LUISS Guido Carli
Dipartimento
di Giurisprudenza

Constitutional Provisions and Health Care Services for Illegal Immigrants in Some Federal and Regional EU Member States: Looking for Best Practices

Andrea De Petris

Working Paper
6/2014

LUISS
Academy

Guido Carli / Department of Law
Working paper n. 06-2014
Publication date: June 2014
Constitutional Provisions and Health Care Services for Illegal Immigrants in Some Federal and Regional EU Member States: Looking for Best Practices

e-mail: adepetris@luiss.it
ISBN 978-88-6856-017-1

LUISS Academy is an imprint of
LUISS University Press – Pola s.r.l. a socio unico
Viale Pola 12, 00198 Roma
Tel. 06 85225485
e-mail lup@luiss.it
www.luissuniversitypress.it

CONSTITUTIONAL PROVISIONS AND HEALTH CARE SERVICES FOR ILLEGAL IMMIGRANTS IN SOME FEDERAL AND REGIONAL EU MEMBER STATES: LOOKING FOR BEST PRACTICES

Andrea De Petris[*]

Abstract

This paper deals with the health care services provided to illegal immigrants in three EU member States: Italy, Germany and Spain. The three countries have been chosen since they represent different levels of sub-national autonomy: a federal (Germany), a regional (Italy) and a community system (Spain). These three models provide different competences to Länder, regions and autonomous communities regarding health care services for illegal immigrants. In its first part, this paper describes the patterns of health protection adopted in the mentioned countries, in order to show differences and similarities, but also to evaluate possible best practices which allow better and more efficient services in this area. The second part of the paper illustrates special forms of health care services granted at local level. This represents a change of perspective which shows that local interventions and projects seem to be more effective than programs conducted at sub-national level. The paper concludes with the description of successful strategies and examples which could be adopted or implemented also at regional level, improving the quality of health care services granted to illegal immigrants.

Summary

Key-words

Illegal immigrants. Health care services. Regional administration. Local administration.

[*] Assistant Professor in Comparative Public Law at Luiss University (Rome).

Introduction

The media been reporting for years the systematic exodus of illegal immigrants into western countries. These host countries often tend to consider this phenomenon as a threat to the stability of their socio-economic and political structure. No wonder, then, that the national authorities concerned react by adopting measures aimed at restricting the access of illegal immigrants to the enjoyment of civil and social rights. The right to health care services is no exception, despite the numerous international conventions which firmly prohibit any discrimination regarding health care treatments on the basis of the recipient's residence status. The right to health should not be equated to a "right to be healthy"[1], but much more to a guarantee of non-discriminatory access to medical infrastructures and public offices providing health care services, which go far beyond the scope of mere treatments due to emergency and extraordinary conditions[2].

A large number of international conventions oblige member States to ensure general access to health care services: see Art. 25, para.1 of the Universal Declaration of Human Rights (right to health care), Art. 12, para.2, point 4 of the International Covenant on Economic, Social and Cultural Rights (obligation of Member States to ensure that everyone, citizens and non-citizens, enjoy medical services and assistance in case of need), and Art.5, letter IV, point 3 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (prohibition of discrimination in securing the right to health and access to medical care)[3].

In addition to this, the preamble to the Constitution of the World Health Organization adopted in 1946 defines health as a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[4] and emphasizes its importance as the right of every human being, without distinction. This should therefore not be intended only as a right to health care, since this represents just one part of a much wider individual right[5]. Furthermore, the same document declares that the right to health should not be conceived in terms of equality, but in terms of fairness, since inequality in the case of health care refers to unnecessary and avoidable differences, which are, at the same time, discriminatory and unfair. Equality will therefore encourage the provision of each individual with the conditions necessary to achieve his proper potential level of health.

At a European level, there is also high attention given to the right to health: see, for example,Art.11 of the European Social Charter of 1961 as revised in 1996, while the United Nations Commission on Human Rights, in 2006 renamed as UN Human Rights Council, in its resolution no.11 of 1989, reaffirmed "the right of everyone to the enjoyment of the highest attainable standard of physical and

---

[1] B. TOEBES, *Towards an Improved Understanding of the International Human Right to Health*, in: *Human Rights Quarterly*, 3/1999, 661-680.

[2] S. Committee in Economic, Social and Cultural Rights (CESCR), General Comment No. 14, 2000, which commented Art.12 of the International Covenant on Economic, Social and Cultural Rights(art. 12 comma 1: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."), affirming that "every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity", available at: http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En [accessed May 25, 2014].

[3] V. also Art.21 of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which provides women full access to health care services, and Art.24 para.1 of the 1989 UN Convention on the Rights of the Child, which recognizes the right to medical treatments for children.

[4] S. Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no.2, p. 100) and entered into force on 7 April 1948.

[5] S. P.OLIVANI/D. PANIZZUT, *Diritto alla salute e interventi socio-sanitari*, in AA.VV. *I diritti fondamentali degli stranieri*, Torino, 2009, 1-17 (1).

mental health" and remembered that "all human rights must be recognized in all patients without exception , and the absence of discrimination in health sector should apply to every individual and in every circumstance"[6].

Although the problems faced in this matter apply in a similar way to the entire European Union, the 28 EU member states have adopted diverse solutions in order to provide immigrants with health protection. Centralized national systems often embrace different strategies for federal or regional states, since the former tend to administrate health care services centrally, whilst the latter also involve regional and local administrative bodies in this effort.

Due to the limited space available in this paper, it is not possible to provide a description of the models of health care chosen by all 28 EU member states. The following pages will therefore analyze patterns of health protection for illegal migrants adopted in three decentralized models: Italy, Germany and Spain. Critical issues and efficiencies in the disciplines adopted in the three cases will be portrayed with the final aim of verifying the presence of possible "best practices", which may result in workable examples to be adopted also in other European countries.

