRANTS WELFARE BETWEEN EQUAL TREATMENT, PERFORMANCE REGIONALIZATION AND STATUS DIFFERENCES: SYSTEMS RESILIENCE OR INSTITUTIONAL VULNERABILITY?

The analysis of migrants welfare is conditioned by two factors which in recent years have operated simultaneously and have influenced the policies at national and regional level, namely the economic crisis and migratory emergency on the Italian coast. It is not possible to analyze all issues related to these aspects (see Keskinen, Norocel, Jørgensen 2016, 3). In the following pages the effects of these continuous and chronic emergencies on the Italian system of social security will

to be recognized as a refugee but in respect of whom substantial grounds for believing that, if returned to his country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm, and is unable, or, owing to such risk, unwilling to avail of the protection of that country.

be analyzed more in depth in order to outline the main characteristics of the migrants welfare in Italy. Despite the progress made in the EU immigration and asylum policies, many critical issues still persist in the European and individual Member States legislation (see, among others, Adinolfi 2015, 3; Vonk, 2012).

The introduction of the long term resident foreigner status (Directive 2003/109/EC of 25 November 2003), aimed at enhancing a regular and lasting connection of migrants with the host State, the repression of the exploitation phenomena such as trafficking in human beings (Directive 2004/81/EC of 29 April 2004 and the Directive 2011/36/EU of 5 April 2011), the definition of a common European asylum system through the effect of the so-called Dublin system and the provisions on family reunification (Directive 2003/86/EC of 22 September 2003) represented an advance in the planning of European Union immigration policies (see Nascimbene 2015, 395). For months the sad news concerning immigration urge the scholars of different disciplines to question the limits of this legal framework. As also noted at the conclusion of the first Section of this paper, it is increasingly clear that «the status of the foreigner and the fundamental guarantees that compose it appear ever more fragmented» (Nascimbene 2015, 398) due to a disorganized plethora of tools and specific categories of subjects.

However, the perceived incapacity to manage the recent migratory crisis is probably not caused only by the regulatory fragmentation, but by the type of consideration of these phenomena (see also McConnachie 2014; for an analysis on human rights, in general, refer to Dembour and Kelly 2011). It is not at all trivial to say that the current connotation of the migratory crisis is one of forced migration, caused by numerous, uncontrollable, widespread scenarios of war, terrorism, persecution of peoples, that from one continent to another force armies of foreigner to seek shelter and safety in Europe.

The European systems, especially the welfare systems, have been designed, not only at the level of principle but also at operational level, to operate in the presence of a selected public of migrants. It is clear, however, that due to the enlargement of the number of foreigners with a special status such as that of the international protection seekers or the migrants for humanitarian reasons, the national social security system and its funding sources are under pressure. The conclusion appears obvious, almost banal therefore that any analysis or future proposal cannot ignore the sad metabolization of the fact that the foreigner is becoming less migrant and increasingly a subject in need of protection.

It is not only the quality (and quantity) of the migratory phenomenon of these years and its impact on the national social security system (for a statistical analysis on migrant access to the welfare measures see Istituto Nazionale della Previdenza Sociale, 2011, 43), but also the terrible economic crisis ranging in Europe since 2009 has caused radical changes and strategic choices in the context of national welfare systems (and thus also in the field of the social security of foreigners).

In an intertwining of destinies, the two tsunamis that have dramatically befallen Europe, on its coasts and borders, namely the migratory crisis and the economic crisis, suffer a strong reciprocal conditioning. It is desirable that the interconnection is not limited to only negative effects, but that it should stimulate the search for wide ranging and common solutions, therefore for both the economic crisis and the migration one. The clash is between the open and closed approach so that on both playing fields the decisive role is the search for a new balance between national sovereignty, democracy and the welfare state (Ferrera 2016, 104).

Among the various effects of this discordant situation, an important role is played by the continuous transformations of principle of equal treatment between citizens and foreigners in relation to social assistance and security, caused by the different status of migrants. Without ignoring the diversity and specificity of many profiles that need a more detailed analysis, within the permitted limits of space, in the following pages I will try to focus on the evolution of the relationship between the principle of equality and the most important exceptions to this principle and the attempts to eliminate them through judicial interpretation.

