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Social rights of migrant minors between the division of powers and the principle of equality. The access to nursery schools [*]

di
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1. Introduction

Starting from the reform of title V, part II, of the Italian Constitution (constitutional law n.3/2001), several times the constitutional Court has dealt with the division of state and regional competences in the matter of immigration, also in relation to the discipline of the access of immigrants to social rights[1].

The Constitution (article 117, paragraph 1, letters *a* and *b*) assigns the regulation of the right of asylum, of the juridical condition of the foreigner and of immigration to the exclusive legislative power of the State. On the other hand, the state Legislator

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[1] Without claiming to be exhaustive, M. Mazziotti, *Diritti sociali*, in *Enc. dir.*, XII, Milan, 1964, 802 ss.; A. Baldassarre, *Diritti sociali*, in *Enc. giur. Treccani*, XI, Rome, 1989,1 ss.; M. Luciani, *Sui diritti sociali*, in *Studi in onore di M. Mazziotti di Celso*, Padua, 1995, 97 ss.; G. Lombardi, *Diritti di libertà e diritti sociali*, in *Pol. dir.*, 1999; F. Politi, *Diritti sociali*, in Nania, R., Ridola, P. (cur.), *Diritti costituzionali*, II, Turin, 2005, 223 ss.; M. Benvenuti, *Diritti sociali*, Turin, 2013; P. Bilancia (cur.), *I diritti sociali tra ordinamento statale e ordinamento europeo*, in *Federalismi.it*, special number 4/2018.

(legislative decree n. 286/1998[2]) attributes the discipline to the Regions in many aspects of social policies and establishes that the provisions contained in this "*Testo unico*" constitute fundamental principles pursuant to art. 117 of the Constitution, in matters of legislative competence of Regions with ordinary statutes, and fundamental norms of economic and social reform of the Republic, in matters within the competence of Regions with special statutes and autonomous Provinces.

Therefore, the constitutional judge recognizes that, in principle, the possibility of legislative interventions of the Regions and Autonomous Provinces with regard to the phenomenon of immigration must be recognized.

The migration phenomenon, in fact, is not only about the control of the entry and stay of the migrant on the national territory, whic is a competence of the State. Neverthless it is necessarily to must consider other areas - social assistance, education, health and housing – involving several regulatory competences, some of them are attributed to the State, others to the Regions[3] (judgments nn. 156/2006[4] and 300/2005[5]).

And indeed, the increasingly limited public economic and financial resources allows the state and regional legislators to introduce limitations on the access of certain social benefits, in order to reduce the number of those who are entitled to access it[6].

[2] "*Testo unico on Immigration*" (T.U.I.).

[3] On this subject, see, among others, E. Gianfrancesco, *Gli stranieri, i diritti costituzionali e le competenze di Stato e Regioni*, in E. Di Salvatore, M. Michetti (cur.), *I diritti degli altri. Gli stranieri e le autorità di governo*, Naples, 2014.

[4] D. Strazzari, *L'immigrazione tra Stato e Regioni*, in *www.forumcostituzionale.it*, 10 june 2006.

[5] S. Baldin, *La competenza esclusiva statale sull'immigrazione vs. la legislazione regionale sull'integrazione sociale degli immigrati: un inquadramento della Corte costituzionale*, in *www.forumcostituzionale.it.* For the distinction between immigration policies and immigrant policies, see T. Caponio, *Governo locale e immigrazione in Italia. Tra servizi di welfare e politiche di sviluppo*, in *Le Istituzioni del Federalismo*, 2004, 805 ss.; T. Hammar, *Democracy and the Nation State*, Aldershot, Averbury, 1990.

[6] For a reconstruction of the interventions of the Constitutional Court on these disciplines, see C. Corsi, *La trilogia della Corte costituzionale: ancora sui requisiti di lungo-residenza per l'accesso alle prestazioni sociali*, in *www.forumcostituzionale.it*, 27 genuary 2019, 3 ss. Most in general, M. Luciani, *La giurisprudenza costituzionale nel tempo della crisi*, in M. D'Amico, F. Biondi (cur.), *Diritti sociali e crisi economica*, Milan, 2017, 15 ss.

And so, more and more frequently, the possession of specific requirements is required as a condition for access these social benefits, such as, for example, income, residency, or needs requirements.

This type of norm, however, cannot ignore the due respect of constitutional parameters, first of all that of reasonableness and proportionality.

Many difficulties in overcoming this screening have those legislations, mostly regional, which for access to some social benefits prescribe limitations based on territorial rooting, using as a requirement not only the mere residence, but the long-term residence on the national and/or regional territory.

The possession of this requirement was sometimes requested only to foreigners, other times to all (citizens and foreigners).

However, the intent to discourage immigrants, who have more difficulties to have the required number of years of residence, remains evident[7].

These legislative norms aimed at limiting the access of foreigners to social rights have been brought to the attention of the Constitutional Court, which has been committed over the last decade to identifying and reaffirming some fundamental principles on the subject[8].

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[7] B. Pezzini, *Una questione che interroga l'uguaglianza: i diritti sociali del non-cittadino*, in *Lo statuto costituzionale del non cittadino. Atti del XXIV Convegno annuale dell'AIC*, Cagliari, 16-17 october 2009, Napoli, 2011, 212 ss.; M. Immordino, *Pubbliche amministrazioni e tutela dei diritti fondamentali degli immigrati*, in *Federalismi.it*, 2014, n. 19; F. Biondi Dal Monte, *I diritti sociali degli stranieri. Politiche di appartenenza e condizioni di esclusione nello Stato sociale*, in E. Cavasino, G. Scala, G. Verde (cur.), *I diritti sociali dal riconoscimento alla garanzia: il ruolo della giurisprudenza*, Naples, 2013; A. Patroni Griffi, *Stranieri non per la Costituzione,* in *Forum di Quaderni costituzionali*, 2009, n. 3.

[8] See the decision of Constitutional Court, 2 dicember 2005, n. 432 (on which C. Corsi, *Diritti sociali e immigrazione nel contraddittorio tra Stato*, cit.; F. Rimoli, *Cittadinanza, eguaglianza e diritti sociali: qui passa lo straniero*, in *Giurisprudenza costituzionale*, 2005, 4675 ss.; M. Cuniberti, *L'illegittimità costituzionale della esclusione dello straniero dalle prestazioni sociali previste dalla legislazione regionale*, in *le Regioni*, 2006, 510 ss.; M. Gnes, *Il diritto degli stranieri extracomunitari alla non irragionevole discriminazione in materia di agevolazioni sociali*, in *Giurisprudenza costituzionale*, 2005, 4681 ss.; F. Girelli, *Gli stranieri residenti in Lombardia totalmente invalidi per cause civili hanno diritto alla circolazione gratuita sui servizi di trasporto pubblico di linea nel territorio regionale*, in *Rivista Aic*, 27 genuary 2006), and the decision 9 february 2011, n. 40 (on which F. Corvaja, *Cittadinanza e residenza qualificata nell'accesso al welfare regionale*, in *www.forumcostituzionale.it*).

