PRESENTAZIONE

Il convegno organizzato a Roma il 23 maggio 2019 presso l'Università degli Studi Roma Tre, sul tema della disciplina dell'assistenza sanitaria transfrontaliera nell'Unione Europea, ha costituito l'occasione per il primo impegno esterno ufficiale del Centro Studi in Diritto ed Economia in ambito sanitario.

In considerazione di ciò, oltre che della rilevanza dei temi trattati, ho ritenuto, nella mia qualità di Presidente del Centro Studi, di promuovere una pubblicazione che riportasse gli interventi degli autorevoli studiosi avvicendatisi nel corso dei lavori, intendendo in tal modo di poter contribuire ad una riflessione più allargata su uno dei temi che costituiscono oggetto delle politiche sanitarie dell'Unione europea e dei singoli Stati membri e cioè l'implementazione delle cure transfrontaliere.

Tale aspetto evolutivo della tutela della salute, in un'ottica che superi le barriere ancora forti che vi si frappongono, costituisce qualcosa di più di una aspirazione, in quanto sono state poste le basi normative, attraverso l'emanazione della Direttiva Ue 24/2011, per consentire agli Stati membri di realizzare un triplice obiettivo, il quale non può non stare a cuore di tutti i cittadini europei: la libertà delle cure; una concorrenza virtuosa tra i diversi apparati sanitari in grado di garantire efficacia e convenienza economica delle cure; una più stretta cooperazione tra gli Stati in materia di assistenza sanitaria.

Certamente l'intero contesto unitario europeo risente del fatto che la tutela della salute rientri tra le competenze legislative concorrenti degli organi legislativi dell'Ue, i quali sono quindi tenuti all'osservanza del principio di sussidiarietà.

Ciò spiega come sia stato necessario adottare lo strumento della Direttiva che, come noto, richiede l'adozione di leggi di attuazione da parte dei singoli Stati, e non quello del Regolamento, il quale, invece, produce effetti diretti sugli ordinamenti giuridici degli Stati membri, ai quali rimangono residuali competenze normative di adeguamento.

Ecco perché risulta particolarmente significativo esaminare come gli Stati europei abbiano proceduto a dare attuazione alla Direttiva, e, soprattutto, come si stiano predisponendo a realizzare gli spunti innovativi che essa contiene.

Si tratta di un esame che non si risolve in un'analisi meramente compilativa, ma costituisce a sua volta l'occasione per promuovere un confronto di idee, se si vuole anche con accenti critici, senz'altro propedeutico a individuare ulteriori forme, contenuti, progetti per il completamento di un'opera – la libera circolazione dei pazienti – di cui sono state poste solo le fondamenta.

Mi sento di poter dire che il convegno di Roma possa costituire una prima tappa fondamentale di un percorso, alla quale, con il fattivo contributo di CSIDEAS, ne seguiranno altre in grado di ampliare la partecipazione di studiosi e operatori sanitari nella ricerca di soluzioni da offrire ai rispettivi ordinamenti nazionali e agli organi istituzionali dell'Ue.

I lavori pubblicati in questo volume sono stati presentati quando nessuno poteva presagire quello che si sarebbe abbattuto sull'Europa (e sul mondo intero) qualche mese dopo a seguito della diffusione della pandemia da Covid-19.

Ebbene, la triste e dolorosa esperienza che tutti noi stiamo ancora patendo, con diversi gradi di sofferenza, accomunati da un unico, profondo sentimento di solidarietà reciproca, non può che renderci ancor più ferventi assertori di una convinta e stretta cooperazione tra gli Stati in ambito sanitario.

Se una lezione possiamo trarre dal drammatico scenario in cui tuttora ci troviamo ad operare è proprio quella di trovare l'energia e le idonee risorse per elevare la tutela della salute a momento fondamentale degli impegni istituzionali dell'Unione europea con l'uniforme coinvolgimento dei singoli Stati membri, giacché i virus e le malattie non si fermano di fronte ad alcun confine.

Con questi sentimenti e ritenendo di esprimere la sensibilità degli Autori, desidero dedicare il presente volume alla memoria di tutte le vittime del Coronavirus, di ogni latitudine.

Massimo De Salvo

Presidente del Centro Studi in Diritto ed Economia in ambito Sanitario (CSIDEAS)

PRESENTATION

The conference organised in Rome on May 23, 2019 at the Roma Tre University on the subject of the discipline of cross-border health care in the European Union was the occasion of the first official external commitment of the Law and Economics in Healthcare Study Centre.