2.1. The Limits and Counter-Limits to Equal Treatment in the Social Security System: The Recent Debate

A double order of limits to equality must be preliminarily identified, namely legal limitations and factual limits, resulting from the adaptation of the rules to the affairs and condition of foreigners. In this dual perspective the problematic issues will be analyzed, referring untreated profiles to other and more detailed examinations (among others, Chiaromonte 2013, 222; id. 2006, 697; id. 2009, 587; id., 2011 657; Calafà 2012; Nunin 2015, 91).

Taking into account the traditional distinction in the Italian law between contributive and non-contributive social security systems (art. 38 Const.), it can be said that the factual limits are mainly in the field of contributive social security, nevertheless the principle of equal treatment is solemnly proclaimed under art. 2, para. 3, of the T.U. on immigration according to which «the Italian Republic, in the implementation of ILO Convention no. 143 of 24 June 1975, ratified by Law 10 April 1981, no. 158, guarantees equal treatment and full equality of rights comparable with those of Italian workers to all foreign workers and their families legally residing in its territory». The contributive social security system for migrants, who carry out their work in Italy, is based on the principle of full equality between citizens and foreign workers and on the principle of territoriality of social legislation. Hence, workers are subject to the social security regulations of the country in which they actually work.

Leaving aside the analysis on the complex issue of the foreign workers residing in an EU country as a result of temporary postings (about this, see Chiaromonte 2013, 217), in the following pages some problems relating to the principle of territoriality that emerged from the most judicial practice are high-

lighted. The core of the international conventions is the institution of aggregation, as a result of which a worker can virtually add up the contributions paid in the systems of two countries that have signed the convention if the period spent in the signatory country does not achieve the seniority contribution requirements for the eligibility for pension benefits; in this way it is possible to avoid any damage arising from the fragmentation of working career. If this is the legal framework, two observations stand out clearly. The delicate weaving of guarantees is based not only on the agreements signed by the Italian State⁵ but also on the effects of the binding association and cooperation agreements on social security signed by the EU with third countries that extend the EU regulatory framework for social security coordination or directly ratify the principle of protection relating to social security⁶. The factual limit represented by the absence of new bilateral agreements signed by Italy is filled by the expansive effectiveness of the EU cooperation agreements and by the EU Court of Justice interpretation (see Giubboni 1998, 108). The Luxembourg judges have referred the principle of equal treatment contained in the EU conventions not only to the contributive benefits, but also to the non contributive welfare treatments⁷. Above all they declared this principle to be applicable immediately even if the bilateral agreement has not been implemented in the Member State in which the foreign worker is resident and stays and to whom the convention applies in accordance with the criterion of nationality⁸.

There are, however, no counter-limits to curb the restrictions in relation to equal treatment between citizens and foreigners in the area of pensions. As is well known, the pension reform of 2011 (the so called “Fornero” Reform, launched by Law 24 December 2011, no. 214), has worked in many directions seeking to stem the hemorrhage in public debt, to restrict the numbers of beneficiaries and to delay their retirement through various instruments including the generalization of the contributory criteria, raising the age requirement and, especially as regards the subject of this paper, fixing the 20 years contribution seniority with the further condition that the total contribution arising from that

⁵ Italy has signed bilateral social security agreements with Argentina, Cape Verde Republic, Australia, Republic of Korea, Brazil, the Republic of San Marino, Canada and Quebec, the Holy See, with the countries of the former Yugoslavia, Tunisia, Israel, Turkey, Channel Islands and Isle of Man USA (United States), Mexico, Uruguay, Monaco Venezuela. See table and the texts contained in the website of the National Social Security Institute (Istituto Nazionale di Previdenza Sociale, henceforth INPS) in www.inps.it.

⁶ The EU has association agreements on social security with the following countries: Algeria, Morocco, Tunisia, Croatia, Macedonia-FYROM and Israel. With Turkey exists a Convention signed in the framework of the Council of Europe in 1972.