1. *The right to health care services for irregular immigrants in Italy*

The right to health care is part of the social rights catalogue that the Italian legal system recognizes to foreign citizens[7], especially the right to receive health care services in the case of illness or injury. A first constitutional protection is contained in Art.32, para.1 of the Italian Constitution[8]. Here, health care focusses on the protection of the single person - meaning not only Italian citizens, but all human beings, regardless of their nationality. The result is a full acknowledgment of the right to health care as a fundamental and absolute right of the individual.

The Italian Cassation Court has characterized the right to health as an "absolute and primary right"[9] that "cannot be (...) conditioned or influenced (...) by any legal status", while the Italian Constitutional Court has defined it as a "primary and fundamental right that (...) requires full and comprehensive protection" [10] to be recognized to anyone, and therefore considered as a public service for every person[11]. In its decision no.309/1999, the Constitutional Court stated that the balance in the right to health protection must necessarily warrant a specific central core, related to the deep substance of human dignity[12]. In its decision no.252/2001, the Court held that the alien citizen must receive a basic core of the right to health, preventing the creation of situations without protection, which may in fact undermine the implementation of that right[13]. The same decision refers to a "minimum level" of health

---

[6] S. UN Commission on Human Rights, *Non-discrimination in the field of health.*, 2 March 1989, E/CN.4/RES/1989/11, available at: http://www.refworld.org/docid/3b00f0b348.html [accessed May 25, 2014].

[7] For an analysis of the social rights acknowledged to foreigners by the Italian legal system and in comparative perspective s. G. ROMEO, *La cittadinanza sociale nell'era del cosmopolitismo. Uno studio comparato*, Padova 2011, 187 ss.; W. CHIAROMONTE, *Lavoro e diritti sociali degli stranieri. Il governo delle migrazioni economiche in Italia e in Europa*, Torino, 2013.

[8] "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent".

[9] Corte di Cassazione, S.U., nr.796 of March 21th 1973. S. also Corte di Cassazione, S.U., nr.999, of April 9th, 1973.

[10] Id.

[11] Corte Costituzionale, Decision no. 992/1988. S. also Corte Costituzionale Decisions no. 88/1979, 132/1985, 61/1987.

[12] S. also Corte Costituzionale, Decisions no.185/1998 and 509/2000.

[13] S. F. RIMOLI, *Cittadinanza, eguaglianza e diritti sociali: qui passa lo straniero*, in: Giur. Cost. 2005, 4675-4681 (4679). On minimum limits to essential treatments and services in civil and social rights in Italy s. M. LUCIANI, *I diritti*

care services, to be intended as a fundamental human right, to be recognized also to foreigners, whatever their legal conditions with respect to the legislation about entry and residence in Italy. The legislation foresees different forms of effective protection of that right, but cannot deny persons unlawfully present in Italy the right to enjoy all urgent and necessary medical treatments, since this is a fundamental right which must be guaranteed to everyone, regardless of whether or not they are in possession of a residence permit. The Italian Supreme Court recognized to everybody, including also illegal immigrants[14], "not only the right to health care services in cases of extreme urgency, (...) but all necessary medical treatments (...) considered essential and necessary in order to avoid irreparable damage to their health"[15].

The consolidated text of the law ruling immigration and the status of foreign citizens in Italy (TUI) modified previous legislation, thereby extending medical prevention, treatments and rehabilitation also to the foreign population resident in Italy[16].

Art.35, para.3 of the legislative decree no.286/98 recognized to illegal immigrants the right to receive urgent or essential out-patient and hospital treatments, as well as the right to be included in preventive medicine programs to safeguard individual and collective health. This is a very broad formulation, enriched by certain benefits related to the "protection of the health of the child" and the "social protection of pregnancy and maternity", also with reference to the use of the voluntary interruption of pregnancy, international prophylaxis interventions and preventive vaccination programs.

A problematic aspect of the legislation is the repeal of Art.35, para.5 of TUI[17] operated by the Decree-Law no.11 of 2009[18], which introduces the mandatory reporting by medical operators treating illegal immigrants who require medical care. This provision could strongly influence the effectiveness of the right to health for irregular migrants, since identification is likely to put them at risk of possible deportation or detention. This could convince irregular migrants who are unwell to renounce medical

---

costituzionali tra Stato e Regioni (a proposito dell'art. 117, comma 2, lett. m*) della Costituzione*, in: Politica del Diritto, 2002, 345-360; C. PINELLI, *Sui «livelli essenziali delle prestazioni concernenti i diritti civili e sociali» (art. 117, comma 2, lett.* m*, Cost.)*, in: Diritto Pubblico., 2002, 881-908.

[14]According to the Italian Constitutional Court, to hold the Italian citizenship cannot reasonably justify differences in the access to social services. S. F. RIMOLI, *Cittadinanza, eguaglianza e diritti sociali: qui passa lo straniero*, cit., 4679; M. GNES, *Il diritto degli stranieri extracomunitari alla non irragionevole discriminazione in materia di agevolazioni sociali*, in: Giur. cost., 2006, 4681-4689; M. CUNIBERTI, *L'illegittimità costituzionale dell'esclusione dello straniero dalle prestazioni sociali previste dalla legislazione regionale*, in: Le Regioni 2006, 510-529.

[15]Many Italian legal scholars agree that health care rights cannot be limited by reasons of citizenship, s. M. LUCIANI, *Salute – 1) Diritto alla salute*, in: Enc. giur., XXVII, Roma 1991, 4; G. D'ORAZIO, *Lo straniero nella Costituzione italiana*, Padova 1992, 286 f.; E. MENICHETTI, *Accesso ai servizi sociali e cittadinanza*, in: Diritto Pubblico 2000, 849-876; C. CORSI, *Lo Stato e lo straniero*, Padova 2001, 341 f.; P. BONETTI/M. PASTORE, *L'assistenza sanitaria*, in: B. Nascimbene (a cura di), Diritto degli stranieri, Padova 2004, 974 f. S. also Corte costituzionale, Decision. no. 252/2001; for a comment on the decision s. A. ALGOSTINO, *Espulsione dello straniero e diritto alla salute: spetta al giudice decidere caso per caso*, in: Giur. it., 2002, 909 f., who warns against possible arbitrary enforcement of the law, as the judiciary can intervene to decide each time the level of services to be provided. S. also E. GROSSO, *Stranieri irregolari e diritto alla salute: l'esperienza giurisprudenziale*, in: R. Balduzzi (a cura di), Cittadinanza, corti e salute, Padova 2007, 157-170.