See also European court of human rights and fundamental freedoms, *Dhabbi v. Italy*, n. 17120/09, § 52-53, ECHR 2014; W. Chiaromonte, *Prestazioni sociali familiari e discriminazione per nazionalità. La posizione della Corte di Strasburgo*, in *Rivista italiana di diritto del lavoro*, 2014, 900 ss.; F. Biondi

Recently, we note three contemporary judgments n. 106[9], 107[10] e 166[11] of 2018[12] relating to three different regional laws that provided for long-term residence to access three different social benefits, all canceled by the constitutional judge.

Dal Monte, *Dhabbi c. Italia: chi ha diritto di accedere al sistema di welfare?*, in *Quad. cost.*, 2014, 743 ss.

In general, on the enjoyment of social rights by non-citizens, A. Ciervo, *I diritti sociali degli stranieri: un difficile equilibrio tra principio di non discriminazione e pari dignità sociale*, in A. Angelini, M. Benvenuti, A. Schillaci (cur.), *Le nuove frontiere del diritto dell'immigrazione: integrazione, diritti, sicurezza*, Naples, 2011; G. Bascherini, A. Ciervo, *I diritti sociali degli immigrati,* in *Esclusione sociale. Politiche pubbliche e garanzie dei diritti*, Florence, 2012; E. Rossi, F. Biondi Dal Monte, M. Vrenna (cur.), *La governance dell'immigrazione. Diritti, politiche e competenze*, Bologna, 2013.

[9] The decision n.106/2018 concerns a provision of the law of the Liguria Region, 6 June 2017, n.13, amending the regional law of 29 June 2004, n. 10, laying down "*Norms for the assignment and management of public housing, and modification of other disciplines on the subject*", which establishes that for the purpose of allocating public residential housing (ERP), the requirement prescribed for citizens of non-EU countries (which the amended standard identified as the ownership of a residence card or residence permit for at least two years combined with a working activity) is now instead replaced by regular residence for at least ten consecutive years in the national territory.

The applicant government complained about the violation of the art. 117, 1st paragraph of the Constitution, in relation to articles 4 and 11 of Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents: the aforementioned directive, in fact, recognizes the status of long-term resident for citizens of countries residing in a Member State of the European Union for at least 5 years, providing that "*long-term residents are equivalent to citizens of the Member State in which they are located, inter alia, for the enjoyment of the services and benefits social (art. 11)*", which includes the hypothesis in question of the allocation of public housing The Court therefore accepts the question, since the Liguria Region provides for long-term residents "*a much more extended time requirement (ten years) for the purposes of access to public residential buildings*". Among the precedents in this matter, see the important aforementioned decision n. 432/2005.

[10]In terms of access to nursery schools, which will be dealt with in detail.

[11] This ruling, unlike the previous ones, originates from an incidental appeal, against the dispute before the Court of Milan of a resolution of the Council of the Lombardy Region of 30 April 2015 and of some determinations of the Municipality of Milan (8 May 2015 and 12 May 2015), "*in the part in which they establish the necessary requisites for access to the Rent support fund*", which find a legal basis in a state discipline, art. 11, paragraph 13, of the legislative decree June 25, 2008, n. 112, converted into the law of 6 August 2008, n. 133, object of the judgment of constitutional legitimacy for the denunced contrast with the art. 3 Cost.

The contested regulation states that *"for the purpose of the allotment of the National Fund for supporting access to rented dwellings (...) the minimum requirements necessary to benefit from supplementary contributions (...) must provide for immigrants the possession of historical certificate of residence for at least ten years in the national territory or for at least five years in the same region*". According to the Court of Appeal referring this provision, under the same conditions of need, it would discriminate against citizens of countries that do not belong to the European Union, as it would require only a period of residence in the national or regional territory for the latter, without it being there is no reasonable correlation between the duration of the residence and access to the measure supporting the payment of the rent. The Constitutional Court has held that the new legislation "*introduces unreasonable discrimination against citizens of countries that do*

Two of them (the sentences number 106 and 166) concern the right to housing[13], the 107 concerns the access to nursery schools.

This reflection will focus on this last one, due to the more direct impact on the migrant minors.

2. *The criteria for access to nursery schools*

The judgment of Constitutional Court n.107/2018, together with the n.370/2003 can be considered one of the most significant statement about nursery schools after the reform of Title V of the Constitution.

The constitutional judge, in order to outline the areas of state and regional competence and in order to verify the constitutionality of the criteria for access to nursery schools, introduced by the contested law, aims first of all to identify the function of nursery schools, through the reconstruction of evolution of the relevant legislation.

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not belong to the European Union". In fact, "*ten years of residence on the national territory or five years on the regional territory*" would constitute "*a manifestly unreasonable and arbitrary duration, as well as not respecting European constraints*", in order to have access to the contribution of the payment of the rent, such as violate the deduced constitutional parameter referred to in art. 3 Cost. On the subject, see F. Corvaja, *L'accesso dello straniero extracomunitario all'edilizia residenziale pubblica*, in *Diritto immigrazione e cittadinanza*, 2009; A. Ciervo, *Il diritto all'abitazione dei migranti*, in L. Ronchetti (cur.), *I diritti di cittadinanza dei migranti*, Milan, 2012.

[12] The aforementioned three sentences are commented together by M. Belletti, *La Corte costituzionale torna, in tre occasioni ravvicinate, sul requisito del radicamento territoriale per accedere ai servizi sociali. Un tentativo di delineare un quadro organico della giurisprudenza in argomento*, in *www.forumcostituzionale.it*, 30 genuary 2019; C. Corsi, *La trilogia della Corte costituzionale: ancora sui requisiti di lungo-residenza per l'accesso alle prestazioni sociali*, in *www.forumcostituzionale.it*, 27 genuary 2019; D. Tega, *Le politiche xenofobe continuano a essere incostituzionali*, in *Diritti regionali*, n.2/2018. See also L. Ardizzone, *La Consulta dichiara illegittimo il criterio della "residenza prolungata sul territorio regionale" per l'ammissione all' asilo nido,* in *Consulta online*, 2018, fasc. II.

[13] With particular reference to the right to housing of foreigners, see, F. Pallante, *Gli stranieri e il diritto all'abitazione*, in *Costituzionalismo.it*, n. 3/2016, 135 ss.; P. Bonetti —L. Melica, *L'accesso all'alloggio*, in B. Nascimbene (cur.), *Diritto degli stranieri*, Padua 2004, 1017 ss.; C. Corsi, *Il diritto all'abitazione è ancora un diritto costituzionalmente garantito anche agli stranieri?*, in *Diritto immigrazione e cittadinanza*, nn. 3/4, 2008, 141 ss.; F. Corvaja, *Libera circolazione dei cittadini e requisito di residenza regionale per l'accesso all'edilizia residenziale pubblica*, in *Le Regioni*, n. 3/2008, 611 ss.; Id., *L'accesso dello straniero extracomunitario all'edilizia residenziale pubblica,* in *Diritto immigrazione cittadinanza*, n. 3/2009, 89 ss.; A. Ciervo, *Il diritto all'abitazione dei migranti*, in L. Ronchetti (cur.), *I diritti di cittadinanza dei migranti*, cit., 285 ss.