⁷ See CJEU, 31 January 1991, C-18/90, *Kziber*; CJEU, 20 April 1994, C-58/93, *Yousfi*; CJEU, 15 January 1998, C-113/97, *Henia Babahenini*; CJEU, 12 February 2003, C-23/02, *Alami*.

⁸ See CJEU, 31 January 1991, C-18/90, *Kziber*, cit. About the implementation of this principle in the Italian law see Court of Cassation, 1 September 2011, n. 17966; in *Massimario di Giustizia Civile*, 2011, 9, 1265.

seniority is such as to determine the disbursement of an income amount not less than 1.5 times the social allowance (see, among others, Cinelli 2015, 544; Pessi 2016, 407).

Formally these two conditions (time and quantity of the minimum contribution) are fixed for Italian citizens and foreigners, but it is evident that this scheme could represent a factual limit in the future to complete equality between the two groups in terms of pension treatments. The time condition is a requirement that seems very expensive to reach for foreigners in view of their fragmented careers, characterized by alternating periods of work in Italy and in other countries including the one of origin, because of the possible returns to their homelands by the expiry of the residency permit. In this already complex situation there is another possible emergency that could occur in a few years. The recent migration crisis in Italy is causing a flow of foreigners who were workers in their countries of origin and for many of them there will be the issue of recognizing these working periods for valid pension contribution in the absence, at the time, of specific bilateral agreements regulating mechanisms such as the contributions totalization. In my opinion, the future sustainability of this migration crisis passes necessarily through the opening of a new bilateral negotiation season in the field of social security at the level of individual Member States, or better yet at the EU level for implementing the right to the enjoyment of pension benefits.

In addition to these factual limits, there are also legal constraints which have created a sort of migrants welfare in spite of the principle of equal treatment. Most of the time these come down to differences dictated by the diversity of status (for example, seasonal foreign workers⁹, foreigners with the right to international protection¹⁰, workers who return in the country of origin¹¹). Very often these diversities are necessary to adapt the guarantee of rights to the sustainability of the pension system even if they raise concerns because they represent

⁹ Due to the particular job characteristics, the so-called seasonal workers (because they have a residence permit not exceeding nine months or maintain the residence in their countries of origin or have affixed to the passport a visa with the words “visa for seasonal work”) do not have the guarantee of certain social security treatments, such as unemployment benefits, family allowances, return of contributions in cases of repatriation. Instead, they enjoy insurance against disability, old-age and survivors pensions, insurance against accidents at work and occupational diseases, insurance against sickness and maternity (art. 25, para. 1, T.U.). In place of the contributions for non-services provided, the employers must pay a contribution to INPS that flows into the National Fund for social policies (art. 25, para. 2, T.U.).

¹⁰ The foreign citizens that have the refugee or international protection status shall be treated as Italian citizens in matters of public assistance, social insurance and in relation to labor standards.

¹¹ As is known, within the meaning of the T.U. (art. 22, para. 13) the foreign worker that repatriates, although seasonal (art. 25, para. 5), retains his social security rights and social security accrued, being able to enjoy them regardless of valid bilateral convention, on the occasion of requirements maturity provided by law, at the age of sixty-five years, even departing from the minimum contribution condition fixed by art. 1, para. 20, law of 8 August 1995, no. 335.

a possible violation of the equal treatment principle (Bonardi 2008, 583; Vettor 2005, 293).