In consideration of this and the relevance of the topics covered, I decided, in my capacity as President of the Study Centre, to promote a publication that would report the interventions of the authoritative scholars who alternated during the work, thus intending to contribute to a wider reflection on one of the issues that is the subject of the health policies of the European Union and the individual Member States, namely the implementation of cross-border care.

This evolutionary aspect of health protection aims to overcome the still strong barriers that stand in its way. It constitutes more than an aspiration because the regulatory foundations have been laid through the enactment of EU Directive 24/2011 that allows Member States to achieve a threefold objective that cannot fail to be at the heart of all European citizens: freedom of care; virtuous competition between the different health systems capable of guaranteeing the effectiveness and economic convenience of care; and closer cooperation between States on health care.

Of course, the whole of the European unitary environment is affected by the fact that health protection falls within the shared legislative competences powers of the EU's legislative bodies, which are therefore required to comply with the principle of subsidiarity.

This explains the reason it was necessary to adopt the instrument of the Directive which, as we know, requires the adoption of implementation laws by individual States, rather than that of the Regulation, which has a direct effect on the legal systems of the Member States, although the regulatory powers of adjustment remain.

It is thus particularly important to examine how the European States have

proceeded to implement the Directive and, above all, how they are preparing to implement the innovative ideas it contains.

This is an examination that is not merely a compiling analysis, but is an opportunity to promote a discussion of ideas, if we want to also with critical accents, certainly inclined to further identify forms, contents and projects for the completion of a work – the free movement of patients – for which only the foundations have been laid.

I feel I can say that the conference in Rome can be a fundamental first step in a journey which, with the effective contribution of CSIDEAS, will be followed by others who are able to expand the participation of scholars and health professionals in the search for solutions to offer to their respective national systems and to the institutional bodies of the European Union.

The works published in this volume were presented when no one could have predicted what would hit Europe (and the whole world) a few months later in the aftermath of the spread of the Covid-19 pandemic.

The sad and painful experience that we are all still suffering, united by a single, deep feeling of mutual solidarity, can only make us even more fervent supporters of a shared and close cooperation between States in the health field.

If we can draw a lesson from the dramatic scenario in which we are still operating, it is precisely that of finding the energy and the suitable resources to raise health protection as a fundamental moment of the institutional commitments of the European Union with the uniform involvement of individual Member States because viruses and diseases do not stop at any border.

With these feelings and the belief that I express the sensitivity of the authors, I wish to dedicate this volume to the memory of all the victims of Coronavirus in all latitudes.

Massimo De Salvo

President of Law and Economics in Healthcare Study Centre (CSIDEAS)

INTRODUCTION: THE FUTURE OF SOCIAL RIGHTS IN THE EUROPEAN LEGAL AREA

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1. The incorporation of social rights into the constitutions of the twentieth century has given a new connotation to modern democratic systems. In fact, with the development of the Welfare State, public power began to play a significant role in the welfare activity of society, assuming the task of guaranteeing all citizens freedom from need. In particular, in order to achieve the conditions considered necessary to ensure the effective enjoyment of civil and political rights by all persons [1], it started to pursue the aim to remove all the concrete obstacles that "de facto" exclude the very possibility of the individual to participate in social life.

All this in the awareness that the effort to rebalance disadvantaged positions in order to build a society that is more just and at the same time freer is «a huge effort because it goes against nature, because life itself is a perennial source of inequalities». Everyone, in fact, when happens to come across situations of unease or social minority, can be a weak subject, «unequal compared to other categories of affiliates, thus becoming bearer of a claim for equality» [2]. In other words, we can find ourselves in a condition of "diversity" with respect to a parameter of social normality built around the axes of citizenship, age, gender or psycho-physical health. And the protection

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[1] *See* G. FARES, *Prestazioni sociali tra garanzie e vincoli*, Napoli, 2018, spec. cap. I, and C. COLAPIETRO, M. RUOTOLO, *Diritti e Libertà,* in F. MODUGNO (edited by), *Diritto Pubblico*, IV ed., Torino, 2019, 632.

[2] M. AINIS, *I soggetti deboli nella giurisprudenza costituzionale*, in *Studi in onore di Leopoldo Elia*, I, Milano, 1999, 13 e 38.

granted to those who find themselves in such situation of relative "weakness" is an expression of the personalist and solidarityist demands that pervade our Constitution, to the extent that the interventions put in place by the State result in the removal of those obstacles that prevent the full development of the human person, assumed as the central value to which all others return.