And so, it is recalled that, originally, in the fascist era, the function of the nursery was to provide temporary custody of the children in order to allow women access to work in the factory.

After, in the Republican era, were added two other functions, to support families in the care of children and an educational function for children (l.s. n. 1044/1971, art. 70).

This discipline, so, under the profile of the division of competences, falls for some aspects in the matter of the protection of work, as well as, for some other aspects, in the matter of education[14] (however in relation to the pre-school phase of the child), and therefore, as a whole, in areas of concurrent legislative power between the State and the regions (Article 117, paragraph 3 of the Constitution): in these cases the State establishes the fundamental principles of the matter and the Regions dictate the details (except, of course, the exclusive interventions of the state legislator which find legitimacy in the "transversal titles"[15] referred to in art. 117, paragraph 2 of the Constitution: lett. m, essential performance levels[16] and lett. n,

[14] In particular on the division of powers concerning education, see M. Benvenuti, *Un problema 'nazionale'. Spunti ricostruttivi in materia di istruzione e di 'istruzione e … formazione professionale' tra Stato e Regioni, a partire dalla giurisprudenza costituzionale*, in *Federalismi.it*, 1/2015; M. Troisi, *Il perenne conflitto tra Stato e Regioni in materia d'istruzione*, in *Diritti fondamentali.it*, 2018, fasc. I, 1 ss. See also G. Bascherini, *Il riparto di competenze tra Stato e Regioni in materia di immigrazione al tempo del "pacchetto sicurezza". Osservazioni a margine delle sentt. nn. 269 e 299/2010*, in *Giurisprudenza costituzionale*, 2010.

[15] On the subject, see M. Belletti, *I criteri seguiti dalla Consulta nella definizione delle competenze di Stato e Regioni ed il superamento del riparto per materie*, in *Le Regioni*, 5/2006. About the "transversal titles", for all, see A. D'Atena, *Diritto regionale*, Milano, 2018, 161 ss., with numerous jurisprudential references.

[16] On essential performance levels see, among others: M. Belletti, *Le Regioni "figlie di un Dio minore". L'impossibilità per le Regioni sottoposte a Piano di rientro di implementare i livelli essenziali delle prestazioni*, in *Le Regioni*, nn. 5-6/2013, 1078 ss.; Id. *I "livelli essenziali delle prestazioni concernenti di diritti civili e sociali" alla prova della giurisprudenza costituzionale. alla ricerca del parametro plausibile*, in *Istituzioni del federalismo*, nn. 3-4/2003, 613 ss.; M. Luciani, *Diritti sociali e livelli essenziali delle prestazioni pubbliche nei sessant'anni della Corte Costituzionale*, in *Rivista AIC*, n. 3/2016; C. Panzera, *I livelli essenziali delle prestazioni secondo i giudici comuni*, in *Giurisprudenza costituzionale*, n. 4/2011, 3371 ss.; C. Pinelli, *Livelli essenziali delle prestazione e perequazione finanziaria*, in *Diritto e società*, n. 4/2011, 731 ss.; A. Ruggeri, *"Livelli essenziali" delle prestazioni relative ai diritti e ridefinizione delle sfere di competenza di Stato e Regioni in situazioni di emergenza economica (a prima lettura di Corte cost. n. 10 del 2010)*, in *Forum di Quaderni costituzionali*, 2010; L. Trucco, *Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali*, in *www.gruppodipisa.it*, 2012.

the general rules on education; cfr. the judgment of Constitutional Court, n.370/2003).

In short, we have to say that the regulation of nursery schools mostly falls within the competence of regional legislators, although there are margins of intervention, even exclusively, from the state legislature.

Well, the priority requirements for access to nursery schools don't find a uniform definition valid for the whole national territory, but they are provided for by each regional law.

Object of the question of constitutional legitimacy defined with the judgment n.107/2018 in question is, indeed, a law of the Veneto Region[17] which provided: "*They have the right of priority for admission to nursery schools in the following order of priority: a) children with disabilities; b) the children of parents residing in the Veneto region, even if not continuously, for at least fifteen years or who have been working in the Veneto region continuously for at least fifteen years, including any intermediate redundancy, mobility or unemployment periods*"[18].

It should be noted that before the change, this rule identified the personal conditions of children (such as impairments, disabilities, etc.) or the presence of situations of risk and social disadvantage as priority titles for admission to the Regional nursery schools.

[17] Regional law, 21 february 2017, n. 6, which introduces changes and additions to a previous regional law, the l.r. April 23, 1990, n. 32, laying down "*Rules for regional interventions for early childhood education services: nurseries and innovative services*".

[18] The applicant government has denounced the contrast with the art. 3 of the Constitution, with reference to the principle of equality and reasonableness; with the art. 31, 2nd paragraph of the Constitution, where the constitutional value of child protection would be frustrated; with the articles 16 and 120, 1st paragraph of the Constitution, where freedom of movement would be hindered; with the art. 117, 1st paragraph of the Constitution, where the disputed regulation would conflict with the art. 21 of the TFEU, in the matter of freedom of movement; with the art. 24 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (about the Directive 2004/38/EC, see F. Biondi Dal Monte, *Cittadinanza europea, libera circolazione e parità di trattamento. Il diritto all'assistenza sociale dei cittadini dell'Unione*, in *Diritto, immigrazione e cittadinanza*, n. 4/2012, 37 ss.) and with art. 11, paragraph 1, letters d) and f) of Council Directive 2003/109 / EC of 25 November 2003 on the status of third-country nationals who are long-term residents.

On the subject see A. Rauti, *L'accesso dei minori stranieri agli asili nido fra riparto di competenze e principio di eguaglianza. Profili definiti e nuovi spunti dalla giurisprudenza costituzionale*, in *Osservatorio AIC*, 3/2018.

After the reform, any reference to situations of risk and social disadvantage disappears and the criterion of long-term residence (15 years) on the regional territory becomes preponderant as a preferential title for access to nursery schools.

Is this rule comply to the Constitution?

To answer this question, the Court began investigation into the "function of nursery schools".

The constitutional judge, as already mentioned, recalled that, originally, as already mentioned, in the fascist era, the function of the nursery was to provide temporary custody of the children in order to allow women access to work in the factory. After, in the Republican era, were added two other functions, to support families in the care of children and an educational function for children (l.s. n. 1044/1971, art. 70). So, the relative service has a double, social and educational, value.