Problems of compatibility with the right to equal treatment occur mainly in relation to the issue of family benefits and repatriation. The long and harrowing story of the possibility for a foreigner who repatriates to preserve the acquired pension rights must be examined in the light of the need to balance the right to equality with the system's economic tolerability. There has been gradual and inexorable shrinking process of the right to portability of social security guarantees. From the mechanism of contributions reimbursement (art. 3, para. 13, law 6 August 1995, no. 335, absorbed by art. 22, para. 11, T.U. on immigration in the original version), we have passed to a system that attributes pension benefits corresponding to the amount of contributions paid at the age of sixty-five years, a threshold that equalizes foreign men and women despite the permanent difference in pensionable ages in the private sector for Italian man and female workers. Beyond the various problematic aspects, including those in relation to constitutional compatibility (see Chiaromonte, 2013, 229), the aim of limiting the treatments payment is clear, also in the light of the subsequent judicial interpretation that has substantially emptied these guarantees also in the quantum of their recognition. Even if some sentences relate to the previous reimbursement mechanism, according to the Italian Supreme Court¹², the payment of contributions to the foreigner that repatriates must take place with the exclusion of contributions concerning some treatments, such as maternity, illness, unemployment and health care. The Court considers that this exclusion is justified because in the Italian social security system there is no right to the return of contributions paid in relation to requirements for maturation of the right to specific social security benefit that no longer will apply nor will apply in the future. Therefore, according to the general principles mentioned above, the reimbursement under art. 22 T.U. on immigration, must concern only the amounts allocated to the insurance coverage of future events that allow the payment of social security benefits at the time of maturity of the related requirements, excluding events (such as maternity, illness, unemployment, health care) which find their cause in the insurance risk coverage for as long as the employment relationship, now ended, was held.

From a different perspective, it is possible to observe the most critical profiles in relation to foreign family equal treatment. In addition to the treatments for supporting families without income (law no. 448/1998; law no. 388/2000) fixed by the municipalities, by the National Social Security Institute or by some regional laws (which will be described in the next Section) because they have a non-contributive social treatment nature and therefore are within the notion of social assistance, the social security system supports the families with insufficient incomes because the sum of each family member income is not adequate (family allowances under law no. 153/1988). Compared to the previous institu-

¹² See Court of Cassation, 30 September 2015, no. 19469, in *Diritto & Giustizia*, 2015.

tion of family allowances (Presidential Decree no. 797/1955), the actual rules for this type of benefits does not presuppose the requirement of the dependent cohabitation because the family is the referent for the treatment in relation to its needs (Pessi 2016, 324).

So, if this is the purpose of the treatment, the limit established by the Italian law which reserves the benefit to the foreign workers whose family members are resident in Italy appears problematic. In the absence of a bilateral convention which provides otherwise or reciprocal conditions, the residence abroad of the family members prevents the fruition of the allowance under law no. 153/1988. On the contrary, in the case of the family members of Italian and EU Member States citizens and for the relatives of a person who has refugee or international protection status, the residence of family members is not a condition for access to the social security benefits in question (art. 2, para. 6, law no. 153/1988).

This rule is an evident limit to equal treatment, especially if we consider the purpose of this treatment, which, as mentioned before, does not imply the requirement of the dependent family members. To soften the effects of this rule the judicial interpretation has intervened, especially in recent years, establishing the non-application of the aforementioned art. 2, para. 6, because the requirement is contrary to the principles of equal treatment and there is an objective diversity in the treatment compared to that of the Italian citizens (see Tribunal of Brescia, 7 March 2016; Tribunal of Brescia, 9 October 2015; Tribunal of Brescia, 14 April 2015; Court of Appeal of Brescia, 20 April 2016). However, in some sentences the Judges apparently complicate the exegetic interpretation, because they qualify the providence in question as a non-contributive benefit, and as discussed below, on this level equal treatment for long-terms residents foreigners is susceptible to exceptions (art. 11 of Directive 2003/109/EC; see also Court of Cassation, 30 March 2015, no. 6351, in *Massimario Giustizia Civile*, 2015). But to overcome this possible risk, some judges of first and second order, on the basis also of the EU Court of Justice interpretation (CJEU, 24 April 2012, C-571/10, *Kamberaj*), have qualified the subsidy as an essential treatment for supporting family needs and therefore it is not possible to include it among the exceptions hypothesis, because it represents a minimum income support (Court of Appeal of Brescia, 20 April 2016).