[16] G. BASCHERINI, *L'immigrazione e i diritti*, in: P. Ridola/R. Nania (a cura di), I diritti costituzionali, Torino 2006, 421 ss. (447-448); for a claim on a minimum level of social services necessary to hold a "substantial citizenship" s. L.M. BASSANI, *Diritti e ordinamenti federali*, in: Quaderni costituzionali, 2/2003, 362-363.

[17]Art.35 par. 5 TUI allowed a report to public safety authorities as a consequence of the access to health care services by illegal immigrants only in the cases where it was mandatory also for Italian citizens.

[18] S. art.45 para.1, lett. T) del D.L.11 of February 23rd, 2009.

treatments even in circumstances where these are highly necessary, causing potential danger to the public health[19].

From this point of view, the final result of the Italian legislation in force is a clear distinction between regular and irregular immigrants, which creates widely differing standards of medical treatments provided to Italian citizens and legal immigrants on the one hand, and to illegal immigrants on the other[20].

2 . *The right to health care services for irregular immigrants in Germany*

In Germany, refugees seeking asylum, refugees from conflicts or civil wars, refugees entitled to stay in Germany on the basis of previous regulations, those tolerated because of their health conditions or for other reasons that require them to defer their return to their homeland, as well as foreigners who can be repatriated are all submitted to the Act on Benefits for Asylum Seekers (*Asylbewerberleistungsgesetz* - AsylbLG)[21].

For these categories of people the law foresees a 30% reduction in public services, including standard health care treatments[22]. According to § 4 AsylbLG, medical treatment should only be provided in the presence of acute or painful pathologies, whilst cases of chronic diseases and disabilities may receive a cure only in cases of acute mental and physical suffering. The protection ruled in § 4 also includes "extraordinary medical services" like physical therapy interventions, the administration of medicines, any travel costs and eventual interpreters, and limitations on dental care.

§ 6 AsylbLG explains which special services are considered essential to ensure full health conditions when there is a risk of disease as a consequence of pre-existing pathological conditions, the worsening of health conditions or chronic diseases.

The practical implementation of the aforementioned discipline often shows additional, partly unjustified restrictions: social services must issue a medical certificate for outpatient treatment, and in such cases irregularities and illegal actions by members of the public services are not rare. Requests for treatments for psychological or psychosomatic illnesses are often not accepted, as well as those caused, for example, by torture or drugs abuse. Prosthesis, glasses or physical therapies are often not funded. Even handicaps resulting from torture or trauma are often not adequately treated, whilst the costs of travel or interpreting are supported only in few cases, and only after strong insistence on the part of the ill immigrant in question.

---

[19] A joint statement issued by Doctors Without Borders, Italian Society for Medicine of Migrations, Association for Legal Studies on Immigration and Italian Observatory of Global Health warns against a "dangerous marginalization of health care for the foreign population present on Italian soil, increasing the risks for the collective health as a whole", cit. in: A. ALGOSTINO, *In nome della sicurezza due equazioni incostituzionali: migrante uguale non persona e dissenso uguale fattispecie da reprimere*, in: Forum di Quaderni Costituzionali, 13/3/2009, available at: http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/temi_attualita/diritti_liberta/0018_algostino.pdf [accessed May 25, 2014].

[20] For a detailed analysis of the adaptation of the Italian discipline to the European norms s. M. BENVENUTI (a cura di), *La protezione internazionale degli stranieri in Italia. Uno studio integrato sull'applicazione dei decreti di recepimento delle direttive europee sull'accoglienza, sulle qualifiche e sulle procedure*, Napoli, 2011.

[21] S. § 1 par. 1 AsylbLG.

[22] For a comment on §§ 4 and 6 AsylbLG. s. G. CLASSEN, *Menschenwürde mit Rabatt, Leitfaden und Dokumentation zum Asylbewerberleistungsgesetz*, Karlsruhe 2000[2]; ID., *Sozialleistungen für MigrantInnen und Flüchtlinge. Handbuch für die Praxis,* Karlsruhe 2008, 115-130.

Since September 1998, refugees accused of entering German territory purely in order to receive social services, or impossible to be expelled for self-sustained reasons, receive medical treatment "only to the extent unavoidably required by the current circumstances"[23]. As a matter of fact, there is a margin of discretionary application of the provisions in force, depending on the person entitled to receive the treatments and on costs.

The implementation of these new provisions is performed differently in the 16 German Länder, varying from the reduction of daily basic income (*Taschengeld*) to the general denial of access to all social services. Health care services should still be provided, but cases where they are also denied are not rare[24].

The regulation of health care services for illegal immigrants poses some complex problems, especially with regard to § 87 para.2 of the Law on the Right to Residence (*Aufenthaltgesetz - AufenthG*) which, in January 2005, replaced the Foreign Citizens Act (*Ausländergesetz - AuslG*). According to this provision, public offices are obliged to inform the competent authorities if they learn of the existence of immigrants illegally present on German soil. To notify such cases is a general obligation for the employees of employment offices, social services, education offices, offices for youth policies, courts and competent authorities for admission to higher education[25]. In cases where a private doctor or the administration of a hospital which provided health care services inform social offices of what they have done, the social offices forward the information to the authorities responsible for foreign citizens. When the patient is an illegal immigrant, there is a concrete risk that this will lead to expulsion or arrest and possible deportation of the subject irregularly present on German soil.