Nursery schools "*have an educational function, to the benefit of children and a social-assistance function, to the advantage of parents who don't have the economic means to pay for private daycare or a baby-sitter: from the legislative discipline emerges above all the intent to favor women's access to work, a purpose that has specific constitutional significance, because the Constitution expressly guarantees the possibility for the woman to reconcile work with the 'family function' (art. 37, first paragraph, Cost.)*".

Once the function of the nursery service has been clarified, the Court recalls the already established principle that "*the legislator, both state and regional (and provincial), is allowed to provide a differentiated regulations for access to welfare benefits in order to reconcile the maximum usability of expected benefits with limited financial resources available*"[19].

However, "*the legitimacy of such a choice does not exclude that the selective fees adopted must still comply with the principle of reasonableness*"[20], and that, therefore, "*they must in any case be consistent and adequate to face the situations of need or hardship, directly referable to the person as, which is the main condition for usability of the benefits in question*"[21].

[19] Judgment n. 133/2013.

[20] See the aforementioned judgment n. 133/2013.

[21] Judgments n. 40/2011 and n.168/2014.

With regard to the requirement of long-term residence, the constitutional judge has already had the opportunity to state that while residence is a non-unreasonable criterion for the attribution of a regional providence22, the same cannot be said for the protracted residence for a predetermined and significant minimum period of time (which in that case was only five years and not fifteen years as in the case in question here).

The provision of the requirement of long-term residence, in fact, where it is general and decisive, does not respect the principles of reasonableness and equality, as it "*introduces arbitrary elements of distinction into the normative fabric*": in fact there is no reasonable correlation between the prolonged duration of residence and situations of need or hardship, directly referable to the person, which in abstract terms can characterize the request for access to the social protection system23.

Taking into account what was said above regarding the function of nursery schools and in the light of the constitutional jurisprudence just mentioned, the contested rule violates the principle of equality[24].

The configuration of the continued residence (or occupation) as a title of precedence for access to nursery schools, even for economically weak families, stands in contrast with the social vocation of these kindergartens. The relative service responds directly to the objective of substantial equality established by art. 3, second paragraph, of the Constitution, as it allows parents (especially mothers) without adequate financial means to carry out work activities. The service, therefore, eliminates an obstacle that limits substantial equality and the freedom of parents and prevents the full development of the person and the effective

[22] See the aforementioned decision of Constitutional Court n. 432/2005.

[23] See the decisions of Constitutional Court n. 40/2011 (on which F. Corvaja, *Cittadinanza e residenza qualificata nell'accesso al welfare regionale*, cit.), and n.222/2013 (D. Monego, *La "dimensione regionale" nell'accesso alle provvidenze sociali,* in *www.forumcostituzionale.it*, 31 march 2014).

A review of recent regional legislation that provides for minimum residence requirements for access to social benefits is found in F. Dinelli, *Le appartenenze territoriali. Contributo allo studio della cittadinanza, della residenza e della cittadinanza europea*, Naples, 2011, 204 ss.

[24] *Ex plurimis* L. Paladin, *Eguaglianza (diritto costituzionale)*, in *Enciclopedia del Diritto*, XIV, Milan, 1965. M. Losana, *"Stranieri" e principio costituzionale di eguaglianza*, in *www.rivistaaic.it*, n.1/2016; A. Lollo, *Eguaglianza e cittadinanza. La vocazione inclusiva dei diritti fondamentali*, Milan, 2016.

participation of the parents themselves in the economic and social life of the country.

For this reason, the service of nursery schools should be destined primarily to families in conditions of economic or social hardship, as was provided by the regional legislation contested in its previous formulation (in line with state regulations, which establishes the principle of priority access to social services for those in conditions of economic and social difficulty: article 2, paragraph 3, Law n. 328/2000).

The contested rule, on the other hand, totally ignores the economic factor and, by favoring people who have been established in Veneto for a long time, adopts a criterion that also contradicts the purpose of social services to guarantee equal opportunities and avoid discrimination (Article 1, paragraph 1, of Law n. 328/2000).

"*Ultimately, the title of precedence established by the contested regulation is contrary both to the social function of nursery schools and to the 'universalistic vocation' of social services. It is clear that the territorial rooting is completely extraneous to the educational function of nursery schools, especially if we consider that the contested rule refers the requirement to parents and not to beneficiaries of educational activity: it is obviously unreasonable to believe that the children of parents rooted in Veneto for a long time have a greater educational need than others*".

The constitutional judge, with regard to the universalistic vocation of social services, notes that, while the requirement of residence tout court serves to identify the competent public office to provide a certain service and is a requirement that each person can meet at any time, that of the long term residence is a condition that can in practice preclude to a specific person the access to public services both in the region of current residence and in the region of origin (in which he no longer resides).

The rules that introduce this requirement must therefore be examined with particular attention, as they involve the risk of depriving some people of access to public services only because they have exercised their right of circulation or have had to change their region of residence.

Therefore, not only violation of the principle of equality pursuant to article 3 of the Constitution, because the contested regulation, neutralizing both the social and educational function of the kindergartens, reduces the principle of substantial equality to ineffectiveness and violates the principle of reasonableness (the service of nursery schools should have privileged users as families in conditions of economic or social hardship); there is also a violation of the constitutional and European Union rules that protect freedom of movement[25].

It is well known that, as always, according to European Union law, the legitimate exercise of the freedom of movement allows the enjoyment of social rights in conditions of equality with the citizens of the Member State to which this freedom is exercised[26].

Under this last aspect, the Constitutional Court also refers to the jurisprudence of the Court of Justice of the European Union, which, with regard to the requirement of 'prolonged residence', has specified that a national regulation "*which disadvantages some citizens of a Member State for the just because they have exercised their freedom of movement and residence in another Member State, constitutes a restriction on the freedoms recognized by art. 21, n. 1, TFEU*".

With reference to European Union law, such a restriction may be justified "*only if it is based on objective considerations independent of the citizenship of the persons concerned and is proportionate to the purpose legitimately pursued by national law*"[27]: the Court of Justice does not exclude the admissibility of residence requirements for access to services provided by Member States, but requires that the rule has a legitimate purpose, that it is proportionate and that the criterion adopted is not too exclusive.

[25] The art. 16, art.120, 1st paragraph of the Italian Constitution, art. 21, par. 1, European Union Treaty and in report to the latter also violation of Article 117, paragraph 1 of the Constitution.

[26] On this matter, G. Cavaggion, *La dimensione sociale della libertà di movimento*, in P. Bilancia (cur.), *I diritti sociali tra ordinamento statale e ordinamento europeo*, cit., 219 ss.

[27] The Constitutional Court cites the following precedents of the Court of Justice: decision 21 july 2011, C-503/09, Stewart, 86-87; see also the decisions 26 february 2015, C-359/13, B. Martens; 24 october 2013, C-220/12, Andreas Ingemar Thiele Meneses (22-29); 15 march 2005, C-209/03, The Queen, Dany Bidar, 51-54; 23 march 2004, C-138/02, Brian Francis Collins; 30 september 2003, C-224/01, Gerhard Köbler.