2.2. The Limits and Counter-Limits to Equal Treatment in the Non-Contributive Social Security System: Current Developments

In the area of social assistance characterized by a non-contributive system it can certainly be said that the antibodies to counter the disparities between migrants and citizens have been injected by the interpretation of the Italian Constitutional Court. With a relentless sequence of pronouncements from 2005 to today, the Court has taken steps to eliminate the inequalities reserved to foreign workers. Although the profiles which can be dealt are numerous, due to rea-

son of space, specific and problematic aspects will be analyzed below in relation to certain case law and, as will be discussed in the final Section, in view of some recent and important national and regional laws.

In the presence of the pendulum case law and the contradictory legislative actions it is possible to make some summary remarks on the current state of health of the equal treatment principle in favor of foreigners.

For over a decade this topic has intrigued and divided the judges, by registering, on the one hand, a certain anarchy of interpretation in the Constitutional Court decisions and, on the other hand, an obvious reluctance on the part of the national and regional law-makers to implement the principles and their interpretation affirmed by the constitutional judges. I have referred here to an interpretive anarchy because the right to equality content is subjected to an opposing trend, expansive and restrictive.

The initial point of discussion is the regulatory level, national or regional, of rules subjected to the constitutional compatibility judgment. In this field we find a greater exegetic coherence in the judgments relating to the regional standards. A certain continuity prevails in pointing up the unreasonableness of the criteria of nationality or citizenship¹³ and, above all, of qualifying residence¹⁴ in relation to the access to welfare benefits. With the exception of an isolated contrary judgment¹⁵, in the group of sentences concerning qualifying residence it is possible to find the most extensive interpretation of the equal treatment notion, because the judges seem convinced that the rule of a differential requirement based on continued residence for a predetermined and significant minimum period of time is not respectful of the principles of reasonableness and equality since it introduces an arbitrary distinction into the regulatory framework. This is because there is not a reasonable correlation between the duration of the residence and situations of need or distress, directly referable to the person as such, that constitute the presumption of use of these benefits. But especially in a sentence it is possible to observe an interpretation that may be an important perspective (Constitutional Court, 19 July 2013, no. 222). Even if the law may reserve certain welfare benefits only to citizens and to persons assimilated to residents in Italy, whose status is valid to generate an adequate link between political, economic and social participation and the delivery of the benefit, however, it is also possible that a link deserving of the same protection could emerge with regard to the position of the persons who, though lacking the status mentioned earlier, have

¹³ See Constitutional Court, 2 December 2005, no. 432.

¹⁴ See Constitutional Court, 9 February 2011, no. 40, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2012, II, p. 155, with comment of Nunin and in *Le Regioni*, 2011, 4, p. 1257 with comment of Corvaja; Constitutional Court, 25 February 2011, no. 61, in *Foro Italiano*, 2012, I, 389; Constitutional Court, 19 July 2013, no. 222, in *Giurisprudenza Costituzionale*, 4, 2013, p. 3291D; Constitutional Court, 7 June 2013, no. 133.

¹⁵ See Constitutional Court, 28 May 2014, no. 141, in which qualifying residence fixed by the regional law in the field of baby bonus does not seem unreasonable because it is useful to favour the birth rate and the stable presence on the regional territory.

a strong bond with the community having established stable work, family and affective life.

Therefore, time is only an indication of the migrant's participation in the economic and social life, because, according to the Constitutional Court, what counts most is the effective participation in the organization of the community, participation that should be found in the work links and family relations established within the community itself. But clearly this is just a hint of a new perspective, which is not gone into more in-depth in this and in the other judgments.

The judgment of the Constitutional Court on national legislative measures is more inconsistent. In relation to this category, indeed, the Court still holds different positions. The debate is focused on the compatibility of art. 80, para. 19 of the Finance Law for 2001 (law 23 December 2000, no. 388), which has subordinated the fruition of the economic and social assistance benefits to the possession of a residence permit, that today is the EC residence permit for long-term residents and, therefore, to foreigners who have been legally resident in Italy for at least 5 years. Before, access to the social security system was permitted to migrants who had a residence permit not less than one year, as fixed by the art. 41 of T.U. on immigration in the original version (see more fully Chiaromonte 2013, 231; De Martino 2013, 55).