Health workers therefore fear that providing medical services to illegal immigrants will somehow result in judicial sanctions for them. The reason for these concerns is § 96 of the *AufenthG* (a norm known as "*Schlepperparagraph*", a norm "in tow"), which imposes a prison sentence of up to five years or a fine for those who instigate the provision of treatments described in § 95 of the *AufenthG* to illegal immigrants, or provide illegal immigrants with treatment in exchange for economic benefit assets. Although Wolfgang Schäuble, the German Federal Minister of the Interior in 2007, sent a letter to the Chairman of the German Federal Chamber of Physicians, Jörg -Dieter Hoppe, which clearly excluded that the medical treatment of an immigrant illegally present on German soil would result in illegal behavior, the initiative had no effect[26]. On the contrary, records show that attorneys and public officials have often initiated prosecutions against doctors who have simply provided medical treatments to illegal immigrants, following the fundamental ethical principles of their profession[27].

---

[23] § 1a AsylbLG.

[24] According to Jessica Gross, several basic services like accomodation and meals have been denied to many families of refugees, in order to make them homeless and therefore justify their expulsion even if they should not have been repatriated, cfr. J. GROSS, *Möglichkeiten und Grenzen der medizinischen Versorgung von Patienten und Patientinnen ohne legalen Aufenthaltsstatus*, Berlin 2005, 9.

[25] Cit. by G. SIERCK, *Krankenhilfe für Ausländer ohne Aufenthaltsgenehmigung*, Wissenschaftlicher Dienst des Bundestages Reg.-Nr. WF VI – 71/00, 2000.

[26] S. BUNDESÄRZTEKAMMER (Hrsg.), *Tätigkeitsbericht 2007. Dem 111. Deutschen Ärztetag in Ulm vorgelegt von Vorstand und Geschäftsführung*, Köln 2007, 5.

[27] M. KNIPPER/Y. BILGIN, *Migration und Gesundheit*, Konrad-Adenauer-Stiftung, Bonn 2009, 84.

3 . *The right to health care for irregular immigrants in Spain*

Spanish law recognizes the right to health care services to all individuals, regardless of their legal status[28]. Art.43, para.1 of the Spanish Constitution acknowledges a universal right to medical treatments[29], since the Constituent Assembly extends this right to all people, without any difference due to their nationality[30]. Art.43, para.2 therefore obliges public authorities to "*organizar y tutelar la salud pública a través de las medidas preventivas y de las prestaciones y servicios necesarios*", making it clear that public authorities are bound to intervene providing the treatments necessary to ensure all individuals full enjoyment of health care[31]. The primary goal of this provision is therefore to offer services in order to protect health not only for individuals, but also for their community, since providing medical treatments to single persons is the only proper way to protect public health[32].

The *Ley Organica de Extranjería* no. 4 of the year 2000 introduced important innovations in this field. Firstly, it recognized the right to health care services also to illegal immigrants, previously not taken into account by Spanish law. Art.12 para.1 declares that "*Los extranjeros que se encuentren en España, inscritos en el padrón del municipio en el que tengan su domicilio habitual, tienen derecho a la asistencia sanitaria en las mismas condiciones que los españoles*". Foreign citizens registered in the town where they officially reside are therefore entitled to receive health care services under the same conditions as the Spaniards[33]. Para.2 recognizes to foreign citizens the right to emergency treatments for serious illness or injuries regardless of their cause, and concedes continuity of care for as long as they are in danger of death[34]. Para.3 states that foreign minors are entitled to health care services under the same conditions as Spaniards, whilst the final paragraph affirms that pregnant foreign women in Spain are entitled to health care services during pregnancy, childbirth and after childbirth, regardless of their nationality or legal status. The Act also introduces a mandatory minimum level of health care protection, recognizing emergency treatments to all foreigners without restrictions or limits due to nationality or legal status. Any refusal by members of medical staff to take care of these people claiming a lack of the health insurance card or of the residence permit results in the initiation of disciplinary proceedings against them[35].

---

[28] G. PISARELLO, *Derechos sociales, democracia e immigraciòn en el constitucionalismo español: de el originalismo a una interpretaciòn sistematica y evolutiva,* in: M.J. Añon, La universalidad de los derechos sociales: el reto de la inmigracion, Valencia 2004, 37-86.

[29] S. Art. 43 para. 1. Spanish Constitution: "*The right to health protection is recognized*".

[30] J.L. MONEREO PEREZ /J.A. MOLINA NAVARRETE /L.A.TRIGUERO MARTÌNEZ (a cura di), *Comentarios a la ley y al reglamento de extranjerìa*, Granada 2012, 232 f.; G. PISARELLO, *Derechos sociales, democrazia e immigraciòn en el constitucionalismo español,* cit., 41. On the universal character of the Spanish health services s. J.V. OTERO, *Impacto de la inmigraciòn en el sistema de protecciòn social*, Madrid 2010, 98 f.

[31] L. PRIETO, *Los derechos sociales y el principio de igualdad sustancial,* in: M.J. Añon (ed.), *La universalidad de los derechos sociales: el reto de la inmigraciòn*, Valencia 2004, 111-170.

[32] A legal scholar defined the right to health protection as a "*figura entre los derechos que de forma universal hay que reconocer, no ya a todos los ciudadanos, sino a todas las personas por el simple hecho de serlo*", S. L. MONEREO PEREZ /J.A. MOLINA NAVARRETE, *Comentario a la Ley y al Reglamento de Extranjerìa*, Granada 2001, 232 f.

[33] Ley Organica de Extranjeria, January5th, 2000, no.4, Art.12 para.1: "Los extranjeros que se encuentren en España, inscritos en el padrón del municipio en el que tengan su domicilio habitual, tienen derecho a la asistencia sanitaria en las mismas condiciones que los españoles". On the right of foreigners to health protection s. E. AJA (ed.)*, La nueva regulaciòn de la inmigraciòn en España*, Valencia 2000; J.M. CAMPO CABAL (ed.)*, Comentarios a la ley de extranjerìa*, Madrid 2001; J. M. ESPINAR VICENTE, *Extranjerìa y inmigraciòn en España*. *Análisis crítico de su regulación jurídica*, Madrid 2006.