The constitutional judge concludes that "*the contested rule is already defective in relation to the aim pursued*" and is "*certainly disproportionate as regards the exceptionally long duration*", 15 years of protracted residence.

Furthermore, the contested provision does not immediately affect the right of circulation and to carry out work activities, so it does not directly violate the prohibitions set by art. 120, first paragraph, of the Constitution: however, it poses an obstacle to the exercise of the rights therein provided, for the same reasons illustrated with reference to art. 21 TFEU.

"*It is evident, in fact, that a parent who has to move to Veneto for work reasons may find himself in difficulty to make the transfer if he does not have the sufficient means to pay for a private nursery, since the contested provision de facto excludes him from nursery schools public*".

The Court concludes that the disputed limitation "*does not pursue a deserving public interest, aiming only to give priority to people long established in Veneto*", in the face of a disproportionate duration, consistent only with the intention of "*guaranteeing a link between applicant and the Region*".

3. The simple residence as a legimate requirement for access to the nursery service.

After excluding the long-term residence as a legimate requirement for access to the nursery service, to ensure a "sufficient connection" with the regional territory, is it possible to require the 'simple' residence, in addition to the presence of situations of hardship or difficulty, of low income, of families with single parent, and so on?

In general, this criterion, unlike the requirements of prolonged residence and/or employment, could hardly be considered discriminatory not only in relations between the regional community and Italian citizens, but also between the latter and foreigners. But perhaps, in relation to access to nursery schools, for this specific social benefit, the residence itself should not be taken into consideration[28].

[28] See Pitino A., *Per l'accesso agli asili nido è incostituzionale il requisito della residenza protratta dei genitori nella Regione. E se lo fosse anche la residenza tout court?*, in *www.forumcostituzionale.it*, 20 february 2019.

And in fact, we have seen that the most important function of this institute progressively shifted from the protection of work (of women) to the education and integration of minors, who therefore become the protagonists and the first recipients of the discipline of the subject.

This trend is also confirmed by the most recent national legislation, the so called "*Buona scuola*"[29]: the national legislator[30] states that nursery schools - and, more generally, socio-educational services for early childhood - are places of education of children, as well as care, relationships and play[31]. This definition is in accordance with the constitutional jurisprudence according to which the discipline of nursery schools finds its material foundation, predominantly, in the right to education[32] and, subordinately, in the right to social assistance (CC, judgment n. 307/2003)[33].

And so, education imparted in early childhood is as an integral part of the right to education.

Indeed, it is necessary to ask whether the residence, even before the long term residence, can be taken as a requirement for the access of children to nursery

[29] A. Poggi, *Il d.d.l. sulla Buona scuola*, in *Federalismi.it*, 2015, fasc. IX; V. Capuzza, E. Picozza, N. Spirito, *La buona scuola*, Turin, 2016.

[30] See the Law n. 107/2015 and Legislative Decree n. 65/2017.

[31] Law n.107/2015, paragraf 181.

[32] On the right to education, see M. Benvenuti, *L'istruzione come diritto sociale*, in F. Angelini, M. Benvenuti (cur.), *Le dimensioni costituzionali dell'istruzione*, *Atti del Convegno di Roma*, 23-24 gennaio 2014, Naples, 2014; Id., *"La scuola è aperta a tutti"? Potenzialità e limiti del diritto all'istruzione tra ordinamento statale e ordinamento sovranazionale,* in *Federalismi.it*, 14 settembre 2018; D. Morana, *I diritti a prestazione in tempo di crisi: istruzione e salute al vaglio dell'effettività,* in *Rivistaaic.it*, 2013, n. 4, 13; A. D'Andrea, *Diritto all'istruzione e ruolo della Repubblica: qualche puntualizzazione di ordine costituzionale*, in AA.VV., *Scritti in onore di Alessandro Pace*, Naples, 2012; G. Bascherini, A. Ciervo, *L'integrazione difficile: il diritto alla salute e all'istruzione degli stranieri nella crisi del welfare State*, in *Gli Stranieri. Rassegna di studi e giurisprudenza*, 2011, n. 3; G. Brunelli, *Welfare e immigrazione: le declinazioni dell'eguaglianza,* in *Le Istituzioni del Federalismo*, 2008, n. 5, 553 ss.; Id., *Minori immigrati, integrazione scolastica, divieto di discriminazione*, in *Diritto immigrazione e cittadinanza*, 2010, n. 1, 70 ss.

On the right to education see also the recent reflection contribution by M. N. Campagnoli, *Diritto all'educazione e nuove tecnologie. Sulla necessità di un approccio consapevole*, in *Dirittifondamentali.it*, 2/2019, 24 luglio2019.

[33] A. Pitino, *Per l'accesso agli asili nido è incostituzionale il requisito della residenza protratta dei genitori nella Regione. E se lo fosse anche la residenza tout court?*, cit., 2.

schools, or if this limit, recognized as valid for social assistance, cannot be applied in the same way as regards access to the right to education[34].

The right to education, in fact, is a right guaranteed particularly broadly not only for Italian citizens but also for foreigners, according to the provisions of the italian Constitution[35] , of the national laws[36] and in line with the International Convention on the Rights of the Child and Adolescent[37], with the Additional Protocol to the European Convention on Human Rights[38] and the EU Charter[39], which among other things, recognizes the right of children to education and health, regardless of the regularity of the position regarding their stay.

And indeed, the article 34 of the Constitution establishes the right to education regardless of the status of citizen and the possession of a residence permit: in fact, it

[34] A. Pitino, *Per l'accesso agli asili nido è incostituzionale il requisito della residenza protratta dei genitori nella Regione. E se lo fosse anche la residenza tout court?*, 11.

[35] See artt. 2, 3, 10 paragraph 2 and art. 34 Cost. B. Pezzini, *Lo statuto costituzionale del non cittadino: i diritti sociali,* in *Lo statuto costituzionale del non cittadino. A.I.C. Cagliari 16-17 ottobre 2009*, in *Rivistaaic.it*, 2009.

[36] See "*Testo unico on Immigration*" (T.U.I.) (Article 38, paragraph 1, Legislative Decree n.286/1998) and its implementing regulation (art. 45, c. 1, d.P.R. n. 394/1999).

[37] Signed to New York on November 20, 1989, ratified and enforced in Italy with the law of 27 May 1991, n. 176. Article. 28 states that: "*States Parties recognize the right of the child to education, and in particular, in order to guarantee the exercise of this right gradually and on the basis of equality of possibilities: a) make primary teaching compulsory and free for all; b) encourage the organization of various forms of secondary education, both general and professional, which will be open and accessible to every child and will adopt appropriate measures such as free teaching and the offer of a financial grant in case of need;[…]*"; Article. 2 establishes that the rights sanctioned by the Convention must be guaranteed to all children without discrimination, even "*regardless of their nationality, immigration status or statelessness*"; Article. 3 of the Convention, finally, establishes that in all decisions concerning minors, the best interests of the child must be a primary consideration.