This new objective of the State has given rise to a true and proper program for social justice which has profoundly enriched the modern Constitutions, first and foremost the Italian Constitutions, with a significant amount of provisions in favour of the "weaker" subjects; provisions which pursue the liberation of individuals from need and the elimination of concrete inequalities, which are necessary preconditions for making possible the access to equal opportunities of freedom and the effective enjoyment of rights by the individual.

2. However, the interdependence between social rights and the economic resources necessary for their effective implementation seems to be led to uncertain developments by European pressures towards the search for economic stability in the Eurozone; such pressures have indeed increased social conflicts and made austerity policies the main anti-crisis instrument put in place by the European Union. The inevitable consequence has been to engender «an involutive parable of welfare models»[3]. With the outbreak of the crisis, in fact, what could be seen at national level also showed its signs at EU level. The increase in interventions to reduce public spending primarily took the form of a reduction in benefits relating to social rights. As a consequence, the principles that had been conquered in previous decades have been challenged – taking it for granted that the financial crisis of the States must necessarily be declined as a crisis of the social States.

It is evident then that the "fundamental" character assumed by social rights in the Union's regulatory framework «is more apparent than real», so much so that such rights continue to occupy the position of "European minority" (to use Massimo Luciani's effective image)[4] from which these rights have always suffered in the European legal system. The austerity policies have eroded the values of European social citizenship, directing the countries of the Eurozone towards «economic policy choices based on rigour and

[3] G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, in *www.costituzionale.it*, 2013, 2.

[4] Cfr. M. LUCIANI, *Diritti sociali e integrazione europea*, in *Pol. dir.,* 2000, 378.

safeguarding at all costs the balance of public finances, while at the same time sacrificing substantial parts of people's rights », especially social rights, which for their full and effective enjoyment require the intermediation of the public authorities [5].

3. In what has been effectively defined as "the age of rights that cost", one cannot therefore fail to take note of the risks involved in reducing the debate on social rights and the Welfare State «to a reflection focused exclusively on the sustainability (financial and non-financial) of the rights themselves», without accompanying these concerns with the inseparable primary value of the human person, given «the inescapable needs of a free and, in principle, incompressible development of the human person (the so-called "universality" in the enjoyment of rights)» [6].

Currently, no progress seems to have been made in this regard. In its most recent jurisprudence on the relationship between budget balance and social rights, the Italian Constitutional Court has reaffirmed the incomprehensibility of rights with respect to the State budget – on the assumption that «it is the guarantee of incompressible rights that affects the State budget, and not the latter that conditions their implementation» (Constitutional Court, judgment No. 275 of 16 December 2016). However, the Constitutional Court limits such protection to the core of the right to benefits linked to fundamental rights, which does not always correspond to a sufficient level for the removal of obstacles to equality.

A clear change of course becomes therefore increasingly urgent in order to further ensure the protection of the most vulnerable. If, on the contrary, the current economic policy, «which is inclined to sacrifice people in the name of market freedoms, dominated by the mechanisms for balancing public budgets which the economic crisis and the dominant neo-liberal ideology have imposed, should continue, fundamental rights will be reserved for an unhappy fate of oblivion» [7].

The evident crisis of the traditional Welfare makes it clear that there is a

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[5] G. GRASSO, *I diritti sociali e la crisi oltre lo Stato nazionale*, in M. D'AMICO, F. BIONDI (edited by), *Diritti sociali e crisi economica*, Milano, 2017, 84 ss.

[6] L. TRUCCO, *Diritti sociali e livelli essenziali delle prestazioni tra politiche legislative e Corte costituzionale*, in E. CAVASINO, G. SCALA, G. VERDE (edited by), *I diritti sociali dal riconoscimento alla garanzia. Il ruolo della giurisprudenza*, Atti del Convegno di Trapani 8-9 giugno 2012, Napoli, 2013, 103.

[7] G. AZZARITI, *La Corte europea ha smarrito i diritti*, in *www.ilmanifesto.info*, 2015.

need to redesign it both from a quantitative point of view and, even more so, from a qualitative point of view. This renovation need to be undertaken in the light of criteria of equity and, above all, of economic sustainability, considering the very serious international economic-financial crisis that has developed in recent years. At the origin of this descending parable of the Welfare state there are, undoubtedly, improper, or at least unsatisfactory, forms of implementation, which represent a falsification of the welfare state based purely on welfarism.