[34] Art.12 para.2: "*Los extranjeros que se encuentren en España tienen derecho a la asistencia sanitaria pubblica de urgencia ante la contracciòn de enfermedades graves o accidentes, cualquier a que sea su causa, y a la continuidad de dicha atenciòn hasta la situaciòn de alta medica*."

[35] S. M. ARBELAEZ RUDAS/S. GARCIA VAZQUEZ, *El derecho a la protecciòn de la salud*, cit., 449.

The most notable innovation, however, was enacted by Art.12 of the Organic Law no.8/2000, whose first paragraph states that all foreigners present in Spain fully enjoy the right to health care - on equal terms with the Spaniards - if they are registered in the *Padrón Municipal of* their habitual residence, while the second paragraph affirms that all foreigners on Spanish territory - legal or otherwise - are entitled to public emergency treatments for health problems resulting from serious illness or accident, whatever their cause, and to the continuity of medical treatment until they fully recover.

The *Padrón Municipal* is a computerized and permanent administrative register, under the control of the municipalities. In practice, it is a register of the resident population. L' "*Empadronamiento*" is the document which certifies the residence of an individual in a given municipality within Spanish territory. It is an essential document for many bureaucratic services, including the application of social benefits (rent, unemployment, etc.), the enrollment of children in school, and most importantly health care requirements. The enrollment in the *Padrón* is binding for the municipality in which the person resides, but also for the province and the Autonomous Community, the regional body which includes the municipality. It allows the enjoyment of a number of services provided by these territorial bodies and, consequently, the enjoyment of social rights stated in the Statute of the Autonomous Community.

Despite some minor modifications produced by subsequent reforms, law no.4/2000 introduces an important innovation which is still in force. The key point is to link the recognition of rights, especially those of irregular migrants, to their "*empadronamiento*" (registration) in a local administration. Foreigners enrolled in the *Padrón* enjoy the right to health care services on equal terms with the Spaniards, with the intention of combining the openness to illegal aliens of fundamental rights, such as health care services, with the guarantee that the access to such rights is limited only to those people able to prove a certain stability in the Iberian territory through their registration[36].

Its original function being a guarantee for information and transparency with respect to the population of a municipality, the registration in the "*Padrón Municipal*" therefore became a prerequisite for the enjoyment of health care services under the same conditions as the Spaniards, combining the warranty of health protection with the need for public service to control and regulate local communities.

In addition to this, it is not allowed to operate any type of control on the legal status of immigrants after the submission of the requested documents to the *Padrón*: a precaution taken by Spanish legislature in order to prevent illegal immigrants from refusing to subscribe to this register fearing that these procedures could reveal their condition and put them under risk of arrest. Instead, the registration to the *Padrón* plays a key role in the gradual integration of irregular migrants into the Spanish social structure[37]: a step that many experts evaluated as a significant improvement in the recognition of rights to immigrants, setting the *Padrón Municipal* as a nexus that helpfully links the immigrant to the territory[38].

A partial amendment of the regulation of warranties for immigrants in Spain was introduced by the Organic Law no.14/2003. The new law provides all foreign citizens who have been in possession of a visa or a residence permit for over six months with a special "foreign identity card". This must be requested in person within one month of arrival in Spain or after the release of the residence permit.

---

[36] E. AJA, *La nueva regulaciòn de la inmigraciòn en España*, cit., 69.

[37] J. ZARAUZ, *Incidencia del Padrón municipal en el exercicio de los derechos de las personas extranjeras en situación irregular*, Vitoria 2007, 145-148, available at: http://www.ararteko.net/RecursosWeb/DOCUMENTOS/1/0_528_1.pdf [accessed May 25, 2014].

[38] L. DIEZ BUESO, *Los derechos de los inmigrantes y sus garantìas* in E. Aia/J. Arango (eds.), *Veinte años de inmigraciòn en España*. *Perspectivas jurídica y sociológica (1985-2004)*, Barcelona 2006, 211 f.

The 2003 Act also introduced a regulation that significantly reduces the protection for illegal immigrants who wish to enroll in the *Padrón Municipal*, amending some articles of the *Ley de Bases of the Local Regimen* (the basic norm for local institutions), causing major consequences in the regulation of data management of foreign persons enrolled in the municipal register. Above all, the *Ley Organica* 14/2003 imposes the exclusion from the *Padrón Municipal* if the registration is not renewed every two years, introduces compulsory exhibiting of a passport number as a requirement to validate the registration, and allows full access to the personal data registered in the *Padrón* by the Directorate General of Police, who may use the data to control the legal status of foreigners in Spain.

On the one hand, the new rules clearly try to make the public administration more efficient in providing more precise information regarding the foreign presence in the country. On the other hand, the new discipline allows a new use of the *Padrón* data as a security control of the foreign presence in the territory, with special regard to irregular immigration. This change of purpose in the use of data has been harshly criticized, and has raised accusations of violation of the constitutional right to privacy in favor of an excessively extended police control power. Some experts hope for this control power to be limited only to cases where there is clear evidence of irregularities in the presence of foreigners on Spanish territory[39].

The new law has in fact resulted in the transformation of the municipal register from a means of integrating immigrants into the host society, to an instrument of public control of foreign citizens, with special regard to the regularity of their residence in Spain. Of course, the permitting of public offices, like security forces, to access data of the *Padrón* plays a crucial role in monitoring and sanctioning illegal presences on Spanish soil, but it also highly endangers the *Padrón* function as a mere register of residents in a municipality, and their consequent access to essential social rights such as health care. This problem clearly affects primarily foreign persons without a residence permit: due to their irregular situation, they risk expulsion if they furnish their data to the *Padrón Municipal*. They therefore have to face the dilemma of whether or not to enroll in the municipal register as a prerequisite to protecting their health, being aware that this step could now make them easily identifiable by the authorities fighting illegal immigration[40].