The conviction of the Constitutional Judges has undergone a clear evolution, from considering the unconstitutionality of the norm for issues regarding a simple income requirement (*ratione census*)¹⁶ to reputing the rule to be incompatible because of the temporal requirement of residence permit (*ratione temporis*). It is evident that the reasonableness of the limits in the field of the migrants access to the social security system is still an open question (Iurato 2015, 2; Turatto 2013, 549). In particular, in the recent sentences of 2015 on this point, among the wrinkles of the sentence can be seen the effort to consider the equal treatment principle not only in terms of the discrimination prohibition, but as an instrument for implementing a more consistent social integration.

This is without doubt a perspective that is lacking in Italian case-law (see Chiaromonte 2013, 242), because the legal framework is based only on the discrimination prohibitions. At same time, the equality between foreigners and Italian citizens is only under the perspective of ensuring the satisfaction of the basic and essential needs for the sustenance and the safeguarding of human life. This is also confirmed by the tenor of other judgments of the Constitutional Court in relation to the requirement of legal and continuous residence for a certain period of time for some benefits, and in particular that of staying for at least ten years before enjoying the social allowance under art. 3, para. 6, of law no. 335/1995¹⁷. Even if at the legal level the right to this benefit is recognized for

¹⁶ See Constitutional Court, 6 October, 2006, no. 324 and 23 January 23, 2009, no. 11, in relation to incapacity pensions; Constitutional Court, 30 July 2008, no. 306 and 15 March 2013, no. 40, relating to disability benefits.

¹⁷ See Constitutional Court, 15 July 2016, no. 180, and 17 July 2013, no. 197.

Italian and other EU citizens, and for non-EU citizens with a residence card or a residence permit for EC long-term residents (Pessi 2016, 472), it is clear that the ten years residence condition is more penalizing for foreigners. Yet, even if there is not an express endorsement of the restrictive logic for government reasons relating purely to public expenditure, the judges legitimize it, because according to the Court, the provision of a stable residence seems not a merely restrictive choice, but a response to the need to select those having the right with more intense and continuous roots in the national territory.

3. THE PRINCIPLE OF EQUAL TREATMENT AS A RIGHT TO SOCIAL INTEGRATION: THE BACKWARD STEP OF THE LAW AND THE GOOD PRACTICES OF COLLECTIVE BARGAINING

From the brief discussion of the most recent law cases on the equal treatment between Italian and foreign citizens as discussed above, it is possible to deduce two trends that, in my opinion, represent real cracks in the protection system.

Equality in the field of social security ignores the perspective of the need to promote the social integration of foreigners and their families. Equal treatment has been seen as equality in the area of essential and basic needs useful for protecting and safeguarding the life and health of the subjects (on this point see also Codini 2012, 607). Although national and European regulations affirm that it is possible to limit equal treatment in respect to the essential treatment¹⁸, the ancillary role reserved to integration and social purposes in the evaluation of the reasonableness and legitimacy of the restrictions is an incoherent passage in the legal framework.

To this observation it is possible to add another second trend that emerges strongly from the analysis of the limits to equal treatment as previously summarized in broad terms. The most striking issues and problems concern family welfare. It is evident that the presence of this trend is alarming, considering the importance of family integration into the social and work community as a tool for the prevention of segregation and ghettoization. The greatest economic cost of expansionary welfare policy in favor of migrant families is obvious; but in my opinion, similar approaches represent a cultural investment, because the integration of the whole family helps foreigners to establish roots within the basic social community. This is only an exemplifying consideration added to the numerous other possible observations under this perspective.