[38] Art. 2: "*The right to education cannot be refused to anyone*". The judges of Strasbourg tend to guarantee in broad terms - and without any kind of self restraint -, the right to education of foreigners residing in the States of the Council of Europe. See the case of *Timichev v. Russia* of 13 December 2005 (joined appeals, nos. 55762 and 55974 of 2000):"*Article 2 of Protocol n. 1 prohibits depriving anyone of the right to education. No exception to this principle has been affirmed and its wording is similar to that of articles 2, 3, 4 §1 and 7 of the Convention [...]. In a democratic society, the right to education, indispensable for the realization of human rights, occupies such a fundamental place that a restrictive interpretation of the first sentence of Article 2 of Protocol No. 1 would not correspond to the purpose and object of this provision*"(par. 64).

[39] Art. 14: "*Everyone has the right to education ...*"

recognizes the right to education to all the "capable and deserving", therefore not only citizens, but also foreigners and in particular minors[40].

Indeed, according to italian law, "*foreign minors present in the territory are subject to educational obligation; all the provisions in force concerning the right to education, access to educational services and participation in the life of the school community apply to them*"[41]. Moreover, it is established that "*foreign minors present in the national territory have the right to education regardless of the regularity of the position with regard to their stay, in the forms and manner provided for Italian citizens*"[42].

So exists the principle that the right to education is guaranteed equally to Italian citizens and foreigners, including those not in order with the conditions of entry and stay in Italy[43], as derived from the two rules just mentioned.

It is believed that this guarantee must also concern the nursery school, although the relative frequency is not compulsory, and this in consideration of the fact that, as already mentioned, it also has educational purposes[44].

And so, "*if the ownership of a regular residence permit cannot affect the protection of the right to education of foreign minors, which is also guaranteed for 'irregular' or illegal immigrants, and if nursery schools are places for the education of children, we must conclude that the residence, which assumes the regularity of the permanence of the foreign*

[40] See A. De Fusco, *Sul diritto all' istruzione come veicolo di integrazione delle seconde generazioni dell'immigrazione in Italia*, in *Osservatorio costituzionale*, 2018, fasc. I, 10.

[41] Art. 38, c. 1 of the T.U.I.

[42] Art. 45, c. 1, d.P.R. n. 394/1999, which also provides that foreign minors without records or in possession of irregular or incomplete documentation are registered with reservation, without this reservation being subject to prejudice the achievement of the final qualifications of the study courses of schools of all levels.

On the subject, recently, also S. Di Mare, L. Saulle, *Il non cittadino nella Costituzione italiana ed il diritto all'istruzione del minore straniero,* in *Dirittifondamentali.it*, n.2/2019; F. Scuto, *Il diritto sociale alla salute, all'istruzione e all'abitazione degli stranieri «irregolari»: livelli di tutela,* in *Rassegna Parlamentare*, 2008, n. 2.

[43] C. F. Ferrajoli, *Il diritto all'istruzione dei migranti. Il ruolo delle Regioni*, in L. Ronchetti (cur.), *I diritti di cittadinanza dei migranti*, cit., 211 ss.; Id., *La disciplina regionale in materia di diritto all'istruzione dei migranti*, in E. Di Salvatore, M. Michetti (cur.), *I diritti degli altri*, Naples, 2014, 207 ss.

[44] See also M. Immordino, *Pubbliche amministrazioni e tutela dei diritti fondamentali degli immigrati*, cit., 29.

minor (which derives, in turn, from that of the parents), cannot be taken as a mandatory criterion for access to nursery schools and, more generally, to early childhood services"[45].

The constitutional Court, in sentence n.107/2018, didn't go so far, did not emphasized the educational function of nursery schools up to this point; but it could be called again to rule on this matter.

Certainly in a future question of constitutional legitimacy concerning the priority requirements for access to nursery schools, it is necessary that the violation of the right to education of foreign children is expressly reported, due to the fact that they are denied access to social services - education intended for early childhood - because parents do not meet the conditions required to obtain residence in Italy[46].

4. A small digression: residence and access to "School lunch service"

If the right to education is to be guaranteed to everyone regardless of the regularity of the stay, for the reasons mentioned above, also the access to services and benefits aimed at making *effective* the right to education and training - such as measures support for the purchase of books, canteen service, transport service, etc. - cannot be conditioned by the regularity of the stay and, therefore, by the residence.

Yet there is no lack of norms aimed at linking, for example, participation in the service of school meals to residence: these rules pose problems if it is agreed that the concept of "education", referred to in art. 34, co. 2 of the Constitution, cannot be exclusively reduced to strictly educational activities, aimed at imparting knowledge, but it should be qualified as a broader process that involves a series of activities, including socio-educational ones, including those related to "school lunch time" they are particularly significant.

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[45] In these terms A. Pitino, *Per l'accesso agli asili nido è incostituzionale il requisito della residenza protratta dei genitori nella Regione*, cit., 12, who recalls the order of the Civil Court of Milan, section I, ord. n. 2380/2008, in which, regarding the access of minors to kindergartens recognized as part of the national school education system, the judge stated that the primary interest of the minor in accessing such structures prevails over the regularity of the title of stay of the parents.

[46] A. Pitino, *Per l'accesso agli asili nido è incostituzionale il requisito della residenza protratta dei genitori nella Regione*, cit., 16.

The "school lunch time" in fact, it represents an important moment of sharing and socialization, during which the teaching staff performs not mere surveillance, but nutrition education activities [47].

Well, from the new report "*(Non) Tutti a Mensa 2018*" of Save the Children, at the beginning of the new school year it emerges that the requirement of residence continues to be a discriminating factor to access or not to the "school lunch time".

There are 28 municipalities[48] that apply it as a restrictive criterion (58%), penalizing many children who for various reasons are not yet resident in the municipality, while 17 do not take it into account (42%)[49].

For the Municipality of Milan, for example [50], the provisions for access to the school canteen service, on the one hand provide that "*participation in the school lunch service is closely linked to the educational offer of the School, becoming an important part of it as it is also an educational moment*", but, on the other hand, they introduce the criterion of residence: "*Students attending schools of every order and degree not resident in the Municipality of Milan will not be able to enjoy the reduced contribution rates, nor any other facility reserved for resident and tax payers families*".