Nevertheless, with the aim to avoid the concrete risk of a dismantling of the Welfare State, it is necessary to look for a solution which allows the combination of solidarity and efficiency, in the awareness that an extended system of social security does not contradict the economic development. The Welfare State can act as a "multiplier of resources", passing from "redistributive welfare to generative welfare", "from cost to social investment" aiming at generating common good. Implementing such profound reforms is neither easy nor painless, but it is the current economic situation that makes it essential to implement those instances of profound renewal of the Welfare State, in order to avoid the risk of dismantling the welfare state, considered an unsustainable luxury [8].

It is precisely in times of crisis, in fact, that there is a "substantial" problem of guaranteeing social rights and strengthening the bonds of solidarity, because «the crisis can be "a stimulus to act", before being a threat to social rights», if one does not want to run the serious risk of seeing «an economic-financial crisis transformed into a real social crisis», obviously to the detriment of the weaker subjects [9].

From the welfare state there is no going back, since, by combining freedom and social justice, it represents in any case the most evolved form of the contemporary state. At the same time, beyond prejudices and ideologies, it is necessary to tenaciously and convincingly pursue a dimension of social rights beyond the national state, which leads to a protection of social rights in the European Union's legal system – that is anything but "evanescent", "discoloured", or rhetorical, but effective and substantive. One is aware, however, that such supranational dimension requires first the start of a new season of European integration, which at present still seems far from over.

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[8] C. COLAPIETRO, *Alla ricerca di un Welfare State "sostenibile": il* Welfare *"generativo"*, in *Dir. soc.*, 2014, 19 ss.

[9] G. GRASSO, *I diritti sociali e la crisi oltre lo Stato nazionale*, in M. D'AMICO, F. BIONDI (edited by), *Diritti sociali e crisi economica*, cit., 86 ss.

4. From this point of view, the right to health turns out to be a key indicator for understanding the current role of welfare in Europe [10]. There is no doubt, in fact, that the satisfaction of the person's needs in the health sector constitutes «the most exposed, immediate and vital frontier, in the individual's perception, of the effective enjoyment of social rights and therefore, ultimately, of belonging to a community», and «an inescapable element for a social citizenship that goes beyond national borders» [11].

The aforementioned setback in the protection of social rights has also involved the right to health, the protection of which should play a central role in the policies of the European Union and in the action of the public authorities of the Member States. According to Article 168 of the Treaty on the Functioning of the European Union, «a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities» (emphasis added). This is also confirmed by Article 35 of the Charter of Fundamental Rights of the European Union, which not only recognises the right of every individual «to have access to preventive health care and to obtain medical treatment», in accordance with the conditions laid down in national legislation and practice, but also ensures significant Union support for «a high level of human health protection», including, where appropriate, by encouraging cooperation between Member States. In this way, a form of "multilevel" protection of the right to health in the European legal area, based on the constant dialogue between the Constitutional Courts, the Strasbourg Court and the Court of Justice of the European Union, has emerged.

As anticipated, however, despite these general provisions, it can certainly not be said that the right to health has found, in the supranational system, the protection that should be due to it in the light of the objectives solemnly proclaimed by the Treaties and the Charter of Fundamental Rights, so much so as to make it considered, paraphrasing Article 32 of our Constitutional Charter, «not so much as a social right, but as the interest of the community» [12]. The absence of operational instruments to provide the services, on the one hand, and the usual propensity of the European Institutions for austerity policies, on the other, have prevented the right to health from being given

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[10] See G. FARES, M. CAMPAGNA, *La tutela della salute nell'ordinamento comunitario*, in P. GARGIULO (edited by), *Politica e diritti sociali nell'Unione europea*, Napoli, 2011.

[11] D. MORANA, *Diritto alle cure e mobilità sanitaria nell'Unione europea: un banco di prove per l'Europa sociale. Note introduttive*, in ID. (edited by), *L'assistenza sanitaria transfrontaliera. Verso un* welfare state *europeo?*, Napoli, 2018, 4.

[12] M. LUCIANI, *Diritti sociali e integrazione europea*, cit., 397, note 29.

the central role that it tends to enjoy within the national systems, as a guarantee of a fundamental human right [13].

5. However, some recent measures introduced by the European legislator in the health sector require to focus on the role of social policies within the Union and on a reassessment of the process of shaping the European Welfare State.