Despite all this, however, as long as its full application was guaranteed, the *Padrón* continued to play a key role in the political integration of the immigrant population, because the risk feared did not seem to have practical consequences up to now.

The situation changed dramatically with the enactment of the *Real Decreto* (Royal Decree) no.16 of April 20th, 2012, introducing "urgent measures to ensure the sustainability of the national health care system and improve the quality and safety of its performance"[41]. The new provision abolished the health care card previously granted to illegal immigrants, who therefore can no longer access free health care, now assured only to holders of a national or a European health insurance card. The general warranty for all foreigners, regardless of their legal status, now only guarantees hospital emergency treatments, assistance to pregnant women (consisting in pregnancy care, childbirth and postnatal aid) and minors. The previously warranted full equality in access to health care services with no restrictions between regular and irregular immigrants which had characterized the Spanish law in the past, has therefore been abolished.

---

[39] L. DEZ BUEZO, *Los derechos de los inmigrantes y sus garantìas,* cit., 212.
[40] Cfr. J. ZARAUZ, *Incidencia del Padrón municipal*, cit., 131 ss.
[41] Available at: http://www.astrid-online.it/Dossier--d1/Spagna---M/real-decreto-ley-16-2012-Sostenibilidad-sistema-salud.pdf [accessed May 25, 2014].

The new regulation has also been criticized by those who have observed that the reform will not produce substantial savings for the Spanish economy . 5,251,040 of the 5,771,440 foreign citizens present in Spain in 2012 had a regular residence permit. The number of "undocumented" citizens amounts to 459,946 , but 306,477 of these come from EU countries, and are therefore not required to be enrolled in the National Health Service. In actual fact, only 153,469 illegal immigrants fall under the restrictions of the Royal Decree no.16/2012. Faced with a public debt of more than €16 billion (as of 2012), the savings gained by the exclusion of approximately 150,000 individuals from health care services doesn't appear to be particularly significant. Compared to a saving of €500 million predicted by the Government, it is estimated that the afore-mentioned measure should save only about €245 million: half of the expectations of the Spanish Ministry of Health[42].

4. *Trying a different perspective: small is beautiful?*

The comparison showed how substantial similar problems regarding access to health care services for illegal immigrants affect different national systems which tend to involve sub-state bodies in the effective delivery of these services. From this point of view, regions, provinces and Autonomic Communities demonstrate the same difficulties in coping with their duties in managing national health services, when they are asked to provide specific medical treatments and benefits[43].

The main problem faced by the bodies mentioned is the difficulty in reconciling their humanitarian obligations with the restrictions in access to health care services produced by the most recent legal reforms. Laying aside these common problematic aspects, the praxis observed in some cases also allow positive experiences to emerge. These are the so-called "Best practices" achieved by some medium or large cities in protecting the health of illegal immigrants.

The cases of Barcelona, Bremen and Cologne showed examples of adequate levels of health care services in spite of the restrictions foreseen by the legislation at a national level. In Barcelona, for example, in 2006 a special "Plan for Immigration in the health care sector" was issued, which expressly regulates the practices adopted to allow full protection of the right to health, including that of the illegal immigrants living in the Catalan capital[44]. The Barcelona City Council has also entered into an agreement with a local non-governmental organization (NGO) active in the field of migration and health protection. The program identifies illegal immigrants who may not have access to health care services and hospital treatment because of their inability to get a national health card. The city tries to fill the absence of the national health service in the provision of medical treatments for illegal immigrants.

A similar approach is also pursued by some local authorities in Germany. In 2008, the Bremen Department for Migration and Health included illegal immigrants in a protection program dedicated to specific groups in vulnerable circumstances, such as asylum seekers, pregnant women or people

[42]This amount is achieved multiplying the health expenditure per capita, € 1.600, for 153.469 illegal immigrants. S. M.J. CALDES, *Controriforma sanitaria in Spagna. Nel mirino anche gli immigrati*, 4/12/2012, avail. in: http://www.saluteinternazionale.info/2012/10/controriforma-sanitaria-in-spagna-nel-mirino-anche-gli-immigrati/ [accessed May 25, 2014].

[43]For a compared analysis of the topic s. N. PASINI (a cura di), *Confini irregolari. Cittadinanza sanitaria in prospettiva comparata e multilivello*, Milano 2011.

[44]EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Publication Office of the European Union, Luxembourg 2011, 33, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1925-FRA-2011-fundamental-rights-for-irregular-migrants-healthcare_EN.pdf [accessed May 25, 2014].

suffering from sexually transmitted diseases, creating groups for an *ad hoc* work aimed at ensuring full access to health care facilities in the city for undocumented migrants[45]. The administrative authorities of Bremen claim to have taken such a decision for several reasons. Firstly, they affirm that this is a policy aimed at containing the risks for collective security as well as protecting the human rights of the inhabitants of the city. They assume that only by ensuring full compliance human rights to all individuals present on the territory of the city, is it possible to provide effective promotion of public health: according to this approach, there is therefore no room for distinctions between German citizens, and regular and irregular immigrants[46].

The municipal administrations of Bremen, Cologne and Frankfurt have set up structures aimed at allowing illegal immigrants to receive medical consultations and basic health services through the establishment of "humanitarian medical examinations" (*Humanitäre Sprechstunde*) in outpatient centers that provide free medical examinations without restrictions. The cost of the services is sustained by the patients in proportion to their income - if they have one. In case of serious illness, the medical offices may opt for the admission of the patient to specialist hospitals involved in the project, and/or check if the case meets the conditions for a grant of asylum for health reasons. The structures in question are also collaborating with local NGOs that seek to offer services complementary to health care assistance[47].