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[47] See on the subject G. Boggero, "*There is no such thing as a free lunch*", in *Osservatorio costituzionale*, 2017, fasc. III, 4. Recently the Court of Cassation, by order of 11.3.2019, n.6972, reiterated that remaining in school during meal times (so-called "canteen time") and sharing it in common among the students constitutes a perfect subjective right because it is inherent in the right to instruction. On this occasion, the Court asked the United Sections the following general question of particular importance: "*can a perfect subjective right be configured for the parents of elementary and middle school students, possibly as an expression of an inviolable personal freedom, whose assessment is susceptible to compliance, to choose for their children between school meals and meals brought from home or packaged independently and to consume them in the school premises and in any case in the time allocated for school meals, in the light of the sector legislation and the constitutional principles , regarding the right to education, the education of children and individual self-determination, in relation to food choices (articles 2, 3, 30, paragraph 1, 32, 34, paragraphs 1 and 2 of the Constitution)*". On July 30, 2019, the United Sections of the Cassation ruled that there is no "subjective right" to eat the sandwich brought from home "*in the canteen and school premises*" and the management of the meal service is "*reserved organizational autonomy*" of the schools.

[48] Bolzano, Bergamo, Turin, Piacenza, Monza, Milan, Brescia, Vicenza, Venice, Verona, Padua, Parma, Bologna, Modena, Reggio Emilia, Genoa, Rimini, Forlì, Ancona, Pescara, Perugia, Latina, Rome, Andria, Foggia , Catania, Syracuse and Sassari.

[49] Bari, Cagliari, Ferrara, Florence, Livorno, Messina, Naples, Novara, Prato, Palermo, Ravenna, Reggio Calabria, Salerno, Taranto, Terni, Trento, Trieste.

[50] Cfr. "*Un posto a tavola. Iscrizione al servizio di refezione scolastica a.s. 2019-2020*" (https://www.milanoristorazione.it/files/News/news_2019/30_04_2019_UN%20POSTO%20A%20TAVOLA_2019_2020_definitivo%20sito.pdf).

Not participating in school meals and recreation means not benefiting from the educational value of these school events that facilitate socialization and the acquisition of correct eating habits.

Hence, therefore, the conclusion that excluding pupils from the school canteen service inevitably entails the denial of the right to quality education.

It is, indeed, issues on which it is necessary to start a serious reflection that can lead to the introduction of suitable regulatory protections or, in the absence, to desirable judicial decisions.

5. Residence and access to social rights in the perspective of the so-called "Security decree" and in the first judgments about it

The problem of residence as a requirement for access to social rights has become very topical following the adoption of the so-called "Security decree" or "Salvini decree" (legislative decree n.113/2018), which (in article 13, lett. a) - excludes that the "*permit of stay for asylum request*" (and only this type of residence permit) constitutes a title for registration in the registry office: in this way, in fact, limits are introduced in the assignment of residence not only to foreigners irregularly present in our State, but also to those who regularly hold residence permits in Italy.

As also clarified by the Ministry[51], although the law did not provide for an express prohibition against registering data for the applicant for international protection, it aimed at this final objective.

It is clear that this rule contrasts with the constitutional jurisprudence described above: it allows, in fact, that persons holding a residence permit cannot benefit from those social rights recognized to the person, regardless of the more or less long period of stay on the national territory.

It should be noted that this rule only affects the type of "residence permit for asylum request", therefore only for certain categories of foreigners regularly, but provisionally residing, while it does not refer to other categories of legally residing

[51] See the Circulars n. 15 of 18/10/2018 and 83744 of 18/12/2018.

foreigners, holders of residence permits, not naturally impacting on long-term residents, continuously residing in the national territory for at least five years[52].

And yet, the hostility towards migrants of this norm appears evident.

Many mayors (heads of municipalities) immediately opposed to the application of this rule, believing that in its ambiguous formulation it could not preclude registration at the registry office, with the aim of not depriving migrants of the fundamental rights connected to this registration[53].

And an intervention on this rule of the Constitutional Court is not to be excluded[54].

Meanwhile, decisions of merit judgments are multiplying. After the decisions of the Courts of Florence (18 March 2019), Bologna (2 May 2019), Genoa (20 May 2019), also the Courts of Prato (26 May 2019) and Lecce (4 July 2019) - accepting the precautionary appeals[55] with almost similar reasons - they recognized the right of holders of residence permits for asylum applications to register in the population register of the resident population.

Through the constitutionally oriented interpretation[56], in fact, it was recognized that the new legislation introduced by Legislative Decree n. 113/2018 converted

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[52] See M. Belletti, *La Corte costituzionale torna, in tre occasioni ravvicinate, sul requisito del radicamento territoriale per accedere ai servizi sociali*, cit., 5.

[53] According to some authors, the decree would have only made the procedure for registering the asylum seekers unreasonably cumbersome: they still be required to make declarations about their habitual residence, but they would inexplicably be deprived of the "title" that allowed an immediate and easy reconstruction; A. Buzzi, F. Conte, *Ma cosa prevede davvero il "decreto Salvini" sull'iscrizione anagrafica dei richiedenti asilo?*, in *laCostituzione.info*, 6 genuary 2019.

[54] A. Morelli, *La "ribellione" dei sindaci contro il decreto sicurezza: la tortuosa via per la Corte costituzionale*, in *Consulta on line*, 7 genuary 2019. See the recent sentence n.194 of 24 July 2019, with which the Constitutional Court rejected a series of questions of constitutional legitimacy raised by the regions of Sardinia, Umbria, Emilia-Romagna, Basilicata, Marche, Tuscany and Calabria against numerous provisions of the Salvini Decree, not having recognized the damage to regional competences.

[55] In fact, the "periculum in mora", was also recognized because the failure to register data entails a breach of the constitutionally guaranteed rights, such as access to work or the opening of the bank account, etc.

[56] It is read in the order of the florentine Court of 18 March 2019 that the law once issued "*detaches itself from the organ that produced it and is no longer highlighted as a 'decision' linked to reasons and ends of those who wanted it, but as a legislative text inserted in the legal system as a whole 'and therefore dutifully interpretable' in a manner consistent with the canon of consistency with the entire regulatory system, a coherence that will obviously be sought also on the constitutional level*".

On the subject, *ex plurimis*, see C. Lavagna, *Considerazioni sulla inesistenza di questioni di legittimità costituzionale e sulla interpretazione adeguatrice (1959)*, ora in Id., *Ricerche sul sistema normativo*,

into l. 132/2018 merely repealed (art.13, lett c) the institution of the so-called registry cohabitation[57] which, in fact, allowed the registration of the applicant for international protection, on the communication of the person in charge of the reception facility by sending only the residence permit for asylum request: a simplified and accelerated procedure that is independent both of the duration of the stay at the reception center and of the declarations of the interested party or of the administration.

Therefore, the coherent interpretation of the two provisions (letters *a* and *c* of art. 13) leads us to believe that the legislator has sanctioned "*the repeal, not the possibility of registering in the register of the resident population of holders of a permit for asylum request*[58]*, but only the simplified procedure foreseen in 2017 which introduced the institution of cohabitation, releasing the registration from the controls provided for other foreigners regularly residing and for Italian citizens. By eliminating this procedure the legislator has somehow restored the system of absolute equality between different types of foreigners legally residing and Italian citizens envisaged by the T.U.I*".