The guarantee of equal treatment at the lowest possible level, without any consideration of family social inclusion and integration seems to be a constant in the political agenda. Even in the recent welfare measures, enacted by the na-

¹⁸ See, for example, the art. 11, para. 4, of Directive 2003/109/CE relating to the *status* of third-States citizens who are resident for a long period; but it is possible to fix exceptions to equal treatment also under art. 9, para. 12, lett. c), of T.U.

tional and regional lawmakers, it is possible observe a backward step even regarding the principles deriving from constitutional jurisprudence. In the recent important measures to combat poverty and social exclusion there are still the same selective and restrictive mechanisms to limit the numbers of potential beneficiaries, limits clearly inspired by the necessity to govern public spending. In the most recent national¹⁹ and regional²⁰ actions, the income support for citizens and their families who are in a fragile and vulnerable situation is attributed to those selected according to the criterion of the qualifying usual residence in the Region, from a minimum of 12 months in the case of the dignity income in Puglia, to a maximum of 60 months in the case of the Sardinian inclusion income and autonomy income in Lombardy. In some of these measures (in particular, the Active Inclusion Measure in the Region Friuli Venezia Giulia) and in the national income support, in addition to the residence condition in the regional territory, the enjoyment of these social security measures is limited only to the foreigners who have the EC permit for long-time residents, which requires as a precondition the legal presence in the Italian territory for at least five years. Then the problem of the reasonableness of a limit to the equal treatment between citizens and foreigners returns because of the usual canon of qualifying residence.

It is not possible to predict here if there will be other disputes over these rules, but it is certainly possible to see that the delimitation of the scope of these measures which are finalized to support the integration and inclusion of the vulnerable and fragile persons, as stated in the preambles of the laws, seems unreasonable because it excludes individuals and households at greater risk of segregation. It seems, after all, that there is an unreasonable and contradictory lack of coherence between the objectives of these treatments and the selection of beneficiaries. Even under another perspective, these new limits generate some perplexity. In the recent labour law reforms²¹ and in the national and regional laws which are analyzed here there is a marked use of the principle of conditionality, as a result of which the supply, enjoyment and successive maintenance of the social security treatments are subject to the assumption of specific and detailed activation obligations on part of the beneficiaries. The recipient is obliged to subscribe to a compulsory and personalized agreement with the employment or so-

¹⁹ The Support for Active Inclusion has recently been revisited with the Interministerial Decree of 26 May 2016, in implementation of the art. 1, para. 387, letter a), Law of 28 December 2015, no. 208. In relation to the issues of the beneficiaries, see in particular the art. 4 of the Inter-Ministerial Decree mentioned above.

²⁰ See the Regional Law of Friuli Venezia Giulia no. 15 of 10 July 2015 (art. 3), the Regional Law of Sardegna no. 18 of 2 August 2016 (art. 3), the Regional Law of Puglia no. 3 of 14 March 2016 (art. 5), the Regional Law of Valle d'Aosta no. 18 of 10 November 2015 (art. 3), the Regional Resolution of Lombardia no. 5060 of 18 April 2016, the law of Provincia Autonoma di Trento no. 13 of 27 July 2007 (art. 35, para. 2) e subsequent implementations.

²¹ See, in particular, the law of 10 December 2014, no. 183 and the legislative decrees on the labour market and on the unemployment benefits (Legislative decrees of 14 September 2015, no. 148 and of 14 September 2015, no. 150; about these issues see also Ferrara 2015).

cial services so that an inclusion plan for the beneficiary and his family made up of disparate actions (orientation and job placement, school dropout prevention etc ...). This mechanism introduces into the system a type of integration that can be called assisted, because the integration process should be created, guided and controlled by different parties, and should satisfy different stages of need.

Especially under this last perspective the limits of access for migrants and foreigners, mentioned before, seem unreasonable, because, on one hand, these limits could be an economic disadvantage in the short term, but, on the other hand, foreigners that are excluded from these processes are deprived of future integration opportunities.

The persistent legitimacy of the regional citizenship (Dinelli 2011, VI; Zonca 2016, 107) as parameter for access to welfare impacts on an already strong status fragmentation which, as I have tried to highlight in the first Section, could derive also from the different definitions of foreigners in the national and supranational legal framework. The same heterogeneous notion of qualifying residence in the different regional standards seems more inspired by the confused logic of a mosaic in which the tiles are randomly ordered, rather than inspired by the necessity to link the enjoyment of social benefits to the concept of local roots.