The practice shows that in this context NGOs can play a crucial role: they often replace the absence of public institutions, and they usually know the context of irregular migration very well. Additionally, since NGOs are not identified with the public authorities, they can much more easily overcome the habitual distrust of illegal immigrants. Even where public authorities and NGOs are able to establish a factual collaboration, as in some local Spanish contexts, this also leads to a better implementation of the national legislation in force. This is the case in Barcelona, where local NGOs involved in health care services for illegal immigrants seek to inform regional health authorities if an irregular migrant has to face illegal restrictions in access to treatments or in receiving a health card. In this case, the regional health service is required to take action to check "what went wrong"[48]. In Bremen, however, local authorities need the advice of NGOs in the field every time they start a program of health care services for illegal immigrants because of their knowledge of the target population of the service, in order to achieve appropriate adjustments to the program and make it fully effective.

Also in Italy, assistance to immigrants not enrolled in the national health care service is provided in different ways, as the experiences observed in several local areas show, with a crucial role of voluntary organizations and non-profit social organizations. Health care professionals point out that it is absolutely imperative to ensure adequate information to the interested population, in order to allow undocumented immigrants to have access to health care treatments[49]. In this respect, it seems useful to mention the case of the *Centro di Salute Internazionale e Medicina Transculturale* (Centre for International Health and Transcultural Medicine) established by the Local Health Care Office (ASL) of Brescia, which recently also developed a local Epidemiological Observatory of Immigrants. The structure not only provides health care benefits to legal and illegal immigrants, but also monitors the health conditions and the most common diseases of the migrant population. In addition to this, it

[45] GENERALITAT DE CATALUNYA, Departament de Salut, Pla Director d'Immigració en l'Àmbit de la Salut, Direcció General de Planificació i Avaluació, Barcelona 2006, available at: http://www.bcn.cat/novaciutadania/pdf/ca/salut/plans/PladirectorImmiiSalut2006_ca.pdf [accessed May 25, 2014].
[46] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Migrants in an irregular situation*, cit., 34.
[47] ID., 36.
[48] ID.
[49] E.-H. ISSA, *La salute degli immigrati ieri, oggi e domani*, in: Tendenze nuove, 1/2007, 39-44.

provides a very helpful service of intercultural mediation, orientation and social health care for the populations concerned, as well as a service for psychosocial distress diseases[50]. The final result of the project is the creation of an integrated model of health care, counseling, information and monitoring services for the immigrant population, efficient and useful also for other purposes of public interest, which could certainly be successfully repeated in other local contexts[51].

Conclusions

The cited examples show that the local dimension may prove to be the most efficient in providing health care services to illegal immigrants, especially in cases where national or regional systems are not able to offer full and effective protection. This conclusion can seem less helpful in centralized systems, since they rarely involve regional and local bodies in the enforcement of the legislation. Because of the crucial relevance of the topic, it would be advisable to consider the opportunity to change strategy and to assign more decisional competences to the autonomic bodies. The major advantage of this approach appears to consist in their ability to work on the practical aspects of health care assistance for illegal immigrants, with less regard for the related normative problems. In fact, despite the problematic aspects posed by the most recent legislative provisions, the afore-mentioned cases demonstrate that specific local initiatives aimed at providing an effective health care assistance to illegal immigrants are probably the most consistent with the very spirit of this right, as intended by national constitutions as well as by international treaties and conventions. It seems, then, that either a vertical or a horizontal application of the subsidiarity principle to the health protection context is warranted, in the belief that the involvement of local authorities and private experts may be able to compensate the obstacles that may otherwise prevent full and indiscriminate access to social rights in the health care field[52]. With regard to designing a general "right to existence", health protection can thus be considered a central tool that can conveniently serve not only as a guarantee of the current quality of life for citizens, legal immigrants and illegal ones, but also as a suitable instrument in order to properly define the legal contours and characters of a new concept of citizenship for the migrant population[53].

---

[50] C. SCARCELLA et al., *L'esperienza del Centro di Salute Internazionale e Medicina Transculturale di Brescia nell'assistenza socio-sanitaria agli immigrati provenienti da paesi extra-Comunità Europea*, in: Tendenze nuove, 3/2007, 357-380.

[51] Per altri esempi di esperienze sanitarie locali effettuate con popolazioni migranti v. M.T. BORDOGNA (ed.), *Disuguaglianze di salute e immigrazione*, Milano 2008.

[52] For a suggestion to apply the subsidiarity principle also to this sector s. S. GERACI/E.H. ISSA, *Migranti ed accessibilità ai servizi sanitari: luci ed ombre*, in: Italian Journal of Public Health, 3/2011, 15-19.

[53] S. M.T. BORDOGNA, *Accesso ai servizi sanitari e costruzione della cittadinanza dei migranti*, in: Autonomie locali e servizi sociali, 1/2012, 111-124.

References

AJA E. (ed.)*, La nueva regulaciòn de la inmigraciòn en España*, Valencia 2000

ALGOSTINO A., *Espulsione dello straniero e diritto alla salute: spetta al giudice decidere caso per caso*, in: Giur. it., 2002, 909 f.

ALGOSTINO A., *In nome della sicurezza due equazioni incostituzionali: migrante uguale non persona e dissenso uguale fattispecie da reprimere*, in: Forum di Quaderni Costituzionali, 13/3/2009

BASCHERINI G., *L'immigrazione e i diritti*, in: P. Ridola/R. Nania (ed.), I diritti costituzionali, Torino 2006, 421 ss.

BASSANI L.M., *Diritti e ordinamenti federali*, in: Quaderni costituzionali, 2/2003, 362-363

BENVENUTI M. (ed.), *La protezione internazionale degli stranieri in Italia. Uno studio integrato sull'applicazione dei decreti di recepimento delle direttive europee sull'accoglienza, sulle qualifiche e sulle procedure*, Napoli, 2011

BONETTI P. /PASTORE M., *L'assistenza sanitaria*, in: B. Nascimbene (ed.), Diritto degli stranieri, Padova 2004, 974 f.