In this regard, we cannot fail to take into consideration what was introduced by the European legislator with Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare [14], representing the most recent epilogue of a European reflection on this issue, which started at the jurisprudential level (since the Decker and Kohll cases of the mid-1990s) and ended with the adoption of this legislation by the Parliament and the Council. This act of harmonization shows how the guarantee of cross-border mobility – and, more generally, of social rights – may be subject to different logics (from the protection of human dignity to that of market laws), sometimes strongly conflicting, which are obviously capable of giving rise to divergent results in terms of health protection and access to care.

It is certainly a discipline still full of limits and inconsistencies between the objectives announced and the measures concretely adopted, which – while moving from an economic perspective and strengthening the internal market – marks an important step forward for welfare policies in the supranational order. It represents «an "incursion" of the European Union, to date among the most significant, in one of the typical sectors of the traditional social form of the rule of law» [15].

There is no doubt that the path set in motion with the 2011 Directive takes on the traits of a laudable tension towards the positive implementation of social rights guarantees in Europe. However, despite the European institutions' constant assertions that equal access to medical care is an essential ob-

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[13] See R. BALDUZZI, *Introduzione*, in R. BALDUZZI (edited by), *Diritto alla salute e servizi sanitari tra consolidamento ed indebolimento*, Bologna, 2016, 10.

[14] G. FARES, *Le condizioni normative di fruibilità delle cure transfrontaliere*, in *Ius et Salus*, n. 1/2020, 263 ss. And, before, ID., *La tutela della salute del cittadino europeo: diritto o libertà?*, in *Dirittifondamentali.it*, n. 2/2019.

[15] L. PIROZZI, *Una rondine fa primavera? La mobilità sanitaria e la sfida per un "sistema sociale" dell'Unione europea*, in D. MORANA (edited by), *L'assistenza sanitaria transfrontaliera. Verso un* welfare state *europeo?*, cit., 19.

jective for the integration process, the new rules on cross-border healthcare do not seem to allow an adequate strengthening of the right to health within the EU, especially when considered in the light of its social component. Nor, therefore, can it be considered suitable to consolidate the foundations of an utopian European welfare state. In fact, «if the state matrix of social rights is given by the solidarity principle, substantial equality and the corresponding duty of solidarity, which allow the redistribution inherent in social rights, the social face of the European Union shows, instead, a different matrix: it originates from the principle of non-discrimination instrumental to the realization of the internal market, just as, in general, freedom of movement seems to be regulated more by "hospitality" than by solidarity» [16].

Beyond the many insights opened up by Directive 2011/24/EU and regardless of the doubts still persisting on the concrete implementation of the new rules on cross-border care, the Directive is certainly worthy of attention for the real impact on welfare policies in Europe. In fact, the objective of the European regulation on cross-border care is undoubtedly to «improve the added value of the European dimension of health policy by integrating, through the free and replicable exercise of an individual right, the organizational competence of States in the provision of health services, in order to make the access to care of European citizens more informed and less discriminatory, in accordance with the provisions of Article 35 of the Charter of Fundamental Rights of the European Union» [17].

[16] C. GIUNTA, *La direttiva sull'applicazione dei diritti dei pazienti relativi all'assistenza sanitaria transfrontaliera*, in D. MORANA (edited by), *L'assistenza sanitaria transfrontaliera. Verso* un welfare *state europeo?*, cit., 66.

[17] See G. FARES, *La tutela della salute del cittadino europeo: diritto o libertà?*, cit., 46.

OPENING SPEECH
THE CROSS-BORDER HEALTHCARE
TOWARDS A EUROPEAN WELFARE STATE?

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Summary: 1. The social dimension of the Euro-community experience: stresses from the 2011/24/EU Directive on cross-border health care. – 2. 2011/24/EU Directive, health protection and effects on the State form. – 3. The peculiarities of the 2011/24/EU Directive in the context of the EU's health protection limits. – 4. The 2011/24/EU Directive and the configurability of a common European model of social rights protection. – 5. Conclusions. – Bibliography.

1. The social dimension of the Euro-community experience: stresses from the 2011/24/EU Directive on cross-border health care.

The reports by other authors will allow us to deepen the contents of the European cross-border assistance discipline and to analyse the most important issues related to its (often strenuous) implementation in national systems, even in a comparative dimension.

In the introduction, I can only recall that the 2011/24/EU Directive, as it is known, aims to bring closer Member States' laws on the right of patients to receive treatment services in a country other than their home country, while also calling for certain forms of interstate cooperation in the provision of health protection services.

In particular, the basic intention is to mitigate, at least in principle, the possibility of a Member State hindering the health mobility of its citizens within the territory of the Union. In view of this objective, the rule of the need for the patient to always have prior authorization from the State of