So, according to the Court of Bologna, the reform of the legislative decree n. 113/2018 has affected the automatism of the registration of asylum seekers hosted in a reception facility, which if previously they were enrolled on the impulse of the person in charge of the structure, today must make a single declaration of residence, on a par with everyone.

Milan, 1984; M. Ruotolo, *L'interpretazione conforme a Costituzione nella più recente giurisprudenza costituzionale. Una lettura alla luce di alcuni risalenti contributi apparsi nella rivista «Giurisprudenza costituzionale»*, in A. Pace (cur.), *Corte costituzionale e processo costituzionale nell'esperienza della Rivista «Giurisprudenza costituzionale» per il cinquantesimo anniversario*, Milan, 2006; A.M. Nico, *L'accentramento e la diffusione nel giudizio sulle leggi*, Turin, 2007; G. Serges, *Interpretazione conforme tra tecniche processuali e collaborazione con i giudici*, in AA.VV., *Studi in onore di Franco Modugno*, Naples, 2011, 3353 ss.; for interesting comparative ideas, see R.G. Rodio, *L'interpretazione costituzionalmente adeguata nel sistema spagnolo*, Bari, 2004.

[57] Introduced by decree-law 17 February 2017, n. 13 conv. in law 13 April 2017, n. 46.

[58] The Court of Bologna recalls that there are no qualifications for registration in the registry and therefore the provision of Legislative Decree N. 113/2018 does not prevent the registration of personal data because "*the residence permit for asylum request - nor any other residence permit - has ever been 'title 'for registration in the registry office. Instead, they constitute proof of the regular stay required of foreign citizens*".

So the residence permit for asylum request does not in itself constitute the right to automatic registration, but requires the appropriate checks required by the registry regulation, like any citizen who applies for registration[59].

It is hardly necessary to point out that the interpretation of the rules concerning the registration of asylum seekers emerging from the aforementioned decisions is consistent with the principle of non-discrimination (Article 3 of the Constitution and 14 ECHR) and guarantees the effective exercise of the rights inviolable (Article 2 of the Constitution) and of the social rights which also derive from the registration in the registry office.

6. *Conclusive considerations*

The legal status of the immigrant has registered a progressive precarization, as a consequence, among other things[60] of the restriction of the welfare areas, amplified in recent years by the economic crisis, which ended up significantly impoverishing the range of social rights recognized to immigrants.

As we have seen, on the issues concerning the social rights of immigrants, there have been significant jurisprudential paths not only for the Constitutional Court and national judges, but also for the European Court of Human Rights and the Court of Justice, all judges who must be ascribed the merit of having reminded and reiterated on various occasions the meaning and value of principles such as social dignity, solidarity and, above all, equality, too often obliterated by the ruling classes of the country.

[59] Every asylum seeker, once he has submitted an application for international protection, must in any case be considered a regular resident in the territory of the State at least for the time required to ascertain the right to the requested protection (generally very long times) and "*the regularity of the stay on the documentary level can be proven, in addition to the residence permit, of which the rule in question excludes the spendability, from further and different documents such as for example the acts concerning the start of the procedure aimed at the recognition of the validity of the claim of protection and in particular through the cd. 'Model C3', and / or through the document in which the police officer certifies that the applicant has formalized the request for international protection*".

[60] See also the imbalance of the Italian immigration law towards the repression of the migration irregularity up to the criminalization of the "irregular", trend registered since the "Bossi-Fini" reform, Law July 30, 2002, n. 189.

The judgments before analyzed by the Constitutional Court, but also the last mentioned judges of merit on the so called "Security decree", through the use of constitution-oriented interpretation, had a reassuring effect because they were issued, respectively, at the time of the establishment and the work in Italy of a government whose policy seems to put at risk the guarantee of migrants' rights.

The italian Constitution repudiates the xenophobic rules and, in this direction, is also very important the anti-discrimination legislation of the European Union (as a rule imposed pursuant to art. 117, paragraph 1 of the Constitution) - recalled by the judges – that is able, for the contents it expresses, of a fruitful and profound dialogue with the fundamental principles of the republican order[61].

The prohibition of discrimination - above all in a multilevel perspective - enhances a strong notion of equality[62] which, in the face of the issues that immigration poses in the field of social rights, induces to take up a series of values that find their constitutional connector in the principle of equal social dignity, which indicates the direction in which the implementation of rights such as education, health, work and housing must take place[63].

To those who oppose the unsustainability of the costs associated with solidarity benefits, it can and must be answered that, in reality, the resources, despite the crisis, are there and would be available if only the political will to intervene to set a barrier to phenomena such as widespread corruption and the inequitable distribution of wealth, an intervention that would make it possible to reduce, if not

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[61] "*They recall an important part of the common heritage of republican Italy and united Europe: a bond that neither of them can deny, without undermining their own identity*"; see D. Tega, *Le politiche xenofobe continuano a essere incostituzionali*, cit., 18. On the subject see also, S. Mangiameli, *Processi migratori, principi europei e identità dell'Europa,* in L. Ronchetti (cur.), *I diritti di cittadinanza dei migranti,* cit.; on this subject see also S. Staiano, *Migrazioni e paradigmi della cittadinanza: alcune questioni di metodo*, in *Federalismi.it,* 5 novembre 2008; V. Baldini, *La società multiculturale come "questione" giuridica*, in *www.gruppodipisa.it*.

[62] G. D'Orazio, *Lo straniero nella Costituzione italiana*, Padua, 1992; A. Pace, *Dai diritti fondamentali del cittadino ai diritti dell'uomo*, in *Rivista AIC*, 2 luglio 2010.

[63] G. Bascherini, A. Ciervo, *L'integrazione difficile: il diritto alla salute e all'istruzione degli stranieri nella crisi del welfare State*, in *Gli Stranieri*, 3/2011, 24; P. Costanzo, S. Mordeglia, L. Trucco, *Immigrazione e diritti umani nel quadro legislativo attuale*, (cur.), Milan, 2008; A. Loiodice, *La dottrina sociale della Chiesa come ausilio nell'interpretazione costituzionale*, in A. Loiodice, P. Giocoli Nacci (cur.), *La Costituzione tra interpretazioni e istituzioni*, Bari, 2004.

completely, the problem of the cost of rights[64], in general and of social rights in particular[65].

[64] See, among all, S. *Holmes*, R. Sunstein, *Il costo dei diritti*. *Perché la libertà dipende dalle tasse*, Bologna, 2000.

[65] A. Ruggeri, *I diritti sociali al tempo delle migrazioni*, in *Osservatorio Costituzionale Aic,* n.2/2018, 25; A. Bonomi, *Brevi osservazioni sugli aspetti più problematici del delicato bilanciamento fra universalismo selettivo, diritti fondamentali e vincoli di bilancio: alla ricerca dell'universalismo selettivo temperato*, in *www.federalismi.it*, 7/2018.