BORDOGNA M.T. (ed.), *Disuguaglianze di salute e immigrazione*, Milano 2008

BORDOGNA M.T., *Accesso ai servizi sanitari e costruzione della cittadinanza dei migranti*, in: Autonomie locali e servizi sociali, 1/2012, 111-124

BUNDESÄRZTEKAMMER (Hrsg.), *Tätigkeitsbericht 2007. Dem 111. Deutschen Ärztetag in Ulm vorgelegt von Vorstand und Geschäftsführung*, Köln 2007

CAMPO CABAL J.M. (ed.)*, Comentarios a la ley de extranjerìa*, Madrid 2001

CHIAROMONTE W., *Lavoro e diritti sociali degli stranieri. Il governo delle migrazioni economiche in Italia e in Europa*, Torino, 2013

CLASSEN G., *Menschenwürde mit Rabatt, Leitfaden und Dokumentation zum Asylbewerberleistungsgesetz*, Karlsruhe 2000[2]

CLASSEN G., *Sozialleistungen für MigrantInnen und Flüchtlinge. Handbuch für die Praxis,* Karlsruhe 2008, 115-130

CORSI C., *Lo Stato e lo straniero*, Padova, Cedam 2001

CUNIBERTI M., *L'illegittimità costituzionale dell'esclusione dello straniero dalle prestazioni sociali previste dalla legislazione regionale*, in: Le Regioni 2006, 510-529

D'ORAZIO G., *Lo straniero nella Costituzione italiana*, Padova 1992

DIEZ BUESO L.*, Los derechos de los inmigrantes y sus garantìas* in E. Aia/J. Arango (eds.), *Veinte años de inmigraciòn en España*. *Perspectivas jurídica y sociológica (1985-2004)*, Barcelona 2006, 211 f.

ESPINAR VICENTE J. M., *Extranjerìa y inmigraciòn en España*. *Análisis crítico de su regulación jurídica*, Madrid 2006

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Publication Office of the European Union, Luxembourg 2011

GENERALITAT DE CATALUNYA, Departament de Salut, Pla Director d'Immigració en l'Àmbit de la Salut, Direcció General de Planificació i Avaluació, Barcelona 2006

GERACI S./ ISSA E.H., *Migranti ed accessibilità ai servizi sanitari: luci ed ombre*, in: Italian Journal of Public Health, 3/2011, 15-19

GNES M., *Il diritto degli stranieri extracomunitari alla non irragionevole discriminazione in materia di agevolazioni sociali*, in: Giur. cost., 2006, 4681-4689

GROSS J., *Möglichkeiten und Grenzen der medizinischen Versorgung von Patienten und Patientinnen ohne legalen Aufenthaltsstatus*, Berlin 2005

GROSSO E., *Stranieri irregolari e diritto alla salute: l'esperienza giurisprudenziale*, in: R. Balduzzi (ed.), Cittadinanza, corti e salute, Padova 2007, 157-170

ISSA E.-H., *La salute degli immigrati ieri, oggi e domani*, in: Tendenze nuove, 1/2007, 39-44

KNIPPER M./BILGIN Y., *Migration und Gesundheit*, Konrad-Adenauer-Stiftung, Bonn 2009

LUCIANI M., *I diritti costituzionali tra Stato e Regioni (a proposito dell'art. 117, comma 2, lett.* m*) della Costituzione*, in: Politica del Diritto, 2002, 345-360

LUCIANI M., *Salute – 1) Diritto alla salute*, in: Enc. giur., XXVII, Roma 1991

MENICHETTI E., *Accesso ai servizi sociali e cittadinanza*, in: Diritto Pubblico 2000, 849-876

MONEREO PEREZ J.L./ MOLINA NAVARRETE J.A./TRIGUERO MARTÌNEZ L.A. (ed.), *Comentarios a la ley y al reglamento de extranjerìa*, Granada 2012, 232 f.

MONEREO PEREZ L. / MOLINA NAVARRETE J.A., *Comentario a la Ley y al Reglamento de Extranjerìa*, Granada 2001, 232 f.

OLIVANI P./PANIZZUT D., *Diritto alla salute e interventi socio-sanitari*, in AA.VV. *I diritti fondamentali degli stranieri*, Torino, 2009, 1-17

OTERO J.V., *Impacto de la inmigraciòn en el sistema de protecciòn social*, Madrid 2010, 98 f.

PASINI N. (ed.), *Confini irregolari. Cittadinanza sanitaria in prospettiva comparata e multilivello*, Milano 2011

PINELLI C., *Sui «livelli essenziali delle prestazioni concernenti i diritti civili e sociali» (art. 117, comma 2, lett.* m*, Cost.)*, in: Diritto Pubblico., 2002, 881-908

PISARELLO G., *Derechos sociales, democracia e immigraciòn en el constitucionalismo español: de el originalismo a una interpretaciòn sistematica y evolutiva,* in: M.J. Añon, La universalidad de los derechos sociales: el reto de la inmigracion, Valencia 2004, 37-86

PRIETO L., *Los derechos sociales y el principio de igualdad sustancial,* in: M.J. Añon (ed.), *La universalidad de los derechos sociales: el reto de la inmigraciòn*, Valencia 2004, 111-170

RIMOLI F., *Cittadinanza, eguaglianza e diritti sociali: qui passa lo straniero*, in: Giur. Cost. 2005, 4675-4681

ROMEO G., *La cittadinanza sociale nell'era del cosmopolitismo. Uno studio comparato*, Padova 2011

SCARCELLA C.et al., *L'esperienza del Centro di Salute Internazionale e Medicina Transculturale di Brescia nell'assistenza socio-sanitaria agli immigrati provenienti da paesi extra-Comunità Europea*, in: Tendenze nuove, 3/2007, 357-380

SIERCK G., *Krankenhilfe für Ausländer ohne Aufenthaltsgenehmigung*, Wissenschaftlicher Dienst des Bundestages Reg.-Nr. WF VI – 71/00, 2000

TOEBES B. , *Towards an Improved Understanding of the International Human Right to Health*, in: *Human Rights Quarterly*, 3/1999, 661-680

ZARAUZ J., *Incidencia del Padrón municipal en el exercicio de los derechos de las personas extranjeras en situación irregular*, Vitoria 2007, 145-148