In this scenario, the guarantee of equal treatment particularly in case of foreigner social integration is rather a perspective that, especially in the most recent practices, begins to characterize the collective bargaining experience.

Although it is not possible to have a complete and comprehensive survey of the collective agreements in the private sector, especially at the enterprise level where there is not a complete database, at the conclusion of this study it seems appropriate to focus on the some good practices that the social partners have implemented.

From the reading of some collective rules it emerges that collective bargaining has realized the equal treatment essentially through integration tools within the working community and in the social and productive local area. In addition to the simple commitment statements for introducing at decentralized bargaining level good practices to promote the participation of migrants workers²², in some contracts the effort is much stronger, because the social parties fix with specific guarantees and rights for satisfying the needs of the immigrant workers. This is the case, for example, of the rules that permit a modality of enjoyment of vacation and permits compatible with the return home of foreigners (for example, in a single period) and with the technical and production needs by an agree-

²² See, for example, art. 4 of Labour National Collective Contract (Contratto Collettivo Nazionale Lavoro, henceforth C.C.N.L.) for agricultural cooperatives and associations (ESAARCO) of 5 August 2016; the Agreement of 29 November 2013 for renewal of C.C.N.L. for the employees of small and medium wood and furniture industries; C.C.N.L. of September 2013 for the glass sector employees (Industry); article 91 of C.C.N.L. September 2013 for the employees of industrial laundries.

ment with the employer²³. In another perspective, equal treatment is guaranteed even on the training plan necessary for an effective integration and respect of the culture of origin: it should be noted that in some collective agreements there are provisions that offer the possibility of using hours of paid leave for attending Italian language courses, under the same conditions as the right to study, or the possibility of using unpaid leave for respecting the religious holidays not covered by national law²⁴.

These good practices are a positive signal; but there is also good news in relation to the method used for trying to face the problems. In this respect, especially in 2016, there was a resumption of the dialogue and of the collective consultation between the Government and the social partners at least in this area in order to set up measures and policies finalized to a rapid and effective integration of foreign workers. In June 2016 two protocols between Confindustria (the main association representing manufacturing and service companies in Italy) and the Interior Ministry²⁵ were signed in which the parties have tried to simplify some administrative procedures, but especially have tried to involve the companies in the management of migration crisis, promoting pathways for the integration of international protection beneficiaries.

In this case the Framework Agreement of 22 June 2016 moves precisely in the direction of creating a collaboration between companies and institutions in order to promote the integration of the refugees who have obtained international protection status through internships, job opportunities and formative initiatives.

The projects just described above represent good practices which could be further encouraged and supported, because they aim to promote a model of active integration and, at the same time, could help to mitigate the impact of the needs for public spending containment which often serve to justify the presence of limits to equal treatment in the field of social security system. These new perspectives could represent an effective antidote for the chronic institutional vulnerability of foreigners integration system caused by the lack of resilience of the social security model.

²³ See art. 63 of the C.C.N.L. 10 June 2015 for the enterprises of chemical, plastic, glass, ceramic sectors; art. 64 of the C.C.N.L. 25 July 2014 for textile, clothing, footwear, eyewear enterprises; art. 32 of the C.C.N.L. 28 November 2011 for the employees of small and medium food industries; art. 36 of the C.C.N.L. 7 November 2013 for the employees of manufacturers of elements and components and prefabricated brick companies; the C.C.N.L. of December 2010 for the employees of textile, clothing and fashion sectors.

²⁴ See art. 29bis of the C.C.N.L. for employees of tobacco companies. In other contracts the creation of specific courses for migrants to train in health and safety is encouraged: see the CCNL of December 2010 for the employees of rubber and plastic sector.

²⁵ See the Protocol of 20 June 2016 finalized to facilitate the release of the EU Blue Card to the highly qualified foreign workers. The goal is to reduce the process time through simplified management procedures for the companies associated to Confindustria which look for highly qualified foreign workers.

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